REPORTS

OF

CASES DETERMINED

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

By JOHN SHEPLEY,
COUNSELLOR AT LAW.

VOLUME X.

MAINE REPORTS,

VOLUME XXIII.

HALLOWELL:
GLAZIER, MASTERS & SMITH.
1845.

JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE PERIOD OF THESE REPORTS.

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

A TABLE

OF CASES REPORTED IN THIS VOLUME.

ERRATA.

Page 159, 18th line from top, for *defendants* read *plaintiff*. 302, the third word of the last line of the abstract should be *creditor* instead of *debtor*. 435, last line but one of the abstract should be *c.* 138, instead of *c.* 38.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF LINCOLN,

ARGUED AT MAY TERM, 1843.

INHABITANTS OF CUSHING *versus* WELLINGTON GAY *& al.*

Writs of certiorari are grantable only at the discretion of the Court; but this is a legal discretion, to be exercised according to the rules of law.

If the petitioner for the writ is aggrieved by a proceeding clearly erroneous, and to his injury, he should not be denied a remedy; but if the error is merely matter of form, and the exception is purely technical, it would be no violation of essential rights, if the Court should withhold its interference.

And if the error complained of exists, yet if it in nowise operates to the injury of the party seeking a remedy, although it may to some person who does not complain, the Court may, in such case, with entire propriety, and in the exercise of a sound legal discretion, refuse its aid.

In laying out the road, the Commissioners must necessarily be more precise in designating the *termini* of the road laid out, than is required in a petition to have it laid out; and therefore, where they may not appear identical on the record, they may be presumed to be the same, in the absence of proof to the contrary.

The Stat. of 1832, c. 42, (Rev. Stat. c. 25, § 3,) requires that the County Commissioners should make a return with their doings, "with an accurate plan or description of said highway," to "the regular session of said County Commissioners' Court, to be held next after such proceedings shall have been had and finished;" but does not require that the plan should be made and their proceedings finished and returned to the regular term next following their viewing and laying out the road.

Cushing *v.* Gay.

If the commissioners name the persons considered to have sustained damage by the location of the highway, and say that no other person has sustained damage thereby, it is no sufficient cause for granting a *writ of certiorari*, if it should be made to appear, that the road passed over lands of others not named.

It is not necessary that it should appear of record, as preliminary to further proceedings, that the County Commissioners first adjudicated upon the ability of the petitioners to pay the expenses which might become payable by them. The provision of the statute on that subject is merely directory, and the omission does not render the proceedings of the commissioners in laying out the road void.

It is sufficient, if the County Commissioners adjudge the road laid out to be, "*of convenience and necessity*," omitting the word, "*common*," found in the statute preceding the word *convenience*.

THE inhabitants of Cushing presented a petition, praying that a writ of *certiorari* might issue, and that thereupon the proceedings of the County Commissioners, in locating a public highway in that town, might be quashed. The petition for the road was entered at the July Term of the Commissioners' Court, 1833, and notice ordered. It was continued until January Term, 1834, when "the County Commissioners made return of their doings under their hands and ordered the same to be recorded." The return is then recited, from which it appears, that the respondents petitioned "for a new highway from Thomas Jameson's in Cushing, by Harrison Brazier's and Thomas Smith's to the house of Rufus B. Copeland in Warren." The report states, that "the County Commissioners have viewed the route for the highway mentioned in said petition, and heard the parties interested in the prayer thereof and their witnesses, and having considered the same, have adjudged, and do adjudge, that said highway is of convenience and necessity."

The highway laid out was described as "beginning on the west side of the town road and on the north side of the road leading to the said Rufus B. Copeland's barn in Warren," and continued by courses, distances and monuments "to the guide board at Wentworth's corner, so called, in Cushing." The Commissioners estimated damages to certain persons named, and then say: "And the County Commissioners do not consider

that any other person is damaged in his property by reason of the location of said highway."

Ruggles, for the petitioners, made five objections to the regularity of the proceedings of the Commissioners. They are mentioned in the opinion of the Court.

In his argument on the third objection, that the names of most of the persons over whose land the road was established, were wholly omitted, he cited *Commonwealth* v. *Coombs*, 2 Mass. R. 491; *Commonwealth* v. *Great Barrington*, 6 Mass. R. 492; *Durell* v. *Merrill*, 1 Mass. R. 411.

In support of his argument on the fifth objection, that the County Commissioners did not adjudge the highway to be of "*common* convenience and necessity," he cited *Pownal*, Petrs. 8 Greenl. 271; *Commonwealth* v. *Egremont*, 6 Mass. R. 491; *Commonwealth* v. *Cummings*, 2 Mass. R. 171.

J. S. Abbott, for the respondents, contended that the writ of *certiorari* was not a writ to be sued out at the pleasure of the party, but to be granted or refused at the discretion of the Court; and will not be granted, unless upon the hearing it be made to appear, that there are such errors and defects as would authorize the Court to quash the record, and that substantial justice requires it to be done. 11 Mass. R. 417; 8 Maine R. 292. He contended that it was the duty of the applicants to make out their case in both those respects, and replied to each of the positions taken for the petitioners, and insisted that neither furnished sufficient ground for granting the writ.

The opinion of the Court was by

WHITMAN C. J. — The petitioners complain of certain irregularities, which they allege to have taken place in the location of a highway through the town of Cushing; and claim on account thereof, to have the proceedings of the County Commissioners reversed.

Writs of *certiorari*, it has been held, are grantable only at the discretion of the Court, and are not allowed "*ex debito justitiæ*." Discretion however, when exercised by a court,

does not mean precisely what the word in common parlance, may seem to import. A legal direction is implied; a discretion to be exercised according to the rules of law. If the rights of a party have been infringed to his detriment, by the erroneous doings of an inferior tribunal, he may justly claim redress; and it will be the duty of a court to afford it to him. It is not the province of the Court to undertake to presume, that it would be wiser for him to submit to the injury, or to conjecture that the public interest would be better promoted by an adjudication against him, and therefore that it would not be discreet to relieve him. If the petitioners are aggrieved by a proceeding clearly erroneous, and to their injury, they must not be denied a remedy. But if the error is merely in matter of form, and the exception purely technical, it would be no violation of their essential rights, if the Court should withhold its interference. Again, if the error complained of exists, yet, if it in nowise operates to the injury of the party seeking a remedy, although it may be otherwise to some person who does not complain, the Court may, in such case, with entire propriety, and in the exercise of a sound and legal discretion, refuse its aid.

The first error complained of is, that the *termini* of the road, as laid out, are not the same as designated in the petition. This does not appear of record. For aught the Court can know they may be identical. The Commissioners may have given names to the *termini* different from those contained in the petition, and yet they may be, to a common intent the same. The petition was for a road from the house of Thomas Jameson to the house of Rufus Copeland. No one would understand, when a public highway is prayed for, with such a description, that the two ends of the road were to butt against those two dwellinghouses. It would be obvious that it was near to those houses, which must be understood to have been in the contemplation of the petitioners. In laying out the road the Commissioners must necessarily be more precise, and designate monuments exactly at the *termini* of the road. These might be of their own erection. The *termini* of the

road in this case, are described by the Commissioners as being, at one end, at the junction of two roads, one of which went to Rufus Copeland's barn; and, at the other, at the guide board at Wentworth's corner, in Cushing. These *termini* we may presume, in the absence of proof to the contrary, were substantially identical with those named in the petition.

It is next objected that the Commissioners did not make return of their doings at the term next after the performance of the service. The statute (1832, c. 42,) provides that "they shall make a correct return of their doings, under their hands, with an actual plan or description of said highway or common road, so laid out, altered or discontinued, to the regular session of said County Commissioners' Court, held next after such proceedings shall have been had and *finished.*" The Commissioners returned, that they had, on the twenty-fourth of July, 1833, met and heard the parties, and viewed the route for the highway; and having adjudged it to be of *convenience* and *necessity*, had laid it out. In this recital they speak in the past tense. The statute, it will be perceived, requires "that they shall make a correct return of their doings, with an accurate plan or description of said highway." Precisely when this part of the service was performed, does not appear. It was after the said twenty-fourth of July, as they speak of their doings then in the past tense. Time was doubtless requisite to prepare an accurate return and plan, subsequently to the view and laying out; and these might not have been "*finished*" until after the term next following the location of the road; and until finished, could not have been presented or recorded. We cannot regard it, therefore, as apparent, that the report and plan were "finished," and in readiness to become a matter of record, earlier than the term at which it was presented.

Again, it is said that the return does not name some of the persons, over whose land the road passes, and that this is an error; and the Court so decided in *Commonwealth* v. *Great Barrington*, 6 Mass. R. 492. But the statute does not, in terms, require any thing of the kind. It requires that dam-

ages shall be awarded to such as may sustain any; and this the Commissioners, naming the individuals, and specifying the amount of damage in each case, say they have done; and it is not very clearly apparent to us how it can be essential "that they should have designated by name the other individuals, over whose land the road passes. Why the return, that no other individuals had sustained damage, should not be sufficient, we do not readily perceive. The reason assigned for the decision is, that the individuals are entitled to a process, in the nature of an appeal from the decision of the County Commissioners. But how are they abridged of this right by not being individually named in the return? The statute does not make their right to such process dependent upon their being so named. The decision, however, took place upon the return of a writ of *certiorari*. When a *certiorari* is allowed and returned, such errors as are apparent in the record, must be allowed to avail the plaintiff therein. And there was in that case a more palpable error, which might well have occasioned the granting of the *certiorari*. The case before us is an application for such a writ. And it is proper that we should inquire whether the petitioners are aggrieved by the error complained of. The individuals, it seems, whose interests were directly involved, have rested contentedly for eight or ten years, without complaint. And how can the interest of the petitioners be affected by the omission? If they cannot be affected by it, why should we, in the exercise of a sound discretion, allow them, by the process prayed for, to place us in a situation in which we might be compelled, without looking to see whether they were interested or not, to quash the proceedings of the County Commissioners.

It is still objected, that the County Commissioners had not taken certain preliminary steps, without which they could not legally have proceeded to lay out the road. The provisions upon which this objection is founded, are contained in the 1st and 5th sections of the act of 1832, c. 42. The first section provides, that "said Commissioners, or a majority of them, upon receiving satisfactory evidence, that the petitioners are

responsible, and that they ought to be heard touching the matter set forth in their petition, shall proceed to view," &c. and the 5th section is, "that whenever the County Commissioners shall decide against the prayer of any petition, they shall order the petitioners to pay into the county treasury all expenses incurred by the county by reason of said petition, and expenses incurred thereon, and, unless the same be paid within a reasonable time, shall issue their warrant of distress against said petitioners." It is contended that it should appear of record, as preliminary to further proceedings, that the County Commissioners first adjudicated upon the ability of the petitioners to pay the expenses, which might become payable by them, as provided in said fifth section. But we regard the provision of the statute, in this particular as directory merely; and do not think, if such adjudication should not appear of record, that it would render the after proceedings void; and at any rate that it affords the petitioners no right to question the doings of the Commissioners in laying out the road.

The Commissioners are not affected in their pecuniary interests, otherwise than is every other citizen of the county, whether they inquire into the ability of the petitioners or not. They receive their compensation from the treasury in any event.

But there remains still another objection; and one attended undoubtedly with some difficulty. The statute requires the Commissioners, before proceeding to locate a road, to adjudge that it is of common convenience and necessity; and it has often been adjudged that the want of a preliminary adjudication, that the road prayed for is of common convenience *or* necessity, is fatal to the laying out of a highway. It is always safest, and advisable to follow the language of the statute in such cases. Omissions to do so are often productive of perplexity, and always attended with danger. In civil and remedial proceedings, however, it is not always necessary to do so. If language tantamount be used it may suffice. The Commissioners in this case adjudged the road to be of convenience and necessity, omitting the word common. Do the words

convenience and necessity here comprise the same meaning as if the word common were prefixed? The County Commissioners have no power, (except in reference to applications in the nature of appeals from the refusal by a town or its selectmen to locate town or private ways,) to lay out or alter other than public highways. And when they do lay out a highway we may well suppose, that they must have considered it necessary that it should be done. And if it be necessary that it should be done, it must be because it will be of convenience to the public, that is, of common convenience. A road cannot be necessary without being a convenience.

Necessary seems to include convenience, and something more, viz. a convenience that is indispensable. Does the addition of the word common, to the word convenience, add to the meaning, beyond what the word necessary embraces? If it must be a highway, which is to be laid out, and if it be necessary, it cannot be otherwise than of a common convenience. To speak of a public highway (and the Commissioners are authorized originally to locate none other,) without its being common, or of common convenience to every citizen, is almost, if not quite, an absurdity in terms. If, then, necessity requires the location of a highway, it must be both common and convenient. An elucidation upon this point may be derived from the fact, that, under the statutes of Massachusetts and of Maine, until 1832, instead of common convenience *and* necessity, the road prayed for was to be adjudged to be of common convenience *or* necessity; evidently using the words common convenience and the word necessity as convertible terms, and of equivalent import. We think, then, that adjudging the road to be of convenience and necessity is tantamount to adjudging it to be of common convenience and necessity; and that in this there was no error.

There are a number of facts, stated by the counsel for the petitioners, upon which he predicates a portion of his argument, which do not appear of record, and of which, from any legitimate source, the Court are wholly uninformed, and of course

the considerations suggested relative thereto, must be laid out of the case.

The result on the whole is, that the petition must be dismissed.

JOHN S. WILLIAMS *versus* DANIEL WILLIAMS.

Where the master takes a vessel on shares, "to account to the owner for one half the earnings," he is, as to all persons but the actual owner, in all contracts, regarded as the owner, and entitled to all the rights and liable to all the duties of an owner; but as between him and the real owner, the "earnings, when collected, are equally the money of the owner and the master, and the latter becomes a trustee of the owner's share, when received, and holds it for his use.

And if a third person, knowing all the facts, is authorized by the master to receive the freight already earned, and promises to pay the owner his share, and afterwards receives the money, he holds it for the use of the owner, who may maintain a suit against him therefor.

THE whole of the testimony given at the trial, before TENNEY J. appears in the report of the case. The substance of it is concisely stated in the opinion of the Court. A nonsuit was entered by consent, which was to be set aside and a default entered, if the Court, upon a view of the whole case, should think the plaintiff was entitled to recover.

M. H. Smith, for the plaintiff, said the money was collected by the commission merchants in New York and credited to the master and owners of the Orbit; that the captain had received his share, and thus severed it from that of the owner; that the defendant specially agreed to obtain this money from the commission merchants and pay it over to the plaintiff; and that the defendant at the time knew all the facts.

The money belonged to the plaintiff, and the defendant is liable on his promise to pay it over to him, when received.

Ruggles and *J. S. Abbott*, for the defendant, contended, that the money belonged wholly to the master; that the half earnings of the vessel, was but the measure of the amount to be paid for the charter of her; that the claim of the plaintiff

was merely a personal one on the master; and that the defendant was accountable for the money to the master only. It has been decided, that where the master takes the vessel, to be sailed on shares, that the freight money is the property of the master. *Thompson* v. *Snow*, 4 Greenl. 264.

What the defendant said respecting paying over the money to the plaintiff, if it should come into his hands, must be understood merely, that he would pay it to the owner, if he had authority for it from the master. It could not have been the expectation of either party, that the defendant was to pay to the plaintiff the money belonging to another, against his will; nor would the defendant be bound by such promise.

The opinion of the Court was drawn up by

SHEPLEY J. — This suit is brought to recover one half of the freight money earned by the schooner Orbit, between the seventeenth day of March and the sixth day of July, 1837. The report of the case shows that the plaintiff was the sole owner of the vessel during that time, and that she earned a freight, for which there was received on a final settlement for it, the sum of $1200. That Oliver Williams was during that time master, having before taken the vessel on shares, "to account to the owners for one half the earnings." When he left the vessel, before July 6, 1837, he employed Messrs. Badger & Peck, of New York, to collect the freight, which after some difficulty was collected by them on or about the 24th of January, 1838. They, on March 1, 1838, by order of the master, transmitted the balance thereof, after satisfying their claims against him, to the defendant. The master being a son of the defendant, it appears from the testimony, that he was applied to in the summer or fall of 1837, for assistance to obtain the earnings of the vessel from New-York, and that he promised it; that he was again called upon in April, 1838, and that he then said, when he got the money he would pay it over. Another witness speaking of this last conversation says, that the defendant said, if it came into his hands he would forward it to the owners. It appears from the correspondence between

the defendant and Messrs. Badger & Peck, that he was informed of the whole amount of freight earned, and what portion of it had been by them detained for claims against his son. By a letter from the master to Horace Williams, another son of the defendant, payments were directed to be made from the amount to be received of $100 to Mr. Leighton, and of $50 to Andrew Williams, which were made. It is also contended, that by another letter bearing date June 20, 1838, to the same person, he directed, that $400 more of the same money should be transmitted to him at St. Louis; but the letter on inspection does not appear to direct that the $400 should be transmitted from any particular fund.

The question arises, whether under such circumstances the owner of the vessel had such a right to one half of her earnings, that he could insist upon a payment of them from the defendant to himself, after they had been collected and transmitted. According to the cases of *Thompson* v. *Snow*, 4 Greenl. 264, and *Cutler* v. *Winsor*, 6 Pick. 335, the master must be considered as the owner *pro hac vice*. And it follows that in all contracts for the shipment of goods and the procurement of materials and supplies, he alone would be liable, and he alone could enforce them. He alone would be entitled to settle her bills and collect her freights. And with respect to all persons but the real owner, he would in all contracts be regarded as the owner and entitled to all the rights and liable to all the duties of an owner. What relation does he sustain to the real owner? It is contended, that it is simply that of hirer of the vessel, as it would be under a charter-party providing for the payment of a stipulated sum by the month or for the voyage. But it may well be distinguished from such a case, and from all others, where the owner's compensation does not depend at all upon the earnings of the vessel. The contract in this class of cases can only be like those, by considering it a contract to pay a sum of money for the hire of the vessel equal to one half of her earnings. But this would not fully meet either the terms of the contract or the intention of the parties. If it was intended to be a sum equivalent to the earnings, there would be

occasion to fix the time and terms of payment. If on the contrary the intention be, what the contract speaks, that each shall be entitled to a share of the freight money itself as earnings, then the time and terms of payment arise out of the contract itself. In the contracts of this class noticed, all appear to have reference to the earnings of the vessel as a fund to be shared, and to a portion of which each is to be entitled. The earnings of the vessel are usually spoken of as belonging to the respective parties to such a contract. Parker C. J. in the case of *Coggeshall* v. *Read*, 5 Pick. 457, speaking of the rights of the parties to such an agreement, when the owner of one-fourth had taken the other three-fourths of the vessel on shares, says, "by this agreement one half of the earnings of three-fourths of the vessel would belong to the defendant and others as owners of the three-fourths, and the other half would belong to the plaintiffs and Wilde, as owners of one-fourth and hirers of the residue." If the true character of the contract, and the intention of the parties be, that the earnings themselves, when collected, should belong in equal proportions to the owner and the master, who has taken the vessel on shares; then the character, in which he acts in making the collection, is that of one, who is collecting the earnings for himself and another; and so far as it respects the other, he becomes a trustee, and holds his share of the money, when collected, for his use, to be paid over to him within a reasonable time after it has been received. And it may well be believed to be upon this intention of the parties to such a contract and upon their understanding of its terms, that owners of vessels are found willing to allow masters, whose contract to pay a stipulated sum would not be received, to take vessels on shares, relying upon their being trustworthy, and that they will lay by the owners' share of the earnings and pay it over on their arrival; and feeling confident, that a creditor of the master could not deprive them of it. Suppose the master to become a bankrupt after collecting the freight so earned, would not a court of equity, if it were found in the hands of his assignee, preserve it for the owner of the vessel, instead of turning him over to the

general fund to take his dividend? If the earnings, when collected, are to be considered as a specific fund for the benefit of the respective parties, those entitled would seem to be able upon well established principles to follow and claim their share of it from any one, into whose hands it may have come with a full knowledge of the facts. And a payment made by such a holder to an equitable owner of a share would constitute a perfect defence against the master, who must fail to establish any equitable right to recover against the real owner of the vessel.

If these doctrines be applied to the facts in this case the result will be, that one half of the freight of $1200 belonged to the plaintiff, as soon as it was collected, that the defendant received of it $693,62 knowing the whole facts, and that the residue had been applied by the master to his own use; that the sum he received was subject to other claims of the master to the amount of $150, leaving something less than his share unincumbered for the owner in his hands. This he had promised to pay when received. There was nothing to prevent a performance. It has long since been decided, that a promise, by one liable to pay to some person, to pay to one equitably entitled, may be enforced. The payment of the $400 to the son, in the summer of 1838, does not appear to have been made from this fund, and if it did, it was made with a knowledge that he was not equitably entitled to it, and in violation of his promise, and in fraud of the plaintiff's rights. The plaintiff is therefore entitled to recover of the defendant the sum of $543,62, being the balance in his hands after deducting the $150, paid out, with interest thereon from the time of its reception.

JOHN K. MILLER *& al. versus* CHARLES MILLER.

When a creditor calls in question a conveyance made by his debtor upon the ground of fraud, in an action between him and the grantee, the demand of the creditor must be subject to examination, in order to see whether he has a right, as such, to question the validity of the conveyance. And if a judgment has been obtained by him, still, as between him and the grantee, who is no party to it, it will not be regarded as precluding the latter from an examination of the grounds of it. The grantee may be allowed to show that it was obtained by fraud, or that the cause of action accrued under circumstances, which would not give the creditor a right to impeach the conveyance.

Where one party claimed under the extent of an execution, and the other under a deed of the same premises from the judgment debtor, and one item in the account which formed part of the foundation of the judgment of the execution creditor was subsequent to the deed, and a credit of larger amount was also subsequent, and neither party had made an appropriation of the payment, the Court held, that it cannot adopt its own notion of what may be equitable in each particular case, even to enable a creditor to contest a conveyance alleged to be fraudulent as to prior creditors, but must apply the payment according to the general rules of law, in extinguishment of the oldest item, instead of the most recent.

THIS was a writ of entry. Both parties claimed under Christopher Benner; the demandants under a levy of an execution in their favor against him upon the premises, Feb. 24, 1841; and the tenant under a deed dated July 10, 1838, and recorded on the sixteenth of the same month. To avoid the effect of the prior deed to the tenant, the demandants undertook to show that the deed was fraudulent against them as creditors of Benner. At the trial before TENNEY J. it appeared that the plaintiffs' action against Benner was founded upon a note and an account, and that all was prior to the deed of the tenant, with the exception of one item in the account of $2,61, which was under date of Nov. 10, 1838. There was a credit, bearing date Oct. 21, 1839, of $3,00.

The counsel for the tenant insisted, that the demandants were not at liberty to impeach the title of the tenant. The presiding Judge, for the purposes of the trial, ruled that they might do so; and the report of the trial states, that evidence was adduced by the demandants in order to show, "that the

deed was fraudulent, and by the tenant to show that it was a fair transaction, free from fraud."

The jury returned a verdict for the demandants, which was to be set aside and a new trial granted, "if the ruling that the demandants were at liberty, as the case then stood, to contest the validity of the tenant's title on the ground of fraud, was erroneous."

There were several other questions raised at the trial and in the argument.

M. H. Smith, for the tenant, insisted that as a part of the demand sued, was subsequent to the deed to the tenant, and both were blended together in the judgment, that the demandants were not entitled to be considered as prior creditors. *Reed* v. *Woodman*, 4 Greenl. 400; *Usher* v. *Hazeltine*, 5 Greenl. 471.

Bulfinch & Kennedy, for the demandants, contended that the objection made for the tenant did not apply in this case, because the credit was greater than the item in the account subsequent to the deed. Here the debtor had made no appropriation of the payment, and the creditor may apply it as he pleases, to the payment of that item. If the creditor cannot now apply it, the law will do it according to the justice and equity of the case. *Seymour* v. *Van Slyck*, 8 Wend. 403. The appropriation of the payment should be so made by the Court, as to prevent the commission of a fraud with impunity. The jury have found that the deed was fraudulent.

I. G. Reed replied for the tenant.

The opinion of the Court was by

WHITMAN C. J. — Where a creditor calls in question a conveyance made by his debtor, upon the ground of fraud, in an action between him and the grantee, the demand of the creditor must be subject to examination, in order to see whether he has a right, as such, to question the validity of the conveyance. If judgment has been obtained by him, still, as between him and the grantee, who is no party to it, it will not be regarded as precluding the latter from an examination of the grounds of

it. The grantee may be allowed to show, that it was obtained by fraud, or that the cause of action accrued under circumstances, which would not give the creditor a right to impeach the conveyance. For this purpose the defendant, the grantee in this case, calls upon the plaintiff, the creditor, to show that his debt accrued before the purchase by the defendant. And this he has a right to do, unless the conveyance were merely colorable, so that the beneficial interest was not intended to pass to the grantee, or unless the object should appear to be to defraud future as well as prior creditors. The plaintiffs' claim appears to have consisted of a demand arising on an account, and by note, the whole of which accrued before the conveyance, with the exception of one item in the account; and there being a credit in the account more than sufficient to balance that item, it is contended that that item may be considered as paid. *Seymour & al.* v. *Van Slyck*, 8 Wend. 403, is cited in support of the position. In the case at bar there does not appear to have been any appropriation of the payment by either party. In such case the Court may make the appropriation; but, in doing so we must be governed by general, and as far as may be practicable, by established principles. In the case cited it is laid down, that in the absence of appropriation expressly or impliedly made by the parties, the rule is to apply payments in extinguishment of the oldest debt. And this, as a general rule in such cases, must be deemed to be reasonable, and in accordance with the presumed intention of the parties, and should be adhered to. The Court cannot be at liberty to adopt its own notion of what may be equitable in each particular case. The credit, then, in this case must be applied to extinguish the earlier items in the account, which will leave the last item uncancelled, and according to the cases of *Reed* v. *Woodman*, 4 Greenl. 400, and *Usher* v. *Hazeltine*, 5 ib. 471, this must prevent the plaintiff from setting up the statute of frauds against the defendant.

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

MOSES CALL *versus* JAMES LEISNER *& al.*

Where the mortgagee has assigned and conveyed all his interest in the mortgage and mortgaged premises, if he then brings a suit against the mortgagor, obtains judgment as upon the mortgage, and enters into possession of the premises under it, this is entirely nugatory as to the mortgagor and those claiming under him, and no foreclosure can take place by reason thereof.

THIS appears to have been a bill in equity, claiming the right to redeem a mortgage made by one Hatch to Borland, one of the defendants. The only papers in the case are the copies of the bill and answer. The fact is, among many other things, alleged in the bill, and admitted in the answer, that Borland conveyed and assigned the mortgage and the demand secured thereby to Johnson, and afterwards brought a suit against Hatch, obtained judgment against him on the mortgage, and entered into possession under his judgment; and that the defendants rely on this entry to show a foreclosure under the mortgage. Several other questions were raised in the arguments.

Mitchell, *Groton* and *French*, for the plaintiff.

J. S. Abbott, *R. Belcher* and *McCrate*, for the defendants.

PER CURIAM. — In this case it appears, that the defendant, Borland, the original mortgagee, on the 4th of April, 1837, sold and conveyed his interest in the mortgaged premises to one Johnson; and yet, in August of that year, he obtained a judgment against Hatch, the original mortgagor, for possession of the same as on mortgage. As it respected the mortgagor, or his assignee, the plaintiff, in reference to the right of redemption, this was a nugatory act. Neither Johnson, the grantee of Borland, nor the defendant, Leisner, who is the grantee of Johnson, so far as appears, has ever entered upon the premises for condition broken, or done any other act by way of foreclosing the right of redemption. There is, then, nothing to prevent the plaintiff from redeeming. But, whether the amount tendered by the plaintiff was sufficient to entitle him to redeem, must be ascertained by a master in chancery,

without reference to the judgment obtained by Borland against Hatch, who will ascertain the amount due on the mortgage, and the deductions to be made therefrom for the net rents and profits, irrespective of any erections on the premises, other than such as were necessary to keep the same in repair. Upon the coming in of the master's report, it will be apparent, whether the amount tendered was sufficient or not to entitle the plaintiff to a decree of redemption.

As to the defendant, Borland, he not being a necessary party to the suit, the bill may be dismissed; but as he claimed to have something to do with it, after he had parted with all interest in it, it is proper it should be without costs for him.

WILLIAM J. BUNKER *versus* EPHRAIM HALL *& al.*

If the justices who administered the oath to the debtor, are not selected in the manner pointed out in Rev. St. c. 148, § 46, they have no authority to administer the oath and make the certificate prescribed in that act; their proceedings have no validity; and in an action on a debtor's bond where such proceedings alone are relied upon to show performance, the plaintiff is entitled to recover as is provided in the same chapter, § 39.

THE action was on a poor debtor's bond, dated Sept. 23, 1841, made in conformity with the provisions of Rev. St. c. 148.

Two justices of the peace and of the quorum for the county of Kennebec certified under their hands, that Hall, the debtor and principal in the bond, had taken the oath prescribed in Rev. St. c. 148, § 28. The justices merely say, "We, the subscribers, two disinterested justices of the peace, and of the quorum, hereby certify," &c. and it did not appear in the certificate, or in any return of an officer, in what manner, or by whom, the justices were selected. This certificate was relied on by the defendants as evidence of the performance of the condition of the bond.

The plaintiff objected to the introduction of this paper, and denied its having any effect, because it did not show, and because it was not otherwise shown, that the justices were

chosen as provided in the act before referred to; and therefore that they had no jurisdiction of the subject matter. The plaintiff then proved by the testimony of witnesses, the defendants objecting thereto, that both justices were selected by the debtor, the same witnesses stating, that neither the creditor, nor any person appearing as attorney for him, nor any officer who could have arrested the debtor, was present at the time and place of taking the oath. A nonsuit or default was to be entered, as the opinion of the Court should be.

J. S. Abbott, for the plaintiff.

E. Smith, for the defendants.

The opinion of the Court was by

WHITMAN C. J. — In *Barnard* v. *Bryant & al.* decided in this county, during the last year, (vol. 21, p. 206,) the plaintiff was permitted to prove, and did prove that the justices were not selected in the manner pointed out in the Revised Statutes, c. 148, § 46; and it was held thereupon, that they had no authority to administer the oath, and make the certificate as provided in § 27, 28 and 31 of the same chapter. We are still satisfied that we decided correctly in that case; and this case presents the same question; and it must receive a similar decision. It is unnecessary to consider of the other questions raised in the case. The plaintiff is entitled to recover as provided in § 39 of the said chapter.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF KENNEBEC,

ARGUED AT MAY TERM, 1843.

JAMES HAUGHTON *& al. versus* FRANCIS DAVIS, JR.

Where a bill in equity alleges that the plaintiff, as a creditor, is entitled under the assignment to a sum of money in the hands of the defendant as assignee of the effects of a debtor, and the answer does not object that the alleged assignment was void, but states the amount received by him as assignee under it, and denies the right of the plaintiff to any portion of the fund on the ground that he had not made himself a party to the assignment; it is not open to the defendant, on the argument, to object, that the assignment was void, because the provisions of the statute on that subject had not been complied with.

An assignment recited that the debtor was "indebted to the several persons, parties hereto of the third part, and in the said several sums set opposite to their respective names," and in the concluding part provided that the creditors of the third part should "release and forever quitclaim unto the said debtor, his heirs, &c., the said several debts and sums of money mentioned and hereunder written opposite their respective names," and also provided that the assignee should "pay over to said creditors in proportion to their respective demands;" and no request was made at the time of signing, or at any other time, that the creditor should affix the amount of his claim. *It was held*, that a creditor who had seasonably signed and sealed the instrument, did not forfeit his right to be considered a creditor under the assignment by the omission to state the amount of his debt.

Where an assignment of property for the benefit of creditors provides, that any surplus above paying the creditors should be paid over to the debtor, he should be made a party to a bill in equity, brought by a creditor against the assignee for the purpose of recovering his share of the fund.

One of the several creditors cannot maintain a bill in equity, in such case, in his name alone, without making the other creditors parties, unless it be a creditor's bill, where all the creditors are entitled to come in and have their rights ascertained.

The Court may however, upon terms, permit the bill to be amended in that respect, at any time before a final decree.

THIS was a bill in equity, and was heard on the bill, as amended, and on the first and second answers. The substance of the bill and answers, as well as of the assignment referred to therein, appears in the opinion of the Court.

N. Weston argued for the plaintiffs, contending among other grounds, that the plaintiffs were creditors, and that the defendant had, as assignee, received funds from the effects of the debtor, and had not paid over to the plaintiffs their proportion. These facts are sufficient to enable us to support our bill. Each party interested may proceed, and assert his rights. The refusal of one cannot prejudice the rights of the others. Besides, the others have received more than their proportion, and have no interest in calling money out of the hands of the assignee. We cannot call it out of their hands, but the assignee may. If through misapprehension of his duties and the rights of others, the assignee has paid to the creditors more than they are entitled to, he may recover it back. *Ward* v. *Lewis*, 4 Pick. 518.

But two objections are interposed to our recovery in the answer. No others can be considered here, because new objections cannot for the first time be made in the argument.

It was not necessary to have made Manley a party, as is asserted in the answer. He had no interest in the question. The demands against him were discharged, and they were to be paid in full before the assignor could be entitled to any thing. The objection is dilatory in its character, and should not be allowed to defeat the bill.

The other is, that although we signed and sealed the instrument, that we are not parties to it, merely because the amount was not appended to the signature.

We have been recognized by the defendant as a party, and he has paid us a part of our dividend. He cannot now say

that we are not a party. The assignment law requires a distribution of the funds equally, in proportion to their demands, among all the creditors. The statement of the amount is only necessary, when but a single demand is claimed, where there is no security, and another kept back where others are liable, or there is security by mortgage. Where no sum is put down, the whole claim is discharged, whatever it may be, and a dividend is also to be paid on the sum actually due, be it little or much.

The bill alleges that the assignment was duly made, and that is not denied in the answer. It is therefore to be considered as an established fact.

Vose and *Lancaster*, for the defendant, contended that the assignment was void and wholly inoperative, because it is not conformable to the provisions of the statute of April 1, 1836, "concerning assignments." This was not repealed by the Revised Statutes. That act requires, that affidavit should be made to it by the debtor, and that public notice should be given by publication in a newspaper. Neither of these provisions was complied with.

The assignment requires that each creditor who should sign, should annex the amount of his demand to his signature. This was not done, and therefore there has been no signature of the plaintiffs in the mode required, and they are not parties to the assignment. The mere fact of the payment to them, regarding them as parties, can make no difference. If they had not put their names to the paper, it would not be pretended, that treating them as creditors under the assignment would make them such. As no amount was affixed to the signing, the assignee could not know how to apportion his dividend. 9 Pick. 410; 21 Pick. 239; 2 Metc. 93.

Manley, the debtor, should have been made a party to the bill. The persons really interested are all the creditors and the debtor. They should liquidate the sums, and determine the mode of apportionment. The defendant has no means of knowing the justice of the claims set up.

The plaintiffs cannot be permitted, as is now attempted by them, to sustain their bill, without showing performance on their part. 1 Fonb. Eq. 391; 4 T. R. 761; 1 Salk. 112; 16 Maine. Rep. 92.

The opinion of the Court was by

SHEPLEY J. — This case is presented for decision upon the bill and answer. The bill alleges in substance, that James S. Manley, in the month of March, 1838, assigned his property to the defendant in trust for the benefit of such of his creditors as should become parties to the deed; that the defendant accepted the trust, took possession of the property, and proceeded to execute the trust; that the plaintiffs became parties and entitled to a proportion of the trust fund to be distributed *pro rata* among those entitled according to their respective debts; and that the defendant has not faithfully executed the trust and paid to them their just proportions.

The defendant in his answer, in effect admits, that the property was assigned to him as alleged. He asserts, that he has faithfully executed the trust according to the provisions of the deed; states the amount of goods and debts assigned; the result of the sales and collections; the payment of $550, to the plaintiffs, and of $1100 to J. H. Hill; and the charges, expenses, and losses incurred, showing, that the property assigned was insufficient to pay in full all those entitled to share in the distribution of the fund. He denies, that the plaintiffs legally became parties to the deed of assignment and entitled to a proportion of the fund; and alleges, that Manley ought to have been made a party to the bill.

The counsel for the defendant in argument contends, that the deed of assignment is void, because it does not appear, that the assignor made affidavit to the truth thereof, and because notice was not given according to the provisions of the statute, c. 240. The answer of the defendant does not present any such objections, or allege, that the assignment was void; and if they had been made, they might perhaps have been met and obviated by proof. To permit them now to be considered

as valid objections to the assignment, would be to deprive the plaintiffs of all opportunity to show, that they had in fact no existence. They were entitled to bring the cause to a hearing upon the case as made by the bill and answer.

The next objection is, that the plaintiffs are not parties to the deed of assignment. They did in fact sign and seal it within the time prescribed; but did not place opposite to their names any sums of money as due to them. The deed recites, that "whereas the said Manley is indebted unto the said several persons, parties hereto of the third part and in the said several sums set opposite to their respective names." And in the concluding part it provides, that the creditors of the third part "release and forever quitclaim unto the said Manley, his heirs, executors, or administrators, the several debts and sums of money mentioned and hereunder written opposite their respective names, and all actions, suits, claims, and demands whatever, in respect or on account thereof." If it should be considered to be the intention of the parties, that the sums set opposite the names should be absolutely conclusive upon them, the assignee would be obliged to pay a dividend upon any sum, which a creditor might place opposite to his name, although a much smaller amount only might be justly due to him. And a creditor might divide his claims, and become a party, and place against his name a doubtful and litigated one, and receive a dividend upon it, and release it, while he retained the more valuable and unquestioned claims without impairing their validity. Such a construction would afford opportunity for the creditors to practice gross frauds upon each other, and upon the debtor. The assignment provides, that the assignee shall "pay over to said creditors in proportion to their respective demands;" and to enable him to do it, and to act faithfully and justly towards all, he must be entitled to make settlements and ascertain balances, and if need be, to require proof of the amounts claimed to be due. To avoid these results and accomplish these purposes, it becomes necessary to consider the clauses respecting the amounts due as introduced for the convenience of the parties and not as conclusive upon them.

There is no positive requirement in the instrument, that the creditor shall, or any stipulation by him, that he will, set against his name the amount of his debt; and without it, there would seem to be little reason for considering, that he had forfeited all rights by an omission to do that which was not expressly required of him. If the claims set against the names may be lessened and varied by settlements, the creditors by signing and sealing the instrument must be considered as entitled to a dividend, upon what may be found justly due to them, and as having released all claims, out of which such final balance may have been obtained. If a creditor were at the time of signing the instrument required to place the amount of his debts against his name, and refused, there might be more reason for considering, that he did not intend to become a party to the instrument. If in this case it could be considered as any thing more than an immaterial omission not affecting the rights of any party, the defendant, having admitted the plaintiffs to be parties by paying them a dividend as such, could not now set up an objection once waived, and refuse to account to them for their just proportion of the trust fund.

Another objection presented in the answer is, that Manley should have been made a party. In the property assigned were choses in action. The rule as stated by Daniel on Equity Practice, 291, would require in such cases, that the assignor be made a party. As it is stated by Story's Eq. Pl. § 153, it would not require it, if the assignment be absolute, and the extent and validity of it be not doubted or denied, and there be no remaining liability in the assignor to be affected by the decree. But where there are remaining rights or liabilities of the assignor, which may be affected by the decree, there he is not only a proper but a necessary party. In this case the deed of assignment provides, that the creditors, who become parties, shall release their claims, and that any surplus of the trust fund shall be paid to the assignor. It would seem, that in these matters he might have an interest to be affected by the decree; and in such case according to the authorities most favorable to the plaintiffs, he should be made a party. *Tre-*

cothick v. *Austin*, 4 Mason, 41; *Hobart* v. *Andrews*, 21 Pick. 532. But if this difficulty might be avoided, there is another, which must prevent a decree in favor of the plaintiffs. Their bill proposes to enforce and carry into effect an assignment of an insolvent debtor, made in trust and for the benefit of those creditors, who should become parties to it. Each is to be paid *pro rata*. The rights of all will be affected by a decree, which may lessen or enlarge the number of creditors and the amount of debts, on which a dividend may be made. The proportion of one creditor cannot be determined and extracted from the common fund without deciding upon the proportion, that would be payable to each of the others, unless his rights are disregarded. And all the creditors, who have become parties to the deed of assignment must be made parties to the suit to enable the Court to make a decree, which will adjust all their rights. Or if one creditor alone files his bill, he must file a creditor's bill, in which he sues not only for himself but for all the other creditors entitled, who may come in and have their rights ascertained and be bound by the decree. *Weld* v. *Bonham*, 2 Sim. & Stu. 91; *Hallett* v. *Hallett*, 2 Paige, 15; *Egberts* v. *Wood*, 3 Paige, 517; *Wakeman* v. *Grover*, 4 Paige, 23; *Bryant* v. *Russell*, 23 Pick. 523.

As all the parties to the deed of assignment have not been made parties to the bill, the Court is not permitted to proceed and make a decree, by which their rights may be essentially affected. This difficulty is not however necessarily a fatal one, for the Court may even, at this stage of the proceedings, permit an amendment upon payment of the costs to make the bill conformable to the rules of law. *Good* v. *Blewitt*, 13 Ves. 397. A motion for that purpose may be entertained or the bill dismissed.

FREDERIC WINGATE *versus* WILLIAM KING.

If the owner of land gives a bond to another, obliging himself to convey the same at a certain price within a given time, and takes back a written agreement stipulating that if the obligee, on a sale thereof, should realize profits beyond a certain sum, that he would pay to the owner one half of such excess, and a sale is made by the obligee above the fixed sum, and the land is conveyed, and half of the profits paid over; this does not make the owner of the land liable for the fraudulent acts of the obligor in effecting the sale, either as partner or agent.

If a party would rescind a contract on the ground of fraud, the rule is, that it should be done within a reasonable time thereafter.

THIS was an action of assumpsit, to recover back money paid for the purchase of one fourth part of several lots of land in Lexington in the County of Somerset, containing in the whole about eleven thousand acres.

It appeared in testimony that the defendant gave a bond to Charles Dolbier, obliging himself to convey the lands at a certain price, and at the same time took a written agreement that he should share equally, in the profits which Dolbier might make by selling at an advanced price over $1,50 per acre. Dolbier, on June 29, 1835, gave a bond of the same lands to James A. Thompson to convey the same at the rate of four dollars per acre. Under this latter bond the land was agreed to be purchased by Thompson, the plaintiff, and others, the plaintiff taking one fourth. Thompson became interested with Dolbier in profits before the contract was completed, and he did in fact share equally with Dolbier in all the profits realized in the transaction. On the first of August, 1835, the purchasers paid Dolbier one fourth of the purchase money in cash, and gave their notes for the other three fourths, and took a bond from the defendant to convey to them. The plaintiff paid in cash one fourth and gave three notes for the three fourths, with interest; and afterward paid the first note and interest on the others for three years.

This suit was brought to recover back all the sums so paid, the money and notes having come to the hands of the defendant through Dolbier.

The plaintiff introduced evidence tending to prove that the plaintiff and others examined the land before the purchase, and were, by a person employed by Dolbier to show the lands, made to traverse several times one small tract of land well timbered and the only timber land on the tract, he representing to them that they had passed over and examined a large portion of it, and that the tract traversed was a fair sample of the whole tract; and also to show that the land was not worth more than fifty cents per acre; and that King told a Mr. Pierce, as he, Pierce, testified, after Dolbier had sold, that Dolbier had done well for him, King, and for Dolbier himself; that he sold for four dollars an acre, and of this he, King, received three dollars, and that Pierce remarked, that Dolbier had sold the poorest of the land, that it had no timber on it, to which King replied, that it had or ought to have.

The plaintiff then proposed to offer testimony of the declarations made by Dolbier, on the ground that he was acting as the agent of the defendant in making the sale to the plaintiff and others. But there being no evidence of any such agency except what appears from the papers introduced, the testimony was not admitted by SHEPLEY J. presiding at the trial.

The plaintiff's counsel then contended that he was entitled to recover of the defendant the money so paid, if the jury should be satisfied that they were induced to purchase by the fraudulent practices aforesaid, on the ground that he was a partner with Dolbier and had received a share of the profits of the sale at an advanced price, although there was no proof that he had been in any other way connected with such fraudulent sale. The Judge being of opinion that the defendant was not liable to repay the money upon the principles contended for, a nonsuit by consent was entered, which was to be taken off and a new trial granted if these rulings were incorrect; otherwise the nonsuit is to be confirmed.

Vose, for the plaintiff, contended that the transactions disclosed showed a partnership between the defendant and Dolbier which rendered him liable. 1 Com. on Con. 258; Gow on Part. 16; 6 Serg. & R. 259, 337; 2 Nott & M'Cord,

427; 17 Ves. 404; 18 Ves. 301; 4 East, 143; 2 H. Bl. 235; 4 T. R. 353; 3 Kent, 3, 4; 10 East, 173; 3 Fairf. 337.

As the money of the plaintiff was obtained through the fraud of Dolbier, and came into the hands of the defendant, the action can be maintained against him. 15 Mass. R. 75, 331; Cowper, 814; 2 B. & Ald. 795; 12 East, 317; 1 Campb. 185; 7 East, 210; *Daniel* v. *Mitchell*, 1 Story's R. 172; 2 Stark. Ev. 107; 3 Bl. Com. 163; 1 T. R. 134; 1 Dall. 148; 2 Dall. 154; 1 Har. & Gill, 258; 7 Mass. R. 288; 6 Wend. 290; 13 Wend. 488; 1 Harrington, 447.

N. Weston and *F. Allen* argued for the defendant.

The opinion of the Court, TENNEY J. taking no part in the decision, having once been of counsel in the case, was drawn up by

WHITMAN C. J. — This is an action for money had and received, commenced by the plaintiff to recover of the defendant a sum of money, which he had paid the defendant on a contract for the purchase of a tract of timber land. The claim is grounded upon a supposed fraud, alleged to have been practised by one Dolbier, with whom the defendant is alleged to have been in partnership. To maintain this action the contract must be deemed to have been rescinded. A period of nearly five years had elapsed, after the alleged fraud, before this action was commenced; and it does not appear that any notice had previously been given of an intention to rescind it. If a party would rescind a contract, on the ground of fraud, the rule is, that it should be done within a reasonable time thereafter. What would be a reasonable time is a mixed question of law and fact. When the facts are ascertained, it becomes a question of law. Those facts, in a case like the present, must be somewhat difficult to ascertain, and of course must be referred to a jury, under the instruction of the Court. No evidence to this point appears to have been introduced. Of course no foundation was laid to authorize the plaintiff to proceed on the ground of fraud, in an action for money had and received.

But the proof, that Dolbier was a partner of the defendant, is deficient. He had taken a bond of the defendant to convey to him, on certain terms and conditions, the tract of land in question. It does not appear that Dolbier was under any obligation to make sale of the land to any one else; or that he was in any-wise employed by the defendant to make sale of it. As the course of dealing, at the time of giving the bond, may have been, it may not be improbable, that Dolbier had contracted for the land in expectation of a profit to be made by a resale of it to some one else. And this seems to have been apprehended on the part of the defendant, inasmuch as he appears to have taken a stipulation from Dolbier, that, in case he should realize, in such a sale, beyond a certain amount of profits, that he should pay to the defendant the one half part of any such excess. This cannot be regarded in any sense of the term, as constituting a partnership between them. In the first place, Dolbier was under no obligation to make sale of the land. Secondly, if he did sell, he might or might not sell at a price above the one named. Dolbier was not under the control of the defendant; and was entrusted with no agency for him in reference to a sale. If Dolbier had sold for less than the amount of profits received, he surely could not be considered as having the semblance of an agency for the defendant. He would have acted only for himself; and the defendant would not have been aggrieved. How does it make any difference, that, in a certain contingency, Dolbier might have been compelled to pay an additional price for his purchase? There are other cases in which one party may become entitled to participate in profits without constituting him a partner. The familiar instance of letting a vessel for a share of the profits is one. And the cases of whaling voyages, in which the master and crew are to receive each a certain share or proportion of the proceeds of the oil. *Baxter & al.* v. *Rodman*, 3 Pick. 435. *Thompson* v. *Snow*, 4 Greenl. 264. In the case at bar the profits to be divided were contingent; and whether there should be any or not, was dependent upon the pleasure of one party independent of the control of the other;

or of any stipulation with him, that exertions should be made to secure any. How can it be considered, then, that Dolbier was in any-wise the agent of the defendant, so that the latter could be implicated by the fraud of the former?

Judgment on the nonsuit.

THOMAS LONGLEY & *al. versus* THE LONGLEY STAGE LINE COMPANY.

Where a corporation organized on the 29th of March, and again on the 4th of June following, and one who became a creditor of such corporation in the intervening time, consented as a stockholder to the new organization and to have the stock divided anew, and took shares in the new stock; it was held, that such creditor did not thereby forfeit his right to recover his debt against the corporation, if the jury came to the conclusion, that the plaintiff did not thereby intend to surrender, discharge or affect his claim against the corporation by consenting to a new organization of it.

THE action was brought by Thomas Longley, Benjamin Rackley and James Phillips against the defendants, for the price of two horses, purchased for the company and paid for by the plaintiffs, and for a sum of money paid to the Granite Bank for the defendants.

The case came before the Court on a motion for a new trial, filed by the defendants, because the verdict for the plaintiffs was against evidence.

SHEPLEY J. who presided at the trial, reported the evidence, the ground assumed by the defendants at the trial, and his instructions to the jury. It is unnecessary to state it here. It seems that the plaintiffs had been running a stage from Portland to Augusta through Standish, and had obtained a contract to carry the mail; that it was proposed to form an incorporated company who should take the property and run the stages; that a corporation by the name of the Longley Stage Line Company was established by act of the legislature in February or March, 1838, having informally commenced conducting the business from the first of February of that year; that the company organized on the 29th of March, 1838; and chose offi-

cers, and recorded their proceedings; that on the 4th of June, 1838, they "concluded to rub out and begin anew," and they again organized under the act of incorporation, and chose a new set of officers, and commenced their records anew in a new book. The claim of the plaintiffs arose out of transactions between March 29th, and June 4th, 1838. It did not appear that either of the plaintiffs were at the meeting of June 4th but each of them afterwards subscribed for some shares. Edward Little had not been a petitioner or stockholder until soon after June 4th, when he subscribed for one share, but at the time of the trial had become the proprietor of the principal portion of the stock.

The counsel for the defendants contended, "that the plaintiffs, being a part of those who on June 4, 1838, consented to organize anew on that day and to have the corporation commence its existence then, they could not afterwards themselves set up a claim against the company for the items named in the writ."

The presiding Judge on this point instructed the jury, that if the plaintiffs, on June 4, 1838, did understandingly, knowing the effect of what was done and voluntarily consenting thereto, intend to surrender their claims upon the company, they would find for the defendants; but that if they came to the conclusion, that the plaintiffs did not intend to surrender, discharge, or affect any of their claims against the corporation, by consenting to a new organization of it, they would find their verdict for the plaintiffs.

Vose & Lancaster argued in support of the grounds of defence taken at the trial; and cited, 2 Metc. 422; Sugden Vend. & Pur. 122 and cases there cited.

Wells, for the plaintiffs.

The opinion of the Court was drawn up by

SHEPLEY J. — This case is presented for consideration on a motion to set aside the verdict and grant a new trial, on the ground, that it is against the weight of the evidence.

The counsel for the corporation, which is principally represented by Edward Little, do not contend, that the organization of the corporation on the 29th day of March, 1838, with the act of incorporation, was not sufficient to prove the existence of the corporation from that date, as it respects all persons, who had not consented, that its first existence should be considered as commencing on the fourth day of June, following. They contend, however, that the plaintiffs did so consent, and cannot therefore be permitted to assert, that it had an earlier existence for the purpose of establishing claims against it, especially after a new stockholder had purchased under the expectation held out by the records, that it had not an earlier existence. If they could be charged with aiding in a double organization with an intention to conceal prior debts or liabilities of the corporation, or to hold out, in any manner, false appearances to a subsequent purchaser of the stock, they would not be allowed to set up any prior claims against it.

The testimony authorized the jury to conclude, that the corporation assumed the payment of the note to the Granite Bank given for money borrowed before the act of incorporation to carry on the business, which the corporation received and conducted after the 29th day of March. And that the plaintiffs paid the principal portion of that note. And that they purchased and paid for two horses for its benefit. In doing this, there is nothing to show, that they did not conduct fairly, and thereby obtain a just and legal claim against the corporation. After they had made the payments, and before the fourth of June, they might, for ought that appears, have brought a suit for it, and have recovered against the corporation. In what manner have they forfeited that right? They consented to regard the first organization as illegal, to organize anew, to permit the stock to be divided anew, to take new shares, and to act under the new organization for the future. They did not profess to surrender or to release any claims. And it does not appear, that they were aware their rights would be affected by considering the organization of the corporation as commencing on the fourth of June. If not fully proved, it might fairly be

inferred from the testimony, that they assented to the new organization under a misapprehension of law, and not from a desire to hold out false appearances, or from any other improper motive. And in doing so, they only acted as three among many members of the corporate body; and cannot therefore be legally held accountable for the acts of the corporation in making up records, which held out false appearances respecting the time of its first existence. They do not appear to have been present, or to have made any statements respecting the debts due from the corporation, when Mr. Little purchased. The effect of those proceedings and of the records may have been to induce him to conclude, when he purchased, that no debts did or could exist against the corporation before the fourth of June. But if all parties acted fairly and under a misapprehension of their legal effect, the law must decide upon their rights without regard to the party, who may prove to be the sufferer. The testimony shews, that it must have been a matter of notoriety, that a line of stage coaches had been running upon that route for two months before the fourth of June, and that the business had been managed by persons pretending to be an agent and directors of a corporation. This would seem to be sufficient to put a purchaser on his guard to inquire, whether there had not been debts contracted, and how far there might be a corporation existing and responsible for them.

Under such circumstances it is not perceived, that there is any just cause to complain, that the jury came to the conclusion, that the plaintiffs did not intend to surrender, discharge, or affect, any of their claims against the corporation by consenting to a new organization of it.

Judgment on the verdict.

THE STATE *versus* SAMUEL CURRIER.

Where the defendant was indicted for "keeping a bowling alley, which was then and there resorted to for the purpose of gaming," under Rev. St. c. 35, § 7, an instruction from the Judge to the jury, "that if they should find, that the defendant owned and had control of a place resorted to for the purpose of gaming, their verdict should be for the government," the testimony to which the instructions were applied not appearing, is incorrect, and cannot be supported.

CURRIER was indicted in the District Court under the statute to prevent gaming, Rev. St. c. 35, § 7. The indictment alleged that Currier, during a certain time, "kept a bowling alley which was then and there resorted to for the purpose of gaming, against the peace of said State and contrary to the form of the statute in such case made and provided."

REDINGTON J. instructed the jury, that if they should find, that the defendant owned and had the control of a place resorted to for the purpose of gaming, their verdict should be for the government.

The verdict was against Currier, and he filed exceptions.

None of the facts or testimony in the case appear in the bill of exceptions.

H. W. Paine argued for Currier, contending:

That it is a familiar principle of law, that to charge a man criminally a guilty intent should be proved; and that when the statute creates an offence and does not expressly require proof of *malum animum*, the Court will nevertheless hold it essential. 16 Mass. R. 393; 1 Pick. 465.

From a fair construction of the section under which this indictment was drawn, it is manifest that the makers must have intended that the owner should have knowledge that the house under his control was resorted to for the purpose of gaming. A clerk or a lodger might have so conducted, that the building should be resorted to for that purpose without his knowledge, or assent. Had the fact come to his knowledge it would have been prevented.

The peculiar phraseology, in using the language, "agent of

a corporation," shows that the construction here contended for is the true one.

This construction, too, is confirmed by a reference to the succeeding section, where the language used is, " or permit any person to play at cards," &c. To permit a thing to be done, implies the power to prevent it.

The instructions of the Judge were such, that the jury had but two facts to find, to return a verdict of guilty, one that the accused owned and had the control of the building, and the other, that it was resorted to for the purpose of gaming. They should have been instructed, that they must also find, that it was done with his permission or knowledge.

Bridges, Attorney General, for the State, contended, that as the defendant had the control of the house he knew or should have known what was ordinarily done there, and for what purposes people resorted thither. He could not have had the control of the building without knowing the purposes for which it was used. He should see that gaming is not commonly carried on in his house, over which he has the control, or he will be liable.

The jury are the judges of the law and the fact in all criminal matters, and their finding is conclusive. The Court did wrong in instructing as to what their duty was, and the jury might well disregard it. It is to be presumed, that they decided the law correctly, and found all the necessary facts.

The instruction however was right. It has been decided, that a retailer is liable, when strong liquors are sold in his store by a clerk, and the principle is equally applicable here.

The opinion of the Court was drawn up by

Shepley J. — The indictment is made a part of the case. It contains two counts and in each the only offence set forth is that the defendant " kept a bowling alley, which was then and there resorted to for the purpose of gaming." The statute, c. 35, § 7, has provided for the punishment of two distinct offences. One for keeping a house, shop or other place, resorted to for the purpose of gaming; and the other for per-

mitting a person to play at cards, dice, billiards, or other game for money or other things in any house, shop or place, under his control or care. A person may permit one to play at such games for money in a place under his control, and yet not keep a house or place resorted to for that purpose. So one may own and control a house or place resorted to for the purpose of gaming without being the keeper of the house or place in the sense of the law. For example, the owner of a house may take a lodger into an apartment, over which he continues to have the control, and such lodger may without his knowledge allow it to be resorted to for the purpose of gaming, and yet the owner, who has the control of such apartment and may displace the lodger at any moment, cannot be considered as the keeper of a place resorted to for the purpose of gaming. The owner of a house could not be considered as losing the control of it, if he should be absent from it for a few days, and another person without his consent should go into it, and occupy an apartment and allow others to resort to it with him for the purpose of gaming; and yet he could not be considered as the keeper of a house or place resorted to for the purpose of gaming. The bill of exceptions states, that "the Judge instructed the jury, that if they should find, that the defendant owned and had control of a place resorted to for the purpose of gaming, their verdict should be for the government." The testimony, to which these instructions were applied, is not stated; and the proposition contained in the instructions must be true under all circumstances, or it cannot be supported.

Exceptions sustained, a new trial granted, and the case remanded to the District Court for further proceedings.

ROBERT H. GARDINER *versus* JOSEPH M. GERRISH *& al.*

The power over mortgages, given by statute to the Supreme Judicial Court, extends only to cases of foreclosure and redemption.

If land be conveyed, and at the same time mortgaged back, each conveyance being with covenants of warranty, and the mortgage be assigned; and after the assignment, the mortgagor acquires a title to the same premises under a sale for taxes, assessed upon the land prior to such conveyances, the tax title enures instantly to the benefit of the assignee of the mortgage; and the remedy of the mortgagor is on his grantor.

But if one afterwards merely contracts to purchase a portion of the mortgaged premises of one of the several mortgagors, it does not prevent him from acquiring a title under the tax sale, and holding it for his own benefit.

The principle is well known in equity jurisprudence, that equity, regards what is contracted to be done, as done; but it means no more, than that a party to a contract, or his legal representatives, may insist upon being placed in a situation equally as advantageous as if the contract had been fulfilled.

To obtain relief in a court of equity, fraud must be clearly and distinctly made out. It cannot be inferred from circumstances of an equivocal tendency; or from a deficiency of mere neighborly kindness.

THIS was a bill in equity against Joseph M. Gerrish and William E. Edwards, and was heard on bill, answer and proof. The facts are sufficiently stated in the opinion of the Court.

F. Allen, for the plaintiff, contended that the Court had jurisdiction on either of the grounds, of its relating to a mortgage, of trust, fraud, or accident and mistake.

The defendants hold under the tax title in trust for the plaintiff as assignee of the mortgagee. The defendants are bound to pay the taxes upon the land, imposed before the conveyance to them as well as afterwards. They purchased as mortgagors and not as strangers. They were bound to redeem as mortgagors, and had no right to do so as strangers. The mortgagors and their assignees are to be considered but as tenants of the mortgagee, and are bound to pay the taxes, and are not permitted thus to acquire a title, and set it up against one standing in the relation of landlord.

It is a fraud upon the rights of the mortgagee for one who ought to pay the taxes, to suffer the land to be sold for their

payment, and to set up a title acquired thereby to defeat the title of the mortgagee. If tenants in common purchase in a tax title they cannot set it up against a co-tenant, but hold it in trust for all. The Court has jurisdiction of implied trusts.

The mortgagors conveyed by deed of warranty, and therefore any title acquired by them afterwards enures to the benefit of the mortgagee. And any one coming in under the grantors is estopped equally with them.

By praying that the money may be paid to us, we open the right to redeem, and the mortgage remains.

The defendants are not at liberty to object to the jurisdiction after having put in full answers, and taken evidence. The following cases were cited in support of the various grounds of argument. 2 Barbour & H. Dig. 122; 3 Greenl. 207; 22 Pick. 231; 3 Sumn. 475; 5 Greenl. 420; 2 Mason, 533; 22 Pick. 55; 13 Pick. 116; 17 Pick. 14; 3 Pick. 52; 4 Cranch, 403; 14 Peters, 156.

C. S. & E. H. Daveis and *Barnes* argued for the defendants. They insisted, that as the mortgagee conveyed the same title that was mortgaged back at the same time, that he was bound to pay all taxes before the conveyance; and that the plaintiff stands in no better condition than the mortgagee. It was their neglect, and not ours, which caused the sale for taxes. We therefore are at liberty to avail ourselves of title by public sale equally with others. The tax title was acquired by us by purchase and not as a redemption.

The defences of Gerrish and Edwards are distinct. Gerrish had no interest in the equity of redemption until more than a year after he had become the assignee of the purchaser under the tax sale; and then he merely took a naked release of the share of John Edwards. He was therefore but as a stranger to the mortgagee and his assignee.

No moral fraud is pretended, and there is no ground for saying there is legal fraud. If the bill can in any way be supported, it must be on the ground of trust. But there can be no trust, where there is no obligation to pay the tax. W. E. and John Edwards had paid their full share of the pur-

chase money, and the plaintiff is by this bill attempting to compel the defendants to pay the shares of others. If the plaintiff seeks equity, he should do equity. If the defendants are not allowed to hold the whole under the tax title, they should be allowed to hold their proportion of the land, free of the mortgage.

The *onus probandi* of a trust is on the party alleging it. 6 Wheat. 481. As to what a trust is, 2 Story's Eq. § 890, 1195, 1268. At law a title purchased in, would enure to the benefit of the grantee. But the rule does not apply here. They are the grantors of Edwards, as much as Edwards to them. And there is this broad distinction, that the taxes were imposed before the conveyance, and it was their duty to pay them, and not ours.

The opinion of the Court was drawn up by

WHITMAN C. J. — This is a bill in equity. Under the limited powers of this Court, in matters of equity, it becomes necessary, in the first place, that we should ascertain, that the case presented comes within the limitation. The application is on the part of a mortgagee; but not for a foreclosure. The power conferred over mortgages is only in cases of foreclosure and redemption. We have, therefore, not cognizance of the matter of the bill under that head. It is, however, urged, that the case presented involves a case of trust or fraud or both; and so that we have jurisdiction of the subject matter of it.

The bill sets forth, that the plaintiff is assignee of a mortgage of a tract of timber land, and that the defendants are the mortgagors, or assignees of the mortgagors of the same, and that they have purchased in an outstanding tax title to the premises mortgaged, and hold the same in trust for the plaintiff, as assignee of the mortgagee, or with a design to defraud him.

From the bill, answers and proof it appears, that, on the twenty-eighth day of March, 1835, Robert H. Gardiner, Jr. conveyed to the defendant, William E. Edwards, and one John Edwards, the undivided third part of several parcels of

timber land; and to Joseph Poor and Albert Alden, the other two third parts of the same parcels, to hold in like manner. At the same time the grantees all joined in conveying the same premises to their said grantor in mortgage, as collateral security for the payment of the consideration for the purchase; notes of hand having been made therefor, viz. by Messrs. Wm. E. and John Edwards for one third part thereof, and by the other mortgagors for one third part by each severally. The notes, so given by Wm. E. and John Edwards, have been wholly paid, as has also a considerable portion of those made by Messrs. Poor and Alden. On the sixth of October, 1840, Robert H. Gardiner, Jr. the mortgagee, transferred and assigned such of the said notes, as then remained unpaid, with the mortgage and mortgaged premises to the plaintiff. On the second day of June, 1835, the said Alden conveyed his one third part of the premises, the one half to said Poor, and the other to Messrs. Wm. E. and John Edwards, whereupon Messrs. Wm. E. and John Edwards became seized, subject to said mortgage, of one quarter part each of the same. On the twenty-third day of June, 1835, the defendant, Gerrish, entered into a contract with said John Edwards for the purchase of him of his right to one sixth part of the premises; and in consideration thereof to pay and take up the notes given by him therefor. On the twenty-third day of March, 1835, by an act of the legislature, a tax of two dollars and three cents was imposed upon the township, in which the premises were situate; and on the thirty-first day of August, 1836, the south half of the same township was sold, according to law, to pay said tax and charges thereon, amounting to five dollars and ninety-five cents, to William Allen, Jr. who, afterwards, on the sixteenth day of August, 1837, for the consideration of eleven dollars, transferred, to the defendants, his right and title so acquired. On the twentieth day of March, 1835, a county tax of two dollars and thirty-four cents was duly authorized and assessed on said township; and on the thirtieth day of August, 1836, the north half of said township was sold, according to law, for the payment of the same tax, and charges

thereon, being in the whole, five dollars and ninety-five cents, to said Allen; who, thereafterwards, on the said sixteenth day of August, 1837, for the consideration of ten dollars, conveyed to the defendants all his right and title, so acquired, to the north half of said township. The right of redeeming said township from said sales has long since expired; so that, by virtue of said purchases of said Allen, the defendants, in their several answers, contend, that they have acquired an indefeasible estate in the premises; the said defendant, Edwards, so contending, because, as he alleges, the said taxes were imposed, and became a charge upon the land before he bought of the plaintiff's assignor; and the said Gerrish, because he had no connexion with that purchase. The defendants, although joined in the bill, have answered severally, each for himself, denying that they made the purchase, under the tax title, in trust either for the plaintiff, or his assignor, or that there was any fraudulent act or intent, in reference thereto, on the part of either of them.

As the defence relied upon on the part of each of the defendants must be regarded, in its principles and circumstances, as different from that of the other, it becomes necessary to examine their cases separately. The defendant, Edwards, was one of the original mortgagors to the plaintiff's assignor. He is therefore in the condition of a grantor of the premises to the plaintiff, inasmuch as his deed contains covenants of general warranty. No rule is believed to be better settled than that a vendor of real estate in fee, with covenants of general warranty, cannot acquire an outstanding title, and set it up adversely to his conveyance. In making such an acquisition, therefore, no injury was done to the rights of the plaintiff. On the contrary, whatever of title the defendant, Edwards, acquired by his purchase of the tax title, was confirmatory of that of the plaintiff, and enured instantly to his benefit. By such a purchase of an outstanding title, this defendant, in effect, acquired no title in himself. He was, to every intent and purpose, merely a conduit, through which it resulted to the perfection of that of his grantee or his assignee, the plaintiff;

excepting, however, in so far as this defendant had a right in equity of redemption.

This defendant, therefore, is not the holder in trust of any estate under the tax title, which would authorize the maintenance of this bill against him. The plaintiff's title is not clogged or incumbered, or in danger of being defeated by it. And much less reason is there for considering him, in the slightest degree, as defrauded by this defendant, by the purchasing in, or rather, as it respects the interest of the plaintiff, by the extinguishment of the outstanding tax title. It may be true, and probably is, that this defendant may have a right of action against his warrantor to recover the amount paid by him to extinguish the incumbrance; but that in nowise concerns the plaintiff. The bill, therefore, as to the defendant, Edwards, must be dismissed; but without costs for him, as he has manifestly been attempting to set up his purchase of the outstanding tax title, unjustly, as paramount to that, which he had contributed to make to the plaintiff's assignor.

In regard to the defendant, Gerrish, it is urged, that, before he purchased the tax title, he had a contract with John Edwards, one of the mortgagors, for the purchase of one sixth of the mortgaged premises, and that, having such contract, he became the equitable assignee of that one sixth; and that equity regards what is contracted to be done, as done. This maxim is, to be sure, well known in equity jurisprudence; but it has, undoubtedly, a limited extent of application. If it had not, nothing further than an executory contract for the conveyance of real estate, would be requisite to transfer it. This principle is applied in furtherance of the objects of equity. It means no more, than that the party to a contract, or his legal representatives, may insist upon being placed in a situation equally as advantageous as if the contract had been fulfilled. It is what may be insisted upon or waived at the pleasure of the parties to a contract. It is very clear, that a levy upon land, contracted for by a debtor, could not be made available to a creditor, either at common law, or in equity.

What reliance Gerrish placed upon his contract with John Edwards does not distinctly appear. Before he took a release of him, in May, 1838, of his interest in the premises, he had acquired the tax title. Whether essential or not, he might think it could do no harm to take a release from John Edwards. Releases are obtained from various motives. Whenever one man finds another setting up a claim to his land, however unfounded it may be, to avoid contention or litigation, a release from him may become desirable; and the release would not, thereby, be considered as acknowledging the title of the releasor, nor would it have the effect to render him responsible for any covenant obligatory upon the releasor. *Fox & al.* v. *Widgery*, 4 Greenl. 214.

Gerrish could not be considered as doing a wrongful act in not paying taxes assessed on lands, in which he had no interest at the time of the assessment; nor in suffering them to be sold therefor; nor in purchasing them of the vendee. His contract with John Edwards did not bind him to do any thing of the kind. He might prefer that mode of obtaining a title to a moiety of all the parcels, instead of to one sixth under the contract with John Edwards. Under that contract he had acquired no seizin, even in the one sixth. He was in nowise a tenant under the mortgagee. Having no title before he acquired one under the sale for taxes, he had no right to redeem from the sale therefor; and, having no such right, it cannot be inferred that he purchased that title for the benefit of the mortgagee, or by way of redemption. He was then as a stranger to the title of the plaintiff, and of his assignor; and not under the slightest obligation in law to regard it. The release, which he subsequently took from John Edwards, may well have been accepted from abundant caution, and cannot have the effect to disturb the title before acquired.

It was urged that the relation of landlord and tenant existed between the mortgagee and Gerrish; but we see no ground upon which any such position can be sustained. Gerrish did not become such tenant by his contract with John Edwards; and surely not by his purchase of the tax title. Under that

title he was in, as of his own estate, acknowledging no superior, subject, however, for a time, to be defeated by a redemption.

Gerrish having thus seen fit to become, conjointly with William E. Edwards, the purchaser of the township, including the premises in question, he, thereupon, became seized of a moiety of the township, in common and undivided; and of course in a moiety of the premises in question, in like manner. He was not the grantor of the mortgaged estate; nor in any-wise affected by the covenants contained in the deed of mortgage; but was wholly independent of any connexion therewith. What he purchased, therefore, he acquired as a stranger to that title. Can he then be considered as having purchased in trust for the plaintiff as urged by his counsel? Nothing in the nature of a fiduciary character can be considered as arising from that purchase. Gerrish has never made any declaration of his holding it in trust for the plaintiff; and implied trusts are to be made out by indubitable evidence; for which we look in vain in this case. Gerrish acquired the legal estate to one half of the premises. He was under no obligation to acquire it for any one but himself; and he peremtorily denies having so done for any one else. There is then no ground upon which we can hold him to be a trustee, of any portion of the premises, for the plaintiff.

But it is contended, that the purchase by Gerrish, was a fraudulent act to the injury of the plaintiff; unless the purchase was in trust for him or his assignor. And how so? There was an outstanding incumbrance upon the estate, whether existing before the plaintiff's assignor sold to Edwards and others, or not, does not seem to be material, so far as Gerrish is concerned. He purchased it, and it has ripened into a title. It was a matter of notoriety, as it arose under acts of the legislature, expressly authorizing the taxation. If it occurred before the plaintiff's assignor sold to Edwards and others, he was bound to have noticed it, and to have paid the taxes. If afterwards, it could make no difference, so far as Gerrish was concerned. Gerrish found the land had been assessed, and

sold for taxes. He was not bound to redeem it; and might purchase it, as might any one else. He was guilty of no act tending to conceal his purchase from the plaintiff, or his assignor. He duly registered his deed. It was always in the power of the plaintiff, or of his assignor, to have traced out the proceedings; and to have paid the taxes; or to have redeemed the lands, after they were sold. Gerrish could not know that the one or the other would not be done.

But it is urged, that the sum he paid for his purchase was trifling, and that it is unconscionable for him to resist the claim of the plaintiff, and, therefore, fraudulent. This would be carrying the doctrine of fraud beyond what the policy of law ever contemplated. Sales for taxes have been and are continually taking place by authority of law. After the expiration of the time for redemption, none having taken place, they are regarded as making perfect titles. These sales are, almost without exception, for an amount equally as trifling, as the one in this instance; yet it was never imagined to be fraudulent for the purchaser to insist upon the right, which the law gave him.

Again it is urged, that Gerrish must have known, that, if the plaintiff or his assignor had been apprised of these sales for taxes, he would have redeemed the lands from the purchaser of them; and that Gerrish was bound in conscience to have apprised him of their situation, in time to have afforded an opportunity to prevent the title from becoming absolute in the purchaser. But we do not see that Gerrish was under any obligation to have given himself that trouble. He was not bound to know that the plaintiff, or his assignor, had not such notice. In the case of sales for taxes of the uncultivated, or other lands, it is not made the duty of the purchasers to seek out and notify the proprietors of their danger. They are expected to be vigilant and attentive to their own interests. They know their lands are liable to taxation; and must be supposed to know, that they will be liable to be sold for taxes and lost, unless they are watchful to prevent it. They must be presumed to know the maxim, that the law aids those, who are

vigilant; and leaves those, who are negligent, to the consequences of their inattention. Gerrish had a right to remain passive. No one could insist upon his doing otherwise. He was bound not to be guilty of any concealment of his purchase, or of any act that could mislead or deceive the plaintiff, or his assignor, and there is no evidence that he did either. Fraud must be clearly and distinctly made out. It cannot be inferred from circumstances of an equivocal tendency; or from a deficiency of mere neighborly kindness. Gerrish doubtless knew, that the plaintiff's assignor held a mortgage of the premises; and it might have been an act of friendship and kindness, on the part of Gerrish, to have admonished him of his danger from the claim held by Gerrish. But this was, at most, but an imperfect obligation, which the law does not enforce. The bill, therefore, as to Gerrish also, must be dismissed, and he must be allowed his costs.

HENRY MARR *versus* HANNAH GIVEN.

To authorize a conveyance of land by attorney, it is not necessary that a power to *convey land* should be *expressly* delegated; it may be imparted by implication.

In the construction to be given to a power of attorney, the intentions of the parties are to be regarded.

The attorney was duly authorized, "to bargain, sell, grant, release and convey to such person or persons, and for such sum or sums of money, as to my said attorney shall seem most for my advantage, and upon such sale or sales, convenient and proper deeds, with such covenant or covenants, general or special, of warranty, quitclaim, or otherwise, as to my said attorney shall seem expedient, in due form of law, as my deed or deeds, to make, seal, and deliver and acknowledge," but the power was silent as to what was to be sold or conveyed; and the attorney conveyed land, and the grantee entered into possession thereof, and continued to occupy for nearly twenty years, during which time the grantor never asserted any title to the land. In an action demanding the land against one who had no title under the grantor, *it was held*, that it was the intention of the parties to authorize a sale and conveyance of all the rights of the grantor in any real estate.

WRIT OF ENTRY demanding a dwellinghouse and small tract of land in Wales, in this County.

Robert Brinley originally owned a small farm, of which the demanded premises are a part, and on Jan. 2, 1819, conveyed the same to John Given, husband of the tenant, who at the same time gave back a mortgage to secure the whole or part of the purchase money, both which deeds were immediately recorded. The demandant then introduced a quitclaim deed of the same premises from John Given to Rufus Marr, under whom he claimed, dated May 22, 1823, and duly recorded. This deed was executed by the agency of Elias Moody, acting as agent and attorney of John Given. To prove the authority of Moody to give the deed a power of attorney was produced of which a copy follows.

"Know all men by these presents that I John Given, of St. David in the County of Charlotte, Province of New Brunswick, Yeoman, have made, constituted and appointed and by these presents do make, constitute and appoint Elias Moody, of Lisbon in the County of Lincoln, State of Maine, to be my sufficient and lawful attorney for me and in my name to bargain, sell, grant, release and convey to such person or persons and for such sum or sums of money, as to my said attorney shall seem most for my advantage and benefit, and upon such sale or sales, convenient and proper deeds with such a covenant or covenants, general or special of warranty, quitclaim or otherwise, as to my said attorney shall seem expedient, in due form of law, as my deed or deeds to make, seal and deliver and acknowledge, and for me and in my name, to accept and receive, all and every the sum or sums of money, or other consideration or considerations the same may be sold for, which shall be coming to me on account of said sale or sales, and upon the receipt thereof suitable acquittance or acquittances in my name and stead to make, seal and deliver; and generally giving to my said attorney full power and authority touching the premises, to do, execute, proceed and finish in all things in as ample a manner as I might do if personally present. Hereby ratifying and confirming all lawful acts done by my said attorney by virtue hereof."

This was dated May 1, 1823, was signed and sealed by John Given, was witnessed, and acknowledged before a justice of the peace. It was proved, that before this time Given had left his wife at Wayne, and gone into the Province of New Brunswick, where he has since resided. Brinley had brought a suit upon the mortgage and recovered judgment in April, 1822, and made an entry under it to foreclose the mortgage. The tenant, Mrs. Given, employed Moody to go to New Brunswick and get the power of attorney to save the place from Brinley's mortgage. "She knew the place was under mortgage, and wanted to redeem it from the proprietor; and on Moody's return, it was concluded to let Rufus Marr have the place for the purpose of taking up the mortgage." Marr went to Augusta and there paid Brinley's agent the amount of the mortgage, $210,42. The entry on the execution, in the handwriting of Brinley's agent, since deceased, was this. "The amount of the within mortgage paid by Rufus Marr." The mortgage did not appear to have been discharged or assigned at that time, and on August 8, 1841, Brinley gave a quitclaim deed of the land to Rufus Marr. It was proved by parol, that when the deed from Given to Marr was made, the latter said, that Given should have the place at any time by paying him back the money he had paid. A witness stated the value of the place at that time, and at the time of the trial, to be about $800,00. The house and a small part of the land had been occupied by Mrs. Given, but Marr put a family into a part of the house for a time. The remainder of the land had been occupied by Marr from the time of his taking the deed. John Given had no estate but this land in Wayne, when the deed to Marr was made.

The tenant was defaulted by consent, and it was to be taken off, if the demandant was not entitled to recover.

Wells, for the tenant, said that she was in the occupation of the premises, and besides had a sufficient interest therein to defend, and to put the demandant on proof of his title. *Gibson* v. *Crehore*, 5 Pick. 146.

The mortgage was discharged by the payment of the money due, and therefore the deed from Brinley, in 1841, conveyed nothing. The title of the demandant depends exclusively on the validity of the deed executed by Moody.

This deed is void, and nothing passed by it, because the power of attorney produced does not authorize Moody to convey the land. Nor is this defence inequitable, as Marr paid but one fourth of the value of the premises, and now claims to hold the whole. He was already in possession of much more than enough to pay him.

Powers of this description should be construed strictly. 5 Mass. R. 36: Story's Agency, 66, 67. The power does not authorize Moody to convey any thing. There is no description whatever of the matter on which the power was to operate. That it could not have been intended to authorize the conveyance of real estate is certain, because the essential words of a deed, heirs and assigns, are not found in the power.

May, for the demandant, contended that the tenant had no interest in the premises, and was to be considered as a mere wrongdoer, and therefore cannot object that the attorney exceeded his authority. A mere tenant in possession cannot do it. 5 Johns. R. 43.

Moody had sufficient authority, under the power of attorney, to execute the deed. That instrument is full and perfect in all its parts, except as to the property to be bargained, sold and conveyed. The words bargain and sell, import a power to convey land by deed of bargain and sale, this being the most common mode of conveyance in the United States. 4 Kent, 495. The several parts of the power were examined in the argument, and the conclusion drawn from them, that the design and intention was, to give to the attorney an unlimited power to convey any property, which in fact consisted only of this equity of redemption. The facts may be looked into in order to ascertain the intention. 13 Petersd. Ab. 640; 3 M. & Selw. 99; 4 Bibb, 530. The only object of inserting in the power a description of the property to be conveyed, is to limit the authority.

But if we are mistaken in this, the deed from Brinley conveys the land to us, or operates as an assignment of the mortgage. *Freeman* v. *Paul*, 3 Greenl. 260; *Hatch* v. *Kimball*, 16 Maine R. 146; *Wade* v. *Howard*, 11 Pick. 289; *Vose* v. *Handy*, 2 Greenl. 322.

The opinion of the Court was drawn up by

Shepley J. — The intentions of the parties are to be regarded in the construction of the power of attorney from John Given to Elias Moody. It is not necessary, that a power to convey lands should be expressly delegated. It may be imparted by implication. Com. Dig. Poiar, A. 2. Moody was authorized "to bargain, sell, grant, release, and convey;" "and upon such sale or sales, convenient and proper deeds, with such covenant or covenants, general or special, of warranty, quitclaim, or otherwise, as to my said attorney shall seem expedient, in due form of law, as my deed or deeds, to make, seal, deliver, and acknowledge." The power of attorney is silent as to what he was to sell and convey. The language used was appropriate to the sale and conveyance of real estate according to the forms in use in this part of the country, and not usual in the sale and conveyance of personal property. The power is sufficiently broad to authorize the agent to sell and convey whatever estate Given might then own. And it would seem to be necessary to permit it to have that effect, or to decide, that it was wholly void. Moody, by virtue of it, claimed the power to convey the right in equity to redeem the estate, which Given had before conveyed in mortgage to Brinley, and made a conveyance of it to Marr, who caused it to be recorded, and entered into possession of the greater portion of the estate, and has continued to possess it without interruption for nearly twenty years. Given, during all that time, has never denied, that Moody was fully authorized to sell, has never claimed any interest in the land, and does not now claim any. The defendant was instrumental in procuring the conveyance to be made to Marr under that power, and in inducing him to advance the money due upon the mortgage. And does

not therefore place herself in a position to claim such a limited construction of the power, as will wholly defeat it, and deprive Marr of the land. She must be regarded as a stranger to the title. The language used in the power and explained by the conduct of the parties for so long a period authorizes the conclusion, that it was their intention to authorize a sale and conveyance of all the rights of Given in any real estate.

Judgment for demandant.

PRES'T., &c. FRANKLIN BANK *versus* GEORGE W. BACHELDER.

If the creditor has recovered judgment in a trustee process against his debtor, and against the trustee for the goods, effects and credits of the principal in his hands, and has taken out execution, and a demand has been made thereof of the trustee by the proper officer in due season, and he has refused to deliver up the same; and afterwards the original debtor files his petition in bankruptcy and obtains his discharge as a bankrupt under the late law of the United States on that subject; such discharge furnishes no valid defence to a *scire facias* to recover of the trustee the value of the goods, effects and credits of the principal in his hands.

THE plaintiffs brought this writ of *scire facias* for the purpose of obtaining a judgment and execution against the defendant for the amount of a judgment recovered by them against Elwell & Pray, and against the goods, effects and credits of the debtors in the hands of the defendant.

On March 7, 1835, the plaintiffs brought an action against Elwell & Pray in the Court of Common Pleas, and summoned Bachelder as trustee. He came into Court, and before judgment was finally rendered, made several disclosures, from which it appeared that he had effects of the debtors in his hands as assignee of Elwell & Pray. On Jan. 17, 1842, at an adjourned term of the Supreme Judicial Court, the plaintiffs recovered judgment against Elwell & Pray for $942,81, and against Bachelder as their trustee. The plaintiffs took out their execution and delivered it to an officer, who by virtue thereof, on Feb. 10, 1842, made a demand of Bachelder to

deliver up the goods, effects and credits of Elwell & Pray in his hands, and made return thereof, and that Bachelder refused to expose, discover and deliver the same, and that the execution was wholly unsatisfied. The present process was commenced on May 6, 1842.

Elwell & Pray, on Feb. 15, 1842, severally filed their petitions in bankruptcy. On March 16, 1842, they were declared judicially to be bankrupts; and they received their respective certificates of discharge on August 2, 1842. The defendant pleaded the bankruptcy of the judgment debtors, Elwell & Pray, in discharge of this suit; the plaintiffs replied thereto, setting forth the previous proceedings; and the defendant demurred.

Very able written arguments were furnished to the Court by the respective counsel. They are too much extended for publication. The amount of the judgment to be rendered against the defendant, if the decision should be against him, was one of the questions discussed. No notice of this will be taken, as there is no decision in relation thereto.

Emmons, for the defendant, contended that by the decree of bankruptcy and the appointment of assignees, the law vested the property, which Elwell & Pray had entrusted with the defendant, in the respective assignees. By their certificates of discharge, the debt of the plaintiffs against Elwell & Pray became so defunct, as that it could never, without a new promise, be enforced against them, by any new process. U. S. Bankrupt act of 1841, § 4. The basis of this action against the present defendant, is the debt and judgment of the plaintiffs against Elwell & Pray. If that cannot, by a new process, acquire legal vitality, it is difficult to perceive, how this *scire facias* can be sustained against the defendant.

If the lien created by an original attachment of property be admitted to have become vested by judgment against the principals, yet the property in the hands of the trustee was incapable of being rendered productive to the plaintiffs against the defendant. The demand for the property having been fruitless, the lien as to its value has become incapable of being

enforced. Upon the appointment of assignees, all the property of Elwell & Pray in the hands of the defendant became vested in their respective assignees. To enforce their claim, the plaintiffs have brought this suit, and insist that their lien was perfected by the demand on the defendant of Feb. 10, 1842. The defendant contends that this will not avail them. The Bankrupt law, and the opinion of Story J. in *ex parte Foster*, Law Reporter, Vol. 5, 56, were cited, and comments made upon them. The case of *Cook*, Law Reporter, Vol. 5, 443, before the same Judge, was also cited with comments. When a judgment is rendered, a lien by attachment of lands or goods may be enforced without any new process. But in case of a foreign attachment, the remedy demands a fresh process, and therefore does not come within the principles laid down by the learned Judge with respect to lands or goods attached on mesne process. The attempt here is to enforce a lien against the trustee by an action, and he has therefore a day in Court to plead any proper bar or defence. And in the words of the same learned Judge, in the case of *Foster*, "a foreign attachment is a remedy liable to be defeated by any act, that bars or takes away the remedy, or right to judgment under it."

There is nothing in the case of *Cook*, which denies the right of the principal to plead his bankruptcy, if he had the means of doing so. But it is too late for him after final judgment. He has no day in Court. Here the opportunity of pleading the bankruptcy remains, and the defendant has properly availed himself of it.

F. Allen and *Evans* argued for the plaintiffs. They said, that the principal question in this case was:—Whether the discharge under the bankrupt law, not of this defendant, but of Elwell & Pray, judgment debtors in a former suit, upon proceedings commenced subsequent to the rendition of that judgment, shall bar the plaintiffs of their right to recover of this defendant the amount which may be found to be in his hands as trustee; judgment also having been obtained against him in that capacity, execution having issued on that judgment,

and a demand having been made upon him in due season; and all prior to the commencement of the proceedings in bankruptcy, by virtue of which the discharge was finally obtained.

This constitutes a perfect lien, under the bankrupt law of the United States. They cited and commented upon the decisions of STORY J., Law Reporter, Vol. 5, 357. Of CONKLING J. same Vol. 362. Of PRENTISS J. same, 392. And of STORY J. in the matter of *Cook*, same Vol. 443. It is not legal liens only, but equitable liens also, which are protected by the act. Law Reporter, Vol. 5, 357.

The lien in this case is as perfect, as it would have been, had it been the case of an attachment of goods at the same time on the same process. *Sturdivant* v. *Robinson*, 18 Pick. 175. It is in fact and in effect an assignment of the property in the hands of the trustee to the creditors by virtue of the statute. 20 Pick. 563. Even in case of the natural death of a debtor who is insolvent, a creditor who has attached and obtained his judgment before the death, has a lien, unaffected by the insolvency, and may levy his execution after the death of the debtor. *Gold* v. *Grosvenor*, 9 Mass. R. 209.

The opinion of the Court was afterwards drawn up by

TENNEY J. — The statutes of this State provide two modes by which means may be secured on mesne process, to satisfy a judgment sought to be obtained in the action. One is by direct attachment of the lands or goods of the defendant, and the other by foreign attachment. The former secures the property returned on the writ, so that the creditor may cause it to be seized and sold upon his execution, to discharge the judgment, which he may obtain; the latter protects the goods, effects and credits in the hands of the trustee at the time of the service of the original writ upon him, so that they, or their value, are in the manner pointed out, to be applied for the same purpose. In both forms of proceeding, it is the property of the defendant, which affords the security, and in each, that is a fund equally holden to be appropriated to the payment of the debt secured thereby. No sale or subsequent attachment

can impair the creditor's rights to the one, nor can any restoration to the owner, or disposition by him or the trustee defeat the right acquired by the other. The manner of making the means thus secured available is different in one case from the other, if the property is not surrendered upon a proper demand, that it may be disposed of, to satisfy the debt; but the laws furnish a remedy in behalf of the creditor for any neglect, in those to whom the property was intrusted. A failure in the plaintiff to obtain a judgment will in both modes dissolve the attachment, because there is no debt, to which the avails of the property can be applied. But if judgment is obtained, whatever is the subject of the attachment in either form, is pledged for its satisfaction, as perfectly as it would be, if it had been placed in the same situation by a contract between the parties.

Do either of these forms of attachment create a lien, after judgment, in favor of the judgment creditor, so as to be excluded from the operation of the Bankrupt Law of the United States of 1841, c. 9, by force of the last proviso in the second section? The proviso is in these words: "provided also, that nothing in this act, shall be construed to annul, destroy or impair any lawful rights of married women, or minors, or any liens, mortgages, or other securities, or property real or personal, which may be valid by the laws of the States respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act."

This question has been fully examined by those distinguished for their talents, learning and long judicial experience, and although in some respects their opinions do not precisely coincide, one with the other, yet they all agree that a direct attachment is a valid lien upon the property, which cannot be defeated after judgment. Judge Story, in the case of *ex parte* Foster, 5 Law Reporter, 55, holds that an attachment on mesne process, before judgment, is not a lien, either in the general sense of the common law, or the maritime law, or in that of equity jurisprudence; but is at most a contingent security, to satisfy the judgment of the creditor, if he obtains one;

but inasmuch as the defendant may plead a discharge in bankruptcy, and thereby defeat a recovery in the action, the whole foundation on which the security rested is taken away. And afterwards, in the matter of *Cook*, 5 Law Reporter, 443, the learned Judge, carrying out the doctrine intimated in the other case, says, "the proceedings in bankruptcy after the judgment, can have no effect whatsoever upon that judgment, or upon the property attached in the suit. The creditors in the judgment have made their right (call it, if you please their lien) perfect under the attachment. It is no longer a conditional or contingent right, but it has attached absolutely to the property, and, by the laws of Massachusetts, it remains a fixed and positive lien for thirty days after judgment, by means of which the creditor at his election may obtain a preference of satisfaction out of the property attached, over all other creditors. Of that election, the Court has no authority to deprive him, or by an injunction to obstruct or stop his proceedings on his execution. If the bankrupt should obtain his discharge, it would be no bar or defence to the due execution and satisfaction of that judgment, in the regular course of proceedings thereon; for the debtor, after the judgment, has no day in Court to plead any bar or defence."

If our views are not erroneous, that a foreign attachment affords equal security with that in the ordinary form under the laws of the State, it follows, that it falls equally within the protecting provision in the proviso quoted from the second section of the bankrupt act. The creditor's risk may be greater or less, when the property secured remains in the hands of the private trustee, than when it is in the custody of a public officer, but his rights are the same under one as the other. The law guards the property, and holds it in both instances as a sacred deposit, which nothing but the want of fidelity of the one to whom it is entrusted can divert from the destination indicated by the statute. In the case of *ex parte Foster*, before cited, Judge Story remarks, "that the attachments under the trustee process," which were also brought to his consideration, by the petition as much as the attachment in the common

mode, "must be governed by similar considerations, and therefore, they will require no separate notice."

If we apply these principles to the case at bar, what are the plaintiffs' rights? They obtained their judgment in which the defendant is adjudged trustee on his own disclosure. The execution issued upon said judgment, and being in the hands of an officer, he demanded thereon of the defendant the goods, effects and credits, which were in his hands and possession, belonging to the debtors, and the same were refused. All these proceedings were before the debtors had filed their petitions to be declared bankrupts. This laid the foundation for a judgment upon *scire facias* against the defendant, *de bonis propriis*, to be rendered upon his examination in the first process, without his being again examined.

Is the defendant at liberty to avail himself of that which was not and could not be the reason of his omission to surrender the property, in bar of this action? When after the refusal, he was liable, and it is not pretended, in his plea, that any excuse therefor then existed, can this neglect avail him to invoke a defence, which was not then open to him? If the bankrupt act had even wrought the entire annihilation of the judgment so far as it regarded the debtors, was not his liability fixed by what had transpired? When the security, which the law of our own State made perfect by that judgment, was unaffected by the bankrupt law of the United States by its express and positive provisions, can the omission of a duty in the defendant take away that security?

It is insisted for the defendant, that the property of Elwell & Pray after they filed their petitions in bankruptcy, including that in the hands of the defendant, was vested in the hands of their respective assignees; and that the defendant having a day in Court can do what the debtors cannot do, who have no opportunity to plead their discharges. This argument is founded upon the assumption, that the *scire facias* is a process to obtain the goods, effects and credits deposited by the principal debtors with the trustee, as they existed at the time of the service of the original writ upon him. The writ of *scire*

facias is not provided in the statute for such a purpose. No surrender of goods or effects, or any other property, short of full payment of the judgment, after the refusal of the defendant to answer the demand on the execution, could exonerate him from his liability. The plaintiffs have no further interest in the property. By that refusal he appropriated the property to his own use, and was bound to answer for the value. He no longer holds it, to be disposed of, as he did before his refusal. The property is now a matter between him and the assignees of the bankrupts. If they take it out of his hands, so that he cannot indemnify himself therefrom, in this suit, he must impute it to his omission to surrender it, and not to any fault of the law. If he had disclosed certain specific articles, and he had refused to deliver them upon a legal demand, and they were afterwards consumed by fire, would he plead this in bar of *scire facias*, because a delivery would then be impossible? A surrender, without consent of the plaintiff, would alike be impossible, if the property had remained entire.

The counsel calls in aid of his defence, a remark of Judge Story in the case of *ex parte Foster*, before referred to, which is, "a foreign attachment is a remedy liable to be defeated, by any act, that bars or takes away the remedy or right to judgment under it." We cannot think that this remark of the learned Judge was intended to have such an application. The question under examination, was whether an attachment on mesne process created such a lien or security as to be embraced in the last proviso of the second section of the bankrupt act of 1841, and in answer to the proposition, that in cases of foreign attachment under the custom of London, the attaching creditors had a lien or pledge of the goods attached in the hands of the garnishee, and that it was such security of the debt, that if the defendant became bankrupt after the attachment and before judgment, the commissioners could not take or assign the goods, excepting subject to the lien and security of the attaching creditor. The Judge denies the doctrine contended for, in relation to a foreign attachment, although apparently supported by some authorities, and says,

"the truth is, a foreign attachment is like a common attachment, on mesne process, a remedy merely given and regulated by law to enable a creditor to obtain satisfaction of his debt; and like every other, is liable to be defeated by any act, that bars or takes away the remedy or right to judgment under it."

As long as a party defendant had an opportunity of pleading his discharge in bankruptcy, the lien created by a common or a foreign attachment, being dependent upon a judgment for its perfection, was liable to be defeated by a failure of the suit in which either was made. This proposition, too plain to require argument in its support, cannot authorize a trustee to plead such discharge in answer to a writ of *scire facias*, which is as distinct from a process of foreign attachment, as is a suit against an officer for not holding and surrendering on demand property attached by him on mesne process. The judgment against the principal debtors cannot be impeached by them, much less by one, who was not a party to the matter of the suit on which it was rendered. It is one, which cannot be enforced against the debtors therein, because they have been discharged from the debt; but it remains a judgment not annulled or reversed, and it is sufficient to secure to creditors any lien made complete thereby. When Judge Story in the matter of *Cook*, before referred to, uses the strong and emphatic language, that the creditor after obtaining his judgment, at his election may obtain a preference of satisfaction out of the property attached over all after creditors; and of that election the Court has no authority to deprive him, or by injunction to obstruct or stop his proceedings on his execution, we cannot believe such a remark as he made to a matter entirely distinct as is quoted by the counsel, can be authority in support of the present defence. Such a construction would make the bankrupt law speak a language altogether different from that intended by its framers; would destroy a lien in terms and in spirit protected by it; would give an effect to the silent and unauthorized omission of a trustee to perform the duty imposed upon him more powerful, than the injunction of the highest tribunal in our land, clothed with power in equity jurisdiction in

matters of bankruptcy more ample, than that of the Lord Chancellor of England.

Replication adjudged good.

FRANCIS DAVIS, JR. *versus* CHARLES KEENE *& al.*

Where there is a joint liability of the two defendants, the confessions of one made under oath as a witness when called by the other defendant in another suit, are admissible against both; although as between each other, it might be that the liability ought to be discharged solely by him who made the admission.

ASSUMPSIT for money paid for the defendants, C. Keene and W. C. Weston. Weston was defaulted, and Keene defended. The plaintiff proved that on Jan. 9, 1838, Weston gave him, he being then a deputy sheriff, a writ for service, the demand sued having accrued prior to Nov. 1837, in favor of Keene and Weston, the defendants, on which he attached certain property; that one Ryerson brought an action against the sheriff for this property and recovered; and that the plaintiff was obliged to pay this sum.

Keene introduced testimony tending to show, that there had existed a partnership between the defendants, and that it had been dissolved on Nov. 12, 1837, and that on Nov. 29, 1837, the demands of the firm had been sold by Keene to Weston, and the action brought for his benefit. There was no evidence that any public, or other notice had been given of the dissolution.

The plaintiff then called witnesses to prove, that on the trial of an action brought by Keene against the Augusta Bank, Keene called Weston as a witness, and that the latter then testified, that there was no such transfer of the partnership demands from Keene to him. To the admission of the testimony of these witnesses, the defendant objected. The objection was overruled by SHEPLEY J. then holding the Court, and the testimony was admitted. A verdict having been returned for the plaintiff, the defendant, Keene, filed exceptions to this ruling.

Vose & Lancaster, for Keene, contended that the testimony objected to at the trial ought not to have been admitted; and cited 3 Esp. R. 181; 2 W. Bl. 973; 18 Pick. 434; 2 Lillie's Abr. 47; 4 Binney, 111; 1 L'd. Raym. 730; 7 Pick. 79; 4 Wash. C. C. R. 440; 4 T. R. 290; 6 Cowen, 162.

Bradbury argued for the plaintiff.

WHITMAN C. J. delivered the opinion of the Court.

The only question in this case is: did the Judge err in ruling that the confessions of Weston, under oath, were admissible? Keene and Weston had been copartners, and were joint plaintiffs in the suit in which the wrong was done to Ryerson by the taking of his property under an attachment made by the present plaintiff as an officer. The attachment must be presumed to have been made by their order. They were then jointly liable to the plaintiff; and if so, the confession of one was admissible against both.

Although the admission was under oath, this has no analogy to the giving in evidence of the testimony of a deceased witness, who had, before his decease, testified in the same cause, as is supposed in the argument for the defendant.

Exceptions overruled.

WILLIAM SIBLEY *versus* JOSEPH ROBINSON.

Where a note payable to a person named, or bearer, was transferred by the payee to his creditor as collateral security for a debt due from the payee to him, and a suit is brought by the creditor in his own name against the maker, it furnishes no defence, if the latter can show, that the payee had paid his own debt to the plaintiff, and so was entitled to have had the note returned to him, before the commencement of the suit.

ASSUMPSIT by the plaintiff as the bearer and owner of a note, dated April 25, 1837, for $25,00, payable in two years and interest after due, given by the defendant to Charles Robinson, or bearer. The defendant introduced in evidence a paper signed by the plaintiff, of which a copy follows. "July 12, 1837. This day received of Charles Robinson five notes

of hand against Joseph Robinson. These notes are dated April 25, 1837, and to be paid to Charles Robinson or bearer, one of $26,50, to be paid in a year from its date and interest, the other four notes are $25,00 each, without interest, and to be paid yearly after the above. The first note is to be applied on one due me, signed by John Glidden and Charles Robinson, that is due me, some days before this demand is out. I have received these notes only as collateral security." The Glidden note was for $150,00, and was paid before this suit was commenced. The plaintiff then held three notes of $200 each, against Charles Robinson, secured by a mortgage of land, dated April 15, 1837, payable in two, three and four years. The counsel for the defendant offered to prove by parol, that the notes were put into the hands of the plaintiff, for the sole purpose of securing the payment of the Glidden note. SHEPLEY J. presiding at the trial, ruled that the evidence was inadmissible.

The counsel for the plaintiff alleged, that the land was wholly insufficient to secure the notes, and claimed that the plaintiff had the right to retain the note in suit for security of the notes described in the mortgage, and could recover in this suit. It did not appear that the plaintiff had any other demands against Charles Robinson, than those mentioned. The presiding Judge, ruled, that by the terms of the receipt, the plaintiff might retain the notes as security for any demands which the plaintiff might have against Charles Robinson at the date thereof, not otherwise secured; but that he had no right to retain or appropriate the same to secure him against any loss upon demands he had against said Charles Robinson secured by mortgage.

The plaintiff became nonsuit; and if the ruling of the Judge was incorrect, the nonsuit was to be taken off and the case stand for trial.

Emmons, for the plaintiff, in his argument, said that when the plaintiff received the five notes and gave the receipt, he held four notes against Charles Robinson, one secured by the

name of Glidden, as surety, and the other three secured by a mortgage of certain real estate. The five notes were received as collateral security. If nothing further had been said, the plaintiff would most certainly have had the right to hold the notes for the payment of all demands he then had against Charles Robinson. The appropriation of one of them towards the payment of the Glidden note, affected that alone, and left the others as additional security to the notes secured by the mortgage. The last ruling of the Judge, then, was erroneous.

The terms used in an agreement shall prevail according to their most comprehensive popular sense. Chitty on Contracts, (Springfield Ed. of 1839,) 66.

Vose and *Lancaster*, for the defendant, contended that the ruling of the Judge on the last point was correct. The Glidden note had no connexion with the notes secured by the mortgage. The five notes, mentioned in the receipt, did not amount to as much as the Glidden note, and the receipt mentions that note only, and has reference to that alone. The first note was to be taken in part payment, and the other four as collateral to the Glidden note. Glidden was not a surety, as the counsel for the plaintiff seems to suppose, but a joint note of the two. The receipt has no reference to the separate debt of Robinson, which, for any thing appearing in the case, was abundantly secured by the mortgage. As the note to which that in suit was collateral was paid before this suit was commenced, all right of the plaintiff to this note had ceased, and he cannot maintain his action.

The opinion of the Court was by

Whitman C. J. — One Charles Robinson was owing the plaintiff several sums of money, and indorsed or delivered to him five several notes of hand, payable to the said Charles or bearer, against the defendant, and took from him a receipt specifying generally, that they were received as collateral security, and that one of them, particularly designated, and not the one in suit in this case, was to go towards a certain note, which the plaintiff held against the said Charles and one Glidden,

which, it appears, has been since paid, and saying nothing as to what other demands the residue were to be collateral security for. All the other demands of the plaintiff against said Charles were secured, to a certain extent, by a mortgage of real estate. The Judge, sitting at the trial, having intimated an opinion, that the plaintiff could not recover, a nonsuit was entered, which is to stand, unless the whole Court should be of a different opinion.

We must in this, as in all other cases of contract, endeavor to ascertain what was the intention of the parties. There were five notes transferred. One of them is specifically appropriated. None of the others were so. This seems to afford a clear indication that the latter were intended to secure other demands. What other demands had the plaintiff to be secured? None but those already partially secured by a mortgage of real estate. To the further security of these, then, it must have been intended that they should have been applied. If otherwise, it would surely have been so expressed. One never would have been selected, and a particular direction given to it, if it were not intended that the others should have a different destination.

But it does not appear that the defendant can question the right of the plaintiff to recover. The latter came fairly by the notes. They were transferred to him by the payee, and for a valuable consideration, and no defence is pretended upon the merits. What right has the defendant to question the validity of the plaintiff's claim to their contents? They are justly due from the defendant to some one. It does not appear that even the payee questions the right of the plaintiff to recover. In such case it has been repeatedly ruled in this State and Massachusetts, that the plaintiff, although but nominally such, may be allowed to recover for the benefit of the party in interest. *Sherwood* v. *Rogers*, 14 Pick. 172; *Hodges* v. *Holland*, 19 Pick. 43; *Bradford & al.* v. *Bucknam*, 3 Fairf. 15; *Fisk* v. *Bradford*, 7 Greenl. 28; *Bragg* v. *Greenleaf*, 14 Maine R. 395; *Marr* v. *Plummer*, 3 Greenl. 73. In this last case the Court go further, and say, such "fact (viz. that the plaintiff

is but nominally such) is of no importance to the maker, except he has a defence, good as between him and the promisee."

This position is abundantly supported by the decisions of the Courts in New York. *Mauran* v. *Lamb*, 7 Cow. 174; *Lovell* v. *Evertson*, 11 Johns. R. 52; *Gage* v. *Kendall*, 15 Wend. 640. In *Conroy* v. *Warren*, 3 Johns. Cases, 259, Mr. Justice Kent laid down the law, and it seems to have been fully concurred in by the other members of the Court, that "a note indorsed in blank, and one payable to bearer, are of the same nature; they both go by delivery; and possession proves property in both cases. If a question of *mala fide possessio*" arises, that is a matter of fact to be raised by the defendant. And if a note be indorsed in blank the Court never inquires into the right of the plaintiff whether he sues in his own right or as trustee."

Nonsuit set aside. — New trial granted.

JOHN F. CHILDS *versus* JOHN HAM.

When a service has been made thereon, the attorney who made the writ has no authority to alter it without leave of Court.

But if an alteration of a writ be made, after a service of it by attachment of property and giving a summons, this does not excuse the officer from performance of the duty of keeping the property safely, that it may be applied to satisfy the judgment obtained by the plaintiff, or returned to the defendant.

The officer serving a writ is not a party to the judgment rendered in the suit, and where there is no fraud, he cannot impeach it collaterally.

Where an officer returns on a writ an attachment of certain goods only, without fixing their value, the presumption of law is, in the absence of all other testimony, that they were of the value commanded to be attached.

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

Case for the alleged neglect of the defendant to keep certain personal property, attached by him as a constable on an original writ, so that the same might be forthcoming to satisfy the judgment.

The plaintiff introduced the writ with a return thereon by the defendant of an attachment of the property. The plaintiff also called the attorney who made the writ in the first suit, and had charge of the action. On cross-examination he testified, that the writ was made "by attaching with a wafer a fly leaf to a capias and attachment blank in common form, thus making the process a trustee writ, and in this form he sent it to a former constable with instructions to inquire, if the supposed trustee was indebted to the principal, and if he was, to serve it as a trustee writ, and if he was not, to make the common service by attaching property and giving a summons. The defendant made no legal service on the trustee, and after the return, the attorney removed the fly leaf, and thus made the process what it now appears to be, a capias and attachment writ."

The defendant requested the Judge to instruct the jury, that if they should believe that testimony, their verdict should be for the defendant. This the Judge declined to do.

The return of the defendant did not set forth any value of the property attached, and the jury were instructed, that they might, in the absence of proof, presume it to be worth as much as by the writ he was ordered to attach. The verdict was for the plaintiff, but for a less sum than the amount of the judgment, and less than the sum for which he was ordered to make an attachment. The defendant filed exceptions.

H. W. Paine, for the defendant, contended that the instruction requested ought to have been given. The defendant was only bound to keep the property attached, to be taken on an execution issued on a judgment founded on this writ. If the return was on another writ, and not on this, it is competent for the defendant to show it. The writ, in this case, was entirely changed after the service, and was not the same writ on which the attachment of the defendant was returned. The attachment was discharged by this alteration. It was done improperly by the plaintiff's own attorney, and was illegal, and rendered not only the attachment, but the writ void. *Greenwood* v. *Fales & tr.* 6 Greenl. 405. This was against the

policy of the law, and should be discouraged. This alteration is, too, one in which the officer had an interest. He might be willing to attach property, where the claimant was to be summoned as a trustee, when he would not without it.

It is not the duty of the officer to return a value on the property attached, and there is no legal presumption, that it has any particular value. There is no evidence, that there were any written instructions to attach property, and on this ground the defendant is not liable.

Lancaster and *J. Baker*, for the plaintiff, said that the paper attached to the writ by a wafer, never was any part of the writ, and that if it had been served as a trustee process, the trustee could not have been holden. Although no change in a writ, or of any thing upon it, ought to be made after service, but by leave of Court, after entry of the action, yet the removal of the paper was immaterial, as it made no difference in the legal effect.

But this question is not now open to the defendant. No change was apparent upon the face of the writ, and the only mode of making the objection was by plea in abatement. *Greenwood* v. *Fales & tr.* 6 Greenl. 405; *Cook* v. *Lothrop*, 18 Maine R. 260.

No fraud is pretended in obtaining the judgment, and it cannot be impeached by the defendant, who was not a party to it. The judgment is conclusive until reversed. *Adams* v. *Balch*, 5 Maine R. 188; *Commercial Bank* v. *Wilkins*, 9 Maine R. 28; *Banister* v. *Higginson*, 15 Maine R. 73; *Badlam* v. *Tucker*, 1 Pick. 389.

The presumption of law is, that public officers do their duty, and therefore it is to be presumed, if no proof is furnished, that the value of the property attached was sufficient to satisfy the execution. 11 Mass. R. 89; 13 Mass. R. 187; 7 Pick. 551; 9 Pick. 309.

The opinion of the Court was prepared by

Shepley J. — The exceptions state, that the "writ was made by attaching with a wafer a fly leaf to a *capias* and at-

tachment blank in common form, thus making the process a trustee writ." The writ, by the statute denominated a "trustee writ of attachment," commands the officer to summon the defendant. The service is not made by a separate summons but by copy. The writ denominated, "*capias* or attachment," does not command the officer to summon the defendant, and service is made by a separate summons. The one made by the plaintiff's attorney, with the fly leaf annexed, does not appear to have corresponded with either. When a service had been made upon it, the attorney had no authority to alter it without leave of Court, and the subtraction of the leaf was illegal. By his doing so the writ had been made to assume again a legal form, and the plaintiff had obtained a judgment upon it. The officer was commanded and authorized by the informal writ to make an attachment of property; and neither the subsequent alteration, nor the want of a legal service, could excuse him from the performance of the duty of keeping the property safely, that it might be applied to satisfy the judgment obtained by the plaintiff, or returned to the defendant, if he should become entitled to it. He has not shown, that the defendant in that suit has become entitled to it; while the plaintiff has shown a judgment rendered in his favor and an execution issued thereon. The officer is not a party to that judgment and cannot impeach it collaterally. It is said, that the attachment of the property was not made upon the writ, on which judgment was recovered. But the fact that certain important allegations contained in the writ at the time of service have been subtracted, does not destroy its identity, the return of the officer still remaining with the part retained.

The law presumes, that an officer, who has made service of a writ, has obeyed the command of his precept and performed his duty, until the contrary appears. The writ having commanded him to attach the goods and estate of the defendant to a certain value, and he having returned an attachment of goods only without fixing the value, the presumption must be, in the absence of all other testimony, that they were of the value commanded. *Exceptions overruled.*

JOHN CHANDLER *& al. versus* SAMUEL GOODRIDGE *& al.*

Where commissioners to make partition assigned certain land to one, and made the following provision for the benefit of another, who had land adjoining, whereon was a gristmill, assigned to him: "excepting the privilege of the county road crossing said land, and a privilege of a pass way over the floom on the south side of the millpond, twenty feet wide, leading from the county road at the south end of the bridge to the gristmill, where said road is now traversed;" *it was held:*

That this gave but the right of passing and repassing along the way described in a safe and convenient manner: —

That the owner of the land had the right to use the pass way for any purposes whatever, provided he did not interfere with such right of passage: —

That if a railing was necessary to make the pass way safe and convenient, the party entitled thereto had the right to erect one, but in such manner, if it could be done, as not to prevent the owner of the land from rolling logs across the same into the millpond, or it would be subject to be removed for that purpose: —

That the pass way was to be located on the south shore of the millpond as it was at the time of the partition: —

And in an action of trespass *quare clausum* against the owner of the land for entering upon the pass way of the plaintiff, tearing down his railing, and "encumbering and impeding his rights of passage," in general terms, that the plaintiff could not recover damages for the defendant's suffering the pass way to be encumbered by lumber and logs.

THE action was trespass, *quare clausum*, for entering upon the pass way of the plaintiffs, tearing down their railing, and "encumbering and impeding their right of passage." At the trial, before SHEPLEY J. it appeared that a partition of certain real estate was made in 1837, by which land was set off to John Goodridge, whose rights the defendants have, which included within its boundaries the premises where the acts were done, complained of as trespasses; and that at the same time a reservation, or exception, was made to one whose rights the plaintiffs now have, in these words. "Excepting the privilege of the county road crossing said land, and a privilege of a pass way over the floom on the south side of the millpond, twenty feet wide, and leading from the county road at the south end of the bridge to the gristmill where said road is now travelled, with the privilege of drawing one quarter part of the

water from said millpond at all times." Since the partition there has been on the part set off to the plaintiffs a sawmill, shingle machine and gristmill; and on the part set off to the defendants a sawmill, gristmill, and fulling and carding mills.

The passage way was on the south side of the millpond, and in January, 1841, the plaintiffs erected a railing on the side towards the water by laying logs at the bottom, putting posts on the logs and nailing planks to the posts. In Feb. 1841, the defendants tore down about thirty feet of this railing, and rolled their logs over the passage way, through this opening, into the pond. The defendants introduced evidence tending to show, that they had for several years, when the pond was frozen, rolled logs into the pond at that place, and that it was the usual and most convenient rolling place for logs in the winter season. There was also evidence introduced by the plaintiffs, tending to show, that logs had been rolled into the pond by the defendants several rods above this place and several rods from the pass way, and that the defendants might have rolled in their logs on their own land more conveniently than where the railing was torn down, and that the defendants encumbered the way with logs and timber. This was controverted by testimony on the part of the defendants. There was also a question made between the parties, whether the railing torn down was, or was not, within the limits of the pass way to which the plaintiffs were entitled. There was also testimony introduced by the parties tending to show that a railing was, and was not, necessary. The plaintiffs offered to prove, that *in the opinion of the witnesses*, who had examined the pass way, a railing was necessary. This was objected to, and ruled to be inadmissible.

The Judge instructed the jury, that the plaintiffs had nothing more than a mere right of a safe and convenient passage for passing and re-passing, on the pass way, and that the defendants had the right to use the same for any purposes whatever, provided they did not interfere with the right of the plaintiffs in manner aforesaid; that if the railing was necessary to make the pass way safe and convenient, the plaintiffs had

the right to erect it; but if a railing could be erected in such manner as to make the pass way safe and convenient, and the defendants could also have a rollway over the pass way, then the defendants had a right to remove the railing, if it was not so constructed as to afford the defendants the means of rolling their logs across the same; that the plaintiffs should locate the pass way on the south side of the shore of the millpond, where the shore was at the time of the partition; that it could be extended twenty feet in width from that shore; that if in putting up the railing the plaintiffs had put the posts thereof out of the limits and further into the pond than where the shore was at the time of the partition, then the defendants had the right to remove the railing; and that there was no claim in the plaintiffs' declaration for encumbering the pass way with logs and lumber, and therefore nothing could be recovered for that cause.

The verdict was for the defendants, and the plaintiffs filed exceptions to the rulings and instructions of the Judge.

Wells argued for the plaintiffs, contending, among other grounds, that an exception wholly prevents whatever is excepted from passing. Co. Lit. 47 (a).

The soil covered by the pass way belongs to the plaintiffs. The extent of the exception, and its location, is given, and the term *pass way* was used by the commissioners to designate the object, and not to limit the right. It is placed on the same ground as the road, and both are alike excepted from any right of the defendants thereto.

But if the soil does not belong to the plaintiffs, they are entitled to the exclusive use of the pass way, and not merely to a concurrent one with the defendants. It is the only approach the plaintiffs had to their mill, and the commissioners intended it for their sole use; and such is the fair import of their language.

But if the right to use the pass way was concurrent, and they are tenants in common, still the conduct of the defendants was not legal or justifiable. The plaintiffs erected a safe railing without objection from the defendants, and it was torn

down without notice. For this the defendants are liable. Co. Lit. 200 (a); *Newton* v. *Newton*, 17 Pick. 201; *Keay* v. *Goodwin*, 16 Mass. R. 1; *Maddox* v. *Goddard*, 15 Maine R. 218; *Porter* v. *Hooper*, 13 Maine R. 25; 1 Chitty on Pl. 180.

This was for a pass way only, and the defendants had no right to use it for any other purpose. The rolling of logs over the road is wholly inconsistent with its being used for a passage way.

Bradbury, for the defendants, said that they merely took down enough of the railing to use their ancient place for rolling logs. The land was set off to the defendants, and the plaintiffs had a mere easement over it. The defendants could use the land for every purpose not inconsistent with the right of passing. "The privilege of a pass way" is all the plaintiffs have, and the very terms show that this mere right to pass was intended, and nothing more. Passage way, or pass way, means only a right of going over another's land, and not the land itself. Hilliard's Abr. 257; 2 Cruise, 124; 16 Mass. R. 33; 1 Yeates, 167; 3 Kent, 419. Such way can be used only according to the grant, and there can be no deviation from the place stated. Cruise, title Ways, § 16; Douglass, 745; *Jones* v. *Percival*, 5 Pick. 485; *Miller* v. *Bristol*, 12 Pick. 550; 1 T. R. 560.

The instruction as to the location of the passage way was correct. The pond was excluded from it. *Bradley* v. *Rice*, 13 Maine R. 198.

The opinion of the Court was prepared by

Tenney J. — The land set off in the partition to John Goodridge by metes and bounds, with all the privileges and appurtenances thereto belonging, embraces the premises in dispute, and gives a title, subject only to the exception contained in the commissioners' report. The counsel for the plaintiffs contend that this exception carries a fee in the land described as a passage way over the floom on the south side of the pond, twenty feet wide and leading from the county road at the south end

of the bridge to the grist mill, where said road is now travelled; but if the fee is not by the language of the exception in the plaintiffs, it is insisted, that the privilege in them is exclusive, and that the defendants have no right to participate in its enjoyment.

The plaintiffs are entitled to the privilege of a passage way; this is the language on which they endeavor to maintain their action, and by the construction put thereon, it must stand or fall. The word *passage way* cannot be any broader in its signification than *way* or *highway*, and can have essentially no different meaning. It must have been used to convey an idea similar to that which is attached to the term *way*, although it was not contemplated, that it would be located by authority of law, like town ways or highways.

A way is an incorporeal hereditament, and is a right of passage over another man's ground. 3 Kent's Com. 337. In *Huslius* v. *Shippam*, 5 Barn. & Cres. 221, the Court say, "a right of way or a right of passage for water (where it does not create an interest in the land) is an incorporeal right and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. *Terms de la Ley*, a book of great antiquity, defines an easement to be a privilege, that one neighbor has of another by charter or preemption without profit, and instances, "as a way or sink through his land or such like." In *Comm.* v. *Peters*, 2 Mass. R. 125, SEDGWICK J. remarks, "where land is appropriated to the use of a highway, the use only is taken; and except so far as that goes, the right of soil remains precisely as it was before. So much so, that the owner of the soil may recover in ejectment, subject however to the easement; and he has a right to the freehold and all the profits above and under ground, except only the right of passage." In *Perley* v. *Chandler*, 6 Mass. R. 454, PARSONS C. J. says, "by the location of a way over the land of any person, the public have acquired an easement, which the owner of the land cannot extinguish or interrupt; but the soil and freehold remain in the owner, although encumbered by the way. And every use to which the land

may be applied, and all the profits, which may be derived from it, consistently with the continuance of the easement, the owner can lawfully claim."

The grant of a sawmill, "with a convenient privilege to pile logs, boards and other lumber," conveys only an easement in the land used for piling. *Thompson & al.* v. *Androscoggin Bridge*, 5 Greenl. 62.

In the case at bar the privilege to the plaintiffs cannot by any construction extend beyond the right of a passage way, which gives to them an easement only over the land in question.

The right of the defendants to the land is encumbered by the right of the plaintiffs to pass and repass over it as described in the exception. To the plaintiffs' right, is incident that of rendering the passage way at all times safe and convenient; and for this purpose he could erect railings where the situation of the ground made it proper for such enjoyment. But in doing this he could not unnecessarily deprive the other party of any of the rights, which flow from his title to the fee in the land; he could not, unless essential to his own privilege, exclude the defendants from any use, to which they might wish to appropriate the land. The pond within their limits was equally the freehold of the defendants, who were entitled to the free and uninterrupted access from one to the other for all and every purpose not inconsistent with the right secured to the plaintiffs. Unless it were necessary to the enjoyment of the easement belonging to the plaintiffs, they could not take to themselves any exclusive occupation of the premises, or exclude therefrom the defendants.

The latter could roll logs from any part of the land falling to them on the partition, unless it impaired the plaintiffs' right of passage. If the rights of both could exist together without interference, the law will allow and require it. If the privilege of the plaintiffs could have been preserved by their erecting a railing, which would have permitted the enjoyment of the defendants, it was the duty of the plaintiffs so to have constructed it, and by omitting to do this, the defendants' rights were

invaded, and they were justified in causing the removal. The cause was submitted to the jury on these principles, and the verdict cannot be disturbed therefor.

The passage way was to be located on the south side of the millpond, and to be twenty feet wide, and to extend from the county road to the gristmill. A way imports a right of passing in a particular line. If a man grant a right of way over his land, designating the course of it between certain *termini*, the grantee has no right to deviate from the course designated. A right of way can only be used according to the grant, or the occasion from which it arises. One having a right of way in, through, over and along a slip of land, cannot have a way across the land. These doctrines, found in the cases cited for the defendants, are reasonable, and are well established. Whenever an easement exists by grant, it may be enjoyed to the extent of the legitimate meaning of the terms used, but to that it must be confined.

In this case the termini, the width of the passage, and the part of the lot, where it was to run, were fully expressed in the Commissioners' report. The plaintiffs had no right to deviate from the limits as laid down. The millpond, as it existed at the time of the partition, was excluded, so that the passageway would be southerly thereof. If any erections were made in, or over the pond as it was at the time of the division, it was unauthorized, and could be legally removed by the defendants.

The writ contains nothing upon which the jury could have assessed damages for incumbering and obstructing the passage with logs, and the instructions to the jury were in this respect unobjectionable.

The evidence offered, that in the opinion of witnesses, the railing torn down was necessary to the safety and convenience of the plaintiffs in the enjoyment of the passage was properly excluded. That was the question for the jury to determine from all the facts, and not from the opinions of others of what their verdict should be.

Exceptions overruled.

ISAAC C. WELCOME *versus* JAMES R. BATCHELDER.

In an action of trespass against a sheriff for goods attached by his deputy on a writ and removed, in favor of a third person claiming to be the owner, the deputy, on being released by the sheriff, is a competent witness for him.

And if a person had promised to indemnify the deputy for attaching and taking the goods, the release of the deputy discharges all claim against such promisor, and he becomes a competent witness for the sheriff.

Public policy authorizes a Judge of a Court to excuse himself from testifying as to what witnesses have testified on trials before him; but it furnishes no ground of exception, should he not insist upon his right to be excused.

A witness may refresh his recollection from his minutes, made at the time of the transaction.

If a debtor, unable to pay his debts, in contemplation of approaching death, makes provision for his wife by a sale of a portion of his property for that purpose, such sale is illegal and void as to creditors.

And if the purchaser, having knowledge of the facts, agrees to pay *bona fide* debts with a part of the property, this will not alter the character of the transaction.

THE action was trespass, *de bonis asportatis*, for goods attached and taken by E. C. Blake, a deputy of the defendant, on Feb. 1, 1842, as the property of Michael Welcome, on a writ against him in favor of Manning & Glover. There was a report of the questions of law, decided by the Judge during the trial, but no statement of the facts on which the ruling was founded appeared therein; but there was a motion on the part of the plaintiff for a new trial, because the verdict was against evidence, and a report was made of all the testimony given in the case, under that motion.

The property attached was, on Dec. 27, 1841, the property of Michael Welcome. The plaintiff claimed the property under a bill of sale of that date, and the defendant claimed to hold it on the ground that the bill of sale was fraudulent and void as to creditors. One of the witnesses called by the plaintiff, gave this account of the matter. That he was called to make a bill of sale of goods from Michael Welcome to the plaintiff, and did make it, the goods being estimated to be of the value of one thousand dollars; that a portion of the goods in the store, consisting of broken parcels, was not included;

that he also made a bond and a deed; that the mode of doing the business was such as the witness chose to adopt; that Michael was very sick at the time with a fever, and, he had no doubt, expected soon to die, but did not; that negotiable notes from the plaintiff to Michael, to the amount of $500,00, were given; that the debts mentioned in the bond were said by Michael to be principally for borrowed money, and upon some of them the plaintiff was surety; that either Michael or the plaintiff said he was afraid there might be attachments made by some of the persons mentioned in the bond, and there would be a sacrifice of the property; that Michael wished the business to be done, because he was afraid he should die; that he was very anxious that those debts should be paid; that Michael expressed great anxiety that his wife should have something after his decease; that the witness told him, that the notes should be written payable to his order, and he could do as he pleased with them; and that Michael told his wife to put the notes in his pocket-book.

The report was drawn up by the counsel for the plaintiff, and the counsel for the defendant did not agree as to the evidence given; and the papers do not show which was considered to be correct.

The report shows, that the counsel for the plaintiff objected to the competency of W. R. Prescott, W. Manning, A. Redington, Jr. and E. C. Blake, as witnesses, and that they were admitted; Blake, the officer who made the attachment, having produced a release from the defendant, discharging him from all liability. The testimony of Judge Redington was objected to, because he produced his minutes of testimony, taken at the trial before him in the District Court, and read them while giving his testimony. SHEPLEY J. presiding at the trial, upon this objection being made, remarked to the witness, that he was aware of the rule, that the notes could be used only to refresh his memory. The witness was then inquired of by the plaintiff's counsel, whether he could recollect the testimony except from his minutes. He stated that most of it he could not, that some portion of it was so peculiar, that he

could not say, that it was not strongly impressed upon his memory without them, and referred to the testimony, and said, it was so impressed on his mind, and read it from his minutes, no further objection being made to it.

The jury were instructed, that if they were satisfied, that the sale was made by the witness, Michael Welcome, with the intention to defeat or delay his creditors, and prevent them from obtaining payment of his debts to them, until it might suit his convenience to pay them, and that the plaintiff at that time knew that such was the intention and assented to the purchase with that knowledge, the sale would be void against such creditors; that said Michael, if unable to pay his just debts, could not, in contemplation of death, legally make any provision for his wife by a sale of a portion of his property for that purpose; that if the sale was made from fear of attachment and to prevent a sacrifice of the property, and to put his creditors in a position that they must wait his pleasure to pay them, the fact that he intended to pay them, when convenient to him, if believed, with the fact, that they were afterwards paid, would not prevent the sale from being considered fraudulent as to the creditors not paid.

The verdict was for the plaintiff for a small sum, and, as the report states, apparently for goods attached and taken out of the plaintiff's hands by the officer, not included in the bill of sale from Michael Welcome. If the rulings and instructions of the Judge were incorrect, the verdict was to be set aside.

Wells and *H. K. Baker* argued for the plaintiff.

In support of the argument to show that the ruling in relation to the witnesses was erroneous, they cited, *Harper* v. *Little*, 2 Greenl. 14; 1 Stark. Ev. 128; 1 Greenl. Ev. 408.

They contended that the instruction in relation to making provision for the wife was too general, as it did not admit of making any provision whatever. It could not be fraudulent to make the same provision the law allowed to the widow, as it took nothing from the creditors.

In the argument to show that the instructions respecting what sale would be fraudulent, were erroneous, they cited,

Wheaton v. *Sexton*, 4 Wheat. 503; *Gardiner Bank* v. *Wheaton*, 8 Greenl. 373; *Northampton Bank* v. *Whiting*, 12 Mass. R. 114; *Stevens* v. *Bell*, 6 Mass. R. 339.

Bradbury and *H. W. Paine* argued for the defendant, contending that the rulings and instructions were strictly correct, and wholly unexceptionable on the part of the plaintiff. They cited *Howe* v. *Ward*, 4 Greenl. 195; *Goodwin* v. *Hubbard*, 15 Mass. R. 210; *Reed* v. *Jewett*, 5 Greenl. 96; *Harris* v. *Sumner*, 2 Pick. 129.

The opinion of the Court was drawn up by

WHITMAN C. J. — In this case exceptions to the ruling of the Judge at the trial were taken, and a motion for a new trial also filed. It is difficult to see upon what ground either of them can be sustained. As to the exceptions to the ruling, in reference to the admissibility of the witnesses introduced by the defendant, we think the ruling was correct. The deputy, who made the attachment, had been released by the defendant; so that he had no interest to testify in his favor. If the plaintiff were to recover the full amount of his claim against him, he could have no remedy over against the witness; who must pay the proceeds of the sales of the goods sold by him, over to the creditor: for the recovery of the value of the defendant, would operate an extinguishment of any claim the plaintiff might otherwise have had against the witness; and if the plaintiff fails of a recovery against the defendant, it must be because he would have no right to recover against either the witness or the defendant. The bond, by which it was supposed Prescott and Manning had become interested, was, as they state, surrendered to be cancelled, and was cancelled; so that any interest they might have had, had ceased. Besides, they had only become responsible to indemnify the deputy, who had been released by the defendant; and this action, being against the defendant as sheriff, it was, even if their bond were uncancelled, indifferent to them whether the plaintiff recovered against the defendant or not. As to Judge Redington, it is true, that he might have been excused from

testifying if he had insisted upon it. Public policy would have authorized it. But it is no ground of exception that he did not insist upon his right to be excused. As to his refreshing his recollection from his minutes, the practice would clearly warrant it: that he testified to any material fact which his minutes did not enable him to recollect, does not appear.

We are equally well satisfied, that there is no just ground of complaint, that the Judge instructed the jury, that it was not competent for Michael Welcome in contemplation of approaching death, if unable to pay his debts, to make provision for his wife, by a sale of a portion of his property for that purpose. Because the court of probate, after his decease, would have a right to do something of the kind, could form no reason, as urged by the plaintiff's counsel, why he should be authorized to make a voluntary conveyance, for the purpose, in his lifetime. All such conveyances are illegal and void.

That the verdict is right in this case we see no reason to doubt. That the plaintiff had purchased nearly all the visible attachable property of his brother, an insolvent debtor, avowedly to aid him in securing it from attachment, by *bona fide* creditors, and without consideration, to secure a considerable portion of it for the benefit of his wife, was abundantly proved. His agreeing to pay *bona fide* debts with a part of it, cannot alter the character of the transaction. If he had been content to purchase simply enough to indemnify himself, for the liabilities he was under for his brother, and for that purpose solely, it would have been otherwise.

Exceptions and motion for a new trial overruled and judgment on the verdict.

William H. Bodfish *versus* Edward Fox & *al.*

There are general and particular customs, and those relating to a particular trade or business. General customs are such, as prevail throughout a country, and become the law of that country; and their existence is to be determined by the Court. Particular customs are such, as prevail in some county, city, town, parish, or place; their existence is to be determined by a jury upon proof; the Court may overrule such customs, if they be against natural reason; and when proved and allowed, they are binding upon all over whom they operate.

There are usages also showing a particular mode, or amount of compensation in a particular business or employment; but these do not necessarily bind all, and can never be allowed to operate against an express contract.

It is competent to admit testimony to prove the usual compensation claimed and paid, for the purpose of enabling a jury to determine what is a reasonable compensation, in the absence of a special contract, in cases of the like kind, such as the usual charge for wharfage, for freight or carriage of goods, for the services of commission merchants, auctioneers, of the various classes of mechanics, of physicians and of attorneys.

But there must be some proof, that the contract of employment had reference to the usage, or proof arising out of the position of the parties, their knowledge of the course of business, their knowledge of the usage, or other circumstances, from which it can be inferred or presumed, that they had reference to it, or it will not necessarily be binding upon them.

When a usage, regulating the compensation to be paid for a particular description of personal services, has been proved, whether the usage be, or be not reasonable, is for the decision of the Court and not of the jury. The true question for the consideration of the jury, in such case, is, whether the usage was so generally known and acted upon that the parties, from that and the other facts and circumstances proved, must be presumed to have had reference to it for the compensation to be paid; as in such case it would become, as it were, a part of their agreement, and binding upon them.

And if there be such error of the District Judge, this Court cannot enter upon the merits of the case, under a bill of exceptions, and decline granting a new trial, on the ground that the usage proved was an unreasonable one.

Exceptions from the Middle District Court, Redington J. presiding. Assumpsit for money had and received by the defendants, partners in practice of the law in the city of Portland. The defendants admitted that they had received the money in satisfaction of a judgment for costs of a suit recovered by the plaintiff in a suit brought against him in the Circuit Court of the United States by Robert Eastman, for the infringement of

a patent right, in which suit the defendants were the only counsellors and attorneys for the then defendant and present plaintiff, from the entry thereof at May Term, 1838, to the trial and close thereof in October, 1841. The defendants also admitted the receipt of $5,00 from the plaintiff during the pendency of the first suit.

The defendants claimed the right to retain the whole of the bill of costs, exclusive of witnesses' fees and money advanced by their client, the now plaintiff, in addition to the regular charge for term fees and arguing fee, as belonging to them as attorneys in the suit, on a successful defence, by the common usage of the bar in Portland for many years. The plaintiff denied such right, and claimed to recover the costs, above payment of the regular term and arguing fees.

To show the usage, several of the oldest counsellors at law, and most extensive practitioners at the Cumberland Bar, stated, in their depositions, that the practice in that county, in the State and United States Courts, had been for many years for the attorney to charge his client with a term fee at each term, excepting at the term at which the case was argued, when an arguing fee was charged instead thereof; and in addition thereto, when the defendant prevails, to charge his client with the taxable costs, exclusive of witnesses' fees and money advanced by the client. The plaintiff seasonably objected to the admission of this testimony, but it was admitted.

The plaintiff, with the view of showing that the defendants had agreed with him as to the amount of their charges, read a letter from them directed to him at Waterville, dated April 7, 1841, in which they say: "Yours of the 5th inst. we have this day received; in answer, have to say that the U. S. C. C. does sit here on the 1st day of May next. We send you, as requested, our bill against you, and if the cause is tried, our charge for arguing fee and services at the May Term will probably be about $30." With this was sent a bill of the regular charges at each prior term, and of some small payments.

The plaintiff contended, that the usage, in order to avail the defendants, must appear to have been certain, ancient, general,

frequent and reasonable; and that the usage here proved was wanting in these requisites.

REDINGTON J. presiding at the trial, called the attention of the jury to the fact, that there was no proof that Bodfish had travelled to or attended at the Circuit Court, and also to the fact, that the defendants had charged their regular term and arguing fees; and then instructed them, that each branch of business had its general customs or usages, according to which parties are presumed to contract when no particular bargain is made; that in this case, so far as it was necessary for the defendants to show that the usage relied upon was ancient, certain, general and frequent, the depositions, if believed, did sufficiently establish it; that the question whether the usage was a reasonable one, he should refer to them; and that if they found it to be a reasonable one, they ought to allow the defendants' claim; otherwise they ought not to allow it.

The jury found a verdict for the plaintiff, and did not allow the claim of the defendants for the travel or attendance taxed for the plaintiff in Eastman's suit against him; and the defendants filed exceptions.

J. H. Williams, for the defendants, said that the point intended to be presented by the exceptions in this case, was, that the *reasonableness of the usage* upon which the defendants rely, *is a question of law merely*, to be adjudged by the Court exclusively; and not to be submitted to the independent decision of the jury, as it was at the trial of this cause. The *truth* of the facts alleged being once ascertained, it is for the Court alone to decide upon their legal character and effect. The reasonableness is a question of equality and degree, and to be adjudged by the reasoning faculties — of legal character, to be determined by legal reason. All that the jury have to deal with in the matter of a usage is, the proof that it is certain, general, frequent, and ancient. Whether it be reasonable or not, is a question for the Court to adjudge.

The following authorities were cited, with comments on some of them. Co. Litt. 62 (a); ib. 97 (b); Com. Dig; Temps. D; Bull. N. P. 275; 1 Bos. & P. 388; 1 T. R. 168;

1 N. H. R. 140; 11 Johns. R. 206; 2 Greenl. 249; 17 Maine R. 230; 1 Wils. 63; Co. Litt. 56 (b); 1 Greenl. 135; Graham on New Trials, 288; 24 Pick. 84; 17 Maine R. 464; 3 Bingh. N. C. 99; 5 Bingh. N. C. 121; 9 Ad. & Ellis, 406.

Noyes, for the plaintiff, remarked, that he did not intend to deny that the question of reasonableness or unreasonableness of a usage or custom, is for the Court, and not for the jury; but should contend, that upon other principles of law, equally well established, the plaintiff was entitled to retain his verdict.

No evidence of the usage, in this case, should have been admitted by the Court, and therefore the verdict is right. There was an express contract between the parties as to the amount of compensation, and this appears by the letter; and no usage can be admitted to vary or change an express contract. 2 Cr. & J. 244; 2 Sumn. 567; Park on Ins. 416; 1 Pick. 29. It was inadmissible to show, that the costs of travel and attendance, recovered by the present plaintiff against Eastman, were a perquisite of his attorneys in that case. The costs were by the statute the property of the defendant in that suit, and his right thereto was as perfect, as to any other property he had. No usage can control the acts of the legislature. 17 Maine R. 462; 7 Pet. 28; 21 Pick. 485; 17 Mass. R. 111; 13 Maine R. 171; 1 Pick. 177; 12 Pick. 107; 14 Pick. 142; 2 Wash. C. C. R. 24.

If the evidence was admissible, still the verdict is as it should have been. This is not a general usage throughout the whole community, of which every person must take notice, but a mere special and local one of certain persons in the County of Cumberland. The defendant was a resident in the County of Kennebec, and could not be presumed to know of this Cumberland usage. It should have been proved to have come to his knowledge as matter of fact. 2 Cr. & J. 136. That a particular usage should have any influence upon the rights of the parties, both must have had knowledge of its existence, and have contracted with reference to it. 9 Pick. 198; 9 Mass. R. 155; 11 Mass. R. 85; 17 Mass. R. 452; 14 Pick.

142. As the plaintiff had no knowledge of any such usage, it should have had no influence on the verdict. The usage set up is an unreasonable one, and should on that ground be disregarded.

The verdict being right, the Court will not grant a new trial. Rev. Stat. c. 97, § 19, and c. 96, § 19, do not require, that a new trial should be granted for every error in the instruction of a Judge; but this Court are to "do therein what to law and justice appertain." If the Judge erroneously submits a question to the jury, which was for the Court, and the jury decide right, a new trial will not be granted. 17 Maine R. 453; 7 Greenl. 442; 15 Maine R. 390; 16 Maine R. 77.

J. H. Williams, in reply, protested against the propriety of the course of argument pursued by the plaintiff's counsel. The bill of exceptions should merely state enough of the facts to show the relevancy of the decisions of the questions of law of which complaint is made. They do not show the merits of the case. On exceptions, from the District Court, the only question is, were the rulings and instructions right in point of law. This has been frequently decided in Massachusetts and in our own State. If a different rule is to be adopted, the whole evidence must be stated in each bill of exceptions; a practice which has been decided to be improper. 1 Metc. 230; ib. 503; 18 Maine R. 418; 19 Maine R. 372.

He also contended that the positions taken on behalf of the plaintiff, as the case is now presented, were erroneous, or inapplicable.

The opinion of the Court was drawn up by

SHEPLEY J. — The defendants were permitted to introduce testimony to prove a usage, existing among the members of the legal profession in the county of Cumberland, to charge the travel and attendance taxed for the defendant as a compensation contingent and dependent upon a successful defence, and in addition to the usual charges for services. And the presiding judge submitted the reasonableness of the usage to the decision of the jury. There are general and particular

customs, and those relating to a particular trade or business. General customs are such, as prevail throughout a country and become the law of that country; and their existence is to be determined by the Court. Particular customs are such, as prevail in some county, city, town, parish, or place. Their existence is to be determined by a jury upon proof. The Court may overrule such a custom, if it be against natural reason. When proved and allowed it is binding upon all, over whom it operates. The customs, or perhaps more appropriately denominated usages, of trade and business, are not necessarily limited to a particular place, but to a particular business or employment. There are usages also showing a particular mode, or amount of compensation in a particular business or employment. But these usages of trade and of compensation do not necessarily bind all, and can never be allowed to operate against an express contract.

It is contended, that the testimony to prove the usage in this case was improperly received, and that, if the jury disregarded it, there is therefore no just cause of complaint. It is not unfrequent to find testimony received, to prove the usual compensation claimed and paid, for the purpose of enabling a jury to determine, what is a reasonable compensation, in the absence of a special contract, in cases of the like kind; and how far the parties may have contracted with reference to it. Examples may be found in the reception of testimony to prove the usual charge for wharfage, for the freight or carriage of goods, for the services of commission merchants, of auctioneers of merchandize and money brokers, of various classes of mechanics, and of physicians. And as there is one law for all, without regard to the character of the business or calling, the like testimony may be received to enable a jury to decide upon a reasonable compensation for the services of an attorney. It is further contended, that it should not have been received because there was proof in the letter of the defendants of a special contract to perform the services for an agreed compensation. The usage does not appear to be, as the argument supposes, in conflict with the contents of that letter. Nor

does the letter shew, that there was a compensation agreed upon between the parties. It was written, while the suit was pending, and states the charges, which would be claimed for the services performed. The usuage does not present any other or different claim as then existing. It presents one as first arising upon a determination of the suit, favorably for the defendant. Again it is said, that it was improperly received, because the usage would appropriate to the attorney as his property, costs, which by law are taxed for and become the property of the party. The usage as proved does not assume to change the law, and to decide that to be the property of the attorney, which the law determines to be the property of the party. The statement of it is, that it is usual " for the attorney to charge his client with the taxable costs exclusively of witnesses' fees and moneys advanced by the client." This would seem to admit rather than deny, that the legal costs belong to the client, and to claim them of him only as a payment to be made by him out of his own property.

It is further contended, that the usage is an unreasonable one, and might therefore properly be disregarded. It is always within the power of the party to make a special contract for the compensation of his attorney, and no usage can have any effect upon his rights, when he has made one. There is nothing in the usage, which determines, that the compensation must necessarily conform to it, when no such special contract has been made. There must be some proof, that the contract of employment had reference to it, or proof arising out of the position of the parties, their knowledge of the course of business, their knowledge of the usage, or other circumstance, from which it can be inferred or presumed, that they had reference to it, or it will not necessarily be binding upon them. If a usage of this description, which can only bind the parties from actual proof, or such as would authorize the presumption, that they had reference to it in making the contract of employment, could be the proper subject for the consideration of either Court or jury for the purpose of deciding, whether it was unreasonable and void, the Court would not feel authorized to

declare it to be so. Especially after it has been declared, that a custom for the advantage of a particular person or corporation to have the sole use of a trade in a certain place may be good, if the one claiming it have stock enough to serve the place. *Mitchell* v. *Reynolds*, 10 Mod. 131. The true question for the consideration of the jury was, whether the usage was so generally known and acted upon, that the parties from that and the other facts and circumstances proved, must be presumed to have had reference to it for the compensation to be paid. In such case it would become, as it were, a part of their agreement and binding upon them. The error consisted in presenting instead of this question, that of the reasonableness of the usage, to the consideration of the jury.

The counsel for the plaintiff further, in effect, contends, that if the testimony was properly received and incorrectly submitted to the jury; that the Court should enter upon a consideration of the merits, and decide, that the usage ought not to have any influence upon the rights of the parties. How far the parties in the contract of employment had, or may be presumed to have had, reference to the usage, is not presented for the consideration of the Court by this bill of exceptions; nor can it be properly made the subject of examination and consideration at this time. To enable it to be properly presented and considered, the exceptions must be sustained, the verdict set aside, and a new trial granted.

Freeman's Bank *versus* Richard H. Vose.

A debtor conveyed to the defendant in a bill in equity a mill, by a deed in the form of a common deed of warranty, but having at its conclusion the additional words; provided that if the grantor pay all liabilities due from him to the plaintiffs in the bill in equity, and also to five others, *without saying that the deed should then be void;* the defendant sold the mill at auction at the request of the plaintiffs and made a conveyance of his right thereto, having special reference therein to the deed to himself and with their assent, took from the purchaser, one of the five named with the plaintiffs in the first deed, an agreement to pay over to the plaintiffs a certain portion of the consideration money, provided his title to the mill *should prove good and effectual in law as a deed of trust or in mortgage;* and the defendant requested the purchaser to pay to the plaintiffs the money due to them, but he refused to do so until after the question as to his title was determined. *It was held,* that although the purchaser had a good title, absolutely or as a mortgage, that the bill in equity could not be supported against this defendant, and must be dismissed.

This was a bill in equity, and was heard on the bill and answer. On Nov. 18, 1836, Wheeler & Perkins conveyed a steam sawmill to the defendant and Harlow Spaulding. The deed was in the usual form of a deed of warranty to the conclusion of the words, "lawful claims and demands of all persons." Then follow these words: "Provided nevertheless, that if the said Wheeler & Perkins shall pay, or cause to be paid, all liabilities now due, or which may hereafter be due from them to the Freeman's Bank, upon paper indorsed by said Vose or any other individual; also any sum due or hereafter to become due from said Wheeler & Perkins to the Augusta Bank; also any sum due or to become due from them to the Granite Bank and to the Neguemkeag Bank; also any sum due, or which may become due to Joseph Eaton of Winslow or to S. Eaton." The deed closes with the date, without any provision, that it shall be void on the payment of those demands. The corporations and persons described in the proviso, requested that the premises should be sold at public auction, and the sale was thus made to Joseph Eaton, one of the persons therein named. Vose by his deed of Sept. 29, 1840, "in consideration of $2500,00, paid by said Eaton,

and said sum is applied to the payment of the debts specified in a deed of supposed trust from Wheeler & Perkins to Vose & Spaulding," dated, &c. conveyed an undivided half of the mill, "the aforesaid premises having been sold at auction by direction of the creditors named in said deed from Wheeler & Perkins." The other half was conveyed to Eaton by a similar deed. The bill alleges that all the debts are paid excepting a claim of the plaintiffs and one in favor of the Neguemkeag Bank, and that the proceeds of the sale to Eaton are sufficient to pay the whole. The defendant, in his answer, states the facts, says the sale was made at the request of the plaintiffs, and "that to secure the payment of the consideration, with the consent of the plaintiffs, he took from Eaton a writing by which he agreed to pay the plaintiffs and the Neguemkeag Bank the balance in his hands, after deducting his own claim, provided that the title he derived from his deeds of the mill should prove good and effectual in law, either on the ground that the deed from Wheeler & Perkins to Vose & Spaulding should enure to his benefit, as a deed of trust, or a mortgage." The answer then alleges, that the defendant has requested Eaton to pay the plaintiffs, but that he has refused so to do until that question is determined, and that the defendant has no means of enforcing the payment, at least until that question is determined.

Bradbury, for the plaintiffs.

Vose, pro se.

The opinion of the Court was by

WHITMAN C. J. — This cause must be considered as having been set down for argument upon the bill and answer; the facts to be gathered from which are, that, on the eighteenth day of November, 1836, Messrs. Wheeler and Perkins made a deed conveying a certain parcel of real estate to the defendant and one Spaulding. The deed in its terms is absolute; but, from certain recitals at the close of it, it would seem, that the parties may have intended to make it conditional. The recital however, stops without the necessary conclusion to make

it so; and is therefore senseless and inoperative. And on a proper bill for the purpose being presented, if it appeared that a mortgage was actually intended, and that the omission to make it so was from accident, the Court might reform it, if it were between the original parties to the deed. But, as the deed now stands, it must be regarded at law as having conveyed an absolute estate to Vose and Spaulding: and the title has now, under that deed, and by virtue of conveyances from Vose and Spaulding, and one Hallet, under Spaulding, passed to Joseph Eaton. The title in Eaton, therefore, has become perfect and indefeasible, unless he purchased with knowledge, that the estate was intended, by Wheeler and Perkins and their grantees, to have been conveyed in mortgage: in which case the conveyance as to him would be subject to be reformed, so that he would hold it only as mortgagee. But it can probably make no difference to him, whether his estate in the premises is a fee simple, absolute or conditional, for the right of the mortgagors to redeem, if the conveyance is to be regarded as a mortgage, would depend on the payment of the whole amount due to the plaintiffs, and to the Neguemkeag Bank, and to said Eaton; the amount of the debts of whom may very much exceed the value of the premises; and in such case render it morally certain, if the deed of Wheeler and Perkins were reformed into a mortgage, that neither they, nor any one under them, would ever redeem the premises.

The defendant does not question the efficacy of the deed to him and Spaulding, either as an absolute deed, or a mortgage; and, in either case, in trust for the payment of debts due to the plaintiffs and others; and he has conducted in reference to it, so far as appears, in entire good faith; and has, at the express request of the plaintiffs, made a conveyance of his estate in the same to the said Eaton. Personally he has realized nothing from it. Eaton, according to the statement, would seem now to have become the trustee of the plaintiffs, and of the Neguemkeag Bank, for the balance remaining in his hands, after paying the amount due to himself. As he has not been made a party to this bill, however, we are not to be

understood as adjudicating upon his rights and liabilities. The plaintiffs appearing to have no well founded claim against the defendant, the bill must be dismissed. The defendant may be allowed his costs.

Heman B. Horn *versus* Nathan Nason *& al.*

By the provisions of the Rev. St. c. 148, a bond taken of a debtor, under arrest or imprisonment, by the officer, is valid as a statute bond, although the penalty, from mistake, accident or misapprehension, shall exceed or fall short of double the sum for which such debtor was arrested or imprisoned; and the rights of the parties are to be regulated by the statute.

Where no attempt has been made to perform the condition of a poor debtor's bond, valid under the statute, the measure of damages is prescribed by the thirty-ninth section of Rev. St. c. 148.

When the principal has not attempted to perform any of the conditions of a poor debtor's bond within the prescribed time, and it has become forfeited, if he afterwards files his petition and obtains his discharge as a bankrupt, this cannot discharge his surety.

The action was debt against Nathan Nason and Reuel Jacobs, commenced April 9, 1842, upon a poor debtor's six months bond, dated Oct. 8, 1841, in the penal sum of $69,46, given by Nason, as principal, and by Jacobs, as surety, to procure the release of the former from an arrest, that day made upon an execution against him in favor of the plaintiff, issued on a judgment, recovered in 1841, for $28,19 damage, $6,36 costs, 15 cents for execution, $1,69 officer's fees and interest.

At August term of the District Court, 1842, the defendants filed a written offer to be defaulted for one dollar, debt, and costs to be taxed according to law.

At the trial in the District Court, April Term, 1843, Nason proved that he received a discharge as a bankrupt, on Nov. 1, 1842; having filed his petition on April 19, 1842; and it was also proved that he had no visible property, liable for the payment of debts, at the time of his arrest on the execution.

After the trial was finished, the parties agreed to turn the evidence given into a statement of facts, with authority for the

Court to draw any inferences and to decide any questions of fact, which a jury would be authorized to do; and thereupon REDINGTON J. then presiding, ordered judgment to be rendered aginst Jacobs for one dollar, damages, and legal costs to the time of the offer to be defaulted, and that Jacobs should recover costs afterwards, and that Nason should recover costs against Horn. The plaintiff appealed.

Bradbury, for the plaintiff, said that allowing costs for Nason from the first term was clearly erroneous. If entitled to any costs, it could only be after proving his discharge.

The plaintiff is entitled to recover the amount of his debt, costs, officer's fees and interest, under the provisions of Rev. St. c. 148, § 39. The principal did not file his petition in bankruptcy until after the bond had become forfeited. He did nothing towards a performance of the condition of the bond, and the measure of damages, is fixed by the statute, if this is entitled to be considered as a statute bond. By the 43d section of the same chapter, when the penalty is accidentally made too large or too small, the bond is nevertheless a statute bond.

There is no ground whatever here for contending that the surety is discharged by the certificate of the principal under the bankrupt law. There was no possibility for the principal to perform. He had not even filed his petition until ten days after this suit was brought.

Child, for the defendant, contended that this was not to be considered a statute bond. It certainly is not such under the twentieth section, because the penalty is not for double the sum for which the arrest was made. It is not made so by the forty-third section. That was not intended to make the bond a statute bond, but like very many other provisions in the Revised Statutes, was intended to enact the decisions of the Court on the subject, and to confirm them, instead of destroying them. This section is merely in affirmance of the common law.

But even if it is to be considered good under the statute, the defendants are entitled to have judgment rendered for the

damages actually sustained only, under the general provisions of the statute allowing chancery in bonds with a penalty.

The surety is discharged by the discharge of the principal under the bankrupt act. The argument in support of this position will be made in another case, to be argued at this term.

The opinion of the Court was prepared by

SHEPLEY J. — This suit is upon a poor debtor's bond. The case does not disclose any attempt to perform the condition. The bond had become forfeited before the principal filed his petition to be declared a bankrupt. The rights of the plaintiff were fixed. A debt had become due to him upon it from both principal and surety. The subsequent discharge of one of his debtors by the proceedings in bankruptcy did not discharge the other or affect his right to recover against him.

The bond was not made in double the sum, for which the debtor was arrested or imprisoned as required by statute, c. 148, § 20. Bonds not in conformity to the statute provisions made before the late revision of the statutes were not considered as authorized by any statute provision, and the rights of the parties to them could not therefore be considered as regulated by statute. Those rights were in all respects to be determined by the rules of the common law. In the late revision a new provision was introduced in c. 148, § 43, declaring, that a bond taken of a debtor under arrest or imprisonment by the officer shall be valid, although the penalty from mistake, accident or misapprehension, shall exceed or fall short of the sum required by law. This bond is therefore valid by virtue of that provision; and it would seem to follow, that the rights of the parties should be regulated by the statute. In addition to this it appears, that the bond was taken by virtue of the twentieth section, and the thirty-ninth section provides, that if the debtor fail to fulfil the condition of any such bond, that is, one taken by virtue of the twentieth section, the same shall be forfeited, and judgment in any suit on such bond shall be ren-

dered for the amount of the execution and costs and fees of service, with interest on the same.

It is said that this construction will operate as a repeal of the twentieth section so far as it determines the penal sum of the bond. This is not perceived. That provision will continue to be binding upon the debtor and the officer. A violation of it is only excused in case of mistake, accident, or misapprehension. The twentieth and the forty-third sections may well exist together, and the provisions of both have their appropriate and designed effect. The latter seems to have been intended to secure to the judgment creditor the same rights, to which he would have been entitled, if no such mistake, accident, or misapprehension had occurred. And such a provision may well be permitted to operate according to a literal interpretation of the statute, when the only effect is to prevent the obligors from taking advantage of any such mistake, accident, or misapprehension in which they have participated in making the bond.

The plaintiff is entitled to judgment against Jacobs according to the provisions of the thirty-ninth section; and Nason is entitled to a judgment in his favor with costs in this Court only.

EPHRAIM CRAGGIN *versus* JOHN F. BAILEY.

If neither of the alternatives of the condition of a poor debtor's bond be performed within the six months, the surety is not discharged from his liability by the principal debtor's filing his petition in bankruptcy before the expiration of the six months, and, after that time, obtaining his certificate of discharge as a bankrupt, under the bankrupt law of the United States.

DEBT on a poor debtor's bond, dated August 25, 1841, given to the plaintiff by the defendant and Willard Bailey, to procure the release of the latter from arrest on an execution in the plaintiff's favor against him. Willard Bailey did not perform either of the alternatives named in the condition of the bond within the six months. If the defendant was entitled to

give the same in evidence, it was agreed by the parties that on Feb. 15, 1842, Willard Bailey filed his petition in bankruptcy; that on April 5, 1842, he was declared a bankrupt; and on August 8, of the same year, he received his certificate of discharge as a bankrupt, under the provisions of the United States late bankrupt act. It is unimportant to state the facts or arguments bearing on the question of damages, as the decision of the Court on the same point was made in another case. The Court were authorized to enter a nonsuit or default.

Lancaster, for the plaintiff, contended, that the proceedings in bankruptcy were not admissible in evidence, because they do not show a performance of either part of the condition of the bond, and because they were irrelevant, the bond not being forfeited at the time the petition was filed, and so not a debt proveable under the commission. 2 B. & A. 802; 5 B. & A. 250; 1 Burrow, 436; 3 B. & A. 521; Cowp. 24; 4 Scott. N. S. 287; Petersdorff's Abr. 641.

If the proceedings are admissible, they cannot operate as a discharge of the surety, for the discharge was not obtained until long after the bond was forfeited, and the defendant had become liable, and because it was uncertain at the time the bond was forfeited, that a discharge would ever be obtained.

But if Willard Bailey is discharged, the defendant is not. The proviso in the bankrupt act saves the liability of sureties.

The decisions under the bankrupt act of 1800 do not apply, because there is a very material difference between the two acts; and decisions respecting the liability of bail rest on entirely different principles, and have no pertinency in the present case.

J. L. Child, for the defendant, contended that the discharge of Willard Bailey, the principal, as a bankrupt, was a complete bar to the present suit.

All proceedings in bankruptcy relate back to the time of filing the petition. Law Reporter, Vol. 5, pages 12, 307, 328, 363, and 367. All the property which he then had, vested

in the assignee, when appointed; and whether he obtains his discharge or not, all the assets go to the assignee, and are distributed under the bankrupt law.

The discharge, as shown by the certificate, is a discharge of the debt, as of the day of the presentation of the petition in bankruptcy. The certificate itself is conclusive on that point, and cannot be drawn in question in the state courts, the United States courts having exclusive jurisdiction of the subject matter of the adjudication. Bankrupt Act, § 6; 5 Binn. 247; 2 Day, 70; 4 Day, 79; 6 Law Reporter, 93. All matters touching the administration of the bankrupt law, belong to the bankrupt court. In an action on the bond, the record of the discharge of the insolvent is conclusive as to his compliance with all things required by law to entitle him to a discharge. 14 Serg. & R. 173; 3 Petersd. Abr. 667, 670.

A discharge of Willard Bailey from the debt, is the same thing as discharging the debt, because he alone was holden for it. The bond is only a substitute for the detention of the body of the principal, is but collateral to it, and is not a satisfaction of the judgment. *Spencer* v. *Garland*, 20 Maine R. 75; *Hathaway* v. *Crosby*, 17 Maine R. 449. The bond is not a joint and several contract, for in such case each could perform the conditions. Willard Bailey only could perform, and the defendant was merely the surety for his performance. And at best, for the plaintiff, it was but a contingent liability, and the contingency never happened. Before any liability of the surety became fixed, the debt itself was discharged, and the defendant's liability was as fully gone, as if the debt had been paid in money.

These bonds have a striking analogy to bail bonds, and the decisions which govern in relation to bail bonds, will be pertinent on these bonds. Bail are entitled to a discharge when the principal is protected from arrest by law. 13 Mass. R. 94; 2 Mass. R. 433; 11 Mass. R. 46. Or committed to prison for life, or for a long term. 6 Cowen, 599; 1 Johns. Cas. 28; 16 Mass. R. 217; 18 Johns. R. 335; 5 Binn. 352; 1 Chip. 153. Bail are regarded as sureties, and are discharg-

ed by any arrangement, which would discharge a surety. 10 Johns. R. 587. The discharge of the principal under a bankrupt or insolvent law, before the bail are fixed, entitles them to an *exoneretur*, and that without a surrender. 2 Bailey, 492; 1 Caines, 9; 2 Johns. Cas. 403; 2 Mass. R. 481; 1 Mass. R. 292; 1 Harrington, 367, 466; 1 Burr. 244, 436; 3 Johns. R. 465; 3 Gill & J. 64; 1 Halst. 149; 3 Petrsd. Abr. 149; 9 Wend. 462; 21 Wend. 670; 4 Johns. R. 407; 1 Brown, 258; 22 Wend. 613; 5 Cowen, 290; 1 Bald. C. C. R. 297; 9 Wheat. 680; Co. Lit. 206 (a.)

The plaintiff could have proved his debt under the bankruptcy, and have obtained his dividend, but the defendant could not. The right of a surety to prove does not arise until he pays. 1 Metc. 387; 4 Mass. R. 96; 2 Hayw. 247; 6 Johns. C. R. 266; 2 Dall. 236; Chitty on Con. 186; 3 Metc. 363.

There is one case in Massachusetts under the bankrupt law of 1800, directly in point and in our favor. *Champion* v. *Noyes*, 2 Mass. R. 481.

Vose, on the same side.

The opinion of the Court was drawn up by

Tenney J. — The defendant, John F. Bailey, was surety for Willard Bailey on a bond executed to obtain the discharge from arrest of the debtor, in the execution in favor of the plaintiff against said Willard Bailey. It is contended by the defendant, that the bond being for a larger sum, than the statute allows in such cases, it fails to be a statute bond, and therefore the plaintiff can recover no greater damages than those, which he has actually sustained by a breach of the condition. This question has been examined and settled in this county in the case of *Horn* v. *Nason & al.*

The defendant also claims to be exonerated on account of the discharge of the principal in the bond under the United States bankrupt act of 1841, c. 9. The bond expired on the 25th day of February, 1842. On the 15th day of the same February, Willard Bailey filed his petition to be declared a bankrupt, in the District Court of the United States. On the

5th day of April, 1842, he was duly decreed a bankrupt, and on the 8th day of August, 1842, he was duly ordered and "decreed a full discharge from all his debts owing by him at the date of the presentation of said Willard Bailey's petition to be declared a bankrupt."

The bond was a substitute for the detention of the body of the debtor. *Spencer* v. *Garland*, 20 Maine R. 75. By its terms, it was broken and a forfeiture incurred, unless one of the three conditions therein mentioned were performed within six months from its execution. It is not pretended that either of these conditions have been fulfilled. But it is insisted by the defendant's counsel, that the certificate of discharge from the District Court of the United States relates back to the time of filing the petition, and is to be regarded as if it was obtained at that time; and therefore is a perfect defence to this action. And an analogy has been attempted to be shown between this case and that of *scire facias* against *bail* for the avoidance of the principal, where the bail have been relieved from liability by that which discharged the principal.

In *Harrington* v. *Dennie*, 13 Mass. R. 93, PARKER C. J. in delivering the opinion of the Court, says, "it is a common principle, that when a man is bound to perform a contract, which becomes impossible by the act of God, or unlawful by statute, after the making of the contract, he is excused from the performance; and may plead such matter in excuse, when sued upon his contract." This course of reasoning, however, applies to cases in which by some involuntary privilege or disability, happening to the principal, the bail are deprived of the custody of the person; so that he cannot be surrendered; or if surrendered, must be discharged upon motion or upon habeas corpus." *Parker* v. *Chandler*, 8 Mass. R. 264, was *scire facias* against bail, who sought to be discharged by reason of the principal's being confined to the State prison. The bail was charged, the Court observing, "that nothing but the act of God can excuse in the case of bail." *Sayward & al.* v. *Conant & als.* 11 Mass. R. 146; and also *Harrington* v. *Dennie*, before referred to, were cases where the principal enlisted

into the army of the United States, and by an act of Congress, passed July 11, 1798, were exempted during their term of service from all personal arrests for any debt or contract, and the bail were holden on *scire facias*. The lunacy of the principal was holden insufficient to entitle bail to any indulgence. 13 East, 355. And a poor debtor's bond like the present was held forfeited, although the principal was a lunatic, and could not therefore be admitted to take the oath, notwithstanding he would have been entitled to a discharge, if he had had sufficient capacity to have made a disclosure. *Haskell* v. *Green*, 15 Maine R. 33. The case of *Champion* v. *Noyes*, 2 Mass. R. 481, is relied upon however by the defendant's counsel as decisive of the question now presented, it being one, where bail was exonerated by a discharge of the principal under the bankrupt act of the United States, passed April 5, 1800, c. 19.

If *non est inventus* is returned on an execution against the principal, and he afterwards dies, the bail are fixed, and are holden absolutely to pay the debt, because a surrender cannot be made on *scire facias*. But if the principal is living, the bail do not become fixed until judgment on *scire facias*; and in such actions, bail have been allowed to plead any matter, which is a discharge of the debt against the principal. For if the debt against him, be discharged, "the body being only pledged for the debt, and the bail only a pledge for the principal," the surrender of the principal by the bail would be utterly useless, because he could not be taken by the creditor, but immediately on his surrender, must be discharged.

The principal, Willard Bailey, must be considered as discharged from the debt on which he was arrested, although the same has not been paid; and we will assume, that so far as he is concerned, the decree of discharge relates back to the time, when the petition was filed. Now if the surety on the bond could be relieved by the surrender of the principal, as bail can be by a surrender on *scire facias*, at any time before judgment thereon, the analogy which is contended for on the part of the defendant would hold good, and the case would fall within the principle of *Champion* and *Noyes*, and numerous other cases.

But such a doctrine is not contended for. If the defendant's liability ever became fixed, it was at the expiration of six months from the date of the bond, and a surrender afterwards, could have no effect to relieve the surety, even if no proceedings in bankruptcy had taken place.

It is true, that the property of Willard Bailey "was divested out of his hands" from the time, that he filed his petition in bankruptcy; and this deprived him of the means of paying the debt, and his creditor of the power of satisfying it out of any property, which he owned. But the other alternative remained. No act of God, nor any statute, prevented the principal from surrendering himself and going into close confinement. And such surrender would not then have been like that made by bail after the debt was discharged. There was no law restraining the creditor from detaining his debtor. The latter had stipulated, that he would be in custody of the jailer on failure to perform other acts mentioned in the condition of the bond. A petition to be decreed a bankrupt took from the creditor none of the power to arrest, which he before possessed; there was no certainty that the debtor would obtain his certificate of discharge or even be declared a bankrupt. It never could have been intended, that the simple petition, at the same time, that it divested the property of the petitioner, should also protect him from arrest. The creditor might have taken upon himself the risk to answer in damages, if a discharge should be obtained by his debtor, but that exposure to injury is not sufficient to deprive him of the power to incur it. In 5 Law Reporter, 19, in the matter of Jonathan H. Cheney, the Court held that a bankrupt not having a discharge, who was in custody on an execution, was not entitled to be discharged from his imprisonment, or to any other relief in that stage of the proceedings in bankruptcy.

In the case cited from 2 Mass. R. 487, the Court say, if "the bail were already fixed, the plaintiff might justly consider them as his debtors on their own contract, and the certificate having no retrospective effect as to bail, they could derive no relief from it."

It cannot be said that there was no breach of the bond at the end of six months from its date. In case of bail, the bail bond has been broken on the return of *non est inventus* on the execution against the principal; and it is by the provision of the statute, that they have been relieved from the forfeiture by a surrender before judgment on *scire facias;* but they have never been exonerated by any voluntary act of the principal, unless he has been discharged from the debt before the bail were fixed. The breach of the bond in the case at bar made the defendant a debtor on his own contract. Nothing which could be done afterwards by himself or his principal could restore him to the position in which he stood before the breach. The liability was fixed unalterably, and the forfeiture incurred. He was in the predicament of bail, who had become fixed. Neither the discharge in bankruptcy, nor the death of the principal could afterwards relieve him.

Judgment for the plaintiff.

THE STATE *versus* AMOS C. STUART.

The inhabitants of the town wherein the offence is alleged to have been committed are competent witnesses to sustain the prosecution, on the trial of an indictment against an inhabitant of the same town for being a common seller of wine, brandy, rum, and other strong liquors without license, contrary to the provisions of Rev. St. c. 36, § 17; although the town would be entitled to the penalty incurred.

The Court is under no legal obligation to quash a defective indictment on motion before the trial is concluded, as the party indicted has his remedy by a demurrer, or by a motion in arrest of judgment.

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

An indictment was found against Stuart, an inhabitant of Gardiner, for that he, on June 1, 1842, and on divers days and times between that day and the finding of the indictment, at said Gardiner, "without any lawful authority, license or admission, did presume to be and was a common seller of wine, brandy, rum and other strong liquors by retail, in less quantity

than twenty eight gallons, and did then and there sell and cause to be sold wine, brandy, rum and other strong liquors in manner aforesaid to divers persons to said jurors unknown, against the peace," &c.

The counsel for the defendant moved the Court to quash the indictment, as being too general, indefinite and uncertain. This the District Judge declined to do.

The witnesses called in behalf of the State, to support the indictment, were inhabitants of Gardiner. The counsel for the defendant objected to their admissibility as witnesses, because they were inhabitants of the town which would be entitled to the penalty on conviction. This objection was overruled, and the witnesses testified.

The verdict was guilty, and Stuart filed exceptions.

Whitmore, for Stuart, said that the penalty, which would be imposed on conviction, enured to the benefit of the town of Gardiner, where the witnesses objected to lived. Rev. Stat. c. 36, § 17. The town, and of course every inhabitant thereof subject to taxation, has therefore a direct interest in the result. The interest of a witness, however minute, at common law, disqualifies him from testifying. 14 Maine R. 204; Stark. Ev. 744, 775; 5 T. R. 174; 2 Show. 47; 10 East, 292 and 395; Greenleaf on Ev. 435, 448, 406, 208.

Nor are the inhabitants of the town made competent witnesses by Rev. Stat. c. 115, § 75. The statutes provide that in their construction, the words used shall be construed according to the approved usage of our language. Rev. Stat. c. 1, first rule. An indictment cannot come within the meaning of the term "suits at law." No criminal prosecution can with propriety be called a suit. Walker's Intr. to Am. Law, 503; 3 Bl. Com. 116; Jac. L. Dic. Title Action; Rev. Stat. c. 146, § 15 and 16.

Section 75 of c. 115 of Rev. Stat. is in derogation of the common law, and should be construed strictly. 4 Mass. R. 471; 15 Mass. R. 205.

H. W. Paine, County Attorney, said that at common law

an inhabitant of the town was a competent witness. Although the penalty incurred is for the use of the town, it is for the government, solely, to enforce the penalty. The fine must be deemed to be receivable by the government, and then is distributed by the government. 16 Peters, 203. There is no direct or certain interest in any one inhabitant of the town, and no one acquires a vested interest in the penalty on the conviction. If the inhabitants are not competent witnesses, the law would operate only as to persons belonging out of town. It has been decided in Massachusetts, that the owner of stolen goods is a competent witness, although on conviction he will be entitled to a restitution of his goods. 9 Mass. R. 30.

But Rev. Stat. c. 115, § 75, makes the inhabitants of towns competent witnesses. The whole of the Rev. Stat. may be taken into consideration in giving a construction to any provision thereof. 3 Metc. 130. The legislature intended that the term, "suits at law," should comprehend indictments for the recovery of penalties as well as suits. In Rev. Stat. c. 25, § 101, *suit* and *indictment* are manifestly used as meaning the same thing.

The opinion of the Court was prepared by

Shepley J. — The defendant was indicted for being a common seller of wine, brandy, rum and other strong liquors, without license, contrary to the provisions of the statute, c. 36, § 17. Forfeitures and penalties exceeding twenty dollars, are to enure to the sole use of the town, in which the offence was committed. The witnesses introduced to prove the offence were inhabitants of the town, in which the offence was alleged to have been committed; and they were objected to as interested in the penalty to be recovered. If an action of debt had been commenced for the recovery of the penalty, as it might have been, the witnesses, if they should be considered as interested, would have been admissible under the provisions of the statute, c. 115, § 75. It is not probable, that the legislature designed, that witnesses should be admitted or excluded

merely on account of the form or name of the process used to recover the penalty. And yet an indictment can hardly be considered as included in the words "all suits at law." Were the witnesses incompetent according to the rules of the common law, because they were interested in the event of a conviction? The interest to exclude must be direct and certain, not contingent or consequential. If the penalty should be recovered and paid into the town treasury, the witnesses could have no title to any portion of it. They could be benefitted only by the diminution of a tax, which might afterward be assessed upon them. And they might not be inhabitants of that town, or be living, at the time of the next assessment. In the case of the *King* v. *Prosser*, 4 T. R. 20, Mr. Justice Buller states, that the question arose before Mr. Baron Burland, "in an action on a penal statute, which gave part of the penalty to the parish; and a person being called as a witness to support the action, who was liable to be rated to the poor, it was objected that such liability rendered him incompetent; but the learned Judge said, that as he was not rated, he had not an immediate interest at that time; and the witness was admitted. The same point has since been repeatedly ruled by different Judges." In the case of the *King* v. *The Inhabitants of Kirdford*, 2 East, 560, Lord Ellenborough says, "the rule is well laid down in *Rex* v. *Prosser*, and in other cases, particularly one mentioned by Mr. Justice Buller, in that case, before Baron Burland." And speaking of the interest of the witness in the case then under consideration, he said, "it was perfectly contingent, whether the witness would be interested or not; he might die, or part with his property before the making of the next rate." The same doctrine was held in the cases of *Cornwell* v. *Shepherd*, 1 Day, 35; *Eustis* v. *Parker*, 1 N. H. R. 273; *Bloodgood* v. *The overseers of the poor of Jamaica*, 12 Johns. R. 285. These authorities justify the presiding Judge in overruling the objection.

The counsel for the defendant moved the Court to quash the indictment as being too general, indefinite and uncertain in the description of the offence. This motion was overruled.

The Court was under no legal obligation to quash the indictment, if it had been defective; for the party had his remedy by a demurrer, or by a motion in arrest. *Rex* v. *Brotherton*, 1 Stra. 702; *Regina* v. *Parry*, 2 Ld. Raym. 865. If it were necessary to decide upon the indictment, it might be found sufficient. *Butman's* case, 8 Greenl. 113. The bill of exceptions does not present any legal ground of complaint.

Exceptions overruled,

and case remanded to the District Court.

WILLIAM WOOD *versus* JAMES BOLTON.

The warning of a private to attend a company training by one who has no authority therefor from the commanding officer of the company, is void.

WOOD, as clerk of a company of militia, brought his action of debt against the defendant to recover the penalty for the non-appearance of his minor son, Philemon, at a company training, before a justice of the peace. To prove the warning of Philemon, the plaintiff introduced an order from the commandant of the company to him, directing him to warn certain persons named within certain limits. Philemon Bolton was not one of the persons named, nor was his place of residence within the limits, but he was found by Wood within the limits, and there seasonably warned. The justice ruled that the warning was insufficient, and decided in favor of the defendant. This writ of error was brought by Wood to reverse that judgment.

J. Baker, for the plaintiff, contended that the delinquent had no right to object to any deficiency in the warning officer's authority, inasmuch as he had actual notice; and that all objections to the order should be made by the warning officer only, and not by the delinquent. He cited the Militia act of 1834, § 44, art. 23; 15 Maine R. 309; 17 Maine R. 447. He also contended that the warning was legal.

Bradbury, for the defendant.

Per Curiam. — In this case the person who warned the private to appear, had no authority to warn him. Firstly, because he was not commanded so to do by the commanding officer of the company. And secondly, because the private was not within the territorial limits of the order to warn.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF FRANKLIN,

ARGUED AT JUNE TERM, 1843.

GREENLEAF BEAN *versus* INHABITANTS OF JAY.

The inhabitants of a town cannot avoid being bound by their vote, at a meeting legally called with authority in the warrant to act upon the subject, by proof that the vote was passed near the close of the meeting and after a portion of the voters had retired.

Where the plaintiff, in an action against a town for the support of one of its paupers, being obliged to support this pauper by the terms of a special contract to support the paupers of the town for one year, and having received payment of the amount due by the terms of this contract, made a claim upon the town for the support of this pauper, and openly stated in the town meeting the amount which he claimed therefor, and the town, within the year from the time the contract went into operation, *passed a vote to pay the plaintiff for supporting this pauper the last year; it was held*, that the vote was sufficiently certain to have reference to the year of the special contract; and that the town had no valid defence, either on the ground of a want of consideration for the promise, or because that the plaintiff was estopped by his special contract from availing himself of it.

ASSUMPSIT for the support of the wife of Simeon Lamkin, a pauper of the town of Jay, from May 1, 1839 to May 1, 1840. The facts in the case are stated at the commencement of the opinion of the Court. At the trial before WHITMAN C. J. after the evidence was out, it was agreed by the parties, that, if the Court should be of opinion that the plaintiff was entitled to recover, a default should be entered, and that the

Court should assess the damages in any mode they should think proper; and that if the plaintiff was not entitled to recover, he was to become nonsuit.

H. & H. Belcher argued for the plaintiff, contending that they were entitled to support the action upon these considerations; that the plaintiff supported a pauper of the town of Jay; that the town voted to pay the plaintiff for the support of that very pauper; and that it was a contract which the town had a right to make.

The town is bound to support its own paupers, and has a right to determine the mode of doing it. The town is under a moral obligation to pay any one who relieves the town from the support of a pauper, and that is a sufficient consideration for an express promise to pay therefor. The plaintiff claimed payment, and if the town intended to resist the claim, they should have so said, and not have adjusted the dispute by a promise of payment.

But were it ever so clear that the terms of the bond would have compelled the plaintiff to have supported the pauper without compensation, the town was competent to waive this ground, and promise to pay according to the justice of the case.

Nor is the plaintiff estopped by the bond from claiming under the vote of the town. There can be no estoppel where the contract is executory. 17 Mass. R. 449; 14 Johns. R. 210; 15 Mass. R. 206.

May, for the defendants, in his argument contended that the plaintiff was not entitled to recover by virtue of the vote of the town. The vote must be understood and regarded either as a promise to pay the plaintiff for supporting this pauper according to the contract which had been made, or as a promise to pay him a sum of money for such support in addition to the sum agreed to be paid in the contract, which had been before made. The plaintiff admits that all his claim under the bond has been paid, and the first ground fails. It must fail also under the second, for such promise is void for want of a con-

sideration to support it. The vote of a town to pay money must be founded on a good and sufficient consideration to be the ground of an action. *Nelson* v. *Milford*, 7 Pick. 18. The plaintiff was bound by his bond to support this pauper. There was then no equitable or moral obligation to support the promise.

The liability of towns to pay for the support of their poor, does not rest upon any moral obligation to do so, but upon the positive enactments of law. The moral obligation which forms a consideration for an express promise is limited in its application to cases where a good and valuable consideration has once existed. 3 Pick. 207; 1 Metc. 276, 520; 1 Chitty on Con. 52, citing 1 Murphy, 181; Peake's R. 72; 1 Verm. R. 420. A promise to pay more than is due, is without consideration. 5 East, 232; 3 Pick. 92; 3 B. & P. 612; 17 Pick. 280; 14 Pick. 198.

The plaintiff is estopped by his bond to deny that he did not receive a full and adequate compensation for keeping this pauper. 4 Pick. 97; 17 Mass. R. 591.

Unless the first contract was waived, which is not pretended here, the party is not bound by any promise to pay an additional compensation. 9 Pick. 298.

The vote can only be regarded as an unexecuted gift, and the town is not bound by it. 7 Johns. R. 26.

The town has no right to give away money as a gratuity to any one, who has no legal claim. 13 Mass. R. 272.

The vote is too loose to bind the town. It does not state the portion of time for which payment is to be made, or refer to any means of determining it.

The opinion of the Court, Whitman C. J. taking no part in the decision, not having heard the argument, was drawn up by

Shepley J. — It appears from the report, that the plaintiff on the 29th day of March, 1839, entered into a contract with the defendants to support all the paupers, then upon the town, or that should come upon it, excepting certain persons named,

for one year from the first day of May following. The wife of Simeon Lamkin was then a pauper supported by the town, and was not one of the persons excepted. The plaintiff had entered upon and continued in the performance of his contract until March, 1840, when an article was inserted in the warrant for calling the annual meeting "to see if the town will allow Greenleaf Bean pay for the support of Simeon Lamkin's wife the past year." In the meeting of the inhabitants the article was acted upon, and a vote passed "to pay Greenleaf Bean for supporting Simeon Lamkin's wife the last year." It was proposed to prove, that the vote was passed near the close of the meeting and after a portion of the voters had retired. The presiding Judge excluded the evidence. To receive such testimony and permit it to impair the effect of the vote, would be to make the votes of towns, passed at a meeting legally called, depend for their validity upon the number present, and upon the time when they were passed. What rule should determine the number, that must be present, and the hour, when a vote might be legally passed? The impossibility of establishing any, by a judicial tribunal, is so obvious as to preclude any argument. Those voters, who are so inattentive to their rights as to retire from a town meeting, before all the articles in the warrant are finally acted upon, must trust them to the decision of those, who remain.

It is contended, that the vote does not determine with sufficient certainty, for what time payment was to be made, to be binding. The contract of the plaintiff was made in March, 1839, and this vote was passed in March, 1840; and it is not difficult to perceive, that by "the last year," the year of the contract was referred to, as the support of the paupers from year to year would seem to have been acted upon at the yearly or annual meeting, and the contract then to have been made, although the support of the paupers under it commenced at a subsequent time.

The principal ground of defence however is, that the town was not bound by the vote for want of a consideration to support the undertaking. The plaintiff was obliged to support

this pauper by virtue of his special contract, and he received his pay according to that contract for the support of the town paupers. He made a claim, before he had fully executed that contract, to be paid separately for the support of the wife of Lamkin, and openly stated in the town meeting the amount, which he claimed. The grounds, upon which he presented and asserted his claim, are not stated. The conclusion must be from the circumstances, that it was made either on the ground, that the contract did not oblige him to support her, or upon the ground, that there were reasons arising from some mistake or change of condition, which ought to relieve him from the support of her. If made upon the former ground, it will not be denied, that the town had the power to settle and agree to pay all disputed claims; and that it must of necessity be the judge of the expediency of contesting the legal right, or of submitting and agreeing to pay the claim. If made upon the latter ground, it will hardly be denied, that it is competent for a town, when it ascertains, that it has by mistake, or by a change of circumstances, obtained a contract, which acts oppressively upon one of its citizens, to agree to annul or to modify that contract. The argument is, that as an agreement to pay more than is justly due, is not binding, so a contract to afford relief in such a case would not be. The cases are different. When the debt has been determined by an executed contract, the rule may well apply, that a promise to pay more is not binding. But when the contract is yet executory, it is in the power of one party to relieve the other from a performance wholly or in part; and this may be done by a parol agreement. *Munroe* v. *Perkins*, 9 Pick. 298. As the liability of towns for the support of paupers arises out of positive enactments, and not from any moral obligation, it is contended, that a promise to pay for the support of a pauper cannot rest upon any such moral obligation to sustain it. When however the statute has imposed the duty, and the town has by its provisions become obliged to furnish a support to a particular person, one, who relieves the town therefrom, has the same moral right to compensation for the services performed and

money expended, as he would have for services performed or money expended for the use of the town in any other way. If the vote was not intended to adjust a disputed claim, it must have been designed to relieve the plaintiff from the literal performance of a contract not fully executed, and to compensate him for the support of the person, from whose support he had been relieved. It is true, that the vote passed proposed to pay for the past as well as future support, till the contract year terminated. But it is not necessary, that there should be a full consideration to support the contract. It is enough, that it was not made without consideration. And the consideration, that he was to support her during the remaining portion of the year, was sufficient.

The doctrine of estoppel is not applicable to the case. The effect of the vote being to exempt the plaintiff from providing a support for her by virtue of the contract for the remaining portion of the time, the contract cannot be used, as if there had been no variation of its terms by relinquishing rights secured by it, to defeat the effect of that variation. And moreover such an executory contract does not act as an estoppel.

Nor will the vote admit of a construction, that it was intended only as a promise to pay so much towards the performance of the contract. No question was made about his title to that; and this claim was presented independently of it, or as a relief from it.

There is no amount of compensation fixed by the vote, and the town is not obliged by it to pay the sum, which the plaintiff claimed. He will be entitled to a reasonable compensation only, not exceeding the amount, which he claimed. A default is to be entered subject to a hearing in damages before the clerk.

DANIEL BLAISDELL *versus* EPHRAIM BRIGGS.

Where it appears by the town records, that the location of a town road by the selectmen was subsequent to the issuing of the warrant to call the meeting of the town for its acceptance, it is not competent to show by parol evidence, that the location by the selectmen in fact preceded the issuing of the warrant.

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

Trespass *quare clausum.* The defendant justified entering on the premises by order of a highway surveyor, and alleged that a legal highway was laid out over the same by the town of Jay. From the records of the town it appeared, that the way was laid out by the selectmen on the twenty-fourth of August, 1836; that a warrant was issued by the selectmen bearing date the twentieth of the same August, in which was an article to see if the town would accept the location by the selectmen of this way, calling the meeting on the twelfth of September following; and that at a meeting on that day the town voted to accept the highway thus laid out by the selectmen. As it appeared by the records, that the meeting was called before the road was laid out by the selectmen, the defendant offered to prove by the selectmen, that the plaintiff called on them, and requested that the road should be laid out in season to be acted upon at the meeting on September 12th, and that, having previously made the warrant, they laid out the road, and afterwards inserted the article in the warrant, to see if the town would accept the road, before the meeting was notified by the constable. The plaintiff objected to the admission of this evidence, but the objection was overruled, and the testimony received. The plaintiff then offered to prove by parol, that the road was in fact accepted only conditionally, and that the condition had not been complied with; and that the vote actually passed was very different from that recorded. The presiding Judge ruled, objection having been made by the defendant, that this testimony was inadmissible, and it was not received. The Judge instructed the jury, that if they were satisfied that the road was actually located, and the article for

its acceptance inserted in the warrant, before the same was delivered to the constable, although the records of the town showed it to be otherwise, that the defendant had made out a legal justification. The verdict was for the defendant, and the plaintiff filed exceptions.

Stacy, for the plaintiff, contended that the Judge erred in admitting the testimony objected to by the plaintiff, and in the instructions given to the jury; and cited 1 Fairf. 335; 16 Maine R. 18, 301; 18 Maine R. 183, 344; 2 Pick. 397; 6 Pick. 6; 13 Pick. 229; 4 Greenl. 475.

R. Goodenow, for the defendant, said he should not deny that the location of the road must precede the issuing the warrant for calling the meeting, but should contend that the location was in fact before it was called. The date of the warrant is not material, and it takes effect from the time of its delivery as a warrant, and not from the day it happens to bear date. It is competent to prove the time of the delivery by parol evidence. He cited 6 Mass. R. 461; 1 Shepl. 64; 8 Greenl. 334; 3 Fairf. 487; 1 Fairf. 335.

The opinion of the Court was drawn up by

TENNEY J. — The title of the plaintiff to the land is not disputed, but the defendant justifies the act complained of as being done in the repair of a town way, which, it is insisted, was duly and legally located. He introduced the records of the town of Jay by which it appears, that the way was laid out by the selectmen on the 24th of August, 1836, and that a warrant calling a meeting of the town, in. which warrant was an article "to see if the town would accept the location of the way in question," was dated the 20th of August, 1836; and at the meeting held in pursuance of the warrant, on the 12th of September, 1836, "It was voted to accept the same as laid out by the selectmen."

By the records, the location by the selectmen was subsequent to the issuing of the warrant calling the town meeting for the approval of the acts of the selectmen. It is well settled,

in the cases cited for the plaintiff, that the location must precede the warrant. The records do not sustain the defence.

Was the evidence, which the jury were allowed to consider, on the question, whether the warrant was in fact issued before the location, admissible? We are satisfied, that it was not. The records upon their face are perfect, and nothing can be supplied, which is now wanting. They cannot be controlled by the evidence introduced. They were intended to afford security, which cannot be found in an inferior species of evidence.

Exceptions sustained and a new trial granted.

HARRY W. LATHAM *versus* INHABITANTS OF WILTON.

By the Statute of 1821, c. 118, § 9, the inhabitants of a town, at a legal meeting called for that purpose, had power to alter or discontinue a town way, without any previous action of the selectmen thereon.

Where, in a rule of reference, entered into before a justice of the peace, the whole matter in controversy is submitted to the referees, "*to be decided according to the principles of law*," the law and the fact are equally submitted to their decision; and that clause does not prevent their being the final judges of both, or require them to report the facts and their conclusions upon them to the Court for its revision.

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

Latham made out and signed his claim against the inhabitants of Wilton, wherein he alleged that he had received a personal injury, and had lost a horse, by reason of defects in a public highway in that town over which he was travelling. Latham and the agent of the town entered into a reference of this demand before a justice of the peace, on April 28, 1842, providing therein, that the case was "to be decided according to the principles of law." On July 13, 1842, the referees made a general report in favor of the plaintiff. The Judge of the District Court, on its being entered there for acceptance, ordered the report to be recommitted, "for the referees to present such facts as present any question of law in relation to

the location of the road, and the effect of the Rev. Stat. c. 25, § 101."

The referees made an additional report, in which they say, that they were satisfied of the plaintiff's right to recover, provided he had sufficiently proved the existence of a highway at the time and place where the injury was proved to have occurred; and upon this point it was proved that there was a highway, situated in said town and connecting two small villages therein, which had been usually travelled for more than twenty years preceding the injury complained of, as a public highway, but that at the place where the accident happened, and for a considerable distance each way therefrom, said way had not been publicly travelled but for twelve or fifteen years, said travelled way having been so altered in that place, as to straighten and carry the travel upon said road about four rods westerly from the old road. It was further proved, that the inhabitants of Wilton had at several times within six years before such injury occurred, which was in April or May, 1841, and also in the summer of 1841, and in the spring of 1842, made repairs upon said highway, and in that part also where the injury happened. The defendants contended, that said alteration was not legally made by the town, inasmuch as it appeared from the records of said town, that the selectmen had not made any location and record thereof before issuing the warrant for the town meeting, at which said alteration was accepted, and offered to prove the illegality thereof; but the referees being of opinion that by force of the Revised Statutes, c. 25, § 101, inasmuch as the town had made repairs within six years before the injury occurred, the town were estopped to deny the legality of said way, or the legal existence thereof, decided to exclude such evidence, and that the existence of said way, at the time and place of said injury, was sufficiently established to enable the plaintiff to maintain his said action; but if in the opinion of the Court, said opinions and decisions are erroneous, then the Court is to make such disposition of said report and award as to law and justice may appertain.

Upon the return of this additional report the Court ad-

judged, that the ruling of the referees upon the law was correct, and on all the facts presented thereby, ordered the report to be accepted. The defendants filed exceptions.

Stacy argued for the defendants, insisting that the referees erred in refusing to receive the evidence offered to show, that there was no legal road where the accident happened; and that the Court also was in error in accepting this report.

The right of an individual to recover damages of a town for an injury sustained through a defect in a highway, is a strictly legal right, and exists only by the provisions of some statute. The defendants are not liable, unless at the time of the accident, the way was one which the defendants were bound in their corporate capacity to maintain and keep in repair. It must have been a legal highway, or the plaintiff was not entitled to recover.

There was no road legally laid out, and none can be acquired by usage for any period less than twenty years. 2 Greenl. 55; 4 Greenl. 270; 2 Pick. 51, 466.

The referees seem to admit there was no legal highway, for they say that the defendants are estopped from denying the legality of the way, or the legal existence thereof, because they have made repairs thereon within six years; and such is the opinion of the District Court. The provision in the Revised Statutes, relied upon, cannot govern this case. The report of the referees shows, that the injury was received before the Revised Statutes took effect as laws. It was in April or May, 1841. As the law then was, the defendants were not liable. The statute was not intended to apply to cases which had already taken place. If it does, it was retrospective, and therefore unconstitutional, and void. 2 Greenl. 275; 2 Gallison, 105; 7 Johns. R. 477; 3 Dallas, 386. If the construction contended for by the plaintiff be correct, then the legislature have by a law of their own given to the plaintiff a cause of action against the defendants, where none had ever before existed. But there is nothing in the law requiring the Court to give it a retrospective operation.

H. & H. Belcher, for the plaintiff, said, that the Revised Statutes merely enacted what was the law, in this respect, before. Although a town was not subject to indictment for neglecting to keep a road in repair, still they were liable to pay damage to any one sustaining an injury in passing along a way treated as a highway by the town, if occasioned by any defect therein.

The road, however, was legally laid out. This was an alteration of an old road, not the laying out of a new one. The town might, before the Revised Statutes, alter a town road without any previous action of the selectmen. Stat. 1821, c. 118, § 9. *Harrington* v. *Harrington*, 1 Metc. 404.

There is nothing *ex post facto* in the statute. It only changes the mode of proving the existence of the road, and that is not unconstitutional. 2 Fairf. 284; 1 Shepl. 250; 6 Shepl. 183. The town has worked upon the same highway since the Revised Statutes went into effect, and thus recognized it as a public highway with all the incidents attached to it.

The opinion of the Court, WHITMAN C. J. taking no part in the decision, not having heard the arguments, was drawn up by

SHEPLEY J. — A distinction has been preserved in the statutes between the laying out and the alteration of highways and town ways. In the case of the *Commonwealth* v. *Cambridge*, 7 Mass. R. 158, it was decided, that a new highway could not be laid out upon a petition for the alteration of an old one. The act of Massachusetts of the 23d of March, 1786, § 7, provided, that towns may approve of any town or private way laid out by the selectmen, "or may alter or discontinue any town or private way heretofore laid out and improved as such, when it shall appear, that the same is unnecessary for the inhabitants of such town." The act of the 27th of February, 1787, authorized the selectmen to lay out town and private ways to be approved by their towns. And if the selectmen unreasonably refused to lay out, or the town to approve, of such ways, an appeal was permitted to the

Court of Sessions. The act was silent respecting the alteration or discontinuance of such a way. In the case of the *Commonwealth* v. *Tucker*, 2 Pick. 44, it was said, "there seems to be no express authority given to towns to discontinue town ways, but without doubt such authority exists by implication." Upon the revision of the statutes in this State, in 1821, the distinction between the authority to lay out and to alter ways was preserved. The provisions alluded to in both the statutes before named were re-enacted. The ninth section of c. 118, authorized the selectmen to lay out town or private ways, and provided, that "any town may alter or discontinue any town or private way, when it shall appear, that the same is unnecessary for the inhabitants of such town." There was no power given to the selectmen to alter or discontinue a town or private way; and according to the doctrine of the case of *Commonwealth* v. *Cambridge*, it could not be done, it would seem, under the power to lay out such ways. No appeal was authorized from any act of the town refusing to discontinue or alter such a way, while there was one for unreasonably refusing to approve of such a way laid out. It clearly was not the design of the statute to entrust the power to discontinue such a way to the action of the selectmen; and yet an alteration would operate as a discontinuance. The power to alter and to discontinue was originally connected and given to the towns entirely independent of the power given to the selectmen to lay out; and these powers have only been brought together in the same section by the revision. But the powers are as distinct in the new as in the older enactments. The latter to be exercised by the selectmen in the first instance, and the former to alter and discontinue, to be exercised by the towns without any previous action of the selectmen, and with a final result not subject to revision by an appellate tribunal. It does not appear from the report of the referees, that the way, called a highway, connecting two small villages in the town, had not been legally laid out as a town way. The defence was not placed upon any such ground; but it was contended, that the alteration made in it some twelve or fifteen years before "was

not legally made by the town, inasmuch as it appeared from the records of said town, that the selectmen had not made any location and record thereof before the issuing of the warrant for the town meeting, at which said alteration was accepted." No action of the selectmen being required by the statute previous to an alteration or discontinuance, the action of the town in accepting the alteration would not be vitiated by their proceedings. The report of the referees should be accepted, unless it appears, that they decided the law erroneously to the injury of the defendants, and the highway, which was out of repair and the occasion of the injury, appearing to be one, which the town was obliged to keep in repair, according to the provisions of c. 118, § 17, the town would be liable to pay for the injury. And it is not necessary to decide, whether the section of the Revised Statutes, referred to in the report of the referees, can be considered as applicable to a case of injury happening before the statutes were in force.

The rule of reference submitted the whole matter to the referees "to be decided according to the principles of law." The law and the fact were equally submitted to their decision; and that clause did not prevent their being the final judges of both; while it required them to be governed, by what they judged the law applicable to the case to be. *Payne* v. *Massey*, 9 Moore, 666. They were under no obligation therefore to report the facts, and their conclusions upon them, to the Court for its revision.

Exceptions overruled,
and report accepted.

Inhabitants of Wilton *versus* James Harwood.

No such equity powers are given to this Court, as will authorize it to decree a specific performance of a parol agreement to convey real estate, or to enter judgment for the amount of damages sustained by a breach thereof, although such parol contract may have been partially performed.

The rule in equity, that one who hears another bargain with a third person for real estate, and sees such third person pay for it, or expend his money upon it, without making known his own title, will not be permitted to disturb him in the enjoyment of the estate — cannot be applied to cases of parol contracts for the purchase of land, where all the parties to the contract fully understood the true state of the title, and one of them seeks relief from another.

This was a bill in equity. The facts are stated in the opinion of the Court.

R. Goodenow, for the plaintiffs, contended that the Court had power to grant relief in this case.

The power is given in the clause in relation to frauds. The defendant cannot avail himself of his own fraudulent act to obtain the property of the plaintiffs. Cases are taken out of the operation of the statute of frauds on the ground of a part performance of the contract. It is a fraud in the defendant, after a performance, or part performance by the plaintiffs, to resist the full and complete execution of it, and thereby destroy the property of the plaintiffs. Constructive fraud includes all cases where one party takes an unconscionable advantage over the other. Rob. on Fr. 137, 141; 1 Story's Eq. § 187, 189, 251, 253; 2 Story's Eq. § 66, 68.

The Court has jurisdiction also on the ground, that the defendant stood by and permitted, encouraged and assisted the town to expend their money, without notice or asserting his title. He cannot now set it up against them. 2 Sumn. 211.

We have no adequate remedy at law. The building cannot be removed without unreasonable expense, and there is no mode of compelling him to convey the land, but by resorting to a court of equity.

H. & H. Belcher argued for the defendant.

It is a sufficient answer, that the plaintiffs are at liberty to

remove their town house, whenever they please. This right has never been denied to them.

This transaction was before the Revised Statutes were in force, and the statute of frauds, which is pleaded, is a bar to the support of the bill. 8 Greenl. 320.

There is no fraud on the part of the defendant. The plaintiffs have not performed their part of the verbal contract, and the defendant is not bound to perform his. Still he is now willing that the plaintiffs may have the privilege of removing the building. The defendant has never claimed it, and has requested the plaintiffs to remove it.

There has been no part performance of the contract. The building of the town house was not in pursuance of any agreement with the defendant, but wholly independent of it.

Nor does the principles applicable to one man's purchasing land of a third person, and the true owner standing by and giving no notice, apply here. The plaintiffs knew the state of the title as well as the defendant, and knew as well as he that they were placing their house on his land.

There is no ground for asserting, that the defendant has converted the schoolhouse to his own use. Had he so done, the remedy would have been by an action at law for the conversion.

If however the plaintiffs had performed, or offered to perform their part of the agreement, the Court has no power to compel the specific performance of a parol contract for the conveyance of land.

The opinion of the Court was by

SHEPLEY J. — The case presented by the bill, answer, and proof, shews, that the defendant made a verbal agreement with their committee to sell to the plaintiffs a small lot of land for the sum of five dollars as a site for the erection of a town house; that the committee made a report of that agreement in writing under date of December, 1829, which was accepted in a town meeting, April 5, 1830, the defendant being present and voting for its acceptance; that the plaintiffs caused a

house to be built upon that lot by contract, during the season of 1831; that the defendant was a member of the committee chosen to superintend its erection and designated the lot, upon which it was built; and, as one of the committee, joined in a written report under date of Sept. 1, 1831, accepting the house thus built upon the lot; that afterward, in September or October of the same year, the plaintiffs, by their treasurer, tendered to the defendant the sum of five dollars and twenty-five cents, and requested a conveyance of the lot, but the defendant refused to receive the money and make the conveyance; that another tender of the sum of twelve dollars was made on April 21, 1842, and a conveyance was again requested with the like result; that the plaintiffs have continued to occupy the building as a town house since it was erected without interruption or obstruction, except that the defendant, in the month of September, 1841, built a fence across the passage-way leading from the highway to the house. The defendant in his answer alleges, that it was agreed, that he should have a license to sell liquors, in addition to the five dollars, on the days, when the town meetings were held in the house; but the proof fails to establish any such agreement. He also states, that on June 17, 1842, he conveyed a lot of land, including that lot, to James Harwood, jr.; and that conveyance is exhibited. The prayer of the bill is, that the defendant may be compelled to perform his agreement, or to pay the value of the house, and that he may be restrained from obstructing the plaintiffs in their occupation of it, and from bringing suits against them on account of it. If this Court were entrusted with a general jurisdiction in equity, there might be no difficulty in decreeing a specific performance of the agreement on the ground of part performance by the delivery and acceptance of possession accompanied by the other acts above stated. But its jurisdiction is limited in such cases. It was decided in the case of *Stearns* v. *Hubbard*, 8 Greenl. 320, that the act of 1830, c. 462, did not authorize the Court to compel a specific performance of a contract in writing. By the Revised Statutes such power is given, but it is limited to contracts in

writing, made since February 10th, 1818. It is contended, however, by the counsel for the plaintiffs, that a specific performance of a verbal contract may be decreed by virtue of the statute giving jurisdiction in all cases of fraud. If the Court were to decree the specific performance of a verbal contract for the sale of real estate on the ground, that after part performance, it was a fraud upon one party for the other to refuse to execute a conveyance, the effect would be to assume, under that clause of the statute, the very jurisdiction intentionally denied under another and more appropriate clause. During the revision of the statutes the law relating to the specific performance of contracts not in writing, after they had been partially executed, was doubtless noticed and considered; and it appears to have been the intention not to authorize under any circumstances a decree for the specific performance of a contract not made in writing.

It is also contended, that the defendant should in equity be enjoined from claiming and asserting a title to the lot, after having been instrumental in causing the plaintiffs to expend their money in building upon it under the promise of a title. It is true, that one, who hears another bargain with a third person for an estate, and sees such third person pay for it, or expend money upon it, without making known his own title, will not be permitted in equity to disturb him in the enjoyment of the estate, because by so doing he knowingly abets or aids the seller to deceive and injure him. The essential ingredient, which destroys his own title, is the knowledge, that the purchaser is deceived with respect to the title, and that he must suffer by it, and the neglect, when he has an opportunity to do so, to undeceive him and save him from injury. But this rule cannot be applied to cases of contract, where all the parties to the contract fully understand the true state of the title, and one of them seeks relief from another. The plaintiffs in this case were not ignorant, that the title to the lot was in the defendant, and that they must rely upon his verbal contract to obtain a title to it. If the defendant, after having authorized the plaintiffs to place the building upon his land, had by any act

converted it to his own use, their proper remedy to recover the value of it would have been an action of trover, and not a suit in equity. It is not therefore necessary to consider, whether the testimony presented would have entitled them to maintain such an action. It is not perceived, that under this process the Court has any power to relieve the plaintiffs from the inconvenience or loss, which they may sustain by having inconsiderately placed too great confidence in the verbal promise of the defendant.

The bill is dismissed without costs.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF SOMERSET.

ARGUED AT JUNE TERM, 1843.

BENJAMIN HILTON *versus* SAMUEL HOMANS *& al.*

Where the plaintiff makes and signs a written agreement to transfer his interest in a parcel of land to the defendant for a specified consideration, parol evidence is inadmissible to show, that the defendant, before or at the time of making such contract, had promised to pay therefor an additional consideration.

If one of two tenants in common of an interest in a parcel of land under a bond, induces the other to sell to him his share for a stipulated price per acre, by reason of a false affirmation that he had contracted to sell his own share to a third person for the same price, and after this purchase is completed, sells the whole to the same third person at a greater price per acre, the first seller cannot recover of his grantee the amount of the difference in the sales in an action for money had and received.

AT the trial before WHITMAN C. J., after both parties had introduced their evidence, objections to the admission thereof having been made on each side, a nonsuit was entered, under an agreement of the parties, that the nonsuit should be set aside, and a default entered, if in the opinion of the Court, the plaintiff was entitled to recover upon all the legal testimony in the case, the Court being authorized to draw such inferences from the evidence, as a jury might do legally.

The substance of the declaration, and sufficient of the evi-

dence to understand the questions of law, may be found in the opinion of the Court.

Boutelle and *Evans* argued for the plaintiff.

To show that the form of action was right, they cited 8 Greenl. 32. To show that the defendants, as agents, were not justified in employing and paying others for procuring a sale by their management, even although others did the same, they cited 17 Mass. R. 410; 4 Esp. R. 179; 2 Johns. Cas. 99; 6 Johns. R. 194; 8 Johns. R. 444; 5 Hals. 87; 3 Metc. 384. To show that the defendants were responsible to the plaintiff, and in this form of action, on the ground of fraudulent representations, they cited 3 T. R. 51; 11 Pick. 532; 7 Pick. 550; 1 Metc. 593; 17 Pick. 545.

Wells argued for the defendants.

To show that the plaintiff could not claim under the contract, and at the same time set it aside as having been fraudulently obtained, he cited 14 Maine R. 364. That the law will not raise an implied promise in addition to an express one in writing. 7 Mass. R. 107. That contracts of sale cannot be avoided, as fraudulent, because of erroneous statements in regard to the price. 1 Story's Eq. § 199.

The opinion of the Court, TENNEY J. taking no part in the decision, having been of counsel in the case, was drawn up by

WHITMAN C. J. — This is an action of assumpsit on a special contract, and for money had and received.

The evidence, at the trial, having been exhibited, it was agreed, that a nonsuit should be entered; and if, upon a report of the evidence by the Judge who presided at the trial, the Court (being at liberty to draw such inferences therefrom as a jury might) should be of opinion, that the action was maintainable, the nonsuit should be taken off and a default entered.

The first question is, does the evidence support the count on the special contract? It is averred, in substance, that the

plaintiff and defendants, having a joint interest in certain parcels of land, the defendants on the 30th day of March, 1832, having contracted to sell the same to certain individuals, and to induce the plaintiff to sell his right to the defendants, so that they might carry into effect their contract, represented to him, that they had agreed to sell to those individuals, at the rate of forty cents per acre, and promised to pay him for his interest therein at the same rate, that they had agreed to sell for to said individuals; or the same amount they might receive therefor from said individuals; and upon such representation and promise he did thereupon transfer to them his interest in said lands; and avers that they in fact received for the same at the rate of fifty cents per acre. On looking into the evidence we find that, whatever may have been the conversation concerning the contract, it was finally reduced to writing, which was subscribed by the plaintiff. No principle is more familiar than that all conversations at and about the time, and preparatory to the formation of a contract, are inadmissible to explain or vary the terms of it, when reduced to writing, and subscribed by the party thereto. The transfer, therefore, signed by the plaintiff, of his interest in the two parcels of land to the defendant, Homans, for a specified consideration, should preclude him from showing, by parol, that there was other and a greater consideration for the transfer, which the defendants had promised to pay. To admit him to do so, would be permitting him by parol, to vary the terms of a contract, which he had caused to be reduced to writing, and had actually signed with his own hand.

The count for money had and received is in the same predicament with the special count. It is dependent for its support upon the same evidence. The subject matter of it is clearly merged in the written contract of transfer.

But, if this estoppel were out of the way, we do not see that the plaintiff could recover in assumpsit. The evidence would not support his special count. No special contract, such as is set forth, appears to have been entered into by the defendants jointly, or severally. They merely, though per-

haps falsely, stated what they had contracted to sell for. This, it is alleged, was done to induce the plaintiff to transfer his right in the lands to them; and that the transfer was made accordingly on the thirtieth day of March, 1832, the time when the contract is alleged to have been executed. But they do not appear to have made any promise to pay any thing more, in any event, than is named in the transfer; but the inference from the evidence is strong, that they utterly refused to pay any thing beyond the amount actually paid. There is still another variance. The agreement was for a conveyance to Homans, and not to both defendants, and the conveyance was made accordingly. And as to money had and received, it would seem, if the witness, Colby, is to be believed, (and we know of no reason why a jury should not have believed him,) that if any thing was received, over and above forty cents per acre, it was for Colby's benefit, and not for the benefit of either the plaintiff or the defendants. From the testimony it appears that they never realized any thing beyond that amount to their own use.

If there be any ground upon which the plaintiff could have hoped to recover against the defendants, it was that of misrepresentation and deceit. There certainly does not seem to have been entire good faith on their part towards him; and if in an action framed for the purpose, any damage could have been made to appear to have occured to the plaintiff, arising from such cause, he might have recovered for the amount of it. But it is difficult to perceive how the plaintiff was in fact greatly injured. He might not have been able to show that the plaintiff did not realize as much for his interest in the lands, as it was actually worth. It is true the defendants induced Usher and others to give fifty cents per acre for it; but the evidence tends to show that this was accomplished by means of circumvention, such as we have little reason to doubt were too common in those days; and would afford no very satisfactory criterion by which to judge of the actual value of the land.

The plaintiff, it is manifest, by selling at forty cents per acre had much more than doubled his money in a very short space of time: and with such good fortune, it is somewhat remarkable, that he should not have set down contented.

Judgment on the nonsuit.

JOHN BERRY *versus* WILLIAM C. STINSON.

In a declaration upon a statute to recover a penalty of an officer for neglect of official duty, where there is no distinct allegation, that it is a plea of *debt* or of any other form of action, but there is an averment, that the defendant owes and unjustly detains the amount demanded, the declaration is sufficient, in that respect, on general demurrer.

In a declaration to recover a penalty for neglect of official duty, it is sufficient in substance, if the language of the declaration, in stating the neglect, is as full and decisive as that of the statute.

In an action against a town officer to recover a penalty, given by a statute for neglect of his official duty, where one section prescribes the duty to be performed, and another section provides for a variation or modification of that duty, and a third section imposes a penalty for neglect of the duty required by the two preceding sections, the declaration must not only allege the neglect of duty required by the first section, but must also aver, that such officer did not perform his duty as permitted by the second section, or the declaration will be bad on general dumurrer.

THE defendant demurred generally to the following declaration. "In a plea that to the said Berry the said Stinson render the sum of one hundred dollars, which the said Stinson owes and unjustly detains from the said Berry, for that the said Stinson, on the day of the purchase of this writ, being treasurer of said town for the year 1842, duly elected and qualified unto said office by the inhabitants of said town, did then and there neglect, and ever since his election and qualification unto the same office hath neglected, and still doth neglect to procure at the expense of said town (the same not having been already done by himself or his predecessors, or either of them) and constantly preserve as town standards a complete set of beams, weights, and copper and pewter measures, except the bushel measure, conformable to the State standards, and ex-

cepting also a nest of Troy weights other than those from the lowest denomination to the size of eight ounces, contrary to the form of the statute."

J. S. Abbott, for the defendant, said that no offence was set forth in the declaration, which subjected the defendant to a penalty.

To recover a penalty the statute, (c. 115, § 21,) requires, that the remedy should be an action of debt. Here no form of action is given.

The declaration does not allege, that the defendant unreasonably, or without sufficient cause, neglected this duty. The offence consists in that. Rev. Stat. c. 73, § 8, 9, 10, 11.

Nor does the declaration state, that the neglect was for an unreasonable time. The declaration does not show, that the defendant was not chosen the day preceding the time mentioned.

The defendant might have done every thing which the statute requires, and yet the declaration be true. The exception, or permission to substitute wooden for copper or pewter measures, in the ninth section, is not noticed. The declaration should have stated that this modified duty was not performed.

Wells and *Mason,* for the plaintiff, said, that an action of debt was set forth in the declaration; and that calling it by that name, is matter of form and not of substance. The statute relied on, does not say, that it shall be by a plea of debt, but by an action of debt. 2 Chitty's Pl. 466.

The declaration does aver that the defendant neglected his duty, and this is admitted by the demurrer. There could be no neglect of duty, if he had not had time to perform it. The law presumes that towns have done their duty, and elected their officers in March or April as the law requires.

The duty of the treasurer is prescribed in the eighth section of the statute, and the right to vary in some particulars as to the measures, and substitute wooden for copper or pewter measures, is given in another section. The rule is, that where the exception is in the enacting clause, the plaintiff must state, that the defendant is not within it; but that where it is in a

subsequent clause, it is matter of defence, and the plaintiff need not allege it. 1 Chitty's Pl. 229; *Smith* v. *Moore*, 6 Greenl. 278. But the necessity of this negative allegation exists only where the exemption, or exception, goes to do away the whole duty, and not where, as here, it goes to but one of several particulars to be performed.

The opinion of the Court was by

Shepley J. — This case is presented on a general demurrer to the declaration.

The first defect alleged is, that it does not appear to be an action of debt as provided by the Statute, c. 115, § 21. It is said, there should be a distinct allegation, that it is a plea of debt. The declaration alleges, that the defendant "owes and unjustly detains" the amount demanded. These terms are sufficient to determine the kind of action; and the form used is in substance, that required by the English precedents.

The second defect alleged is, that the declaration does not contain an averment, that the defendant unreasonably or without sufficient cause neglected to perform the duty required. It does allege, that from the time of his election and qualification, "he hath neglected and still doth neglect."

The provision of the statute is, "every treasurer neglecting his duty" shall forfeit and pay. And the language of the declaration is as full and decisive as that of the statute. A charge of continued neglect of duty implies blame, and excludes the idea, that there was sufficient reason for an omission to perform it.

In the third place it is contended, that all the allegations in the declaration may be true, and yet the defendant may not have been guilty of any neglect of the duties required by the statute. They are sufficient to show a neglect of the duty required by the eighth section of the statute, c. 73; but the ninth section so far varies that duty, as to permit the treasurer to procure half-bushel, peck, and half-peck, measures made of wood, instead of the like measures made of copper, or pewter, as required by the eighth section. As the declaration alleges,

that he neglected to procure "a complete set of beams and copper and pewter measures," except the bushel measure and the nest of troy weights; it might be true, if all the measures of copper and pewter with half-bushel, peck, and half-peck, measures made of wood had been provided, that there would not be a complete set of copper and pewter measures, required by the eighth section. To avoid this difficulty, the plaintiff contends, that as the liberty to procure those measures made of wood is given by the ninth section, he is not obliged to negative their procurement in the declaration, that being only a matter of excuse, which might be offered in the defence. The rule, as stated in the cases of *Williams* v. *The Hingham & Quincy turnpike*, 4 Pick. 341, and of *Smith* v. *Moore*, 6 Greenl. 274, is, "that where an action is given by statute, and in another section, or subsequent statute, exceptions are enacted, the plaintiff need not take notice of these exceptions in his count, but leave it to the defendant to set them up in defence. But where the exception or limitation is contained in the same section, which gives the right of action, the plaintiff must negative the application of them to his ground of action." Whatever failure there may be in attempts to prescribe a rule in all cases, there can be no doubt, that the plaintiff must in his declaration allege all the facts, upon which the statute gives him a right of action. Having done this, if there are any matters of exemption, or excuse, they may well come from the defendant. The plaintiff does not bring himself within the rule stated in those cases, for the section, upon which his declaration is framed, does not give him a right of action. The phraseology of the statute is peculiar. It does not give the right of action for a violation of the duty required by any one section alone, but for the violation of any duties required by three sections, the eighth, ninth, and tenth, considered in connexion. The eleventh section creates the penalty and gives the right of action, the provision being, that "every treasurer neglecting his duty required by the three preceding sections shall forfeit and pay for each neglect one hundred dollars." His right to recover that penalty must therefore depend upon a neglect of duty to be

ascertained not from the provisions contained in any one of them, but from those contained in them all. By "the enacting clause," or "by statute" as used in the books, is meant such an enacting clause or statute provision, as creates an offence and gives a penalty, when it is said, where an action is given by statute or by the enacting clause, and in another section, or subsequent statute, exceptions are enacted, the plaintiff need not notice them.

In this case the plaintiff is not entitled to recover upon the facts stated in his declaration, for the penalty is not incurred, except by a neglect shown from a consideration of the provisions of the three sections.

Declaration adjudged bad.

CLIFFORD WILLIAMS *& al. versus* SAMUEL BURRILL *& al.*

In an action on a poor debtor bond, where the certificate, or record, of persons acting as justices of the peace and of the quorum, stating that they had administered the poor debtor's oath to the debtor, is introduced in evidence by the defendants, it is competent for the plaintiff to prove by parol testimony that such persons had no jurisdiction of the subject.

Two justices of the peace and of the quorum must appear at the time and place fixed in the notice from the debtor to the creditor, for the purpose of acting in the matter, before any legal act can be done. If therefore but one appear, he has no power under the statute to adjourn until a subsequent time.

And if the attorney of the creditor should consent to such adjournment by one justice, not being conformable to the statute provisions, it would still be invalid.

DEBT on a poor debtor bond, dated June 28, 1841, given by the defendants to procure the release of Samuel Burrill from arrest on an execution in favor of the plaintiffs. At the trial before WHITMAN C. J. after the bond had been read in evidence, the defendants produced and read the certificate of two justices of the peace and of the quorum of the county, dated Nov. 29, 1841, wherein they say that one of them was selected by the debtor and the other by the attorney of the plaintiffs, and that they had examined the notice and found,

"that the debtor had notified the creditors of the time and place," &c. and that they duly administered the poor debtor's oath to Samuel Burrill. The plaintiffs then offered to prove by parol testimony certain facts tending to show, that the proceedings before the justices were irregular, and that they had no jurisdiction in the case. The defendants objected to the introduction of such testimony, and contended that the record of the justices was conclusive evidence on this subject. The presiding Judge ruled, that the testimony was admissible, but before it was introduced, the defendants offered in evidence a paper signed by one of the justices, and alleged it was a part of the record of the proceedings of the justices, and again contended that this record was conclusive evidence of the facts stated therein, and that the parol evidence was inadmissible. This paper set forth, that Samuel Burrill appeared before him at his dwellinghouse on Nov. 22, 1841, and entered his application to take the benefit of the poor debtor act; that the debtor selected him, and that the attorney of the creditors selected the person, who acted as a justice with him on the 29th, as the other justice, who was not then present; that the parties, on the motion of the creditors' attorney, agreed that the application should be continued to the 25th, and from that time to the 29th of November, and that it was so done by him. The notice to the creditors was to appear on the 22d of November. The presiding Judge again ruled, that the testimony offered by the plaintiffs was admissible. The plaintiffs objected to the admissibility of the papers offered as records, and offered to prove that they were made up on the day before the trial. The Judge admitted the papers alleged to be records in evidence, and allowed the plaintiffs to show when they were made up, the defendants objecting thereto. Testimony was introduced by the plaintiffs tending to show, that the plaintiffs' attorney in the suit against Burrill did not designate any justice to act for the plaintiffs, and did not consent to the postponement to the 29th; and the defendants introduced testimony tending to prove the contrary. Both parties agreed, that but one justice had knowledge of any of the proceedings until

Nov. 29, and that the attorney of the plaintiffs did appear before the justices on the latter day, and put interrogatories to Burrill, and urged a decision in his own favor by the justices. And it did not appear that he objected to their proceedings.

One of the justices testified, that Mr. Smith, then the attorney of the plaintiffs, on Nov. 29, objected to the administering of the oath, unless the debtor would give a quitclaim deed of a supposed interest in certain real estate; that the other justice wished that the oath should then be administered; that he had himself agreed to it, but after this objection had some doubts, but should have decided to administer the oath; that there was something said about taking counsel; and that it was finally agreed by Mr. Smith, the attorney of the plaintiffs, the other justice, the debtor and himself, that the administering of the oath should be postponed for him to take counsel, and that if he was satisfied that it ought to be done, he should administer the oath to the debtor at another time without the other justice being present, and that the proceedings should be considered the same as if administered in the presence of both justices; and that in the course of a week or fortnight, having become confirmed in his opinion by consulting counsel, he administered the oath to the debtor, in conformity with the arrangement, made out the certificate and signed it, and it was afterwards signed by the other justice.

Upon all the evidence in the case, it was intimated to the defendants by the presiding Judge, that upon the law of the case, the instruction of the Court to the jury would probably be against them. Whereupon a default was entered by consent; and it was agreed, that if upon the evidence legally admissible in the case, on the one side and upon the other, the plaintiffs were entitled to recover, the default was to stand; and if not, that it should be set aside and a nonsuit entered.

The case was very fully argued in writing.

Moor, for the defendants, argued in support of these, among other positions.

The certificate, presented by the defendants, of the two justices of the peace and of the quorum, that the debtor had no-

tified the creditor according to law of the time and place of the examination and administering of the oath to the debtor, is conclusive evidence of that fact, and it is not competent for the plaintiffs to go behind their certificate, and raise subsequently any question as to the sufficiency of the notice, for the purpose of showing that the oath was improperly administered. *Cunningham* v. *Turner*, 20 Maine R. 435; *Carey* v. *Osgood*, 18 Maine R. 152; *Agry* v. *Betts*, 3 Fairf. 415; *Black* v. *Ballard*, 13 Maine R. 239; *Matthews* v. *Houghton*, 2 Fairf. 377.

The principle sustained by the cases above cited is qualified by the condition, that the justices have jurisdiction of the subject matter to which their certificate relates. *Knight* v. *Norton*, 15 Maine R. 337; *Granite Bank* v. *Treat*, 18 Maine R. 340.

The cases already cited show, that the record of the justices is equally conclusive with their original certificate. The record of the justices, acting under the poor debtor law, is made conclusive evidence of the facts most essential to their jurisdiction, viz. notice to the creditor, and the sufficiency of that notice. The same cases also show, that the record is conclusive evidence of all the facts specified in the certificate which they are authorized by the statute to give to the debtor. It would seem, that it would be equally conclusive as to the other facts, which it may recite, that appertain to the jurisdiction of the justices. They could not act in relation to the notices until they were selected, and their certificate must be conclusive as to their own selection, or it could not be so as to the giving of the notice and the effect of it.

The time when the record was made up does not vary its legal effect. It may be made up, like the records of the Court, after adjournment. *Murray* v. *Neally*, 2 Fairf. 238; *Matthews* v. *Houghton*, before cited.

It was competent for the parties to confer the power of continuing the citation upon one justice, by mutual consent. The plaintiffs are precluded from taking advantage of it, if an error, or it would be allowing them to take advantage of their own wrong. It would be permitting them to be benefited by an error

committed at their own request. *Moore* v. *Bond*, 18 Maine R. 142. The same principle will apply to the absence of the other justice on the first day. That was at the instance of the attorney of the plaintiffs and for their accommodation.

If the manner and time of the continuance were irregular, and without an appearance of the adverse party would have been of no validity, his appearance without objection, cures the irregularities, and saves the jurisdiction. 3 Pick. 408; 7 Johns. R. 381; 9 Johns R. 136. The object of the proceedings is to afford the creditor the opportunity of appearing and examining the debtor, and if he avails himself of the opportunity, it cures the defects in the preliminary steps. *Moore* v. *Bond*, before cited.

The same principles are applicable to the administering of the oath by one justice after the day of the examination. Both justices decided that the oath should be administered. The performance of the act is necessarily by one. It could never have been intended that each justice should administer the oath.

Wells, for the plaintiff, said that the statute requires, that the court for the discharge of poor debtors should be organized by the choice of two justices. Rev. St. c. 148, § 46. One has no power to act alone, but in the single instance provided for in the statute, a second adjournment, if but one should be present, at the time fixed by the first adjournment. § 6, & 24. The adjournment, with this exception must be by the justices.

It is argued, that whatever is said in the certificate or record is conclusive, and can neither be contradicted nor explained by testimony. If such be the fact, as it respects the sufficiency of the notice, it is not so as to the jurisdiction or organization of the Court. *Granite Bank* v. *Treat*, 18 Maine R. 340. And it is necessary that such should be the case to furnish some security against fraud and ignorance. Here we have a certificate from which it might be supposed, so evasively is it drawn, that the time appointed in the notice to the creditor was on the 29th of November, and that the ex-

amination took place and the oath was administered on the same day. And yet it appears from the oaths of these very justices, that the time appointed in the notice was the 22d, and that the oath was not administered until some indefinite time a week or two after the 29th, and that the two justices, signing the certificate, were not together saving on the 29th, and that one of them was never informed of his being selected by any person until that day. The Court never had any legal existence, and if it ever had, it terminated before the oath was administered. *Knight* v. *Norton*, 15 Maine R. 337; *Hanson* v. *Dyer*, 17 Maine R. 96.

But the certificate, if the justices had power to act, is wholly insufficient. It neither conforms to the requirement of the statute nor to the truth. It merely says, that "the debtor had notified the creditors of the time and place."

But the statute form of the certificate of discharge does not show the manner of the selection of the justices, nor of their organization, and contemplates that they should be shown in some other manner. The question of jurisdiction is necessarily open to proof. The decisions referred to simply show, that when the Court is organized, and have jurisdiction, they are the exclusive judges, whether the notice is conformable to the statute requirements.

The other papers introduced, are not evidence, and ought not to be admitted. They do not pretend to be the act of but one justice, and have no connection with each other, or with the certificate of both. But if admissible they show no organization of the Court, or power to act. They do not however purport to be copies of records, and are mere loose certificates, and on that ground inadmissible. *Owen* v. *Boyle*, 15 Maine R. 132.

But it is said that the gentleman, who then acted as attorney of the plaintiffs, consented to the course of proceedings adopted by the defendants and the justices. He is not the person of whom they should take counsel. If he had authority to dispense with the requirements of the law, and to discharge this bond, without payment or a compliance with the

law, there should be some consideration for it, as it was merely by parol. There was none. Without this consent, the justices had no power to act, and the defendants are attempting to support the proceedings by the same kind of proof they object to on our part. But were the proof admissible, it amounts to nothing more, than that they all acted under a mistake of the law. His consent could give no authority to these men to act as a Court, when they had not been organized as such, and when it was too late to do so. If the Court had been duly organized on the 22d, they had no power to adjourn as one of them did to the 29th, and there was no adjournment after the latter day, and all acts afterwards were void. No consent could render such proceedings valid as the doings of a Court. As well might such consent render the proceedings of these men valid as judgments, if they should undertake to act as Judges of this Court, or render a judgment valid, given in vacation, and without process or pleadings. The agreements of the parties as to their own conduct in Court, are not binding unless in writing. *Smith* v. *Wadleigh*, 17 Maine R. 353. The attorney had no power to bind the plaintiffs by any such consent. *Jenney* v. *Delesdernier*, 20 Maine R. 183.

The opinion of the Court was drawn up by

TENNEY J. — This is an action upon a bond given to liberate from arrest on execution, the principal obligor. The defence relied upon is, that the condition of the bond has been fulfilled, the debtor having been legally admitted to take the poor debtor's oath, within six months from its execution. The defendants introduced the certificate of two justices of the peace and of the quorum, in the form prescribed by law, and also introduced certain papers as records of the proceedings of the same justices, in relation to the discharge of the debtor, which documents the counsel for the defendants contended were conclusive evidence of the facts, therein stated; but the plaintiffs were permitted to introduce parol testimony for the purpose of showing, that the justices, who signed the certifi-

cate, had no jurisdiction over the matter, against the objection of the defendants.

If the case before us presented a question touching the form of the notice to the creditors, the authority from which it issued or the service of the same; or if objections were made to the propriety of administering the oath, on account of the insufficiency of the proof adduced, the cases cited are authority, that the certificate is conclusive. But the objection, which we are called upon to consider, relates to an earlier stage of the proceedings. It is denied that the justices who signed the certificate were a tribunal possessing any power to examine the notice, or the return of the officer who served it, to take the examination, or to administer the oath.

It must appear, that the justices of the peace and the quorum, who signed the certificate, had jurisdiction, while it has been held, that their certificate and their record was evidence of their jurisdiction, it has also been held, that neither was conclusive evidence; and that it was competent for the creditor to prove that they had no authority to proceed in the matter. In the case cited from 3 Pick. 404, the Court say, "where there is no jurisdiction, the proceedings may be avoided by plea or evidence." In *Granite Bank* v. *Treat*, 18 Maine R. 340, it is said, "The certificate, however, would not be conclusive on this point, and it would be competent for the plaintiffs to prove that they had no jurisdiction." Suppose in a case of this kind, the plaintiffs should offer to prove by competent evidence, if any was admissible for that purpose, that the commissions of the magistrates had expired, and had not been renewed, would it be contended, that their record would be conclusive? That the persons composing the tribunal should be justices of the peace and of the quorum, and should also be selected according to the statute, are equally material. It cannot be admitted, that persons may assume to act judicially as a tribunal of inferior jurisdiction, without in fact having the least authority, and protect their acts by a jurisdiction conclusively established by their own records.

Is it shown, that the justices had not jurisdiction at the time

the oath was administered to the debtor? The citation to the creditors, the certificate of the two justices, dated Nov. 29, 1841, the paper signed by Nathan Fowler, justice of the peace and quorum, and another paper signed by the two justices, are in the case without objection. From these there can be no doubt, that all the proceedings were under the citation returnable at the office of Nathan Fowler, Esq. on the 22d day of November, 1841. The argument proceeds upon no other ground, and the testimony of all the witnesses confirm the fact.

The statute contemplates, that on the return of the citation and at the time fixed therein, a tribunal shall be constituted as provided in chap. 148, section 47, of the Revised Statutes. The proceedings will be invalid, unless the steps there pointed out shall be followed. At the return day of the citation in the case before us, the debtor selected a justice of the peace and of the quorum, and notified him of his wishes to proceed to the examination. No other justice was present or notified of his selection, if a selection was made. There was no tribunal at the time and place designated for the examination, clothed with the least jurisdiction over the subject.

Could the justice so selected adjourn the proceedings to a future day? Section 24 of chapter 148, provides, that the examination shall be had before two disinterested justices of the peace and of the quorum for the county, and the justices shall have the like power to adjourn as is provided in § 6, which authorizes the justices to adjourn from time to time, if they see cause; and if either of said justices shall not be present at such adjournment, the other may adjourn to another time. The power is given to one justice to adjourn only in this single instance, and that is in a case, where there has been organized a tribunal in every respect competent to act. A Court may adjourn its sittings. A justice of the peace may adjourn proceedings over which he has jurisdiction. But a tribunal, which has never had a being cannot be adjourned. One justice of the peace and of the quorum, though selected by one of the parties, has no more jurisdiction to examine the citation, and to commence proceedings under it, than the offi-

cer who made service of it, and can have no power to adjourn, unless the statute confers it upon him. The authority to adjourn for the purpose of making a selection of another justice, and giving notice to him, and procuring his attendance, is not given to the one who may be selected.

Is the defect cured by the consent of the creditor's attorney, if he did consent to proceed? The jurisdiction of the justices is enacted by the statute, and not by the consent of the parties. If the proceedings were in every other respect regular, excepting that one of the justices was not of the quorum, and it was expressly agreed, that he should act, could their record be upheld? If a justice of the peace rendered a judgment in a civil action, where the debt or damage was one hundred dollars, and it appeared by the record, that he had jurisdiction over the matter by consent of the parties, is not that judgment erroneous? Can a judgment of this Court be sustained rendered in an action, it appearing to have been done by consent of parties? If the consent of parties would give two justices of the peace and of the quorum jurisdiction over the matter on the 29th November, 1841, when the citation was made returnable on the 22d of the same November, we do not perceive the necessity of any citation, to authorize the justices to act in the premises, provided the parties consent to proceed.

There is reason to suppose, that the debtor believed that he was proceeding legally, and it may be regretted that he was misled, but the plain requirements of the statutes cannot be disregarded.

Default must stand.

WILLIAM JOHNSON *versus* SAMUEL BICKNELL *& al.*

Where the father of a minor son, with his assent, although not so expressed in the agreement, transferred his services to the plaintiff for the term of three years, for a consideration paid wholly to the father, and while the minor was *de facto* the servant of the plaintiff, he performed labor and services for the defendants, at their request, and where neither the father nor the minor son set up any claim to compensation therefor, *it was held*, that the plaintiff might recover of the defendants the value of such labor and services.

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

Assumpsit to recover the sum of $22,50, alleged to be due to him for the labor and services of his servant, Samuel Johnson, performed for the defendants, and at their request.

To show that he was entitled to the services of Samuel Johnson, the plaintiff introduced in evidence a paper of this tenor. "Bloomfield, Nov. 30, 1839. Memorandum of an agreement made this day, John Johnson on one part, and William Johnson on the other. Know all men by these presents, that I, John Johnson, in consideration of one hundred dollars to be paid me by William Johnson, agree to sell to said William Johnson the remainder of my son, Samuel Johnson's time, until the said Samuel is one and twenty years of age, it being three years and two months, the said William Johnson to have the whole control of the said Samuel, until he, the said Samuel, becomes of lawful age to act for himself. The said William agrees to furnish the said Samuel with all necessary clothing without any expense to said John Johnson. Received payment by note for the above hundred dollars. John Johnson."

The District Judge ruled that the plaintiff could not maintain the action. The plaintiff then offered to prove, that the agreement was made by the said John and William Johnson at the request of the said Samuel, and that said Samuel assented to it at the time the agreement was made, and has ever since continued to give his assent to it. The defendants objected to the admission of this evidence, and the Judge refused to receive it. The plaintiff was nonsuited, and then filed exceptions to the ruling of the Judge.

Leavitt, for the plaintiff, cited and relied on the case *Day* v. *Everett*, 7 Mass. R. 145, as directly in point.

J. S. Abbott, for the defendant, conceded that the case cited for the plaintiff was in point, but contended, that it was not good law.

It is not true, that the father has a right to the son's time, while a minor, without performing the corresponding duties. He has no legal right to sell his son's time. 13 Maine R. 151; 8 Johns. R. 328; 1 Mason, 78, 85. The paper does not disclose the consent of the son, and the contract is therefore void. 6 Greenl. 465.

The opinion of the Court was by

WHITMAN C. J. — This is an action brought by the plaintiff to recover pay for the services of one Samuel Johnson, a minor, who had been placed at service by his father with the plaintiff. The defendants contend, that the plaintiff has no right to recover, upon the ground that the father of Samuel had no right to put him to service for the three last years of his minority, reserving to himself a stipulated compensation therefor. Samuel was *de facto* the servant of the plaintiff at the time the service was performed for the defendants. The service was performed at their request. It does not appear, that the father or Samuel laid any claim to compensation for the services; or that the defendants had paid or claimed a right, or pretended a liability to pay any one else therefor. What possible concern can they have with the nature or efficacy or inefficacy of the contract between the father and the plaintiff. There can be no pretence, that if the defendants pay the plaintiff, they will be answerable again for the amount, either to the father or to the son. In the first place, it does not appear that either makes any such claim, and secondly, if they should do so the contract with the father by the plaintiff, would be an estoppel.

Exceptions sustained and new trial granted.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PISCATAQUIS,

ARGUED AT JUNE TERM, 1843.

OLIVER CROSBY *versus* SAMUEL WYATT.

Where it appears upon the face of a promissory note, that one of the makers is principal and that the others are sureties, and one of the latter, having paid the note, claims contribution of the other, the character in which the parties signed will be presumed to be correctly exhibited by it; but the contrary may be proved by the other party.

Where it was the custom of a New Hampshire Bank to receive payments of interest from time to time on notes in advance, and suffer them to remain, and still hold the sureties, and this custom was fully known to both principal and sureties, and they come into this State to enforce a contract, made in that State, arising out of a note to such bank whereon they are sureties, and interest on the note in advance has been taken of the principal, the sureties will not be considered as discharged by the taking of such interest in advance.

If a suit be brought by the payee against one of two sureties on a note before the statute of limitations could be successfully interposed as a defence by either party, and judgment is obtained therein after the time when the statute would have furnished a defence in a suit then commenced by the maker, and this judgment is satisfied, the same statute would not prevent the maintenance of an action against the co-surety for contribution, brought within six years from the time of payment.

Where the debtor, at the time the cause of action accrued, was residing out of the State, proof that since that time, he had often been a few miles within the limits of this State on business, with attachable personal property, which was removed on his return to his own dwelling in another State, without any proof that the plaintiff had knowledge of it, is not sufficient to take the case out of the operation of the exception contained in the ninth section of the statute of limitations of 1821, c. 62.

ASSUMPSIT. The writ is dated May 29, 1841. With the general issue, the statute of limitations is pleaded.

Prior to 1816 Oliver Crosby, the plaintiff, and Jesse Varney had been partners in business in Dover in the State of New Hampshire, and on July 25, 1816, they, severally, as principals, and Mann and Chandler, as sureties, made their note to the Strafford Bank, located at Dover, for one thousand dollars, and it was discounted by the bank. On May 25, 1821, this note had been reduced by payments to the sum of $600,00, and was then taken up, and the remaining $600,00 were paid by a note to the bank, dated that day, and signed by Varney, as principal, and by Crosby and Chandler as sureties. On May 25, 1825, this last note was taken up by another for the same amount, bearing date March 28, 1825, to which time the interest had been paid, signed by Jesse Varney, as principal, and by the present plaintiff and defendant as sureties. Each of these notes was made payable in sixty days. All these persons resided in Dover until April, 1821, when Crosby removed to Atkinson in the State of Maine, where he has since lived. The others have continued to live in Dover. On Feb. 3, 1830, the Strafford Bank commenced a suit upon this note, several payments of interest having been made by Varney upon it, and sometimes in advance, against Crosby, and recovered judgment against him in the Supreme Judicial Court, for the county of York, at the April Term, 1832. (See 8 Greenl. 191.) On May 28, 1832, Crosby paid the amount of this judgment, in New Hampshire, to the bank, being then $835,70, and on the same day demanded of Wyatt, at Dover, payment of one half the sum he had thus paid. That bank "has been in the habit of discounting accommodation notes made payable to said bank in 60 days, and when said notes have become due, the custom has been to receive checks and interest, and in many cases merely the interest for the next 60 days, and to indorse the same on said notes, and to continue to indorse every 60 days, or whenever payments are made, without releasing the sureties; it has been frequently the case that notes have remained several years, and nothing but interest

been paid upon them. It is understood that the note is to lie during the time for which interest is paid, but either principal or sureties have liberty to take up the note in the mean time." Varney, Crosby and Wyatt, severally, knew of this custom at the bank, and had done business there in that mode. Varney was in good credit until May, 1828, when he failed, and has since been without property. It would seem that Wyatt had been within the State of Maine within six years next after the payment by Crosby, but no copy of the deposition referred to is found in the case.

Rowe, for the defendant, remarked that the action by one surety against another was borrowed from equity. Where there is an equality of liability, there should be an equality of burden. Where equity says there should be a contribution, the law implies a promise. 14 Ves. 163; 1 Cox, 318; 2 B. & P. 270; 12 Mass. R. 102. But if one surety become such at the request of another, the latter cannot claim contribution. 2 Esp. R. 478.

To render the defendant liable, the plaintiff must show both a moral obligation, and a legal liability. He has done neither. This note grew out of one whereon the plaintiff was a principal. The plaintiff has never for a moment been discharged from that liability, and in making this payment, he was in fact but paying the joint debt of himself and Varney. The defendant's name was given for an extension of time, and not for a new loan. Whatever the form of the transaction may be, it makes no difference. The Court will look through forms to facts. 14 Mass. R. 163; 12 Mass. R. 102; 1 Cox, 318.

If the defendant had ever been liable to contribution, he was discharged by the statute of limitations before the payment by the plaintiff to the bank was made. The contract was made in New Hampshire, and the laws of that State must govern, and by them the defendant is discharged. 2 Kent, 459; 2 Mason, 157; 1 East, 6; 5 East, 124; 13 Mass. R. 1. More than six years had elapsed before the plaintiff's payment, and the defendant has done no act since to make himself liable. And by the laws of New Hampshire no payments or promises

by one of several joint promisors, can take the contract out of the operation of the statute of limitations as to the others. *Exeter Bank* v. *Sullivan*, 6 N. H. R. 124. On the day of payment, the bank could have maintained no action against the defendant by the laws of New Hampshire, and by the same laws the plaintiff could do no act, which would create a new liability.

By the laws of New Hampshire, also, the defendant was discharged by giving day of payment to the principal.

The defendant too was discharged by the statute of limitations of Maine. Six years had elapsed after the plaintiff paid the money, long before this suit was brought, and the defendant before that time, had been in this State, subject to process.

J. Appleton, on the same side, cited 4 Ham. 358; 2 Greenl. 42; 6 Gill & John. 256; 21 Pick. 195. And also, in the close, replied to the arguments for the plaintiff.

Ingersoll and *J. Crosby* argued for the defendants, contending:

That the plaintiff and defendant stood as co-sureties for Varney, and not as principal and surety. There is no evidence that the note for a thousand dollars was a partnership note, and there is evidence that long before the last note was given, the plaintiff had removed to the then County of Penobscot, and that Varney had continued in New Hampshire. The first $600,00 note, with the balance in cash, was a full and complete payment of the first note. 10 Pick. 121; 2 Metc. 157; 2 Greenl. 121; 13 Pick. 426; 15 Mass. R. 69.

The note on its face shows, that Varney was principal, and the plaintiff and defendant his sureties. There is not only an entire absence of evidence to show any different relation, but it would not be competent for the defendant to introduce it. 4 Greenl. 195; 19 Maine R. 244; 2 Stark. Ev. 548; 5 Taunt. 192; 10 B. & C. 578; 6 Mass. R. 519; 7 Mass. R. 518.

The defendant was not discharged by the reception of interest in advance from Varney. The case *Strafford Bank* v. *Crosby*, 8 Greenl. 191, is conclusive. It was the same trans-

action, and there is no material variance in the evidence in the two cases. *Freeman's Bank* v. *Rollins*, 13 Maine R. 202; *Oxford Bank* v. *Lewis*, 8 Pick. 450; *Central Bank* v. *Willard*, 17 Pick. 150; 2 N. H. R. 448; 3 N. H. R. 231; 5 N. H. R. 99. That it should operate as a discharge of a surety the holder of the note should enter into a contract which should disable him from proceeding against the principal, or enable him in equity to claim an injunction. 15 Maine R. 249; 2 Metc. 176; 16 Maine R. 72; 10 Pick. 129; 20 Maine R. 235. To have that effect, too, the contract must be founded upon an adequate consideration. 16 Maine R. 72; 19 Maine R. 88.

The statute of limitations would have furnished no defence to Wyatt in this State, if at the time of the signature of the note he had, like Crosby, been an inhabitant of this State when the note was made, and so continued until the present suit was brought, either as against the bank, or his co-surety. And his remaining in New Hampshire could in this respect give him no additional advantage. 17 Mass. R. 55; 2 Mason, 151; 11 Pick. 36; 2 Mass. R. 84; 20 Pick. 305. But if the statute of limitations would have furnished a defence in a suit by the bank, it could not in a suit by Crosby. The cause of action does not accrue until payment is made by the surety. 11 Mass. R. 361; 19 Maine R. 244; 4 Greenl. 195; 1 Metc. 381. The defendant was not discharged by coming within the State in the manner he did. 16 Pick. 359. The same reasons, and the same authorities, now pressed upon the attention of the Court by the defendant on this point, would apply with as much force, if this suit had been brought against Varney, the principal.

The opinion of the Court was drawn up by

Shepley J. — The plaintiff has instituted this suit to recover one half of the amount of money, which he paid to the Strafford Bank, to satisfy a judgment recovered against him on a promissory note made on March 28, 1825, by Jesse Varney, as principal, and by the plaintiff and defendant as his sureties.

It is contended in defence, that the plaintiff was in fact a principal on the note, although he signed it as a surety. From the testimony of the cashier of that bank it appears, that prior to the year 1816, Crosby and Varney were partners in business in the town of Dover, N. H., the then place of residence and of business of all the parties to the note; that on the twenty-fifth day of July of that year Crosby and Varney made their note to the bank as principals, with John Mann and Philemon Chandler as their sureties, for one thousand dollars; and that note remained in the bank on May 25, 1821, having been reduced by payments in part to the sum of $619,24, when it was taken up by a new note for $600, the balance having been paid in cash, signed by Varney as principal and by Crosby and Philemon Chandler as sureties. This last note remained in the bank on May 25, 1825, when it was taken up by the note first named. The character, in which the parties signed that note, is presumed to be correctly exhibited by it, until the contrary be proved. Are the facts, that the loan of 1816 was made to Varney and Crosby, and that they were then partners in business, sufficient to destroy that presumption, when considered in connexion with the other testimony in the case? It appears, that part of the loan had been paid, and that Varney became the principal and Crosby a surety on a note to pay the residue as early as the year 1821; and that Crosby removed from Dover to the town of Atkinson in this State, in 1820 or 1821, and that he has since continued to reside there. Varney therefore became principal for the residue of the loan about the time or soon after Crosby's removal. When the last note was made, Crosby had been absent from Dover as a place of residence for four or five years. During that time Varney had paid the interest on the second note. If these facts would not be sufficient to authorize the inference, that the joint interest of Varney and Crosby in the original loan had been extinguished, and that Varney had assumed the payment of the balance due before the defendant signed the last note as his surety, they would at least be sufficient to neutralize the influence of the facts before referred to, and to leave the case with-

out satisfactory proof, that the note did not exhibit the true relation of those who signed it. The testimony does not therefore rebut the presumption of law, and establish the fact, that Crosby was in fact a principal upon the last note.

It is further contended, that the defendant was discharged by the bank by its giving time to the principal; and also by the statute of limitations of that State. The only proof, that the bank gave time to the principal, arises from its permitting the note to remain uncollected, and from its having received payments of interest upon it according to the usages of the bank. These usages appear to have been well known to the defendant. Under such circumstances the defendant would not be discharged, as the law appears to have been formerly administered in New Hampshire as well as in this State. In the case of *Bank* v. *Woodward*, 5 N. H. R. 99, the opinion says, "the note was originally payable on demand, although probably interest was paid for sixty days in advance with an understanding between the parties, that the money was not to be demanded within that time, unless the safety of the debt, or the situation of the affairs of the bank, should make a demand necessary. And the interest might have been paid in advance at any subsequent period, on the same terms and with a like understanding, without doing any wrong to the surety, and without discharging him from his liability upon the note." In a recent decision made between these parties in a case arising out of the same facts, the payment of the interest in advance was considered as *prima facie* evidence of a contract for the delay of payment of the principal during the period for which the interest was so paid. *Crosby* v. *Wyatt*, 10 N. H. R. 318. But such has never been admitted to be the effect here. If it had been, or their law should be considered as decisive, the long continued usage of the bank, well known to both the sureties, would seem to be as satisfactory evidence of an assent on their part to the agreement for delay, as the payment of interest in advance would be of such an agreement.

A payment of part of the debt by one of several joint debtors would not, as the law has been decided to be in New

Hampshire, authorize the inference of a new promise by all. *Exeter Bank* v. *Sullivan*, 6 N. H. R. 124. While it would have that effect in Massachusetts and in this State. *Frye* v. *Barker*, 4 Pick. 382; *Getchell* v. *Heald*, 7 Greenl. 26. But the defendant was not discharged by the statute of limitations of New Hampshire, when the suit was commenced by the bank against the plaintiff on February 3, 1830. If therefore the plaintiff had been then resident in New Hampshire, he could not have succeeded in a defence for himself or his fellow surety, founded upon the statute of limitations. As the bank did not recover judgment against him until the year 1832, and as he did not pay that judgment until the year 1833, it is contended, that he did not then relieve the defendant from any existing liability; because he could then have interposed the statute of limitations with success; and that the plaintiff is not therefore entitled to recover. If this reasoning were admitted to be sound, the result would be, that one of two sureties might be compelled by law to pay the whole debt, and yet could have no legal claim for contribution upon the other, unless he could shew, that the creditor had a legal claim upon that other, not only, when the debt was contracted, but when it was paid. And such a doctrine would enable the creditor frequently to impose the whole burden upon one of the sureties by omitting to commence a suit against the other, until he could successfully interpose the statute of limitations. Such a course of reasoning arises out of an imperfect statement of the implied contract between the two sureties. That contract is, that each surety will pay one half of the debt if the principal neglects to pay it, or will save his co-surety harmless from injury by his being obliged through the neglect of the other surety to pay more than his half of it. The obligation of one surety to repay to another, who has paid the whole debt, a moiety of it, does not arise solely out of the consideration, that he has thereby been relieved of a burden, but also from the consideration, that he engaged to indemnify him against loss arising from his own neglect to pay his own share, in case the principal should neglect to pay. It is no sufficient

defence therefore for the defendant to show, that he could not have been compelled by law to pay any part of that note, when it was paid by the plaintiff; for that would not show, that he had not broken his implied contract with the plaintiff to save him from loss by his being compelled to pay that half of the note, which he ought himself to have paid. The plaintiff's right of action for the breach of that engagement first accrued upon payment of the whole debt to the bank in the year 1833. The defendant was then residing in New Hampshire. The testimony, which proves, that since that time he had often been a few miles within the limits of this State on business with attachable personal property, which was removed again from the State on his return to his own dwelling, without any proof that the plaintiff had any knowledge of it, is not sufficient to exclude the case from the exception contained in c. 62, § 9. *Little* v. *Blunt,* 16 Pick. 359. It is not perceived, that any of the points made in the defence can be successfully maintained.

Judgment on the default.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PENOBSCOT,

ARGUED MAY TERM, 1843.

AMOS M. ROBERTS *versus* BENJAMIN BOURNE.

An attachment of all the debtor's "right, title and interest in and to any real estate in the County of P." is valid, and sufficient to hold all his real estate in that county, subject to attachment in that suit.

And such language is effectual to create an attachment of the estate, when the debtor has made a conveyance of his title to another person, but the deed has not been recorded.

If the debtor, who had taken a deed of the premises, made prior to the attachment, but not recorded until afterwards, has conveyed the same premises to another, and the last deed was recorded before the attachment, this cannot be regarded as giving notice of such unrecorded deed.

THIS case was argued in 1841, when the present Reporter did not hold the office, and no papers, except the opinion, came into his hands. The facts, however, sufficiently appear in the opinion of the Court.

Moody, for the demandant.

Kent & Cutting, for the tenant.

The opinion of the Court was delivered at the October Term, 1843, as drawn up by

SHEPLEY J. — It appears from the agreed statement, that John Bourne on the 21st of February, 1835, conveyed the

premises to David Greeley ; who on the same day reconveyed them in mortgage to Bourne. Both these conveyances were recorded in March following. Greeley on the 12th of August, then next by deed of release conveyed his interest to Ransom Clark, but this deed was not recorded until the 18th of August, 1837. And it does not appear, that he entered into possession of the premises. Clark by deed bearing date on the 8th of August, 1835, four days before he had acquired any title from Greeley, conveyed to the defendant ; and this deed was recorded on the 13th day of August following. On the first day of January, 1836, Robert Farley caused all Greeley's "right, title, and interest, in and to any real estate in the county of Penobscot" to be attached ; and afterwards obtained a judgment and caused Greeley's right in equity to be seized and sold, and the plaintiff became the purchaser.

It was decided in *Crosby* v. *Allyn*, 5 Greenl. 458, that an attachment of all the debtor's right, title and interest to real estate in Belfast and Thorndike, was valid. In *Whitaker* v. *Sumner*, 9 Pick. 310, the officer returned, "I attach all the right, title and interest in and to a certain piece or parcel of land with the buildings thereon situate in Columbia street at the southerly part of Boston ; and one piece of land and the buildings thereon standing being situate in Pleasant street in said Boston, which the within named Benjamin Huntington has to the estates before mentioned." And the Court say, "the return of the attachment on the plaintiff's writ against Huntington has as much certainty as returns in general of attachments on mesne process" ; and it was decided to be good. In *Taylor* v. *Mixter*, 11 Pick. 341, the return was, "I have attached all the right, title and interest, which the within named Ruggles has to his homestead farm, on which he now dwells, together with all the land thereto belonging lying in Enfield in said county. Also all the right and interest, which said Ruggles has to any lands lying in Enfield aforesaid." It was decided to be a valid attachment of any other lands in Enfield, which might not be a part of the farm. These cases sufficiently prove, that an attachment is good, though made in

as general language as the officer used in this case. And that it has been a common practice sanctioned by the courts, for officers, when they intended to attach certain real estate as the property of the debtor, to make use of the words "right, title and interest" in and to it, for the purpose of accomplishing it. These words were probably introduced with a design to enlarge and not to diminish the effect of an attachment of a farm or tract of land, so as to secure not only the fee, but whatever right the debtor might have in it, as an estate for life, or for years, or by way of contract in writing, or the right to redeem it. In all these cases, the debtor had not conveyed the title to another, but was the owner at the time of the attachment.

And it is contended, that such language is not effectual to create an attachment of the estate, when the debtor has conveyed his title to another person, although such conveyance has not been recorded. The case of *Adams* v. *Cuddy*, 13 Pick. 460, is relied upon as exhibiting a close analogy to the present case. It was in that case decided, when the owner of land in Boston had conveyed it to another person, describing it by metes and bounds, and subsequently executed a second deed conveying "all the right and title to the land I have in Boston," which was recorded before the first; that the land conveyed by the first was not within the description of the estate conveyed in the second deed, and so did not pass to the second grantee. There could be no doubt of the intention of the grantor in making the second deed. The first was effectual against him, and he could not be presumed to intend to commit a fraud upon one of his two grantees by conveying the land a second time. And there was nothing in the deed to destroy the effect of such a presumption. But there is no such presumption of law operating against a creditor or an officer. They are not placed in a similar position; and the law permits them to avail themselves of the neglect of a grantee to record his deed without imputing to them any fraudulent design. And there is no similar intention to be discovered in such grantor and the officer or creditor. Does the offi-

cer, when he uses the words right, title and interest in and to land, intend to attach only, what the debtor has never conveyed away? Is not the intention rather to attach all the right title and interest, which by any words may be liable to be attached as the debtor's estate? Will it be contended, that an attachment of all the debtor's right, title and interest in and to a farm described by metes and bounds would not be good against a prior conveyance of it not recorded? The intention in such a case could not be doubted. Yet if a technical construction of the officer's language is to prevail, it may be truly said, that the debtor himself had no legal interest and therefore an attachment of his right, title and interest in and to it amounted to nothing. And if such an attachment were made of an estate fraudulently conveyed by the debtor, and the conveyance recorded before the attachment, the result would be the same. The Court say, in *Taylor* v. *Mixter*, "had the tenant caused an attachment of the debtor's *interest* in twenty or a hundred different parcels of estate to be made, it is not contended, that the attachment would not have been effectual, had they been specifically returned." It is not easy to imagine a case in which there would be less reason or more danger in considering language to be used with technical accuracy, than in an officer's return upon a writ. The very idea of doing so almost deprives it of a sober consideration. And it would be in principle opposed to the case of *M'Mechan* v. *Griffing*, 9 Pick. 537. It appeared in that case, that the five sons of Timothy Griffing undertook to divide their late father's estate among themselves; and that the division was made by executing deeds of release to each other on the 9th of May, 1821, which were not recorded until the 5th of March, 1822. And that the petitioner attached the son Timothy's "undivided share" on the 12th of February, 1822. The decision was, "that the plaintiff's attachment of February 12, 1822, was a valid attachment of Timothy Griffing's undivided share of the premises." And yet at the time of the attachment he had in himself no undivided share. A conclusive objection to all the reasoning against the validity and effect of the attachment in

the present case will be found in the statute, c. 36, § 1, which declares, that no conveyance of lands shall be effectual against any other but the grantor and his heirs, unless the same be acknowledged and recorded. The deed therefore from Greeley to Clark, not having been recorded, must be considered as inoperative against all others but Greeley and his heirs. So far as he and they were concerned, he had no interest at the time of the attachment; but so far as others were concerned he had in judgment of the law "a right, title and interest in and to it," because the deed had not been recorded. If there had been no conveyance, the case of *Crosby* v. *Allyn*, decides that the attachment would have been good. And the statute decides, that as to all but the grantor and his heirs, the deed to Clark shall not be effectual; and the attachment is therefore, as respects the officer, the creditor, and the plaintiff, as effectual, as it would have been, if no such deed had been in existence.

It is next contended, that the record of the deed from Clark to the defendant, made before the attachment, gave notice of the conveyance from Greeley to Clark. But the fact, that Clark had conveyed the premises to the defendant, would not afford one, who wished to purchase them of Greeley, any satisfactory evidence, that Clark purchased of Greeley or had a right to convey to the defendant. The record cannot be regarded as giving notice of any facts not stated in it, or not to be expected in the ordinary course of business to be found in it. In the case of *Bates* v. *Norcross*, 14 Pick. 231, it was decided, that the record of a conveyance is only notice to after purchasers under the same grantor.

It is said also, that the defendant by proving the execution and record of his deed performed all which the statute required of him, and that he therefore obtained a perfect title. And he did do all required of him to secure to himself all the title, which his grantor could convey. But that did not relieve him, if he would be careful to obtain a perfect title, from the necessity of making an examination into the title of his grantor. Again, it is said, that the title vested in Clark

without any record of his deed. And it did so as between the parties to that deed, but the statute deprives it of any legal effect so far as others are concerned.

Judgment for the plaintiff.

SAMUEL VEAZIE & *al. versus* RUFUS P. PARKER.

An attachment of all the debtor's "right, title, and interest in and to any real estate in the County of P." is valid, and sufficient to hold all his real estate within the county, subject to attachment in that suit.

And such language is effectual to create an attachment of the estate, when the debtor has made a conveyance of his title to another person, but the deed has not been recorded.

Where the tenant, who received a deed from the debtor prior to the attachment, but did not record it until afterwards, gave back a mortgage to his grantor at the same time, and this mortgage was recorded before the attachment, the record of the mortgage cannot be considered as notice of the unrecorded deed.

When the person in possession is other than the grantee, it is necessary that there should be a visible change which should indicate to others that there had been a sale, to have the effect of giving notice to a subsequent purchaser or attaching creditor. Therefore where one, who had been a tenant of the grantor before the giving of the unrecorded deed, attorned to the grantee at the time it was given, and remained in possession afterwards until after the attachment, such possession cannot furnish notice of the conveyance.

WRIT of entry. Statement of facts by the parties. From this statement, it appeared, that both parties claim under Joel Hills. The title of the demandants was by deed from the Casco Bank, March 1, 1839; and the title of the bank was by virtue of an attachment of all right, title and interest which Hills had to any real estate in the County of Penobscot, wherein the land lies, made on Jan. 25, 1836, on a writ in favor of the bank against Hills and others; and a due and seasonable levy of their execution on the demanded premises, Dec. 22, 1838, and a seasonable record thereof.

The tenant claimed under a deed from Hills bearing date November 16, 1835, recorded July 13, 1837. On the same

day the deed was made, Parker mortgaged back the premises to Hills, and this mortgage was recorded on that day, and has not yet been discharged.

Hills never occupied the premises, consisting of a dwelling-house and small tract of land, personally, and one Stewart was in possession as his tenant prior to the date of the deed to Parker. "At the time of said conveyance said Stewart attorned to the defendant." "Previous to the attachment, the defendant hauled timber for a barn frame upon the premises which, subsequent to the attachment, was by him erected." Sometime after the attachment Parker moved into the house, and occupied it personally until after the commencement of this action.

It was agreed, that the Court might render such judgment, as in their opinion would be conformable to law, on the statement of facts.

Cutting argued for the demandants, contending: That a general attachment was sufficient. It is not necessary, that the lots of land attached should be particularly described. The record title is the title intended in attachments.

The demandants have the record title. The recording of the mortgage is not notice to us. After tracing the title on the records into Hills, we have nothing to do, but to ascertain whether he had conveyed, when we made our attachment. *Connecticut* v. *Bradish*, 14 Mass. R. 296; *Trull* v. *Bigelow*, 16 Mass. R. 406.

The burthen of proof is on the tenant to show implied notice of the conveyance from Hills to him. The facts stated in the case are wholly insufficient for that purpose. The facts must be such as to leave no reasonable doubt of a conveyance. *M'Mechan* v. *Griffing*, 3 Pick. 149; *Norcross* v. *Widgery*, 2 Mass. R. 508; *Lawrence* v. *Tucker*, 7 Greenl. 195; *Hewes* v. *Wiswell*, 8 Greenl. 94.

Hobbs argued for the tenant, contending, among other grounds, that the Casco Bank, as attaching creditor, was in no better situation than a grantee at the time of the attachment.

Kent v. *Plummer*, 7 Greenl. 464; *Brown* v. *Maine Bank*, 11 Mass. R. 153; *Priest* v. *Rice*, 1 Pick. 164.

By a deed with this description, the grantee would have taken nothing but what property Hills had in the premises at the time the deed was executed. *Adams* v. *Cuddy*, 13 Pick. 460; *Blanchard* v. *Colburn*, 16 Mass. R. 345.

The bank was bound to take notice of all the records, and by examining them, there would have been found a deed of mortgage, recorded before the attachment, showing that a conveyance had been made by Hills to Parker. 2 Hilliard's Abr. 427; *Newhall* v. *Burt*, 7 Pick. 157; *Newhall* v. *Pierce*, 5 Pick. 450; *Trull* v. *Bigelow*, 16 Mass. R. 406; 15 Wend. 588.

There was sufficient notice of the deed by Hills to Parker. All that is necessary is, that there should be sufficient facts and circumstances to put a prudent man upon his guard. *Farnsworth* v. *Child*, 4 Mass. R. 636; *Porter* v. *Cole*, 4 Greenl. 20; *Prescott* v. *Heard*, 10 Mass. R. 60; *Dudley* v. *Sumner*, 5 Mass. R. 438; Newland's Eq. 511; 1 Story's Eq. § 397, 400.

This case was argued at June Term, 1842, and the opinion of the Court was delivered at Oct. Term, 1843, as drawn up by

Shepley J. — It appears from the case agreed, that Joel Hills, on the 16th November, 1835, conveyed the premises to the tenant by a deed, which was not recorded until the 13th July, 1837. And that the tenant on the same 16th of November, re-conveyed the same to Hills in mortgage, which was recorded on the same day. On the 25th of January, 1836, the Casco Bank caused all right, title and interest, which they or either of them have to any real estate in the county to be attached on a writ against Hills and others, and afterwards regularly obtained a judgment and levied on the premises, and released its title to the demandants.

In the case of *Roberts* v. *Bourne*, in this county, it has been decided, that such an attachment was good; and that

the record of a conveyance not from the grantor could not be considered as giving notice, that he had conveyed.

The only question remaining is, whether the facts disclosed in the agreed statement can be considered as giving such notice. Stewart was in possession of the premises as the lessee of Hills before he conveyed to the tenant, and continued in the possession until after the attachment. He attorned to the tenant at the time of the conveyance to him; but that made no visible change which could indicate to others, that there had been a sale; and this is necessary where the person in possession is not the grantee, to have the effect of giving notice to a subsequent purchaser or attaching creditor. The hauling of timber upon the premises for a barn frame before the attachment would give no such notice. The acts of the tenant after the attachment could not deprive the creditor of the right, which was secured by it.

Judgment for the demandant.

Benjamin Shaw *versus* Lendall M. Gray *& al.*

The powers of the Supreme Judicial Court, as a court of equity, are specific, and limited by statute; and in regard to mortgages, are expressly confined to "suits for the redemption or foreclosure" thereof. What is to be understood, in this instance, by *foreclosure*, it may be difficult to ascertain; but the Court, it is believed, are not vested with the power to decree a foreclosure in any case. The acts which are to foreclose a mortgage are, in every case, to be those of the mortgagee, or of those standing in the place of the mortgagee.

An individual conveys two tracts of land in mortgage, and afterwards conveys, by deeds of warranty, one tract to the plaintiff and the other to W. who stipulates with his grantor to pay the amount due to redeem the whole mortgage; W. does not redeem it, and conveys the land by quit claim deed, subject to the mortgage, to G. who verbally agrees with his grantor to pay the debt secured by the mortgage; G. procures an assignment of the mortgage to be made to himself, possession having been previously taken to foreclose the same, and the three years expire, when he sells the land he purchased of W. to one man, and another tract, originally sold to the plaintiff, and included in the mortgage, to H. who is ignorant of the former transactions; the plaintiff brings his bill in equity against G. and H. praying to have a decree made, directing that this land should be conveyed to him; *it was held*, that the bill could not be maintained against either G. or H.

This was a bill in equity against Lendall M. Gray and Edward Gray. The plaintiff is Benjamin Shaw of Newport. Another man of the same name, Benjamin Shaw of Orono, on Sept. 16, 1826, mortgaged certain lands to Sanger to secure the payment of a debt, who on Aug. 27, 1827, took possession under his mortgage for condition broken. On Feb. 23, 1828, Shaw of Orono by deed of warranty conveyed certain lands to Shaw of Newport, a part of which was included in Sanger's mortgage, and on the same day conveyed other lands to Whitney, a part of which also was covered by the mortgage. As part consideration for this conveyance, Shaw, of Orono, took Whitney's note for the amount due on the Sanger mortgage, and deposited it with a third person, and agreed that whatever Whitney paid to Sanger should be indorsed on this note, and Whitney agreed with him to pay Sanger. Whitney made one payment on the mortgage, but neglected to pay the residue. On Feb. 15, 1830, Whitney

was indebted to Edward Gray, and conveyed to him the premises purchased of Shaw of Orono and covered by the Sanger mortgage, subject to the mortgage, Gray agreeing with Whitney verbally, to pay Sanger, and receiving from Whitney a small sum, being the difference between the estimated value of the land, and the amount due to Sanger and to himself. On Aug. 23, 1830, four days before the time for redemption would expire, E. Gray took an assignment of the Sanger mortgage to himself, this mortgage including a part of land conveyed by Shaw of Orono, to Shaw of Newport. On Nov. 25, 1831, the right to redeem the mortgage having expired, E. Gray conveyed a part of the premises included therein to Butler; and the plaintiff alleges in his bill, that E. Gray received of Butler sufficient to pay the mortgage and his own debt. On March 13, 1834, E. Gray for the consideration of $125,00, conveyed the residue of the premises, the same being a part of the land conveyed to the plaintiff by Shaw of Orono, and not included in the deed to Whitney, to Lendall M. Gray, the other defendant. The bill concludes with the prayer, "that said L. M. Gray may be required by deed of release or otherwise to deed to your orator the land conveyed by said E. Gray to said L. M. Gray, as aforesaid, on such terms as to your honors shall seem meet, and that your orator may have such other and just relief in the premises as the nature and circumstances of the case may require, and to your honors may seem meet."

The case was spread over a large surface; but it is believed that this short history of the transactions, with the remarks upon the facts by the Court, will be sufficient for the understanding of the questions of law arising in the case.

J. Appleton, for the plaintiff, contended that Shaw of Orono had conveyed the land in controversy to the plaintiff by deed of warranty, leaving other lands included in the mortgage more than enough to pay it off, which were afterwards, although on the same day, conveyed by him to Whitney; that the land thus conveyed to Whitney stood charged with

the payment of the mortgage; that Whitney was bound in law to pay off the mortgage; and besides agreed to do so, and had a fund placed in his hands for that purpose. It was Whitney's duty to us to redeem this mortgage and relieve our land. He sits in the seat of his grantor, and can have no greater rights. Independent of the agreement and the fund in his hands, the second grantee must pay off the mortgage, and can claim no contribution of the first. If then Whitney had taken an assignment to himself, the mortgage could not have been enforced against us. 1 Johns. C. R. 447; 5 Johns. C. R. 240; 10 English C. R. 500; 2 Atk. 446; 2 Paige, 300; 3 Leigh, 532; 10 Serg. & R. 450; Fonb. Eq. 514; 6 Paige 39; 1 Cowen, 592; 2 Pow. on Mort. (Rand's Ed.) 873; 17 Pick. 55.

Edward Gray purchased with full knowledge of all the facts, and took but a quit claim deed subject to the mortgage thereon, retaining of the purchase money sufficient to discharge the mortgage, and relieve our land. He then stands in the place of Whitney. 3 Edw. C. R. 133; 9 Paige, 446, 648.

L. M. Gray, the other defendant, is in a similar position. He must be presumed to have knowledge of the records and of their contents. The description of the premises shows our deed was before Whitney's. And besides he had personal knowledge of our claim to this land. This was enough to put him on enquiry, and that is sufficient. 8 Conn. R. 389; 9 Conn. R. 290; 7 Conn. R. 333; 2 Powell on Mor. c. 77, § 13. Before the conveyance to L. M. Gray, E. Gray had received all the money due on the mortgage, and all his advances. The mortgage therefore, as to the plaintiff, was discharged before the three years expired. The plaintiff's land was freed from it. Nothing passed by the deed from E. Gray to L. M. Gray. 4 Johns. C. R. 530; 3 Johns. C. R. 53; 6 Johns. C. R. 395; 3 Sumn. 477; 2 Sumn. 489; 6 N. H. R. 12; 5 Munf. 402; 3 Greenl. 207.

A. G. Jewett, for the defendant, said that if there was any cause of action for the plaintiff against Whitney, it was

at law, and not in equity. It was solely on the covenants of his deed, that Whitney was liable to the plaintiff for any injury sustained in consequence of the mortgage. Whitney was never bound to pay the mortgage. He thought it for his interest to do so, and for that purpose had his note placed in the hands of a third person, with liberty to have his payments on the Sanger note indorsed on his own note. The conversation about the payment of this note by paying Sanger, was not binding on either party. The plaintiff was paid or secured for the full consideration of the purchase by Whitney, and no fund was left in his hands.

It is enough, that the plaintiff was an entire stranger to any arrangements made between Whitney and E. Gray. Whether there was or was not any obligation on the part of the latter to redeem the mortgage, is one with which the plaintiff has no concern. But as between Gray and Whitney, Gray was not bound to redeem the mortgage. He took the land subject to the mortgage, so that he had no claim on his grantor to redeem it, but he was entirely at liberty to suffer it to be foreclosed, or to redeem it. Any prior parol agreement was merged in the written one. Any person but the mortgagor, may take the assignment of a mortgage without extinguishing it, and the Court will uphold it as a mortgage, if it is for the interest of the purchaser to keep it alive. 3 Greenl. 260; 7 Greenl. 377; 3 Pick. 475; 5 Pick. 146; 8 Mass. R. 491; 14 Maine R. 9; 16 Maine R. 149. Whitney could maintain no action against Gray for refusing to redeem the mortgage, and much less the plaintiff with whom he never made any agreement whatever.

The plaintiff had the same right and the same opportunity to purchase in the mortgage as the defendant. Any one of several owners of the land mortgaged may redeem, and hold upon the mortgage until he is paid. The defendant could not compel the plaintiff to redeem; and if he did not choose to do it himself he has no cause of complaint. 5 Pick. 152.

The plaintiff knew all the facts, saw the defendant making improvements, and making sales of this land, and in every respect treating it as his own, and never gave any notice that he

claimed it. He has thereby waived all claim, if he otherwise might have had one. 5 Johns. C. R. 272; 1 Story's Eq. 379; 16 Maine R. 149; 1 Johns. C. R. 344; 2 Story's Eq. 486.

Lendall M. Gray purchased the land now in controversy, and paid its full value, without any notice of the claim now set up by the plaintiff. This land was never conveyed to Whitney, and L. M. Gray had only to see that it was in the mortgage to Sanger, and that he had a good title under it. He was entirely ignorant of the other titles, and transactions, and was under no necessity of looking into them. It is difficult to conjecture any ground of claim by the plaintiff, or indeed by any other person, on account of his purchase of this land.

The opinion of the Court was by

WHITMAN C. J. — An individual conveyed two certain tracts of land in mortgage to one Sanger; and, afterwards, sold one of the tracts to Samuel Whitney; and the other to the plaintiff, by deeds of warranty; Whitney having stipulated, in consideration of the conveyance to him, to pay the amount due to redeem both. The plaintiff and said Whitney thereupon became the assignees of the mortgagor, as to the tracts purchased by each severally. But Whitney, having in trust the fund, with which the whole was to be redeemed, could not take an assignment from the mortgagee without rendering himself liable to the mortgagor for a breach of contract; and a Court, having general equity powers, might compel him to place himself in the condition he would have been in, if he had merely procured the mortgage to be discharged; and it may be that the same might be done by the plaintiff, he being, in reference to a portion of the mortgaged premises, the assignee of the mortgagor. But the powers of this Court, as a Court of equity, are specific, and limited by statute. In regard to mortgages it is confined to "suits for the redemption or foreclosure" thereof. What is to be understood, in this instance, by foreclosure, it may be difficult to ascertain; for the legislature have prescribed with precision, what shall be done to foreclose a mort-

gage. This Court, it is believed, are not vested with the power to decree a foreclosure in any case. The acts which are to foreclose a mortgage are, in every case, to be those of the mortgagee, or of those standing in the place of the mortgagee. It is not presumable, that the legislature intended to superadd a power in this Court to adjudge or decree a foreclosure upon grounds other than what they have specifically enacted to be such. As to suits for redemption, the power delegated must have reference to the mode of proceeding particularly prescribed for the purpose. If the bill can be considered as presenting a case, on the part of the plaintiff, under either branch of the statute, it must be upon the ground that the defendants, or one of them, is or are in the condition of a mortgagee; and that the plaintiff is in the condition of the mortgagor; and that the amount due to discharge the mortgage has been paid. It is not pretended that either of the other alternatives in the statute have been performed, so as to give the plaintiff a right to proceed as the assignee of the mortgagor.

If the parcel of land, claimed by the plaintiff, were in the possession of Edward Gray at the time of the filing of the bill, or if it were at that time in the possession of Lendall M. Gray, and had been acquired by him with knowledge, on his part, that Edward Gray, of whom he purchased, held the same by a defeasible title, it may be that we could pass a decree in the plaintiff's favor, as prayed for by him. But if Lendall M. Gray has acquired an indefeasible title to the premises, it would be out of our power to afford the plaintiff the relief particularly designated by him. We could not in such case order a release to be made of the premises to the plaintiff.

It will then be well, in the first place, to consider whether Lendall M. Gray, when he purchased of Edward, could fairly suppose that Edward had an indefeasible title to convey. It is alleged that Edward, not only had no such title, but that Lendall knew it; and that the sale to him was by collusion. But the proof does not seem to support these allegations. It is admitted by L. M. Gray in his answer, that he knew the

plaintiff made some kind of claim to the land; that he pretended there was an elder title to it, than the one set up under the mortgage; and that he avowed his determination to avail himself of it; and the proof goes no further than the answer admits. This is very different from knowledge that there had ever been a redemption of the mortgage; and quite a number of years after his purchase would seem to have elapsed before he ever heard of any thing of the kind. When Edward took an assignment of the mortgage, it is admitted the right of redemption had nearly expired. Looking at the record, Lendall might well see it to have been so; and, looking at the assignment to Edward, he would not be led to apprehend that he had not a perfect title to the land. It does not appear that he had the slightest intimation, at the time he purchased, that there was any pretence that Edward had been furnished with funds to enable him to redeem the premises. He might, therefore, well suppose Edward's title to be good; and might innocently purchase the same of him; and having so purchased, must be considered as having acquired an indefeasible estate therein. 1 Story's Eq. 415. He cannot, therefore, be decreed to release the same to the plaintiff. And this puts an end to our power to deal with the estate, as a Court of equity, under the mortgage; and the bill, as against Lendall M. Gray, must therefore be dismissed.

The next question is, can the bill be sustained against Edward Gray upon any other grounds. If there was a fund, as is supposed, placed in his hands, and there is much reason to suppose there was, for the purpose of redeeming the mortgage, which cannot now be made available for such purpose, can it be reached by this process for the benefit of the plaintiff? Can we award that it shall be paid to him? or can we assess damages for the breach of the undertaking, on the part of Edward, to redeem; and decree the same to be paid to the plaintiff? If it be considered that a sum of money was placed in Edward's hands in trust to redeem the mortgage, by whom was it placed there? and who is the *cestui que trust.* Not the plaintiff. There is no privity between him and Edward

Gray. The privity is between Samuel Whitney and Edward Gray. There was no privity between Edward and the grantor of Whitney; and much less between the former and the plaintiff, who is but a collateral grantee of a different parcel of real estate from the grantor of Whitney. Without such privity, or certainly without collusion between the said grantor and said Whitney, with the said Edward, of which there is not the slightest pretence, the plaintiff could not recover. 3 Story's Eq. § 262, 513 — 17.

If the plaintiff would proceed against the said Edward upon the ground of fraud, he would still find obstacles to encounter. The fraud must be alleged to consist in the purchase of an assignment of the mortgage, instead of redeeming it with funds in Edward's hand, placed there by Whitney for the purpose; and of the sale of the premises in question to L. M. Gray in fee, &c. in which case the same want of privity would exist as in case of the supposed trust. The immediate fraud, if such it could be called, was committed against Whitney. The injury to him was direct. The plaintiff is in no sense his assignee; and Whitney is not responsible to him. This bill, then, upon any such ground is not sustainable.

Besides, the allegations in the bill are not such as to entitle the plaintiff to recover upon the ground either of fraud or trust. The claim is to have a redemption decreed; or that the amount paid for the assignment should be treated as a redemption. But this having become impossible from the circumstance that L. M. Gray cannot be disturbed in the enjoyment of his purchase of Edward, nothing but damages can be recovered for the breach of his engagement; or for the fraud, if such it could be deemed; and the bill, setting forth no such ground of claim, the defendant, Edward Gray, could have no intimation that he was to place himself upon his defence, as to any such claim. If this had been set forth as the ground of claim, the plea of the statute of limitations might have been interposed, in addition to the want of privity. There was no concealment of the facts from which the fraud is supposed to be inferable. They were mostly matters of record. His sup-

posed rights were invaded eight or nine years ago with his knowledge. Having slept so long over the alleged wrong he cannot reasonably complain if he is subject to some inconvenience in consequence of it. He however is probably not without his remedy against his warrantor; and it must be a plain, adequate and appropriate one.

Bill dismissed.

STEPHEN ROWELL & *al. versus* JOHN FREESE.

To maintain a bill in equity, it is not sufficient to allege merely, that a conveyance of land by an absolute deed from a third person to the defendant was made in trust for the plaintiffs; it should appear, that the conveyance was made in trust expressly, or by implication; and if by implication, such facts should be stated, as would clearly show it to be so made.

THE bill in equity of the plaintiffs alleges, that on January 30, 1819, a lot of land in No. 2, now Greenbush, in the State of Maine, was the property of the Commonwealth of Massachusetts, and that on that day the legislature, by a resolve, authorized Lucy Rowell, whose husband had occupied the land in his lifetime, and her children, to occupy the lot twenty years, rent free; that the commissioners of the land office were by the same resolve empowered to convey in fee the same lot, after the expiration of the twenty years, to the children of the said Lucy, then alive, being the present plaintiffs, on their paying into the treasury one hundred dollars; that at the expiration of the twenty years, the District of Maine having become a separate State, the plaintiffs paid to the treasurer of the State of Maine one hundred dollars, and demanded a deed of the Land Agent; that although the Land Agent was duly authorized, he refused to give a deed to the plaintiffs, and did give a deed thereof to the defendant; that on the same day the plaintiffs tendered one hundred dollars to the defendant, and demanded a deed of release from him, and that he refused; that the Land Agent could convey no legal title to any one, but to the plaintiffs; and that whatever was

conveyed by said deed to the defendant, was in equity in trust for the plaintiffs, and he is bound in equity to convey the same to the plaintiffs on demand. The bill further alleges that the defendant also pretends to hold a right to the same land by a release from said Lucy and her children, the consideration whereof had wholly failed. The bill prays, that the Court may order and decree, that a conveyance may be made by the defendant to the plaintiffs. The defendant demurred generally.

A. G. Jewett, arguing in support of the demurrer, said that the Land Agent in fact acted under a resolve of the legislature, but as the case stands, as he is not made a party to the bill, the propriety of his acts cannot be called in question. The bill does not charge fraud, accident, or mistake in either the Land Agent or the defendant, and supposes that the title passed by the deed to the defendant. It is not pretended that the Court has jurisdiction on any of those grounds. The bill alleges, it is true, that the conveyance was in trust for the plaintiff; but it does not pretend, that there was any trust expressed in the deed, and does not show from the facts charged, that the defendant holds the land in trust for the plaintiff. Nor is it alleged in the bill, that the defendant had any notice of the plaintiffs' claim, until after he had obtained a valid title to the land from the State. There is no fiduciary relation shown between the parties from whence a trust would arise. 1 Story's Eq. 75, 76.

There is too a complete remedy at law. If the validity of the conveyance is called in question, a court of law is the tribunal in which it should be tried. If the Land Agent had no authority, then nothing passed to the defendant by the deed, and the bill cannot for that cause, be maintained.

J. A. & H. V. Poor argued for the plaintiff, contending that the plaintiffs had never parted with their equitable title. A party cannot convey an estate to commence *in futuro.* 13 Pick. 116; 4 Mass. R. 688; 6 Mass. R. 246.

The resolve in favor of the defendant is void. 6 Greenl.

112; 2 Fairf. 118: 4 Wheat. 122; 6 Cranch, 87. The legislature have no power to convey to another what belonged to the plaintiffs.

The conveyance to the defendant was in trust for the plaintiffs. Any conveyance obtained by means, which in a court of equity have the character of imposition or undue advantage, is relievable in equity. A person deriving title under a conveyance thus obtained is a trustee, and the Court will relieve by ordering a conveyance. 1 Mad. Ch. 246; 1 Story's Eq. 395; 14 Ves. 334; 1 Paige, 147.

The opinion of the Court was by

WHITMAN C. J. — This is a bill in equity. The defendant demurs to it, alleging that it contains no such facts as would authorize this Court, as a Court of equity, to take cognizance of it. On looking into the bill we find an allegation, that the defendant received a conveyance of an estate, therein described, in trust; and this Court has cognizance of trusts. But we think, that the bill should have stated something more; it should appear that the conveyance was made in trust expressly; or by implication; and, if by implication, such facts should be stated as would clearly show it to be such. It should appear either, that the whole consideration for the conveyance came from the plaintiffs; or that the plaintiffs had an equitable right to have the conveyance made to them; and that the defendant well knew it; but that he, nevertheless, fraudulently procured it to be made to himself; or some other ground, from which a Court could be authorized to infer an implied, resulting, or constructive trust. The bill does not present any such case; and therefore must be adjudged insufficient, and be dismissed.

NEWTON M. WHITMAN *versus* ANDREW FREESE *& al.*

To avoid a note, given for a quantity of boards within the County of Penobscot, because the contract was in contravention of the provisions of the act regulating the survey of lumber within that county, the defendant must not only show, that the boards were sold within the county without survey, but also that they were not purchased for the defendants' "own use, or for home consumption," and that the parties did not agree to have the lumber "shipped without survey."

Where a witness, in testifying to an admission, has stated the words used, it is not competent for the party calling him, to ask the witness, what he supposed was intended by those words.

ASSUMPSIT upon a note dated April 26, 1839, for $283,00, given by the defendants to F. & I. S. Whitman, and indorsed to the plaintiff. The suit was for the benefit of the payees. The defendants, with the general issue, filed a brief statement, wherein they allege, that the consideration of the note was a quantity of boards, bought by the defendants to be shipped beyond the limits of the county of Penobscot, wherein the sale was made; that the sale was made by Wadleigh, the agent of F. & I. S. Whitman, for that purpose; and that the boards were never surveyed according to the requirements of the law regulating the survey of lumber in the county of Penobscot. The whole of the testimony in defence is stated in the opinion of the Court.

The defendants contended, at the trial before TENNEY J., that the consideration of the note was illegal, as the boards had not been surveyed according to law. Upon the evidence, the Judge ruled, that the consideration was not illegal, and that the plaintiff was entitled to recover. The defendants then consented to be defaulted, the default to be taken off, if in the opinion of the Court, the action could not be maintained.

M' Crillis, for the defendants, said that it appeared, that the consideration of the note in suit was a quantity of boards, sold within the county of Penobscot, in violation of the provisions of the statute regulating the survey of lumber in this county. Persons may avoid their illegal contracts. If they are in contravention of the provisions of a statute of the State, contracts

are illegal, and may be avoided, although there may be no penalty provided for the violation of it. An action cannot be maintained on a contract prohibited by law. *White* v. *Franklin Bank*, 22 Pick. 184; *Wheeler* v. *Russell*, 17 Mass. R. 258; 4 N. H. R. 285; 8 N. H. R. 257.

The effect of the avoidance of this contract, is not to enable one party to hold the property, and refuse to pay for it. The real plaintiffs may recover the value of the boards in trover. 22 Pick. 184; 8 T. R. 557.

If the plaintiff would bring himself within the exceptions in the statute, the burthen of proof is on him to show it. It does appear however that the lumber was purchased for shipping, which negatives the supposition, that it was for his own use.

Kent, for the plaintiff, said, that this was a case where the defendants claim the right to retain the boards, and refuse to pay for them, and of course is highly penal. The defendants should be held to the rules regulating penal actions. They should be required therefore to bring themselves within the exceptions in the statute, if they would avail themselves of such exceptions. 2 Pick. 141; 14 Pick. 461.

The facts of the case do not show, that this was a contract within the statute. There is no necessity for the survey, where the boards are for the purchaser's own use, or for home consumption. Home here means within the State, and not merely within the county, as supposed by the brief statement. But for any thing appearing in the case, the parties might have agreed to the shipping of the boards without a survey. The statute does not forbid this. 14 Maine R. 402.

It is clearly improper to inquire of a witness what the party intended by certain words made use of by him. 1 Phil. Ev. 227.

The opinion of the Court was by

Shepley J. — This is a suit upon a promissory note made by the defendants payable to F. & I. S. Whitman, or order, and by them indorsed to the plaintiff, who prosecutes the suit

for their benefit. It was received in part payment for boards sold without survey, by estimation, by their agent, Wadleigh, to the defendants, who contend, that the sale was made in violation of the provisions of an act approved on March 9, 1834, regulating the survey of lumber in the county of Penobscot. The burden of proof is upon them to establish that fact, if they would thereby avoid their contract. The only testimony introduced by them in proof of it came from the witness, Brown, who testified, that at the time of the sale Chadwick, one of the defendants, "said in the presence of Wadleigh, that he wanted the boards for the purpose of shipping them over the shoals; and the agreement was, that said Chadwick was to take them by estimation of the quantity; and that Wadleigh was to run them to Bangor at one dollar per thousand; that Wadleigh said, the boards had never been surveyed; that they called upon him to assist in estimating the quantity; and they estimated the quantity at two hundred thousand."

The clause in the fourth section of the act declares, "and it shall not be lawful for any person or persons to sell or purchase any of said sorts of lumber within said county, unless the same shall be surveyed and marked as aforesaid by the surveyor general, or by one of his deputies, except such as may be purchased by any person or persons for his or their own use, or for home consumption." The sixth section imposes a penalty upon any person, who shall sell or purchase any such lumber, not surveyed and marked, as the act requires; and upon any person not being the surveyor general, or one of his deputies, who shall take an account of or survey any such lumber, "but said forfeiture shall not extend to such lumber as the parties may agree to have shipped without survey; provided the same be actually shipped in pursuance of said agreement." The inquiry put to the witness, "what place he supposed, the defendant, Chadwick, meant by the shoals," was properly suppressed. The object might perhaps have been legally attained by a different mode of examination. But if the place alluded to be without the limits of this State,

and the phrase, home consumption, be construed to have reference to the use of them within the State; the testimony does not prove, that the sale was made in violation of the provisions of the act, for it does not prove, that the boards were not purchased by the defendants for their own use. And such a purchase would be lawful without a survey. The testimony would authorize the conclusion also, that the parties agreed to have the lumber shipped; for the contract appears to have been completed. And in such case there would be no forfeiture by the provisions of the statute.

Judgment on the default.

ALFRED HERRICK *versus* JOSEPH JOHNSON *& al.*

In an action by an indorsee of a promissory note, indorsed before it fell due "without recourse," where the defence set up was, that the note was obtained by the fraudulent representations of the plaintiff, or that it was given in consequence of a mutual mistake in the value and character of the land for which the note was given, *it was held*, that a verdict for the plaintiff should not be set aside for error in the instructions to the jury, when they were instructed to find for the defendants, if there was fraud between the plaintiff and the defendants, inducing the latter to make the purchase and give the note in question; or if there was fraud between the vendors and the defendants in obtaining the note declared on of which the plaintiff was conusant; or if there was a mistake which went to the essence of the contract, and the plaintiff procured such contract to be made, or was instrumental in making it.

ASSUMPSIT on a note, dated July 20, 1835, for $779,40, given by the defendants to Tibbets & Dwinel, or order, and by them indorsed to the plaintiff "without recourse," payable in three years from date with interest.

The report of the case states, that "the defence set up was, that the note was obtained by the fraudulent representations of the plaintiff, or that it was given in consequence of a mutual mistake in value and character of the consideration."

The defendants introduced testimony for the purpose of establishing their defence.

TENNEY J. presiding at the trial, instructed the jury, that if they found, that the plaintiff was a party to the negotiation of the sale and was instrumental in effecting it, although not nominally a party, any defence was open to the defendants which they could have set up in an action in the name of the payee of the note. If they were not satisfied that the plaintiff was interested in making the bargain, they would then inquire if the note was fraudulently obtained, and if so, then the defence was open unless the plaintiff could show, that the note came into his hands in the regular course of business, he having no knowledge of the fraud. If the defence was open on either of these grounds, to prove fraud in the inception of the note, they must be satisfied that it was obtained by false representations, known to be false by the person making them, with the intent to deceive; that by them the defendants were deceived, while using common and ordinary prudence; and that if fraud was procured by the plaintiff, it was the same as if done by him. If however the defendants wished to obtain an exaggerated, or any statement of the character of the land as to its value and condition, in the letter from Weston to Parks, for the purpose of making a sale of the same, and this without the procurement of the plaintiff, that the latter would not be responsible therefor, especially if done after the purchase; but if from the evidence they were satisfied the plaintiff did induce Weston to give a false and fraudulent account thereof as an inducement to purchase, he would be responsible; though, if Weston knew his own statements to the defendants to be false, the plaintiff would not be answerable therefor, unless such statements were procured to be made by the plaintiff. That if the defendants shut their eyes to the true value of the land, and if deceived by their own negligence in not using ordinary prudence and care, and obtained exaggerated accounts for the purpose of making sale, the plaintiff was not prevented from recovering on that account; and in the inquiry whether ordinary prudence and care was used by the defendants, the fact of their not going on to the land when advised thereto by Weston, and their taking an

account from Weston in a letter to Parks after the purchase, was evidence for the jury on this question.

If there was such a mistake honestly made by the parties to the contract as went to the very essence thereof, that on that account the jury should deduct such an amount as they believed the deficiency to be from this note, or return a verdict for the defendants if the deficiency was the whole of this note. This was illustrated by the purchase of a tract of land honestly supposed by the parties to be of value, and in the location thereof, it turned out to be water, and of no value; and of the purchase of a house believed by the parties to be existing, when in truth it had been burnt. But if the defect did not extend to the essence of the contract, but only so far as to make it of less value than was supposed by the parties, such as the purchasing a horse having no unsoundness, but less valuable than the parties believed, the jury would not be at liberty to annul the bargain, honestly made, though not advantageous to one of the parties; that the jury would inquire whether the land was purchased for its intrinsic value, or the marketable value and for sale, and if for the latter, they would have a right to regard that in determining whether the defect went to the essence of the contract; that they were not to be governed by the value before or since the contract but at the time it was made; that although the land was not offered to be re-conveyed by the defendants, still if the defence could avail on either of the grounds, on the principles before laid down, of fraud or mistake, they would still have a right to return a verdict for the defendants, if the jury believed they had already paid for the value of the land, the value to be estimated on said principles.

At the request of the defendants' counsel the jury were required to return in addition to their general verdict, the intrinsic value of the land; and at the request of the plaintiff's counsel the marketable value thereof. The Judge was requested by the defendants' counsel, to instruct the jury that if there was a mutual mistake of more than one half the value of the land, as to the timber on the same, though both par-

ties acted in good faith, still if the plaintiff had been paid the full value of the land, he was not entitled to recover. The Judge declined to give this instruction, unless the mistake should extend to the essence of the contract in the opinion of the jury. A general verdict was returned for the plaintiff for the amount due on the note; and the intrinsic value of the land was found to be $625.00, and the marketable value $1831,25.

If any of the foregoing rulings and instructions were erroneous, or the requested instructions, which were withheld should have been given, the verdict was to be set aside and a new trial granted, otherwise judgment was to be rendered thereon.

The arguments were in writing. They are too much extended for publication, and no abridgement can do them justice.

J. Appleton, for the defendants.

H. Hamlin, for the plaintiff.

At a succeeding term,

PER CURIAM. — The verdict in this case is not to be disturbed, unless the rulings of the Court or the instructions to the jury at the trial were erroneous. Upon a careful revision of those rulings and instructions we are of opinion, that they were as favorable to the defendants as could legally have been required. If there was fraud between the plaintiff and the defendants, inducing the latter to make the purchase and give the note in question, or if there was fraud between the vendors and the defendants in obtaining the note declared on, of which the plaintiff was conusant, or if there were a mistake which went to the essence of the contract, and if the plaintiff procured such contract to be made, or was instrumental in making it according to the rulings and instructions, the jury were to find for the defendants. We cannot see what more could reasonably have been desired.

As to what was said to the jury about the intrinsic and marketable value of the land, although it might not have been called for by the state of the evidence in the case, we do not

see that it could have tended to influence the jury unfavorably to the defendants; especially as the jury have found the land to be of substantial value under either of the alternatives presented.

Judgment on the verdict.

Charles G. Kelley *versus* John Kelley.

A tenant claiming by virtue of a possession and improvement may not only offer to purchase in the title, but may in writing contract to do so, without altering the character of his occupancy, if the terms of the contract show, that the intention was to purchase and sell, not a full and perfect title, but one encumbered by such claim.

But all claim for *betterments* will be considered as abandoned, if the contract expressly admits, that the demandant was the owner of the land, and that the tenant was living upon it, and agreed to purchase an unqualified title thereto by deed of warranty.

To entitle the tenant to *betterments*, the "actual possession for the term of six years or more before the commencement of such action," required by the statute, should be immediately preceding the commencement of the suit, and not at some remote period.

The tenant will not be permitted to set up in defence, that nothing passed by a deed from the lawful proprietor to the demandant, by reason of a disseizin by the tenant, if the latter, three years afterwards, while continuing in possession, in writing, admits the title of the demandant, and contracts to pay him for the land, and has since occupied it as his tenant at will.

Writ of entry. The following is a copy of the contract between the demandant and the tenant, refered to in the opinion of the Court.

"Memorandum of an agreement between John Kelley, on the one part, and Charles G. Kelley, on the other. The condition of this obligation is such, that I, Charles G. Kelley, stand bound to said John, his heirs and assigns, to give him or heirs a good warranty deed of lot No. 60, containing one hundred acres of land, the same that the said John now lives on, or pay him the sum of nine hundred dollars, in case said John pays me four hundred dollars, to be paid within two years from this date, one hundred dollars to be paid down, one hundred

and fifty dollars to be paid in one year, and one hundred and fifty dollars to be paid within two years from this date. In case said John pays according to said obligation, and I, said Charles G. Kelley, give him or his heirs a good deed of said land, this obligation is null and void. Hampden, October 25, 1832."

The tenant gave to the demandant, at the same time, his notes for four hundred dollars, payable as mentioned in the contract, which had not been paid.

The facts appear in the opinion of the Court.

The trial was before TENNEY J. who instructed the jury, that if they were satisfied from the evidence, that the papers dated October 25, 1832, were executed and delivered by the parties, these papers would operate to prevent the tenant from claiming any betterments, made before or after the date thereof; and that they would operate so as to give effect to the deed from Hall J. Kelley to the demandant, if said H. J. Kelley, at the time of the delivery of said deed had been disseized by said John. And that if they were satisfied of the execution and delivery of those papers, they would inquire no further, and return their verdict for the demandant on the general issue. The verdict was for the demandant, and the tenant filed exceptions.

Kent argued for the tenant. The grounds taken are stated in the opinion of the Court. On the first point, that the tenant was entitled to betterments, these cases were cited: *Knox* v. *Hook*, 12 Mass. R. 329; *Shaw* v. *Bradstreet*, 13 Mass. R. 241; *Ken. Pur.* v. *Kavanagh*, 1 Greenl. 348; *Blanchard* v. *Chapman*, 7 Greenl. 122; *Fiske* v. *Briggs*, 3 Fairf. 377; *Bacon* v. *Callender*, 6 Mass. R. 308; St. 1821, c. 47; Rev. St. c. 145, § 26; *Newhall* v. *Sadler*, 17 Mass. R. 350; *Runey* v. *Edmands*, 15 Mass. R. 293; 9 Johns. R. 35, 330; *Small* v. *Procter*, 15 Mass. R. 499. On the second point, that nothing passed to the demandant by the deed under which he claimed, because his grantor was then disseized by the tenant, were cited *Allen* v. *Thayer*, 17 Mass. R. 302; *Small* v. *Proctor*, 15 Mass. R. 499; *Brinley* v. *Whiting*, 5 Pick. 358;

8 Wend. 633; 13 Johns. R. 290, 466; 1 Wend. 493; 5 Wend. 157.

Rowe and *J. A. Poor* argued for the demandant, citing 9 Cowen, 552; 12 Mass. R. 329; 13 Mass. R. 341; 15 Mass. R. 294, 499; 1 Greenl. 349; 7 Greenl. 122.

The opinion of the Court was drawn up by

Shepley J. — This is a writ of entry demanding possession of lot numbered 60 in the town of Orono. The deeds of conveyance introduced by the demandant will be sufficient to establish his title, unless the operation of one of them can be defeated by proof, that the grantor was disseized at the time of making that conveyance. The tenant contends, that the testimony introduced by him should have that effect, and also that it should establish his right to the improvements by virtue of a possession and improvement of the lot, under the provisions of the statute. It shews, that he entered upon the lot as early as the year 1819, made improvements, and continued to live upon and occupy it exclusively to the time of the trial. The demandant and the tenant, as the jury have found, entered into a written contract of two parts on October 25, 1832, by which the one agreed to sell and the other to purchase the lot upon certain terms therein stated. The counsel for the tenant contends, that he had acquired a right to the improvements before he entered into that contract; that the fee and the improvements had become distinct claims or titles; and that he might admit, that he did not own the fee, and contract to purchase it, without surrendering any of his rights or acting inconsistently. And the inference is drawn, that the contract in this case was one of that description. The fault of the argument may perhaps be in an erroneous inference. It is admitted, that the case of *Knox* v. *Hook*, 12 Mass. R. 329, was correctly decided, because the first entry upon the land was made under a contract to purchase it. The opinion states, "now a person, who has made a contract with the proprietor to purchase, and has entered in pursuance of such contract, cannot be said to hold the lands by virtue of a pos-

session and improvement. He holds by virtue of a contract with the proprietor." That position is founded upon the well established doctrine, that one, who is in possession of land is presumed to be so rightfully, until the contrary is made to appear. He may be considered as the tenant at will of the owner. *Cooper* v. *Stower*, 9 Johns. R. 331. No doubt, a tenant claiming by virtue of a possession and improvement may not only offer to purchase in the title, but may in writing contract to do so, without altering the character of his occupancy. And if one so situated should make such a contract, as would shew, that the intention was to purchase and sell, not a full and perfect title, but one incumbered by such a claim, he would not be considered as holding under the contract any thing more, than he contracted to purchase. But his contract with the owner of the title must, like other contracts, be construed according to its terms and the intention of the parties. In this case the contract between the parties expressly recognizes as the state of facts, that the demandant is the owner of the land, and that the tenant is living upon it, and agrees to purchase it. And he does not contract for the title of the demandant, or for any incumbered or qualified title, but for "a good warranty deed of lot No. 60." And the demandant by contracting to sell to the tenant the land he "now lives on," admits the possession of the tenant to be rightful; and from that time he must be considered as holding the land by consent of the owner and at will. He had so held it for more than seven years before the commencement of this suit; and cannot therefore during that time be considered as holding adversely by a possession and improvement. And he cannot, by neglecting to fulfil his contract, claim to set up his rights, as they existed before it was made; for neither at the time of the commencement of the suit, nor during all that time, did he hold by virtue of a possession and improvement. And not the language only, but the spirit of the statute, required, that such "actual possession for the term of six years or more, before the commencement of such action," should be immediately preceding, and not at some remote period. And when

this action was commenced the premises were not "holden by such person by virtue of a possession and improvement," as the statute requires, to entitle him to have the value of the improvements assessed.

It is further contended, that the demandant did not acquire any title under the conveyance made to him, on October 13, 1829, from Hall J. Kelley, because the grantor had been, before that time, disseized by the tenant, who about three years afterward, and while continuing that possession, admitted the title of the demandant, contracted to pay him for it, and has since occupied the land as his tenant at will. After such an occupation for so many years, he proposes to dispute his landlord's title. That is inadmissible. His contract explains the character of his previous possession, as well as puts it out of his power to raise the objection.

Exceptions overruled.

SALMON G. SAWTELLE *versus* FRANKLIN ROLLINS.

A bankrupt can, after his bankruptcy, maintain in his own name, a suit for a wrong done, brought before he was declared a bankrupt, unless his assignee should interpose an objection.

And if there has been an equitable assignment of the cause of action before the bankruptcy, the suit may be prosecuted afterwards in the name of the bankrupt, for the benefit of the party in interest.

Where trespass or trover can be maintained for the unlawful conversion of goods, replevin will also lie.

THIS case came before the Court on exceptions, on the part of the defendant, to the ruling of TENNEY J. presiding at the trial, permitting the action to proceed in the name of the plaintiff on the record, after he had been decreed to be a bankrupt, and an assignee had been appointed.

The facts and grounds of defence appear in the opinion of the Court.

M' Crillis argued for the defendant, and cited 1 Chitty's Pl. (7th Ed.) 24, 25, 80, 81; 7 Taunt. 59; Eden on Bankr. 346, 347; 15 East, 627; 2 Johns. R. 342.

J. Appleton argued for the plaintiff, and cited 15 Mass. R. 485; 12 Johns. R. 346; 3 Price, 214; 1 T. R. 463; 3 B. & P. 40; 10 Pick. 166; 2 Root, 52; 3 T. R. 438; Cooper on Bankr. 394; 2 Wils. 372; 7 T. R. 391; 1 Tidd's Pr. 175; 8 Taunt. 742.

The opinion of the Court was drawn up by

TENNEY J. — This is an action of replevin commenced in April, 1839, and the property, after it was taken by the officer on the replevin writ, was delivered by the plaintiff to his surety on the replevin bond, as his security. Since that time, the plaintiff has been decreed a bankrupt, and an assignee appointed, who has taken upon himself the trust; but it did not appear, that any certificate of discharge had been obtained. The assignee being in Court, when the action came on for trial, would not recognize or prosecute it, but the surety on the bond, on request of counsel, was permitted to proceed therein, against the objection of the defendant, though none was made by the plaintiff or the assignee.

It is contended for the defendant, that the plaintiff being in bankruptcy, the action can be prosecuted farther, only in the name of the assignee, and as he would take no control thereof, and the parties remaining as they were, it must abate. By the bankrupt act of 1841, § 3, "all suits in law or in equity, then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to its final conclusion, in the same way and with the same effect, as they might have been by such bankrupt." And assignees are vested with all the rights, titles, powers and authorities to sell, manage and dispose of all the property of the bankrupt, and to sue for and defend the same, subject to all the orders and directions of the Court, as fully to all intents and purposes, as if the same were vested in, or might be exercised by such bankrupt, before or at the time of his bankruptcy. The property in dispute is claimed as having belonged to the plaintiff, and to have been taken by the defendant as a wrongdoer, and is for that kind of injury to the bankrupt, when the right to obtain satisfaction,

and cause of action pass to the assignee. It was his privilege, certainly with the assent of the surety on the bond, to have assumed the prosecution of the action for the benefit of the creditors. 1 Chitty's Pl. 59 and 60; and from authority we are satisfied that it could have been done by him in the name of the plaintiff. *Kretchman* v. *Beyer in error*, 1 T. R. 463; *Waugh* v. *Austin*, 3 T. R. 438; *Kitchen* v. *Bartsch*, 7 East, 64; 1 Chitty's Pl. 15. Several cases have been cited for the defendant, and relied upon, in support of the positions taken for him. But on examination, they are distinguishable from the one at bar; in them the assignee had either interposed to prevent the prosecution by the plaintiff, or had not declined to assume the control of the subject matter of them. In this, the assignee did not, in the exercise of the discretion which he possessed, recognize the suit or the claim, therein embraced, although notified that such a claim had been made, and of the institution and pendency of the action thereon.

This omission of the assignee could not avail the defendant; it made him none the less liable; and if the suit should proceed against him, it took from him no rights, which before existed. He could not be subject to any suit in the name of the assignee, after a recovery in the present. This objection is matter of form, and does not affect the merits of the case; and if suffered to prevail, it gives to the defendant property, to which by the verdict he had no claim; and damages for the detention by the real owner; and costs in an action, which was rightfully commenced. Nothing but a strong and rigid rule of law should be permitted to lead to such consequences. We are satisfied, that the bankrupt can maintain in his own name, a suit brought by him, for a wrong done, before the bankruptcy, unless the assignee should interpose an objection. In *Fowler* v. *Down*, 1 Bos. & Pul. 44, HEATH J. says, "an uncertificated bankrupt has a defeasible property, which none but the assignees can defeat." *Webb* v. *Fox & al.* 7 T. R. 392, was an action of trover for goods, and the defendants pleaded the bankruptcy of the plaintiff before the alleged conversion, to which the plaintiff replied, that he was lawfully

possessed of said goods, and so continued till the defendants took them; the defendants rejoined, that the plaintiff had not obtained his certificate, and to this rejoinder, there was a demurrer, and the action was maintained. Lord Kenyon said, "The plaintiff is possessed of these goods, and *prima facie*, the possessor of personal property is the owner of it. Therefore on principle, and without adverting to the authorities alluded to, I am of the opinion, that no body has a right to take this property from the bankrupt, but those who regularly claim under the commission. With regard to the authorities, I should not rely on the authorities decided before me at *nisi prius*, but those cases have been since recognized in the late case of the Court of Common Pleas, and I subscribe to the opinion given by that Court, that the bankrupt has a right to these goods against the defendants, who are wrongdoers. Convenience and sound policy also require a similar decision. If the plaintiff had brought an action of trespass instead of trover, his possession would have entitled him to recover against a wrongdoer; and the form of the action cannot alter the law." Ashhurst J. in the same case remarks, "I take the general rule to be, that a bankrupt has a right against all persons but the assignees." In *Clark* v. *Calvert*, 8 Taunt. 742, the Court review the authorities, and treat the question as being settled, that the bankrupt can maintain an action for property taken wrongfully from him, unless the assignees interpose an objection; and that he may sue as their trustee. The cases referred to, in support of the doctrine contended for by the plaintiffs' counsel, were not replevin, but it is well settled that where trespass or trover can be maintained for the unlawful conversion of goods, replevin will also lie. 6 Com. Dig. Replevin, A.; *Shannon* v. *Shannon*, 1 Schoales & Lefroy, 337; *Pangburn* v. *Partridge*, 7 Johns. R. 140.

There can be no reason against the prosecution of an action commenced before the decree of the plaintiff's bankruptcy, in his name, if one brought subsequently thereto by him can be maintained. It would be absurd, that the former should abate

while the latter can be sustained. This action then, as it respects the parties of record thereto, is unaffected by the decree.

The suit however is prosecuted by the surety on the replevin bond, and it is insisted for the defendant, that this cannot legally be done; that a chose in action is not legally assignable. A chose in action cannot be assigned, but Courts of law always favor the party, who has an equitable interest. They notice a trust and see who is beneficially interested. And the assignor of a chose in action, who has become a bankrupt, may sue the debtor for the benefit of the assignee. *Winch* v. *Keeley*, 1 T. R. 619.

The basis of this suit is not a chose in action, but one, which equally demands the protection of the Court. The property was equitably pledged to the surety on the replevin bond, in consideration of the liability which he assumed for the plaintiff; though not in writing, yet the delivery of the property replevied to the surety, and the agreement between him and the principal, vested a right in the former, which nothing but a surrender could defeat in favor of the latter. This agreement stands uncancelled, and it is not in the power of the defendant to annul it. If the plaintiff should obtain his certificate of discharge, the surety alone must be responsible on the bond. It would be a reproach upon the law, if the defendant, who detained the property wrongfully, should be permitted to regain the possession thereof and to throw the expense of the suit upon the surety, who took measures which were then effectual for his security.

The evidence offered of the declarations of E. A. Glidden, while he had the horse in his possession, were clearly inadmissible; and the exceptions taken to the rejection thereof by the presiding Judge, do not seem to be relied upon in argument.

Exceptions overruled.

WILLIAM T. SARGENT *versus* CHISTOPHER B. ASHE.

If the defendant goes into the occupation of a house by the permission of the plaintiff and another, and promises the plaintiff, by parol, to pay him one half of the rent therefor, this may be regarded as a consent on the part of the defendant to hold and occupy one half of the house under the plaintiff, for which he may be entitled to a reasonable amount of rent, for the time the defendant so occupied.

A parol agreement concerning the amount of the rent to be paid, made at the commencement of the occupation, is competent evidence, in determining what would be a reasonable amount of rent.

THIS case was to have been argued in writing, but no arguments have been furnished.

McCrillis and *Robinson*, for the plaintiff.

J. A. & H. V. Poor, for the defendant.

The opinion of the Court was by

WHITMAN C. J. — In this case a default was entered by consent, which is to stand unless the Court should be of opinion that, from the evidence, the plaintiff is not entitled to recover. The action is for the use and occupation of a certain dwelling-house. There seems to be no reason to doubt, that the defendant went into the occupation of the tenement by permission of the plaintiff, and one John Sargent, jr. And it was in evidence that he promised to pay one half of the rent therefor to the plaintiff. Although this was by parol, we think it may be regarded at least as evidence of consent, on the part of the defendant, to hold and occupy one half of the dwelling-house under the plaintiff, for which he may be entitled to a reasonable amount of rent, for the time the defendant so occupied. The agreement concerning the amount of the rent, also, may be regarded as evidence of what would be a reasonable rent. We think therefore that the default should stand; and that, a reasonable rent being ascertained, judgment should be entered therefor.

Moses R. Comstock *versus* Stephen Smith *& al.*

Where a sale of the right to cut and take off standing timber is on condition, that "all the timber cut on said land shall be and remain the property and subject to the control of the proprietor of the land" until payment of the consideration therefor shall have been made, the person receiving such permission cannot grant to a third person any right to such timber against the proprietor of the land, which will vest the property in him, without performance of the condition. His possession of the timber, therefore, although with the knowledge of the owner of the land, will not impair the rights of the latter.

Where the bill of exceptions merely sets forth, that a deposition was offered, and on being objected to by the other party, was excluded by the presiding Judge, without stating that the rejection took place on account of interest in the depenent, informality in the caption, irrelevancy, or other cause, the Court cannot decide thereupon, and the exceptions must be unavailing.

If a deposition be improperly rejected, yet this will furnish no cause for granting a new trial, if the party offering it, is not injured by the rejection.

The acceptance of a negotiable security for an existing indebtedness by simple contract, is to be deemed payment; but it is competent for the parties to agree, that it shall be received as collateral security merely; and proof by parol may be admitted to show, that it was so taken.

When a negotiable security is taken as collateral to an existing debt, the holder may endeavor to make it available by a suit; and failing of success, he may resort to his original security, without restoring that taken as collateral.

This case came before the Court on exceptions, and on a motion for a new trial, because the verdict was against the evidence.

The last provision in the permit to cut timber from the agent of the proprietors to Bartlett was this. "And all the timber cut on said land shall be and remain the property and subject to the control of said Stackpole, until one half of the amount of the stumpage for the lumber, cut under this permit, shall have been paid, which shall be on or before July 1, 1835, and an indorsed note or draft, satisfactory to said Stackpole, payable September 1, 1835, for the other half, shall have been given, and all the other conditions contained in this permit shall have been duly and faithfully performed." The whole evidence at the trial, and papers read, amounting to fifty pages,

appear in the exceptions. It is believed, that the questions of law will be sufficiently understood from what appear in the instructions to the jury, and in the opinion of the Court.

After the evidence at the trial, TENNEY J. presiding, was before the jury, the exceptions state that the defendants contended, that there was evidence to go to the jury to prove that the plaintiff had surrendered the logs to the Messrs. Stevens and abandoned them entirely, before the defendants took them. But the Court ruled that there was not sufficient evidence to authorize a verdict against the plaintiff on this point, and declined to allow the question to be argued to the jury, and instructed the jury for the purpose of this trial, that they would not regard the logs as the property of the Messrs. Stevens.

The defendants further contended that if the jury should find that the Messrs. Stevens' claim on the logs was more than they were worth, with the other evidence in the case touching the right of Messrs Stevens, that then the plaintiff could recover nothing or only nominal damages. But the Court instructed the jury on this point, that the plaintiff was entitled to recover the full value of the logs, if any thing.

The defendants further contended, that it was a question of fact for the jury, whether the title of Rines to the logs had been lost before he sold them to the defendants; and the Court so instructed the jury, and further instructed them, that if the plaintiff once had possession of the logs, claiming them, and the defendants took and made use of them afterwards, the burthen of proof was on the defendants to show title in themselves, and that if Rines' testimony was believed by them, it proved that he had parted with all his title before he sold to defendants, that nothing passed to defendants by any of the transfers put into the case, and the plaintiff was entitled to recover the value of the logs, but that the credibility and correctness of his testimony was for their consideration, in connexion with the other testimony in the case, tending to impeach or corroborate it, and that this was the great point in the case for their consideration.

The defendants further contended, that if Rines had not parted with his title before his sale to the defendants, that if his title was transferred to the defendants, the plaintiff could not maintain trespass against the defendants; and the Court so instructed the jury.

On the evidence the plaintiff contended:

1. That Bartlett, by taking a negotiable draft and giving an absolute receipt for the stumpage, forever discharged it.

2. That if Bartlett did not absolutely relinquish his lien on the logs, when he took said draft, he was bound in a reasonable time after said Stevens refused to accept said draft to elect whether to retain said draft, or his lien on the logs, and to notify I. J. Stevens of said election, and return said draft to him.

3. That by retaining said draft, and commencing an action upon it, he relinquished his lien.

4. That he relinquished said lien by attaching these very logs and other property of Isaac J. Stevens.

5. That Rines by taking an assignment of this draft, even if he did not take it in payment of his stumpage, with a knowledge that it was taken by Bartlett for the stumpage and of the course that Bartlett had taken in relation to it, thereby ratified Bartlett's acts and became bound by them, and thus relinquished and lost his own lien.

6. That Rines by prosecuting the action on the draft to judgment, and taking execution, which still remains unpaid and has never been released or returned to I. J. Stevens, relinquished, or lost, their lien (if they then had any) on said logs.

7. That the permit gave no power to Rines to sell these logs for stumpage without judicial sanction.

8. That if the permit gave power to sell, the sale must have been made in good faith, free from suspicious circumstances, and that Rines' intention to become a purchaser, and the hasty manner in which the sale was made, and the low price, and the immediate sale by Rines & Griffin at an advance, rendered the sale invalid.

9. That if Rines agreed with Griffin before the sale, to be equally interested with him and stand equally with him afterwards, the sale was void.

10. If this agreement was not made till immediately after the sale, in the manner stated by Griffin, still the sale was void.

11. That the assignment of the permit by Comstock to I. J. Stevens & Co. did not convey any interest in these logs, or if any interest, only a pledge, and that was void for want of delivery; hence the sale to the defendants was void for want of a demand of payment of the plaintiff, and notice to him of the intended sale.

12. That if the Messrs. Stevens had an interest, still, the plaintiff being the general owner, such demand on him and notice to him were necessary.

13. That the appearance of Mr. Prentiss at the sale, on behalf of Mr. Stevens, was not sufficient to show that he had authority from Stevens to appear, or that he was notified seasonably by Rines of the intended sale.

14. The assignment by the proprietors to Rines, conveyed only the *stumpage* and not any interest in the logs.

15. That the amount of the stumpage on these logs, according to the Stackpole permit, was much less than the amount for which the logs were sold, and that the plaintiff at any rate was entitled to recover for a part of the logs.

16. That Rines abandoned his possession to Wadleigh, and never took possession afterwards, and thereby lost the claim on the logs.

17. That the spruce logs were not conveyed by the auction sale, and that the defendants were liable for them.

The presiding Judge sustained these positions so far as appears in the following instructions to the jury and no farther. That by the Stackpole permit the proprietors retained the ownership and control of the logs, subject to be defeated by complying with the terms of the contract; that if the stumpage was not paid so as to give a right in the other contracting party to control the logs, the proprietors would become the absolute owners of the logs, after the failure of the other party

to comply; that their assignment to Rines gave him the same control over the logs which they had; that if Rines had not before done any thing to relinquish his claim, he could dispose of the logs as he thought proper, either at public or private sale; that it was no matter if the logs were struck off too soon, as the conduct of Rines in relation to the sale and his interest in it, would not vitiate the sale; that it was for the plaintiff, as between him and Rines, to show that Rines had received payment of the stumpage; that if Bartlett took the draft in payment of the stumpage this did not injure Rines, unless he took it also in payment; that Bartlett's retaining the draft and commencing an action and attaching the logs and other property, and Rines' taking an assignment of the draft and action, with the knowledge of these facts, and continuing to prosecute the action, did not destroy Rines' claim on the logs, if he in fact took the assignment as collateral; but were proper circumstances for the jury to consider in determining whether he received the draft in payment or as collateral; that if Rines received the draft in discharge of the stumpage, his claim on the logs could not be afterwards resumed as against the plaintiff without his consent; that they must determine, from the testimony whether Rines received the draft in payment; and that as the assignment did not express the consideration, that if the testimony of Rines was out of the case, the plaintiff could not recover, provided the defendants had shown to the satisfaction of the jury, that they had acquired the right which Rines derived from the proprietors.

The verdict was for the defendants.

To the rejection of testimony offered by the plaintiff, to the admission of testimony objected to by the plaintiff, to the overrulings of the plaintiff's positions; and to the instructions of the Court to the jury, the plaintiff excepted.

Prentiss, for the plaintiff, furnished a written argument of more than sixty pages. An abridgment could not do it justice, and the whole cannot be published. He cited, in support of the positions taken, 2 Greenl. 121; 2 Dallas, 63; 16 Ves. 276; 9 Greenl. 125; 5 Pick. 46; Story on Bailm. 241; 2

Kent, 638; 21 Pick. 230; Montagu on Liens, 215; 1 Mason, 212; 1 Johns. R. 34; 10 Johns R. 104; 15 Johns. R. 247; 5 Pick. 178; 8 Mass. R. 150; 20 Pick. 399; 10 Mass R. 155; 4 Mass. R. 620; 4 Mass. R. 443; 3 Pick. 38, 365; 8 Pick. 408; 4 Pick. 220; 2 Kent, 614; 12 Mass. R. 60; 1 Metc. 39; Com. on Con. 23; 2 Metc. 260; 6 Verm. R. 448; 7 Pick. 52; Story on Bailm. 209, 213; Story's Eq. 317, 319; Caines' Cas. in Er. 183; 2 Kent, 577; 1 Pow. on Mort. 3, 4; 4 Kent, 137; 6 Mass. R. 424; 15 Mass. R. 480; 1 P. Wms. 261; 1 Brown, 176; 3 East, 258; 1 Johns. R. 290; 4 Johns. R. 475; 1 Stark. Ev. 199; Phil. Ev. 39; 3 Greenl. 165; Greenl. Ev. 563; 2 Greenl. 64; Dougl. 56; 3 East, 366; 14 Johns. R. 82; 1 Marsh. 526; 2 Pick. 20; Greenl. Ev. 449; 4 Mass. R. 488; 2 Kent, 585; Story on Bailm. 238; 5 Bac. Abr. 165; 4 Kent, 159; 8 Pick. 73.

A. G. Jewett and *J. H. Hilliard*, for the defendants, furnished concise written arguments, citing 11 Mass. R. 27; 16 Maine R. 478; 6 Greenl. 200; 7 Greenl. 386; 18 Maine R. 357; 4 Mass. R. 683; 3 Fairf. 201; 8 Greenl. 30; 8 Pick. 51.

The opinion of the Court was by

WHITMAN C. J. — This is an action of trespass for taking and carrying away a parcel of mill logs. The plaintiff cut the timber, in the winter of 1834—5, on the land of certain proprietors, for whom one Stackpole was agent. Stackpole, as such agent, had contracted with one Bartlett to go on to the land, that winter, and cut and haul off timber; which was to become his, only, upon his paying at a certain rate per M. for what he might cut. Bartlett thereupon, as if owner of the soil and timber upon it, contracted with the plaintiff to go on and cut upon similar terms. This was, by the contract of Bartlett with Stackpole, wholly unauthorized; and the plaintiff, by going on and cutting, under such circumstances, became in strictness a trespasser; and could, therefore, under such circumstances, acquire no legal interest in the timber he might cut, as against the proprietors of the land. By his con-

tract he was not accountable to them; and there was no privity between him and them. Yet to maintain this action he must prove property in himself. To do this he contends, that the proprietors, or their assignees, have done certain acts, which recognized his cutting, as if under a license from them, upon the terms agreed upon between him and Bartlett; and upon an alleged payment to them, or their agent or assignee, for the timber cut upon those terms.

The defendants claim as vendees or assignees, under the proprietors of the land, and, as such, may maintain their defence, unless the plaintiff's allegations are sustained by his evidence; to do which the burthen of proof is upon him. It appears that one Rines, with certain other individuals, were co-tenants of the land on which the timber was cut; and that those individuals, on the fifteenth day of May, 1835, transferred and sold to him fifteen sixteenths of the timber cut during the previous season for cutting, "under the direction of Richard H. Bartlett," with whom the plaintiff had contracted as before stated. Rines, owning the other sixteenth part, thus became the owner of the whole, subject to such rights as pertained to those, who had cut the timber, whatever they might be.

There was evidence introduced by the plaintiff tending to show, that, while Rines so owned the timber, he recognized the right of the plaintiff to become the owner of it, upon his paying what, among lumbermen, has acquired the appellation of stumpage, viz., the value of the timber when standing; and of such recognition there does not seem to have been any question made at the trial. The plaintiff further introduced evidence, which he contended shew also, that Rines received full satisfaction for the value of the timber as estimated before it was cut. It appeared, that Bartlett had taken a negotiable draft of one Isaac J. Stevens on one Nathaniel Stevens for that amount, but the evidence tended to show that it was with an express understanding that, if not accepted by the drawee, the claim upon the timber was not to be affected; that the same draft, not having been accepted, Bartlett in-

stituted a suit thereon against the drawer to recover the amount drawn for, and attached the logs in question as the property of the drawer; that Rines afterwards, while the action was pending upon the draft, took an assignment of it from Bartlett; and gave him, as he (Rines) testified, a receipt in full for the stumpage. In this wise, as the plaintiff contended, the stumpage had been paid for, and that thereupon the timber became his.

On the other hand, much evidence was introduced by the defendants, tending to show that the testimony of Rines was not to be relied upon, and that in fact he never gave any such receipt as he testified that he did; but that he retained his ownership of the timber, unaffected by the assignment of the draft, no part of which had ever been paid. And the question whether Rines received the assignment of the draft in full discharge for the stumpage, was, in the instructions of the Court to the jury, explicitly stated to be for their consideration; and if it was so received, they were further instructed, that the verdict should be for the plaintiff; otherwise for the defendants. The jury thereupon returned their verdict for the defendants. This question of fact, therefore, would seem to have been deliberately settled; leaving no ground upon which the plaintiff can rest for the support of his action.

He insists, however, that the finding of the jury was not warranted by the evidence; and has filed a motion for a new trial upon that ground; but it was a matter of fact; and, as such, exclusively within the province of the jury to be decided. In such cases the Court cannot interfere to subvert their doings, but upon the most manifest delinquency on their part, of which the case furnishes no exhibition.

But the great reliance, on the part of the plaintiff, to have the verdict set aside, would seem to be upon his exceptions; the first in order of which is, that the deposition of I. J. Stevens, offered by him, was ruled inadmissible. Whether this ruling was correct or not the bill of exceptions does not enable us to decide. It merely sets forth that the deposition was offered, and, on being objected to by the defendants, was ex-

cluded. It is not set forth that the rejection took place on account of interest in the deponent, or of informality in the caption, or for irrelevancy. We are, however, in the arguments of counsel, informed, that it was on account of interest in the deponent. This is not enough. It should have appeared in the exceptions how, and in what particulars the plaintiff was aggrieved. If the witness was disinterested, and his rejection was upon the supposition, that he was interested, still the plaintiff might not have been injured thereby.

Upon an inspection of the deposition on file we have been enabled to see, if it had been admitted, it could not have affected the result. The supposed settlement with Bartlett, to which this deponent testifies, was not obligatory upon Rines, who had become the owner of the stumpage, as the jury have found; and there is no other material fact contained in the deposition, not abundantly substantiated without it. In such case the plaintiff could not be considered as aggrieved by its exclusion; and it would be improper that the verdict should be disturbed for that cause.

We do not deem it necessary to examine minutely all the twenty-six points raised under the exceptions, with their numerous subdivisions, ingeniously and elaborately argued by the counsel for the plaintiff, with a citation of authorities indicative of a widely extended and praiseworthy research. Many of his propositions are based upon the hypothesis, that the interest, which the owners of the land had reserved to themselves, was in the nature of a lien or pledge, and that such lien or pledge was, by certain acts of the owners or their agents, virtually discharged. These sales of stumpage, in this State, are but conditional, viz. if certain payments be made, and certain other terms be complied with, the sale will become absolute; otherwise it will be void. If the plaintiff, in this case, had contracted with the owners of the land, or their authorized agent, to cut the timber, an interest in it, against the owners, could not have vested in him, but upon strict performance of the conditions named in his contract; or a waiver of performance on their part. If such had been the contract the main

condition, the payment of the value of the timber, as when standing, has never been performed. Here there was no contract with the owners, which they could have enforced; and the plaintiff had no specific agreement with them, which he could have enforced. Every thing on his side rests upon implication; and, surely, a very clear case of this kind should be made out to authorize a Court to conclude, that he had become absolutely the owner of the timber. Whoever finds himself in difficulty for want of due precaution should calculate that he must abide by the consequences, and not look to Courts for relief. The plaintiff himself, according to the testimony of one of the witnesses, was sensible of his failure, and of his consequent forfeiture of his right to the timber.

The position, that the acceptance of negotiable security for an existing indebtedness by simple contract, is to be deemed payment, may be, and doubtless is, sustained by the decisions in this State and in Massachusetts; but it is competent to the parties to agree that it shall be otherwise deemed. They may agree that it shall be received as security merely collateral; and proof by parol may be admitted to show, that it was so taken; and, when so taken, it is the right of the holder to endeavor to make it available for the purpose for which it was taken, by suit or otherwise; and failing of success, he may resort to his original security; and this without previously restoring the collateral security.

The attachment of the timber in question, in the suit against the drawer, by Bartlett, is much relied upon in argument by the plaintiff's counsel. But such attachment could not make it the property of the plaintiff. He was, so far as appears, a stranger to that suit. It was a matter *inter alios*. Rines, when he had taken an assignment of the draft, and had obtained judgment, did not levy upon the timber, but resorted to his original ownership, as well he might, if he had not accepted of the assignment in full discharge of his claim, which by the finding of the jury it seems he had not.

The circumstances attending the auction sale, which were introduced at the trial, tended only to show that Rines recog-

nized the right of the plaintiff to become the owner of the timber upon the payment of its value when standing. It was a useless formality; unless he had it in view, as equity perhaps would have dictated, after deducting his claim, to have restored the surplus to the plaintiff; and if this were his purpose he might as well have sold at private sale in the first instance as finally. The several portions of the testimony objected to by the plaintiff could not have varied the result.

The exceptions and motion for a new trial are overruled; and judgment must be entered on the verdict.

NEWTON M. WHITMAN *versus* ANDREW FREESE *& al.*

SAME *versus* SAME.

A mere description in a bill of sale of the articles sold as "certain lots of boards and dimension stuff now at and about the mills at P." does not amount to a warranty that the articles were merchantable.

It is not competent for a surveyor of lumber in the county of Penobscot, whose survey has been returned and recorded as provided in the statute regulating the survey of lumber in that county, to show by his testimony, that the lumber surveyed by him was of a different quality from that stated in his survey.

ASSUMPSIT on a note given by the defendants to F. & I. S. Whitman, dated April 26, 1839, for $283,00, payable in six months, and indorsed to the plaintiff. There was another suit between the same parties, brought afterwards on a note similar in all respects, save that it was made payable in eight months. They were both argued at the same time, as one case, on exceptions to the rulings and instructions of TENNEY J. presiding at the trials, and on motions to set aside the verdicts as against evidence.

The defendants in a brief statement, alleged that the notes were given for boards, bought within the county of Penobscot to be shipped beyond the limits of the county, and not surveyed according to the provisions of the statute regulating the survey of lumber in that county, and that there was a war-

ranty at the sale, that the boards were merchantable, when in fact they were not. It was agreed, that the actions should be subject to the same defence, as if F. & I. S. Whitman were the plaintiffs. The sale of the lumber was made by an agent, Dexter E. Wadleigh. The defendants introduced in evidence the bill of sale of the lumber, of which a copy follows.

"Messrs. Freese & Chadwick bought of F. & I. S. Whitman, Bangor, April 26, 1839, the following mentioned lots of lumber, viz. two lots, at the mouth of the Pushaw stream, boards, also certain lots of boards and dimension stuff now at and about the mills at Pushaw; being the same lots shown to Mr. Chadwick by Dexter E. Wadleigh in the presence of Warren Brown, April 25, 1839, estimated to be two hundred thousand, more or less; also, seven thousand of clapboards under the mill, also thirty thousand of laths, all for the sum of eight hundred and fifty dollars per agreement. Received payment in notes of four, six and eight months.

"F. & I. S. Whitman."

Among the witnesses called was one Oakes who testified, that he was a deputy surveyor of lumber in the county of Penobscot, and as such surveyed a quantity of this lumber, and made his return thereof, according to the provisions of the statute, to the Surveyor General, where it was recorded. He was inquired of respecting the quality of this lumber. The plaintiff objected to the admission of this testimony on the ground that there was better evidence in writing. The Judge rejected the testimony. The surveyor's books were then introduced, and the same witness was asked by the defendants, whether a large portion of the boards surveyed by him were not of a quality inferior to what appeared on the survey-book. The plaintiff objected, and the Judge ruled that the testimony was inadmissible, and that the surveyor could not contradict his own survey of those boards.

The objections made, at the trial, to the admission of Wadleigh and I. S. Whitman as witnesses, and the facts and rulings in relation thereto, are stated in the opinion of the Court.

The general instructions to the jury, appearing in the ex-

ceptions, relate exclusively to the question of fraud in the sale, one ground of defence set up at the trial. As no objections were made to their correctness in the argument, they are not given. The verdict was for the plaintiff, and the defendant filed exceptions.

McCrillis argued for the defendants. Under the motion for a new trial, it was contended, that the bill of sale was a mere bill of parcels, and that parol evidence was admissible to show a warranty; and that the verdict was against evidence on that ground. The lumber sold was described in the bill of sale as boards, which amounts to a warranty, that they were such and of fair quality. 13 Mass. R. 139; 11 Pick. 97; 2 Pick. 214; 2 Rawle, 23; 12 Wend. 566.

There was an implied warranty in law, that the lumber was of a merchantable quality. The sellers were the manufacturers of the articles sold. 1 Stark. Ev. 384; 2 Kent, 483; 2 Hill. 606; 6 Taunt. 327; 5 Bingh. 533; 4 B. & Cr. 108.

It was also contended that the rulings of the Judge were erroneous, both in the admission and in the exclusion of the testimony.

Cutting argued for the plaintiff. He said no points of law were open to examination, but such as were made in the exceptions; and contended that the rulings of the Judge, who presided at the trial, were correct in overruling the objections made on the part of the defendants to the admission of the plaintiff's witnesses, and in rejecting the introduction of parol evidence to contradict the survey made by the witness, which had been returned and recorded according to the provisions of the statute regulating the survey of lumber in this county.

He contended, however, that if new points of law could now be made, under a motion for a new trial, the positions taken for the defendants could not aid them. There is no warranty in the bill of sale; and on the question of warranty, no parol evidence was admissible of what was said before or at the time of sale. Besides the defences of fraud and warranty cannot be set up together. They are inconsistent.

The opinion of the Court was drawn up by

TENNEY J. — The signatures on the notes in the two suits were not denied; but the defence was upon the ground, that they were obtained by fraudulent representations, and that thereby they were given for too large a sum. It is not perceived, that any of the general instructions to the jury were erroneous; and indeed the argument in support of the exceptions is not founded upon such a position; but that the plaintiff was not entitled to recover, because there was a warranty arising from the terms used in the bill of sale of the lumber from F. & I. S. Whitman to the defendants, and from the evidence in the case. The bill of sale, we think, will not admit of such a construction. The fair import of it is, that a quantity of lumber, not surveyed, was sold for a gross sum, there being no description of the kind or quality, or the precise amount. The word "boards" was used not to indicate that the lumber was merchantable, or that it was sold as such, but as a term applied to a particular species of lumber. There is nothing in the evidence, which required the legal instruction to the jury, that, if it was believed, the vendors of the lumber were holden to deliver merchantable boards.

Objections were made to the competency of I. S. Whitman and Dexter E. Wadleigh as witnesses for the plaintiff. They were both examined on their *voir dire*. Every person not a party to the suit is admissible, until his incompetency is made in some manner to appear; and we are to look at the whole of the statement made by a witness in this examination in determining the question; and Courts have endeavored to let the objection go to the credit, rather than to the competency of witnesses. *Bent* v. *Baker*, 3 T. R. 27.

Whitman stated that he had at the time of the trial no interest in the event of the suit, that he had transferred the notes some time previous and an allowance to him therefor for more than their amount was made by his creditor; and it appears that he was released by the plaintiff in the suit from all liability for costs. He is not a party of record, and a verdict in this case, cannot be evidence for or against him in a suit, in

which he may be a party, and his testimony was properly allowed.

Wadleigh once owned the lumber, which was the consideration of the notes, and it was put into the hands of F. & I. S. Whitman as collateral security for his indebtedness to them, before the sale to the defendants. The bargain was made by him, but his creditors sold the lumber, and took to themselves negotiable notes, and he expected they would give him credit therefor. The witness and the Whitmans had a reference, and he expected no further credit, and that he had no interest in the event of the suit. There is no suggestion made by him, that the makers of the notes were of doubtful ability to pay, and the facts, and the expectations of the witness were inconsistent with the idea, that the notes had not absolutely gone into the hands of his creditors; and that he either had credit for their amount, or was entitled thereto, we think is manifest. It is true, he stated that the notes were taken as collateral security, but we are satisfied, that when the whole is taken together, his meaning must have been, that they were to account to him on their claim for the same.

The testimony of John Oakes and Atherton Pratt was admitted, excepting so far as it had reference to the quality of the lumber, which they had surveyed, as surveyors appointed by authority of statute, and which was required to be made matter of record, and was in fact so made. These records were introduced, were the best evidence of the facts, and could not be controlled by parol testimony.

The question, whether the notes were obtained by fraudulent representations or not was one of fact, which was put to the jury and passed upon by them. The evidence as reported, we think will not authorize the Court to interfere in that, which it was their province to settle.

Exceptions and motion for new trial overruled.

JEDEDIAH HERRICK *versus* MERCY HOPKINS *& al.*

Every call in the description of the premises, in a deed, must be answered if it can be done; and the intention of the parties is to be sought by looking at the whole, and none is to be rejected, if all the parts can stand consistently together.

If there be a precise and perfect description, showing that the parties actually located the land upon the earth, and another, general in its terms, and they cannot be reconciled with each other, the latter should yield to the former.

But where there is inaccuracy or deficiency in the particular description, the one which is general often becomes important, and renders that clear, which, without it, would be obscure and uncertain.

WRIT of entry. At the trial, before TENNEY J. after the evidence was before the jury, a nonsuit was ordered, by consent of parties, on the ground, that by the true construction of the deed, Hamlin to Sheppard, the premises in controversy belonged to the tenants. If that construction was erroneous, the nonsuit was to be set aside, and the action stand for trial. The material parts of the deeds are given in the opinion of the Court. A plan was exhibited, and remarks made in reference to it at the argument, but none appears with the papers.

J. Appleton argued for the demandant; and in support of his views, cited 11 Pick. 193; Sheph. Touch. 87; 3 Pick. 272; 7 Greenl. 220; 20 Maine R. 61; 5 Greenl. 482; 5 Mason, 410.

Kent and *H. Hamlin* argued for the tenant, citing 17 Maine R. 123; 1 Har. & Mc. H. 139; 4 Monr. 32; 1 Met. & P. Dig. 479; 5 N. H. R. 450; 7 Wheat. 10; 3 Sumn. 170; 8 Greenl. 85; 6 Cowen, 544, note; 3 Kent, 480; 20 Wend. 149; 7 Cowen, 723; 11 Conn. R. 163; 13 Pick. 145; 5 Pick. 135; 3 Fairf. 326; 3 Greenl. 398; 7 Verm. R. 511; 5 Greenl. 486.

The opinion of the Court was drawn up by

TENNEY J. — The land in controversy is a small portion of lot No. 17, as surveyed by E. Ballard in 1796, in the town of Hampden, conveyed by the Commonwealth of Massachusetts

to Perez Hamlin. Hamlin conveyed to John Sheppard, (under whom, through several mesne conveyances the defendants claim,) a parcel thereof by deed dated April 3, 1797, and is described as follows.— "Begining at a cedar stake with stones about it, thence running South 43° West, 17 rods to a cedar stake with stones about it, thence South 56° East, 15 rods to a cedar stake at the bank of Penobscot River, thence North 42° East, or as the river runs, about 11 rods, thence North 38° West, 15 rods to the first mentioned bounds, and contains, by estimation, about one acre and one third of an acre, and is bounded Northerly on Kennebec road, Easterly on Penobscot River, and Southerly and Westerly on the said Perez Hamlin's land." The residue of that part of lot No 17 in which the land conveyed to Sheppard is situated, was subsequently conveyed by Hamlin, to which conveyance, the demandant traces back his title.

In the first count in the writ, which is the only one relied upon, the demandant claims to be the owner of a peice of land "beginning at a stake and stones on the bank of Penobscot River, thence North 42° East, or as the river runs, about 11 rods, thence North 38° West, 15 rods to a stake on the Kennebec road, so called, as laid out by Ballard, thence East 7° South, by said Kennebec road to Penobscot river, thence by Penobscot River Southerly to Daniel Emery's land, thence by said Emery's land, North 56° West, to the place of beginning." This claim is made upon the ground that the land conveyed to Sheppard extended only to the *bank* of the river, and that it left also a gore at the North East corner of lot No. 17, bounded Northerly on the Kennebec road, and Easterly by the Penobscot river.

It is insisted by the demandant's counsel, that the land conveyed to Sheppard is particularly described by lines of specific lengths and courses, and so that its location cannot be mistaken, and although there is a general description afterwards, bounding the land on the Kennebec road and Penobscot river, yet as this cannot be reconciled with the first it must yield thereto.

It is a familiar principle, that every call in the description of the premises in a deed must be answered, if it can be done. The intention of the parties is to be sought by looking at the whole, and none is to be rejected, if all the parts can stand consistently together. If however there be a precise and perfect description, showing, that the parties actually located the land upon the earth, and another, which is general in its terms, and they cannot be reconciled with each other, the latter may yield to the former. But where there is inaccuracy or deficiency in the particular description the one which is general often becomes important, and renders that clear, which without it would be obscure and uncertain.

In the deed to Sheppard, the length and direction of the first, second and fourth lines are precisely given; three of the four corners have monuments of cedar stakes, and two of these with stones about them. No monument is given as the termination of the third line, till the fourth line is laid down in the deed, and still, as the last or fourth line is of a given length and course, and ends at a point which was fixed and certain, the third line must have terminated at a place, existing distinctly in the minds of the parties. But the language used implies, that the length and course of the third line were uncertain, for the course is in the alternative, North 42° East, or *as the river runs, about* 11 rods, very different from the precise terms used in reference to the other lines. If this third line is limited to 11 rods, and was not intended to deviate from the course of North 42° East, there are words, which are entirely destitute of meaning, which we cannot admit, if other points of the description will give them effect. This is not a case where there are two distinct descriptions, the whole is necessary to make one, which is perfect; and when taken together it is not perceived that there is any such inconsistency as to make it necessary to exclude the effect of the latter part. A monument at the termination of any particular line, may as well be inserted in one place as another, in the description, provided it is clearly expressed. The monument at the end of the third line is the Kennebec road, and that only. This

line was probably not run as the others were, perhaps on account of the state of the river at that season of the year. And as the point where that line was to end is distinctly indicated, it was useless to run it, in order to know in what manner to locate the land to be conveyed.

The course of the last line in the description is certainly widely different from that of the Kennebec road, as described in the writ, the surveyor's report, or the deed from the Commonwealth to Hamlin, under whom both parties claim; but monuments must control courses and distances even where the latter purport to be given with perfect precision, but in this case, the parties must have understood, that both were uncertain. How such a mistake in the course of the last line should have occurred, it is not necessary to inquire; but when we see, that the course of the Kennebec road from the river was North 83° West, and the last line in the description was North 38° West, it is not unnatural to suppose, that the scrivener reversed the figures indicating the course, writing it 38 instead of 83. The construction adopted is fortified by the fact that Hamlin in his subsequent conveyance of the residue of the lot No. 17 excepted the land conveyed to Sheppard, being in the North East corner thereof.

The parties did not agree as to the location of the Kennebec road, referred to in the deed to Sheppard, and the Court are to draw such inferences from the evidence in that particular as a jury would be authorized to do; and the whole evidence in the case, documentary and parol, all tends to the same point, and clearly established the fact, that the Kennebec road was located at the time of the original survey between lots Nos. 17 and 18, taking half from one and half from the other, on a straight course from the head of the lots to the river; and that the road so located is the same referred to in the deed to Sheppard and in the demandant's writ.

Does the language in the deed from Hamlin to John Sheppard embrace the land between the bank of the Penobscot river and the river itself? It is well settled, that when land is bounded "on a river, by a river, or to a river," where the tide ebbs

and flows, the flats are embraced. But where the boundary is "by the bank of the river" it may be otherwise, often depending upon other language used in connection. The second line mentioned in the description of Perez Hamlin's deed to Sheppard runs to a cedar stake "at the bank of Penobscot river, thence *as the river runs*, &c., and the parcel is afterwards represented as bounded on the East by Penobscot river. It is manifest from the whole, that the land *below* the *bank* was intended to be conveyed, and that the language "at the bank" was used synonymously with the term at, by or on the river. The land was on a navigable river, which probably enhanced the value of it; and it is improbable therefore that the parties should have referred to that as the Eastern boundary without fully understanding the import of the language.

Nonsuit confirmed.

SAMUEL CLARK *versus* BULAH FRENCH.

A conveyance of personal propety, made without consideration, and for the purpose of defrauding creditors, is void as well against *subsequent* as *prior* creditors of the vendor.

Where it was agreed between the parties, that one should take certain furniture in a house in payment of a pre-existing debt, the price to be determined by the appraisement of certain men, who ascertained the value in the presence of the parties, and the vendor left the premises and the vendee immediately entered into the occupation thereof and took actual possession of the furniture, this is a sufficient sale and delivery, although no receipt is given for the furniture, or charge or credit on the books, and no formal delivery is made.

REPLEVIN for a quantity of furniture. The plaintiff claimed under a bill of sale of the property from Charles Hayes to himself, dated Sept. 19, 1836, and proved a formal delivery to him. The defendant also claimed the property under a sale from said Hayes to her on the last of April, 1838. The defendant pleaded the general issue, and filed a brief statement, alleging that she was at the time the owner of the property.

The counsel for the plaintiff contended, that the general issue and brief statement were inconsistent; and moved that the defendant should be put to her election to say, by which plea she would abide, and that the other should be stricken out. TENNEY J. presiding at the trial, permitted the defendant to rely on each. Clark, the plaintiff, was bar-keeper of Hayes at the Penobscot Exchange, a public house in Bangor, at the time his bill of sale was made, and also at the time of the sale to the defendant. Hayes occupied the Exchange from April, 1832, until April, 1838, as a tenant of the defendant, who had a life estate therein. When Hayes left that house the defendant occupied it herself, and the plaintiff continued as bar-keeper for some months afterwards. The furniture in controversy was originally purchased by Hayes for the use of the Exchange, and remained in use there until it was taken by this writ of replevin in April, 1841. At the time Hayes left the house, he was indebted to the defendant for rent to an amount greater than the value of the furniture, and it was agreed between them, that she should take the property in payment at a price to be determined by the appraisal of two men. The appraisal was made, and the amount ascertained, Hayes, Clark, Mrs. French and her agent, all being present. Hayes left the house, and Mrs. French took possession immediately and used the furniture, but it did not appear, that any bill of sale was executed, or charge made, or receipt or credit given, or any formal delivery, other than going out and leaving the defendant in possession. It was admitted at the trial, that when the bill of sale was made to the plaintiff, Hayes gave him a note for $600, and that the plaintiff gave his notes to Hayes for $2,000. The objections made, and the facts bearing on certain points, appear sufficiently in the opinion.

The Judge instructed the jury, that if they were satisfied, that said Hayes, passing through four rooms, pointed out to the plaintiff the furniture therein, and stated to him, this is a part of the furniture mentioned in that bill of sale, and I deliver it to you as your property, and the rest is about the house, and if the jury believe that the plaintiff was living in

the house and from his business had rightful access at that time to every part of the house where any articles of the furniture were, it constituted in law, a sufficient delivery.

That they would then consider whether or not the sale from Hayes to Clark was made in good faith and *bona fide*, or fraudulent, and for the purpose of defrauding or delaying his creditors; and if fraudulent, whether or not Clark was consusant of such design and intention; and that the burden of proof to establish fraud and knowledge in Clark was on the defendant.

That if the jury according to the foregoing instructions should find the sale fraudulent, that they would then consider and find whether or not the defendant had established a title in herself to the furniture in controversy by making and completing the purchase thereof.

That they would consider the evidence as to this point, and if they were satisfied, that it was the design of Col. Hayes to sell and Mrs. French to purchase, and in pursuance of such intention the furniture was appraised and delivered, it constituted a valid sale, and a legal title in the defendant as between the parties to the contract; that if they believed that French entered into the house and took actual possession of the property, it constituted a sufficient delivery, and that no other or different delivery was necessary.

The Judge further instructed the jury, that whether the sale to the plaintiff was *bona fide* or not, still if he afterwards stood by and saw Hayes sell the same property to the defendant, without making any objection, or interposing any claim to it; and they were satisfied of these facts, and in other respects the sale to Mrs. French was complete, it would be too late for the plaintiff to assert his claim with effect; or if the plaintiff did state to the agent of Mrs. French, that he had a bill of sale of the property, and said nothing further on the subject, and he afterwards continued to bring forward the property, and was aiding in the appraisal and in completing the sale to Mrs. French, knowing fully at the time the object and the design of Hayes and Mrs. French, and made no objection, the

jury would be authorized to consider him precluded from afterwards setting up a title thereto.

The jury returned a verdict for the defendant, which was to be set aside if any of the rulings or instructions of the Judge were erroneous.

Kent & Cutting argued for the plaintiff.

On the first point, that in an action of replevin, the pleas of the general issue and of property in the defendant, are inconsistent, were cited Rev. Stat. c. 115, § 18; 1 Mass. R. 181; 1 Greenl. 198; 16 Maine R. 84; 15 Mass. R. 48; 1 Pick. 1.

On the third point, that as the rent, for the payment of which the purchase of the defendant was made, accrued after the bill of sale to the plaintiff, she cannot come in as a creditor to defeat the bill of sale to the plaintiff, on the ground of want of sufficient consideration, or of its being fraudulent as to creditors, were cited the statutes of frauds of 13, c. 5, and 27, c. 4, of Elizabeth, and 4 Kent, (4th Ed.) 462. It was contended, that the statute of 27 Eliz. applied exclusively to real estate, and that hence the case of *Howe* v. *Ward*, 4 Greenl. 195, had no application to the present case.

McCrillis and *Moody*, for the defendant, in their arguments, on the first point, relied on the express provisions of Rev. Stat. c. 115, § 18, as authorizing this mode of pleading.

On the third point, that where there is actual fraud in the sale, to cover it for the benefit of the seller against his creditors, there is no distinction between prior and subsequent creditors, or between sales of real or personal property, were cited 3 Johns. C. R. 371; 18 Johns. R. 515; 2 Kent, 441; Rob. on Fr. Con. 541; Cowper, 434; 14 Mass. R. 137; 20 Pick. 247; 2 Pick. 411; 3 Metc. 338; 4 Greenl. 195; 4 Kent, 464; 10 Ves. 144; 2 B. & P. 59; 15 East, 21; 5 Taunt. 212.

The opinion of the Court was drawn up by

WHITMAN C. J. — The verdict in this case was taken subject to the exceptions on the part of the plaintiff to the rulings and instructions of the Court. It does not appear to be im-

portant to consider of the first supposed error, viz., as to whether the defendant should have been put to her election in her defence, to proceed under her plea, or under her brief statement. The result was ultimately unaffected by the ruling of the Court in this particular. The decision did not turn upon any question concerning the taking. The defendant, if put to her election, it is manifest, must have selected the matter set out in the brief statement for her defence; and the decision took place upon no other ground. The only effect of the error, if such it was, was in the first instance, to put the plaintiff to the proof of the taking, about which, ultimately, there was no question. It would not be reasonable, therefore, to set the verdict aside for this cause, and under such circumstances.

It is insisted that the testimony of Ebenezer French, the son of the defendant, should have been ruled out of the case; as upon the production of a certain paper purporting to be a contract, on certain terms and conditions, for a lease of the Exchange Coffee House, in 1831, for five years, the rent for which house, which accrued after the lapse of the five years, formed the consideration for the purchase set up by the defendant, of the furniture in question, was in the witness' name, as if he were the person to make the lease. This contract, thus made in 1831, for a lease for five years, had no tendency to show that the witness had any interest in rent, which accrued after the five years had elapsed. Besides, the defendant was sued for a lot of furniture, which she claimed to own. Whether the verdict should or should not be in her favor did not seem, in anywise, to concern the witness, in a pecuniary point of view. This objection, therefore, cannot be sustained.

It is contended that Hayes never made any sale of the furniture to the defendant; and that there was no bill of sale made, or delivery of it; and no credit given for it. But we think the instructions of the Judge, upon this point are well warranted by the rules of law. There was an agreement for the purchase, an appraisement of the property to ascertain its value; and the defendant thereupon took possession of, and

used it for years afterwards. Whether Hayes made a charge of it, or not, cannot affect her rights. It would seem to have belonged to him, to make such a charge; and she might well rely upon him to do so; and that it would, on settlement, appear as an item in his account. She was confessedly the creditor of Hayes; and as such took the furniture in payment *pro tanto*. The same was then, and ever had been in his possession; and the sale to her was *bona fide*, and for a valuable and adequate consideration.

The evidence, moreover, tended to show, that, when the appraisement took place, the plaintiff was present, and well knew what was going on; and was even active in bringing forward the articles for appraisement. And although he stated that he had a bill of sale of the furniture, yet he intimated no objection to the proceedure. It seems also that he remained in the house with the defendant, as her bar-keeper, for more than a year afterwards; and must have seen this large amount of furniture constantly in use by her; without, so far as appears, the slightest intimation of any claim to it, or to compensation for the use of it. Under such circumstances, it could not be deemed matter of surprise if a jury were to draw the inference, that in fact there never had been an actual sale to the plaintiff; his bill of sale to the contrary notwithstanding. Surely such evidence, connected with the insolvency of Hayes, and his fear, as may be gathered from the testimony of one of the witnesses, to have property stand in his name; and the fact that the plaintiff had been his bar-keeper for years, and of course a confidential agent, might well lead to the presumption, that the bill of sale was but colorable and never understood by him or Hayes, to have been designed to be any thing more. If further evidence were wanted to confirm such a presumption, there is the circumstance, that the plaintiff gave his note to Hayes for $2,000; and at the same time took Hayes' note for $600. If the pretended sale were any thing, other than colorable, why was not the $600, if any such sum was due to the plaintiff, deducted from the $2,000, and a note taken for the balance? And why was no effort made by

Hayes, embarrassed as he was during his lifetime, a period of several years thereafter, to collect any part of it? But the cause was not put to the jury precisely or solely upon this ground. It was put to them, also, upon the hypothesis, that there was in fact a sale to the plaintiff, but that it might not be valid as against creditors.

Whether the jury found for the defendant upon this ground, or upon the other, or both, we cannot now know.

That being the case, it becomes necessary to ascertain whether the instructions were correct upon that hypothesis. It is contended that the sale to the plaintiff was anterior to the existence of the indebtedness to the defendant, and, therefore, that she can have no right to question the validity of the sale to the plaintiff. The evidence as to the accruing of the defendants' debt seems undeniably, to show it to have been a year or more posterior to the bill of sale. There are authorities, which in their general aspect when considered without due discrimination, may seem to favor the plaintiff's position. But when critically examined, it will be found, that there are many of no inconsiderable weight, which, in reference to a case like the one before us, will tend to a different result. In the 1st Story on Equity, 352, it is said, "where a conveyance is intentionally made to defraud creditors, it seems perfectly reasonable, that it should be held void as to all subsequent, as well as to all prior creditors. In the 1st Eq. Dig. by B. & H. 570, it is said, where a deed is set aside as fraudulent against creditors, the property becomes assets, and subsequent creditors are let in. In Newland on Contracts, 389, it is said, "the deeds, which are avoided by the statute of 13 Eliz. are void as well against those creditors whose debts were contracted subsequently to such deeds, as against those creditors whose debts were in existence at the execution of the deeds." And in a note in 1 Story's Eq. 353, he says, "where a settlement is set aside, as an intentional fraud upon creditors, there is strong reason for holding it so as to subsequent creditors."

In *Taylor* v. *Jones*, 2 Atk. 600, the master of the rolls says, "here is a trust left to the husband, under this deed,

and his continuing in possession is fraudulent as to creditors." "The next question is, whether the debts contracted after the settlement made are included in the statute of the 13 Eliz." "The word others in the statute seems to be inserted to take in all manner of persons, as well creditors after as before the settlement." And "it is very probable, that the creditors after the settlement trusted Edward Jones, the debtor, upon supposition that he was the owner of the stock, upon seeing him in possession." If, therefore, in the case at bar, there was originally, in the making of the bill of sale by Hayes to the plaintiff, an intention to defraud creditors, the conveyance, according to those authorities, ought to be held void as against the defendant.

If a deed be made, which is intended to be absolute, without the reservation of any secret trust for the benefit of the vendor, although made with a fraudulent intent, well understood and intended, by both parties, to place the property beyond the reach of creditors, and although made for a valuable consideration, yet, wanting the other ingredient, viz. good faith, it shall be avoided only by creditors existing at the time. But if the deed be not absolute in fact, though in form it may be so, and a secret trust and confidence exist for the benefit of the vendor, in such case, it should not only be held void against precedent but subsequent creditors. For it is, in such case, a continuing fraud; and may actually operate as such as well in reference to debts contracted after as before the conveyance. Property conveyed in trust is still the property of the vendor to every beneficial purpose; and if he continues in possession it induces others to give him credit; and credit so obtained ought to have all the benefit to be derived from legal ownership in the vendor.

In the case of *Archer* v. *Hubbell*, 4 Wend. 514, the Court say, "the established doctrine of this Court is, that a voluntary sale of chattels, with an agreement that the vendor may keep possession is, except in special cases, and for special reasons to be shown to and approved of by the Court, fraudulent and void against creditors." This was the case of a sale of the

furniture of a tavern, and it was for a valuable and adequate consideration, and it did not appear otherwise than by the continuing possession of the vendor, unexplained, that there was any intention to defraud creditors. But such continued possession was held to be evidence of a secret trust.

In 3 Bacon's Abr. it is laid down, that, "if goods continue in the possession of the vendors after a bill of sale of them, though there is a clause in the bill that the vendor shall account annually with the vendee for them, yet it is a fraud, since if such coloring be admitted it would be the easiest thing in the world to avoid the provisions and cautions in the act.

Some of the seeming discrepancy in the authorities may have arisen from not discriminating between the different kinds of fraudulent conveyances, and the different degrees and shades of fraud in each. For some a valuable and adequate consideration is paid, and actual possession delivered and retained, yet they are made with a view to aid the debtor to convert his property into that, which cannot be attached or levied upon, and so to aid him in placing it beyond the reach of creditors. But being covinous such conveyances may be avoided by creditors, who were such at the time, but not by subsequent creditors; for there will be no secret trust, in such cases, for the benefit of the vendor. And in many cases of absolute conveyances, and for a valuable and adequate consideration, the possession may be allowed to be continued in the vendor, if it can be made evident that no secret trust is reserved for his benefit. But when the sale purports to be absolute, and the possession, unexplained, still remains with the vendor, and it be made out that the sale was colorable merely, and for the purpose of defrauding creditors, then it may well be inferred that there was not only a secret trust for the benefit of the vendor, but that fraud was actually meditated against subsequent as well as prior creditors. In every such case the pretended sale should no more protect the property from the subsequent, than from the prior creditors; for the property may be regarded as still in the debtor. The authorities before cited, as well as reason and common sense, will certainly sus-

tain this doctrine. And furthermore, the defendant in the case at bar, seeing Hayes in possession of the furniture, may well have supposed him to be the owner, and might give him credit on account of it. The jury may well have thought there was no reason to doubt, that there was a secret trust remaining for the benefit of Hayes; or else why was the possession and constant use continued in him, and without accounting for the use or rent of it, so far as appeared? We think, therefore, that the instruction upon this point was substantially correct. The able reasoning of the learned C. J. MELLEN, in the case of *Howe* v. *Ward*, 4 Greenl. 195, may be cited in elucidation of the foregoing remarks; and we are not to be understood as questioning the soundness of the corollaries by him deduced in conclusion, when correctly understood.

Judgment on the verdict.

HORACE S. M'KECKNIE *versus* ELISHA D. HOSKINS.

Where land is conveyed, and at the same time mortgaged back for the security of the consideration money, and the mortgagee continues in the actual possession and occupation thereof, but neither the deed nor the mortgage is recorded, and during the time the mortgagee is so in possession under his unrecorded mortgage, the mortgagor makes another mortgage of the property to a third person, who instantly records it, the former mortgage is entitled to priority over the latter.

Nor will the sale by the first mortgagee to the mortgagor, at the time the conveyances were made, of "one half of the herbage and crops of all kinds now standing and growing on the land," prevent the priority of the first mortgage.

JOHN BOWLEY was once the undisputed owner of the land demanded in the present action, and both parties claimed under him.

On July 20, 1835, Bowley, by his deed of that date, conveyed the premises to Solomon Moulton, and at the same time Moulton made a mortgage thereof back to secure the purchase money. The deed to Moulton was recorded on June 19, 1837, and the mortgage to Bowley, Oct. 28, 1836. This

mortgage was assigned to the demandant on Oct. 30, 1839, and the assignment was recorded on the next day. Bowley, by his bill of sale, under seal, bearing date July 15, 1835, conveyed to Moulton, "one half of the herbage and crops of all kinds now standing and growing on the land conveyed by me to said Moulton, by deed of *even date with this writing*," and the materials for erecting a house lying upon the premises, "the said Moulton to furnish at his own expense one man to help cut and make the hay the *present* season." At the time the deed and mortgage were made, Bowley was in the possession and occupation of the land, and so continued until long after the mortgage thereof to Eli Hoskins.

Moulton made another mortgage of the same premises to Eli Hoskins on Oct. 29, 1835, which was recorded on the same day. On March 24, 1841, Eli Hoskins made an assignment of this last mortgage to Elisha D. Hoskins, the tenant, but the assignment was not recorded until the day of the trial.

At the trial, before TENNEY J. the demandant was permitted by the presiding Judge, although objection was made thereto by the tenant, to prove the confession of Eli Hoskins, that before he took the mortgage from Moulton he knew of the mortgage to Bowley, made after his assignment to the tenant and before the recording thereof.

After the evidence was all introduced, a verdict was taken for the demandant, without any instructions to the jury, which was to stand, provided the ruling as to the admission of evidence was correct, *or if it should appear from the whole case that the demandant was entitled to judgment;* otherwise the verdict was to be set aside.

J. Appleton, for the tenant, considered it to be very clear, that the admissions of Eli Hoskins, made after he had assigned the mortgage, were improperly admitted. The verdict was obtained by illegal evidence, and the tenant is entitled to a new trial. Without this evidence ours was the prior title, as our mortgage was first recorded. There was no entry or possession shown under the demandant's mortgage. The possession of the mortgagee was under the contract only.

Kent, for the demandant, said that so long as the assignment remained unrecorded, it was the same as if never made, except as between the parties. The testimony was therefore rightly admitted. But this is an immaterial question, as we are entitled to judgment on other grounds.

1. The mortgagee, under whom we claim, was in the actual occupation of the premises until long after the mortgage of the tenant was made. This is equivalent to the recording of our mortgage. *Webster* v. *Maddox*, 6 Greenl. 256; *Davis* v. *Blunt*, 6 Mass. R. 487. The contract between the parties as to the crops does not alter the case. It did not authorize the holding.

2. If a man takes a title from a grantor who has no record title, he does it at his peril, and subject to all encumbrances existing upon the premises. When the tenant's mortgage was made and recorded, his grantor had no title whatever on the records. If the tenant relies on the records to give priority to his subsequent deed, they show our prior mortgage before they show any title in his grantor. He therefore fails with the records, as well as without them. *Flynt* v. *Arnold*, 2 Metc. 626.

The opinion of the Court was prepared by

TENNEY J. — Judgment is to be entered upon the verdict for the demandant, if the admissions of Eli Hoskins were competent evidence, or, if from the whole case, he is entitled thereto. If the result were to depend upon the first alternative, there is much reason to believe, that a new trial must be had, but from the whole case, as it is reported, the verdict can be well sustained.

At the time of the demandant's conveyance to Moulton, the latter had only an instantaneous seizin, he having executed and delivered back a mortgage for the security of the purchase money. *Holbrook* v. *Finney*, 4 Mass. R. 566; *Chickering* v. *Lovejoy*, 13 Mass. R. 51. As between the parties to that transaction, and those claiming under them respectively, the legal title and freehold was in the demandant, and he had the

right of possession at all times, till the condition of the defeasance should be fulfilled. There was evidence, that he was in possession at the time, he took his mortgage, and so continued till after the time, when Eli Hoskins took his mortgage from Moulton. This fact was not derived from the admission of Eli Hoskins, and does not seem to have been at all controverted at the trial; and the argument for the defendant proceeds upon the ground of its having been well established. The demandant must be treated as being in possession by right, and cannot be presumed, in the absence of evidence, to hold that possession under a title inferior to that, which he actually had. It is contended however for the defendant, that the instrument executed by the demandant, and in the case, shows that he held under Moulton, by virtue of that agreement, and not under the mortgage deed. This paper, though purporting upon its face to have been executed more than a month before the conveyance to Moulton, recites that it is of even date therewith. It is a bill of sale under seal, for the consideration of one hundred dollars, of one half of all the herbage and crops of all kinds, then standing and growing on the tract of land in dispute. Also all the materials of every description, then lying upon the premises for the purpose of erecting a dwellinghouse, it being understood, that Moulton was to furnish a man to aid in cutting and making the hay on the same.

Is there any thing in this instrument sufficient to show, that the demandant by a binding contract relinquished his perfect and legal right to retain possession as mortgagee, and that he was in fact holding under this instrument? Before the relation between them could be so entirely changed, there must be some unequivocal proof thereof; it could not be so determined by doubtful implication. By the terms and general tenor of the paper, the demandant sold a part of the crops then growing to maturity under his care, upon the farm of which he had possession, and also other property having no connexion with the premises. This sale implies at least, that the property sold, previously belonged to him, and it was not in the mouth of Moulton to deny this. But the conveyance to Moulton, taken

by itself, would pass the herbage and crops attached to the soil, and would render a purchase thereof entirely unnecessary. If it was understood between them, that Moulton was in the possession, as well he might be by the consent of the mortgagee, then so far from his being a purchaser of one half the crops, which he was to enjoy, he should have sold to the demandant the portion intended for him. When we look for the contract under which the demandant became the owner of the crops, so that he could sell a portion thereof to Moulton, we find none but the mortgage. No other than that and the bill of sale is pretended. The latter could not on any construction confer such a title, but the former was entirely sufficient for the purpose.

The demandant then must be regarded as holding the possession under the mortgage, and by the authority of the case of *Webster* v. *Maddocks*, 6 Greenl. 256, that possession perfects and secures his title as effectually as the registry of deeds.

Judgment on the verdict.

ROBERT TREAT *versus* HASTINGS STRICKLAND *& al.*

The second section of the repealing act in the Revised Statutes preserves not only actions, which technically and properly speaking had accrued by virtue of, or been founded on, the repealed statutes, but those also which were preserved and secured to a party by those acts.

Where one of two demandants in a writ of entry, pending at the time the Revised Statutes went into operation, afterwards dies, the Court has power to permit an amendment by striking out the name of the deceased, and otherwise amending, so that the action may stand as if commenced by the survivor alone.

The acts authorizing tenants in real actions to claim for the value of the improvements on lands, "holden by such person by virtue of a possession and improvement," require that such holding should be adverse to the legal title; and therefore a tenant holding under a bond for a deed from the owner, is not entitled to claim the value of such improvements.

The declarations of a former owner of land, made while he was proprietor of the estate, respecting the extent and boundaries thereof, are competent, though not conclusive evidence against those claiming title under him.

Where the general issue is pleaded, and a brief statement of the special matters of defence, not embracing, however, non-tenure or tenancy in common, is filed, no actual ouster need be proved, as the general issue admits the tenant to be in possession of the premises as tenant of the freehold.

If land be conveyed, and at the same time a bond be given by the grantee to the grantor and another, conditioned to convey the same premises to them on the payment of certain sums at certain times, the instruments do not constitute a mortgage of the estate.

Where land adjoining on tide waters is conveyed "with the flats adjoining the land and appertaining thereto, meaning to convey only the flats of right belonging to said parcel of land," such flats only would pass as the law would determine to belong to that parcel of land, unless there be sufficient evidence to show, that the language was used by the parties in a different sense. If there be such evidence, the language must receive such a construction, as will accord with their intentions.

To explain the language used in conveying an estate, its actual condition and occupation at the time of that conveyance may be considered.

And the purchaser of land with flats appertaining thereto, must be presumed to have known the manner in which the flats had before been conveyed in deeds spread upon the records, and the manner in which they were occupied at the time of the conveyance.

THIS was a writ of entry wherein was demanded one half part of a tract of land in Bangor, bounded beginning in the easterly line of a twelve feet passage way leading from Hammond Street northerly to Kenduskeag Stream, 69 feet northerly from the North line of said Hammond Street as used in 1832; thence North 87½° East, 131 feet to the centre of the Kenduskeag Stream; thence up said stream North 32° West, 166 feet; thence South 61½° West, 17½ feet to a 12 feet way; thence on the easterly line of said passage way South 8° West, 136 feet to the place of beginning. Also one undivided fourth part of another parcel of land in Bangor, bounded beginning on Hammond Street 12 feet westerly from the southwest corner of T. A. Hill's store, as it was standing in 1832; thence easterly on the line of Hammond Street 23 feet; thence northerly at right angles to the centre of Kenduskeag Stream in the same direction with the side lines; thence down said stream to a point where the westerly line of a twelve feet passage way leading from said Hammond Street to Kenduskeag Stream extending in the direction as the side lines would strike

the centre of said stream; thence southerly on said passage way to the place of beginning.

The action was originally brought by Waldo Pierce and Robert Treat. During the pendency of the action, Oct. 10, 1841, Pierce died, and Treat moved for leave to amend by striking out the name of Pierce and otherwise amending, so that the action should stand as if commenced by Treat alone. The tenants objected, but the amendment was permitted by TENNEY J. presiding at the trial.

Each party filed exceptions to the rulings and instructions of the Judge. The Reporter has received the exceptions on but one side. It is believed that the rulings and instructions of the Judge, and such of the facts as are necessary to show their bearing, appear in the opinion of the Court.

The question presented by both the bills of exception were ably and elaborately argued by

J. Appleton and *W. Kelley*, for the demandant; and by

J. P. Rogers, for the tenants.

The opinion of the Court was prepared by

SHEPLEY J. — The first question presented for consideration by the exceptions taken by the tenants, relates to the amendment. It was provided by statute, c. 186, § 3, that if either of the demandants should die during the pendency of a real action, his death should be suggested on the record, and that the survivor might amend the declaration by describing his interest in the premises, and proceed in the cause to final judgment. In the Revised Statutes, c. 145, § 19, there is a provision, that in such case the action shall not abate, but the Court shall proceed and determine the same after notice to the heirs. The forty-ninth section of the same chapter provides, that all real actions which shall be pending, when the chapter shall become a law, "shall proceed and be conducted to final judgment, or other final disposal, in like manner, as if this chapter had never been enacted." This action was pending at that time. It is insisted however, that the revised code repealed c. 186, and that there was no longer any statute pro-

vision authorizing the action to proceed after the decease of one of the demandants. In the second section of the act, which repealed that statute, there is a provision saving to all persons "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 such acts had never been repealed." But it is contended, that this action cannot be considered as having accrued in virtue of, or to have been founded on the repealed act. A literal construction of the language would authorize such a conclusion. When the language is considered in connexion with that of the forty-ninth section of c. 145, and with the recollection, that the general purpose of the revision was to embody in a more systematic form the existing laws, with certain modifications and new provisions, without destroying existing rights; there can be little doubt, that it was the intention of the legislature to preserve not only actions, which technically and properly speaking had accrued or been founded on the statute, but those also, which were preserved and secured to a party, by the repealed act. This intention is indicated by such actions being saved to them "in the same manner as if such act had never been repealed." The other part of that clause providing, that the proceedings in every such case shall be conformed, when necessary, to the Revised Statutes, cannot apply to this case, because it would be a violation of the provisions of c. 145, § 49, so to apply it. The amendment must therefore be considered as legally made.

The next question presented is, whether the testimony offered by the tenants to prove, that they and those under whom they claim had made improvements upon the premises, was properly excluded. It appears, that Samuel Smith conveyed the premises to the demandant and Pierce, on December 18, 1832. That on the same day they executed a bond to Edward and Samuel Smith to convey the same premises to them upon the performance of certain conditions. The tenants claim under a title derived from the Smiths or one of them, and especially desire to avail themselves of the value of the improvements made by Samuel Smith. The acts author-

izing tenants in real actions to claim for the value of the improvements made on lands "holden by such person by virtue of a possession and improvement," have uniformly been considered as requiring, that such holding should be adverse to the legal title. There is no testimony stated in this bill of exceptions tending to prove, that either of the Smiths, or any grantor of the tenants, held adversely to that title. From the testimony presented, the conclusion would be, that the Smiths entered by virtue of their bond, and if so, they were holding in submission to that title. But it is contended, if this be so, that testimony should have been received to prove, that they had subsequently denied that title and claimed to hold adversely to it. It does not appear to be necessary to enter upon an examination of this position, for the bill of exceptions does not state, that any such testimony was offered. It only states, that the tenants "called a witness to prove the value of the improvements made upon the demanded premises by them and those under whom they claim, particularly by said Smith." This testimony was properly excluded.

The next question presented is whether the agreements signed by Samuel Smith and others, made on October 10 and November 7, 1833, were properly admitted as testimony to prove the line of highwater mark. In these agreements Smith recites, that he was owner of one of the lots. He had before that time conveyed to Pierce and Treat one undivided half of one of the lots, and the whole of the other lot demanded, but he was at that time the owner of the other undivided half of one of the lots, by purchase from Dealing and Leavitt on April 25, 1833. The tenants claim under a title derived from him; and the acts and declarations of one, while he was an owner of the estate, respecting the extent and boundaries of that estate, may be received in evidence against those claiming title under him. *Human* v. *Pettell*, 5 B. & A. 223; *Adams* v. *French*, 2 N. H. R. 387; *Jackson* v. *Griswold*, 4 Johns. R. 230. These agreements were not received as binding and conclusive upon the estate, but only to show the acts and declarations of a former owner,

while he owned a part of that estate; and for that purpose, they were properly admitted.

The jury were instructed, "that by the pleadings in this case no actual ouster need be proved." This is alleged to have been erroneous. The tenants had pleaded the general issue accompained by brief statements of certain matters in defence. Non-tenure or tenancy in common with the demandant, was not made a point in the defence by the brief statements; and they cannot be considered as presenting any matter of defence not stated in them. The general issue admitted their possession of the premises as tenants of the freehold. The decision requiring such proof from the demandant in the case of *Cutts* v. *King*, 5 Greenl. 482, was founded on the statute, c. 344, § 2, which was repealed by c. 63, and the instructions were correct.

The jury were further instructed, that the passage way referred to in the deed from Smith to Pierce and Treat, "extended from highwater mark, in the same direction and of the same width as on shore, upon the flats towards the centre of the Kenduskeag stream in a line at right angles with Hammond street, and that the line described in that deed, as being seventeen feet and six inches in length, went to the East line of said passage way as the same extended." The conveyances, by which it was created and preserved, extend the passage way only to the stream; and if it can be extended further, it must be by virtue of some right or title other than that derived from the language of these conveyances. And if by their true construction the land, over which it was located, did not pass to the grantees, but only a right of way over that land, it may be doubtful, whether the passage way can be extended in any direction over the flats. It is not perceived, that a mere right of way would be extended from high to low water mark in these tide waters by the ordinance of 1641; for that only thus extends the title of the owner of the adjoining upland. But it will not be necessary to decide, whether the passage way did or did not extend beyond high water mark, if the tenant were not injured or aggrieved by those instructions. And this will

depend upon the construction of two deeds. One from Billings and wife to Samuel Smith, made on July 10, 1832; and the other from Smith to Pierce and Treat, made on the eighteenth day of the following December. By the former the line of boundary of the first lot conveyed is made to extend "to the centre of Kenduskeag stream, thence up said stream to a point, where the easterly line of said twelve feet passage way would strike the centre of said stream." This point was to be found, not by an actual extension of the passage way into the centre of the stream. No such idea could have been entertained. Nor could low water mark have had any influence upon the extension of that line, for it was not to terminate at low water mark, but in the centre of the stream. As the line of the passage way upon the upland was to be extended to the centre of the stream, the inference necessarily is, in the absence of any proof to the contrary, that the line was to be continued straight to the point of termination. And the point of union of the two lines referred to, will be found independently of any passage way upon the flats, by extending the eastern line of the passage way on the same course to the centre of the stream. In the deed from Smith to Pierce and Treat, the northeasterly line of the lot, which in the former deed was described as running "up said stream," is described "thence North thirty-two degrees West, one hundred and sixty-six feet." This last description would seem, according to the map of the premises exhibited, not to extend that line so far up the stream, as it was extended by the deed from Billings and wife to Smith. From a lower point of termination the line of boundary by the deed from Smith to Pierce and Treat, turns "South sixty-one and a half degrees West, seventeen feet and a half, to said twelve feet passage." This last line is laid down upon the map, S. 85° 30m. W. 17 feet and 10 inches. The case does not explain, why it is made to vary so much from the line described in the deed. If it be possible to extend that line according to the description of the deed, and make it unite with a line made by extending the eastern line of the passage straight to the centre of the stream, it is

not perceived, that there should be any such deviation. If the deviation was made to make it unite with an actually existing "twelve feet passage," the propriety or necessity for doing so, is not perceived; for the deed from Smith to Pierce and Treat says, "being the same parcel of land conveyed to me by Caleb C. Billings and Betsey Billings by their deed dated July 10, 1832." Any or all the obscurities, which arise from the description in the deed from Smith will be explained by the description in the deed to him. And the point of union of the northeasterly and southwesterly lines of the tract conveyed by the latter deed has been already exhibited. The tenants do not appear therefore to have been aggrieved by the instructions on this point.

The Court does not consider, that the deed from Samuel Smith to Pierce and Treat, and their bond to Edward and Samuel Smith of the same date, constitute a mortgage of the estate.

The point made respecting the finding by the jury of the line of highwater mark, and respecting the form of their verdict, it will become unnecessary to consider.

The exceptions taken by the demandant present for consideration the question, whether he was entitled to recover an undivided fourth part of the flats contained within the side lines of the lot described in the second count in the writ, continued to low water mark, on the same courses as those lines ran upon the upland. The jury were instructed, that he was not so entitled. In the year 1825, Caleb C. Billings and wife appear to have been the owners of a tract of land, including the demanded premises, bounded easterly by the passage way, northerly by the Kenduskeag stream, westerly by the land of William Emerson, and southerly by Hammond street. They conveyed to Thomas A. Hill, on August 22, 1825, one undivided third part of that tract, describing the East line thereof as "perpendicular to the northern line of said street." This deed also says, "it is intended by this deed to convey all the right, which the grantors have to the flats adjoining the lot conveyed *in the same direction with the side lines and no*

more." On the same day Billings and wife conveyed to Andrew W. Hasey the other two undivided third parts of that tract by a similar description, making a similar statement, that "it is intended by this deed to convey all the right, which the grantors have to the flats adjoining the lots conveyed *in same direction with the side lines of said lot and no more.*" Hill and Hasey divided that tract between them by deeds made on September 5, 1825. And Hill became the sole owner of the easterly, and Hasey the sole owner of the westerly, part of that tract. The line of division between their lots commenced on Hammond street fifty-two feet westerly from the south west corner of land conveyed in the year 1821 from Billings and wife to Hill, and extended at right angles with that street to the Kenduskeag stream. Thomas A. Hill conveyed to Samuel Hudson and John R. Greenough, on September 15, 1829, the lot demanded in the second count in the writ, bounding it on the northerly line of Hammond street, twenty-three feet, and extending it between side lines at right angles with that street to the Kenduskeag stream. The deed then says, "and I hereby also sell and convey to said Greenough and Hudson all the right and title, which I have to the flats adjoining the lot hereby conveyed *in the same direction with the side lines of said lot.*" Greenough conveyed to Samuel Smith on February 28, 1831, his half of that lot by a similar description of the lot, and in his deed says, "and I also sell and convey to said Smith one undivided half of the flats adjoining to the lot hereby conveyed *in the same direction with the side lines of said lot.*" Samuel Hudson conveyed to Arnold Dealing and Stephen Leavitt on January 22, 1833, his half of the lot by a similar description, and conveyed half the flats also "*in the same direction with the side lines of said lot.*" Dealing and Leavitt conveyed this half to Samuel Smith on April 25, 1833, by a similar description with one half of the flats "*in the same direction with the side lines of said lot.*" Before Smith had purchased this last half of the lot, he had conveyed the other half to Pierce and Treat on December 18, 1832, and after a similar description of the lot he says, "and also

hereby conveying one undivided half of the flats adjoining the land last described *and appertaining thereto meaning to convey only the flats, of right belonging to said parcel of land.*"

The argument is, that the flats appertaining thereto, and of right belonging to said parcel of land, can mean nothing more or different from flats, which the law would determine to belong to that parcel of land. And this will doubtless be correct, if there be not sufficient evidence to show, that the language was used by the parties in a different sense. If there be such evidence the language must receive such a construction, as will accord with their intentions. Some of the indications of a different intention are, that the flats adjoining the eastern side of the lot had been conveyed and held for seven years before that conveyance by a line at right angles with the street and on that course extending over the flats. That the flats on the westerly side of the lot had been conveyed and held by a like line for three years. That the grantees had been in possession of the land under deeds recorded. This would have the effect to disseize others, and to give them a seizin of the flats according to the bounds named in the deeds, whether they actually occupied the flats or not. Smith had purchased one undivided half of the flats, describing the whole flats as between the side lines of the lot extended on the same course over the flats. And when in conveying them he spoke of them as appertaining thereto, must he not have meant such flats, as had been appurtenant to and connected with the upland for several years? And when he described them as "of right belonging to said parcel of land," could he have doubted, that the flats, which he purchased with the land rightfully belonged to it; or have intended to attempt to convey by that language flats, which he had not purchased, and did not own, and to leave unconveyed a portion of the flats, which he had purchased with the lot? Such would be the result of a construction, that the deed conveyed such flats only, as the law, independently of all description of them, would assign to the lot. The case finds also, that the demandant "introduced evidence tending to show, that there was erected a wharf

below highwater mark several years before the purchase made by him, and between the side lines of the lot continued in the direction of said lines." Here then was proof to the eyes of both seller and purchaser showing, that a portion at least of the flats so described had been occupied and considered as appertaining to and rightfully belonging to the lot. To explain the language used in conveying an estate, its actual condition and occupation at the time of that conveyance may be considered. The purchasers also must be presumed to have known the manner, in which the flats had before been conveyed in deeds spread upon the records, and the manner, in which they were occupied at the time of the conveyance. And it cannot be supposed, that they would not have understood the language of their deed to convey the flats according, as they had been occupied and described in former conveyances. These considerations are esteemed to be sufficient to show, that the intention of the parties was by the use of that language thus to convey the flats, such flats, as the grantor had purchased with the lot, and such, as had been partially occupied for several years in connexion with the lot.

The exceptions of the demandant are sustained,
the verdict is set aside, and
a new trial granted.

LOT RIDER *versus* ELBRIDGE G. THOMPSON *& al.*

The poor debtor's oath should be administered by two justices of the peace, each of the quorum; but if one only be of the quorum, the act of 1839, c. 366, gives relief.

A poor debtor's bond is forfeited by an omission to take the *legal* oath; and the act of 1839, c. 366, does not give relief, when an oath found in a repealed act, is administered, instead of that required by the statutes in force at the time.

DEBT on a bond dated Nov. 30, 1838, given by E. G. Thompson, as principal, with the other defendant as surety, to procure his release from imprisonment by virtue of an exe-

cution in favor of the plaintiff. The defendants introduced the certificate of two justices of the peace *quorum unus*, that after due examination, &c. they had administered to the debtor the oath prescribed in the act entitled "An act for the relief of poor debtors." This was the poor debtor act of 1835.

At the trial before TENNEY J. the plaintiff objected, that no performance of the condition was shown, because the statute required, that both justices should be of the quorum. The Judge ruled, that the certificate did not, on that account, show a performance of the condition of the bond, but that it was competent evidence to go to the jury, under the statute 1839, c. 366, and *prima facie*. evidence, that the debtor was destitute of property.

The plaintiff also objected, that as the proper oath had not been administered, the certificate was not evidence of any fact, but was wholly void. The Judge ruled, that the certificate was *prima facie* evidence of the facts therein contained, and conclusive evidence to show due notice to the creditor, and sufficient to show, that the proper oath had been taken by the debtor. And also, that to maintain his action the plaintiff was bound to show, that at the time of taking the oath the debtor had property which might be available to him on his execution.

The verdict was, that there had been a breach of the condition of the bond, but that the plaintiff had sustained no damages. The plaintiff filed exceptions.

J. A. Poor, for the plaintiff, insisted that each of the objections taken at the trial was fatal to the defence set up, and that therefore the instructions were erroneous; and cited *Williams* v. *Turner*. 19 Maine R. 454.

A. G. Jewett, for the defendants, contended that the statute of 1839, applied to both the objections, and that the jury were authorized thereby to find only the damages actually sustained.

The opinion of the Court was by

SHEPLEY J. — This is an action of debt upon a poor debtor's bond. The certificate of two justices *quorum unus* was introduced by the defendants to prove a performance of the condition. The oath should have been administered by two justices of the quorum. But the act of 1839, c. 366, gave relief in such cases.

There is a more serious difficulty. The condition of the bond properly provided, that the debtor should take the oath prescribed by the seventh section of the act of 1836, c. 425. The certificate introduced shews, that he took the oath prescribed in an act for the relief of poor debtors, which is the act of 1835, c. 195. This was not the lawful oath to be administered; and the bond was forfeited by the omission to take the legal oath; and the act of 1839, did not give any relief in such cases.

Exceptions sustained, and new trial granted.

ANDREW PIERCE *versus* CHARLES C. TAYLOR.

The record of a conveyance of land in mortgage, which on the records appeared to be the land of the mortgagee, is not notice of a prior conveyance thereof by the mortgagee to the mortgagor.

WRIT of entry. Pierce claimed under the levy of an execution upon a tract of unimproved and unenclosed land in Bangor, and regularly traced his title back to an attachment thereof as the property of Samuel Smith, on Jan. 20, 1836. The tenant claimed under a deed from Smith, dated March 21, 1835, and recorded March 19, 1836, and introduced the record of a mortgage back to Smith of the same premises from the tenant, of the same date, and recorded March 23, 1835.

Rowe, argued for the demandant, citing *Stanley* v. *Perley*, 5 Greenl. 369; *Kent* v. *Plummer*, 7 Greenl. 464; *Lawrence* v. *Tucker*, 7 Greenl. 195; *Norcross* v. *Widgery*, 2

Mass. R. 506; *Farnsworth* v. *Child*, 4 Mass. R. 637; *M'Mechan* v. *Griffing*, 3 Pick. 149.

J. Godfrey argued for the tenant, citing *Clark* v. *Jenkins*, 5 Pick. 280; *Kendall* v. *Lawrence*, 22 Pick. 540; *Curtis* v. *Mundy*, 3 Metc. 405.

The opinion of the Court was by

SHEPLEY J. — The demandant claims to recover by virtue of an attachment made on January 20, 1836, upon a writ in his favor against Samuel Smith and others; and shows a judgment obtained in that suit and the levy of an execution issued thereon duly made upon the demanded premises. And a conveyance of the same from John C. Dexter and wife to Smith, by a deed made on March 31, 1835, and recorded on April 7, 1835.

The tenant exhibits a conveyance of the same from Smith to himself and William H. Foster, by deed made on March 21, 1835, and recorded on March 19, 1836, after the attachment. And conveyances from himself and Foster to Smith of the same in mortgage on March 21, 1835, and recorded on March 23, 1835. In the agreed statement it is said, that "the premises are wood and timber land unenclosed."

It was decided in the case of *Veazie* v. *Parker*, *ante* p. 170, that the record of a conveyance in mortgage to a person did not give notice, that such person had before conveyed the same estate to the mortgagor. The case does not present any evidence of an entry or occupation by the grantees of Smith under their deed, which would give notice, that they had purchased from him.

Judgment for demandant.

CHANDLER EASTMAN *versus* ISAIAH AVERY.

A delivery of personal property for security is not a transfer on condition, and does not constitute a mortgage thereof, but a pledge merely; and if the pledgee voluntarily relinquishes the possession of the property to the pledgor, and does not regain it, his right thereto against third persons ceases.

Where goods are attached by an officer and delivered to a third person for safe keeping, the latter is but the servant of the officer, and cannot maintain replevin against one who shall take them from him.

REPLEVIN for a pair of oxen and a cow. Plea that the defendant as an officer, attached them as the property of Hazen Eastman, whose property they were.

At the trial, before TENNEY J. it appeared that the oxen and cow were once the property of Hazen Eastman, and as such had been attached by Adams on a writ in favor of Sweetser, and delivered to the plaintiff as receipter therefor; that such proceedings were had, that the plaintiff became liable to Adams for the value of the property, because he did not restore it to him on demand; that afterwards Hazen Eastman, in the words of the witness, "did deliver the property to the plaintiff as security on that account;" that the plaintiff then told Hazen Eastman, that he might keep the cattle until he, Chandler Eastman, was called upon to pay the execution; and that Hazen Eastman did keep them in his possession until they were taken from him by the defendant by virtue of an attachment thereof on a writ in favor of Zebulon Pease against Hazen Eastman.

A. G. Jewett, for the plaintiff, contended that the action could be maintained upon this evidence. The plaintiff did not stand in the mere relation of servant of the officer, but of a creditor of Hazen Eastman, who had transferred the property as security for the plaintiff's liability. He had the ownership, and the right to take immediate possession of the property, and that is all that is necessary to maintain trover, trespass, or replevin. It was, too, that description of property, which the statute permits to remain in the possession of the former owner, without subjecting it to attachment.

A. W. Paine, for the defendant, argued:

1. That the plaintiff, as receipter, could not maintain the action. He is the mere servant of the officer. 9 Mass. R. 112, 265; 14 Mass. R. 217; 7 Cowen, 294; 8 Cowen, 137.

2. The contract existing between the plaintiff and Hazen Eastman was that of pledge only, and not mortgage; and therefore possession must not only be given but retained. A mortgage is a conveyance by which the legal title passes conditionally to the mortgagee, and if not redeemed at the time, the title becomes absolute. In a pledge a special property only passes, the general property remaining in the pledger. This is no more than a pledge. Story on Bailm. § 287; 2 Story's Eq. § 1030; 15 Maine R. 49; 2 Ves. Jr. 378; 2 Pick. 610; 12 Pick. 81; 8 Pick. 236; 12 Pick. 320.

The opinion of the Court was by

TENNEY J. — The property in dispute was attached as that of Hazen Eastman, on a writ in favor of one Sweetser, and the officer delivered the same to the plaintiff, and took from him an engagement to redeliver it on demand. Judgment and execution having been obtained in the action, legal and seasonable demand was made upon the plaintiff, who refused to deliver the property. Hazen was absent at the time of the attachment, and did not return till after the plaintiff was called upon for the cattle, and had no knowledge of these proceedings.

From these transactions, the plaintiff was merely the servant or bailee of the officer, who made the attachment, and had no special property in the goods, so that he can maintain this action. *Ludden* v. *Leavitt*, 9 Mass. R. 104; *Bond* v. *Padelford*, 13 Mass. R. 395; *Brownell* v. *Manchester & al.* 1 Pick. 232.

After the liability of the plaintiff to the officer became fixed by the demand upon him and his refusal, he informed Hazen Eastman thereof, and wished him to turn out the property attached, as his security. Hazen thereupon did deliver the property to him on that account, and immediately after, there

being no removal of the cattle, Hazen and the plaintiff agreed, that the former might keep the cattle, till the latter should be called upon, to pay the execution. The cattle thereafterwards remained in the possession of Hazen, until he exchanged a part of them for other property, and a part he slaughtered. Hazen paid the whole of the execution, the plaintiff never having been called upon to pay any part thereof after he took delivery of the cattle from Hazen. Eighty dollars of the execution was paid after the alleged taking by the defendant.

The goods having been delivered to the plaintiff by the general owner for the purpose of security, the contract was that of a mortgage or a pledge. By the former, the whole legal title would pass to the mortgagee, and would become absolute at law in him, on the failure of the mortgagor to redeem at the stipulated time. After delivery possession in the mortgagee is not essential. A pledge is defined to be a bailment of some personal property as security for some debt or engagement. The general property in such a contract remains in the pledger, and only a special property passes to the pledgee. Story on Bailments, 197. To render a pledge valid as security, there must be a delivery; and continued possession in the pledgee is indispensable for its preservation, and on a restoration to the pledger, of the possession, the pledge no longer exists. It is upon the ground of possession, that the lien thus created can be maintained, and it ceases upon its relinquishment.

It may have been the intention of the parties to this agreement, that the measures taken, should render the security perfect, and their expectation, that it was in reality accomplished. But if they mistook the law and the mode of doing the business, their intention will not supply any essential defects in the contract. From the evidence, there was wanting in the transaction some of the peculiar characteristics of a mortgage. A delivery of property for security is not a transfer of that property on a condition. The contract, by its terms and the apparent design of the parties, was in the nature of a pledge as defined by jurists. By the delivery the plaintiff

was entitled to the possession of the goods, which he could have retained by himself or his agent; but this he voluntarily relinquished, and never regained it afterwards; and thereby one of the necessary elements of a pledge at the time of the commencement of this suit was wanting, and the basis of the action fails.

The plaintiff must become nonsuit.

ELIZABETH L. PIPER *versus* SAMUEL C. GOODWIN.

Where an objection to the form of a writ might have been taken by plea in abatement, it cannot be assigned as error to reverse the judgment.

If the declaration be sufficient in substance, and the judgment be formal, there may be an informal writ without subjecting the party to the loss of his judgment. Error will not lie for defects in matter of form.

A promise by an administrator to pay a debt of the intestate need not be in writing, nor upon any other consideration than the debt due from the intestate, to be sufficient to authorize a judgment against the goods and estate of the intestate in the hands of the administrator.

And when the action is founded upon such promise by the administrator, it is not necessary to declare upon a promise made by the intestate, or to allege that he was requested and refused to pay. And indeed a request to pay need not be alleged in any other than those cases, in which it is necessary to allege and prove one, to entitle the plaintiff to maintain his action.

All objections to the *form* of the writ and declaration are cured by a verdict, or judgment by default.

Where the clerk of the Courts, in an action by an administrator, erroneously enters up judgment against the administrator instead of against the goods and estate of the intestate, or makes a mistake in the name of the administrator, the judgment should not be reversed, but corrected.

THIS was a writ of error by which the plaintiff sought to reverse a judgment rendered between the same parties, or between Goodwin and her in the capacity of administratrix of Ebenezer S. Piper, at the October Term of the Supreme Judicial Court, in this county, 1837.

The errors assigned were, in substance, as follows: —

1. That in the original writ, the sheriff was commanded to attach the goods and estate of the administratrix instead of the intestate.

2. That in the record of the judgment the said Elizabeth was called Elizabeth S. Piper, when in the writ she was called Elizabeth L. Piper.

3. That the judgment was against said Elizabeth, when it should have been against the goods and estate of the intestate.

4. That the consideration of the promise, alleged in the declaration, is not sufficient to support the promise.

5. That the declaration does not allege, that the contract was founded on any valid and legal consideration.

6. That in the declaration the debt alleged to have been incurred by the said Ebenezer, is not alleged to have been incurred at said Elizabeth's request.

7. That it is not alleged that the said Ebenezer was ever requested to pay the debt.

8. That it is not alleged that the said Ebenezer ever in his lifetime promised to pay the debt.

9. That it is not alleged that said Ebenezer ever neglected or refused to pay the debt.

10. That the declaration and the matters therein contained are not sufficient in law for the said Goodwin to have and maintain the action.

11. That it appears by the record that the judgment was given against the said Elizabeth, when it should have been given against the said Samuel.

In the original writ the officer was commanded to attach "the goods or estate of Elizabeth L. Piper administratrix of the goods and estate of Ebenezer S. Piper, late of Levant, deceased," and she was summoned to appear and answer unto Samuel C. Goodwin "in a plea of the case, for that the said Piper in his lifetime was indebted to the plaintiff in the sum of thirty-seven dollars and fourteen cents according to the account annexed, which is still unpaid, in consideration whereof the said Elizabeth hath promised to pay the same on demand. Yet though often requested, said defendant has not paid the same, but neglects so to do. To the damage," &c.

It was agreed, that the case should be argued in writing, but no argument was furnished for the defendant in error.

Crosby, for the plaintiff in error, contended that if this was to be considered as the original contract of Elizabeth L. Piper, then as it was to pay the debt of another, the consideration is insufficient. Such contract must be founded on a new consideration. St. 1821, c. 53, § 1; *Perley* v. *Spring*, 12 Mass. R. 299. The consideration being past, it should have been alleged to have been made at said Elizabeth's request. 5 Pick. 295, 380; 1 Greenl. 128; 3 Pick. 209; 1 Chitty's Pl. 297. Unless the party making the promise gains something, or the one to whom it is made loses something there is no validity in the promise. The assumption of a supposed danger, which has no foundation in law or fact, is not a sufficient consideration for a promise. 3 Pick. 209; 3 Pick. 83; 7 Mass. R. 449, 483; 4 Mass. R. 341; 5 Pick. 393; 14 Pick. 198; 1 T. R. 712.

If it be a contract of the intestate, then the judgment against the goods and estate of the administratrix is erroneous. St. 1821, c. 52 § 19; 4 T. R. 645. There was no suggestion of waste. The judgment is erroneous against the administratrix on a contract of the intestate. 16 Mass. R. 530; 1 Fairf. 137; 4 T. R. 648. It is not a misprision of the clerk, and cannot be amended. 1 Fairf. 278. There is error, because it is not alleged, that the defendant ever promised. Oliver's Prec. 82; 2 Strange, 793; 2 N. H. R. 289; 3 Mass. R. 176. No breach of any promise by the intestate is any where alleged, as it should have been. 2 N. H. R. 289. The declaration is bad, where no time or place is alleged, when and where the services were performed. 3 Halst. 69.

A. Sanborn, for the defendant in error.

The opinion of the Court was by

Shepley J. — The first error assigned is, that the sheriff was commanded to attach the goods and estate of the plaintiff in error instead of the goods and estate of her intestate. This objection to the form of the writ might have been taken by a plea in abatement; and one cannot assign as error that, which might have been thus presented to the consideration of the

Court. 2 Saund. 101, g, note. And if the declaration be sufficient and the judgment be formal, an informal writ may be used without subjecting the party to a loss of his judgment; unless the informality or defect be so great, that the writ will not authorize a judgment. In such case the defect may be a matter of substance; otherwise it is but a defect in matter of form, for which error will not lie, since the statutes of jeofails. 2 Saund. 101, note 1.

The errors from the fourth to the tenth inclusive are assigned for defects in the declaration. The account annexed is a part of the declaration. There can be no doubt, that the suit was instituted against the plaintiff in error in her capacity of administratrix upon the estate of Ebenezer S. Piper. The declaration alleges, "that the said Piper in his lifetime was indebted to the plaintiff in the sum of thirty-seven dollars and fourteen cents according to the account annexed, which is still unpaid, in consideration thereof the said Elizabeth hath promised to pay the same on demand, yet though often requested said defendant has not paid the same, but neglects so to do." The allegation is not made in terms, that she made the promise in her character of administratrix, but from the description in the writ and the other allegations in the declaration, that may be inferred. Such promise by her as administratrix need not be in writing or upon any other consideration, than the debt due from the intestate, to be sufficient to authorize a judgment against the goods and estate of the intestate in the hands of the administratrix. *Secar* v. *Atkinson*, 1 H. Bl. 102; *Whitaker* v. *Whitaker*, 6 Johns. R. 112. And when the action is founded upon such promise, it is not necessary to declare also upon a promise made by the intestate, or to allege, that he was requested and refused to pay. Indeed a request to pay need not be alleged in any other than those cases, in which it is necessary to allege and prove one, to entitle the plaintiff to maintain his action. A formal defect in the venue was aided at common law after a judgment by default, because the defendant thereby admitted, that there was nothing to try. *Shandois* v. *Simpson*, Cro. Eliz. 880. But a more conculsive

answer to all the objections to the form of the writ and declaration is, that they were cured after verdict by the statute of 16 and 17 Car. 2, c. 8; and the statute 4 Ann, c. 16, § 2, extended the provisions to cases of judgment by default.

The second, third, and eleventh errors assigned, relate to the form of the judgment, which, according to the case of *Hardy* v. *Call*, 16 Mass. R. 530, should be regarded as a judgment against the plaintiff. It was the duty of the clerk to have made up a formal judgment appropriate to the case stated in the writ and declaration. It was the error of the clerk and not of the Court, that a judgment was not formally entered up against the goods and estate of the intestate. And that the name of the administratrix was not correctly recited. In such cases the judgment although erroneous should not be reversed, but corrected. *Short* v. *Coffin*, 5 Burr. 27, 30; *Atkins* v. *Sawyer*, 1 Pick. 351. The clerk is directed to correct the error in the record of the judgment, which is then to be affirmed.

SAMUEL F. FULLER *versus* DAVID BENJAMIN.

If a bill in equity be brought by one of several partners founded on partnership transactions, all the members of the copartnership must be made parties, or it cannot be maintained.

If some of the partners are insolvent, yet they must be made parties; and if bankrupts, their assignees should be made parties in their place.

BILL in equity. The case is stated in the opinion of the Court.

Washburn, for the defendant, among several causes of demurrer, said that a most substantial and meritorious one, was the want of proper parties. The bill states that there were four partners, doing business at Bangor, of which the plaintiff and defendant are alleged to be members. It is indispensable, that all of the partners should be made parties to the bill. 21 Pick. 526; Story's Eq. Pl. § 72 to 77, 81, 82, 83, 85,

86, 136, 137, 149, 160, 162, 218; 4 Pick. 78; Coll. on Part. 200.

The fact stated in the bill that the other partners are insolvent, does not aid the plaintiff. The whole account should be settled; and it may be there is a balance due them, or that they owed the partnership an amount greater than the sums due to both plaintiff and defendant, and that the latter is a larger creditor of the partnership than the former. It is not alleged, that the other partners have received their certificates as bankrupts. But if it were so, their assignees should have been made parties in their place. Story's Eq. Pl. § 167, 178; Coll. on P. 201, 202.

J. B. Hill, for the plaintiff, admitted, that the want of proper parties was fatal to the bill, if that was made out. But to determine who are the proper parties, reference must be had, not to the subject matter about which the suit is brought, but to the object of the suit. The subject matter is the copartnership of which Aldrich and Hall were members. The object of the suit is the balance which is equitably due from the defendant to the plaintiff. The plaintiff does not ask that the defendant should pay him the balance due from Aldrich and Hall, but to have a fair settlement between the solvent partners. Our case comes within the principle stated in Story's Eq. Pl. (2d Ed.) 77, note. "It is not all who are concerned in the subject matter concerning which the demand is made, who are the proper parties to be before the Court; it is all who are concerned in the very thing which is demanded." Here it is neither practicable or useful to make the insolvent parties partners. Unless we can maintain this bill, we are entirely without remedy, and the defendant may retain the money justly belonging to the plaintiff, merely because other and insolvent partners are beyond the reach of process.

The opinion of the Court was drawn up by

WHITMAN C. J. — The plaintiff sets forth, in his bill, that he and the defendant, and two other persons, in June, 1833, entered into a copartnership in the business of lumbering;

and that the plaintiff believes there is a balance of one thousand dollars due to him from the concern; that the two partners, not summoned, are out of the State, and insolvent; and, as he supposes, are, or are about becoming, bankrupts; that the business having ceased, for about four years, and not being likely to be resumed, the defendant, who, he supposes, is indebted to the concern, ought to be held to account, and to pay over to him, the plaintiff, what is justly due to him from the defendant. To the bill the defendant demurs for sundry causes, the most prominent of which is, that the proper parties have not been declared against, and duly summoned to appear.

In cases of partnership it must be difficult, if not impracticable, to proceed in equity, without the presence of all the copartners, or their legal representatives. Each must be expected to have claims, either for services rendered or advances made, without the adjustment for which, it will be impossible to ascertain what may be due from or to the joint concern by each; or what just claim any one or more of them may have against any one or more of the others. Until such an ascertainment shall have been made it will be impossible to pass a decree, which shall be founded upon the principles of justice, as to their several rights.

It is not alleged that any books of account, of the partnership transactions, have been kept, and that they are in the hands of the defendant, from which he could be enabled to exhibit a developement of their concerns. The plaintiff would seem to have no account, even, of his own services and advances; for he makes no exhibit of any. If the defendant were required to answer, there does not seem to be any reason to expect, that he could aid the plaintiff in making out any such account. Indeed, from aught that appears, it may well be doubted if the defendant is in any better situation than the plaintiff, to make an exhibit of his own claim against the concern. Four years had elapsed, at the filing of the bill, since their business had entirely ceased. This was a lumbering concern, necessarily multifarious, and managed, as is not unfrequently the case, as we may well presume from what we

have known in such cases, without much of system or regard to critical exactness, in which every variety of perplexity and difficulty might be expected to occur. How then, can it be possible, that the Court, in the absence of information to be derived from the other partners, can ascertain what may be due and owing to or from either the plaintiff or defendant, or from them or either of them to or from either or both of the other partners? It does not seem that written articles of co-partnership were, in this instance, entered into. No stipulations between them are set forth, except in relation to the shares of each of interest in the concern. Who were to be active and who passive, and what compensation for services was to be made, does not appear. Persons, entering so loosely and so unguardedly into such business, should not deem it matter of surprise, if they find themselves left at last in an unfortunate state of embarrassment.

The plaintiff in this case would seem to be without remedy, either at law or in equity. In Story on Eq. Pl. § 82, 83, 162 and 218, it is clearly shown, that a court of equity cannot take cognizance of a case in the predicament of the one here exhibited. Although the partners, not present, are insolvent, yet are they indispensable parties, whose right might be affected by a decree, and who must be presumed to be able to afford information, as to their own claims in connexion with those of the others. And if bankrupts, their assignees should be made parties. If one of them had deceased his executor or administrator would have become a necessary party; but not more so than his assignee in case of bankruptcy.

The bill therefore must be adjudged bad upon demurrer, and be dismissed; and the defendant be allowed his costs.

JAMES BANKS *versus* CHARLES M. ADAMS.

An award to do some act, other than the payment of money, to be good, should be so certain, that a specific performance could be decreed.

An award, that B should pay to A a certain sum "in property as good as he had received," and that A should pay to B "the amount which B had paid to R in as good property as he had paid to R," is void for uncertainty.

An award may be good for part and bad for part; and the part which is good will be sustained, if it be not so connected with the part which is bad, that injustice will thereby be done.

Where the parties enter into an agreement in writing in relation to a certain business between them, one cannot maintain an action for money had and received against the other, to recover money received in the business, as provided in the agreement, if it still remains open and executory.

THE facts are stated in the opinion of the Court.

A. W. Paine argued for the plaintiff, citing 1 Chitty on Pl. 309, 312, 314; 2 Pick. 155; 1 Saund. 320, (b.) note 4; 6 Binn. 159; 7 Johns. R. 249; 20 Maine R. 275; Caldw. on Arb. 195; 1 Com. Dig. Arb. G.; 2 Petersd. Abr. 196; 2 Stark. 102; 24 Wend. 60.

M'Crillis argued for the defendant, citing 1 Caines, 304; 3 Serg. & R. 340; 9 Johns. R. 43; 1 Dall. 365; Kyd on Aw. 230; 8 T. R. 366; 5 Mason, 254; 12 Wend. 599; 1 Sumn. 440.

The opinion of the Court was drawn up by

SHEPLEY J. — The case presented by the bill of exceptions shows, that the plaintiff, being the owner of a certain patent, entered into covenant with the defendant, by which he was constituted sole agent for the sale of rights to use the process secured by it. The amount of money received by the defendant, after deducting the expenses incurred by him, was to be equally divided between the parties. The defendant also covenanted, "whenever the sum arising from the sale of said rights should amount to four hundred dollars," to pay George Rigby such sum, as he had expended in obtaining the patent. The obligation between the parties provided, that disputes arising under it should be referred to three disinterested men.

Disputes having arisen, the parties by a verbal agreement submitted the matters in dispute, and a certain other claim of the plaintiff for money received by the defendant of one Southwick, to the decision of three persons; who after hearing the parties made a verbal award. And this action is assumpsit founded upon that award. The arbitrators ascertained, that the plaintiff had received $59,78 more than the defendant had, after deducting his expenses; and "they thereupon awarded, that Mr. Banks should pay Adams one half of $59,78 in property as good, as he had received. And that Adams pay Banks the amount, which he said Banks had paid Geo. Rigby, (which was understood by the referees and parties to be $100,) in as good property, as he paid said Rigby. Also that Adams pay Banks the amount of money received of Southwick, being $32,89." The jury were instructed, "that in order for the plaintiff to sustain his action on the award, it was necessary for him to prove, that before the commencement of the suit he had performed his part of the award, or offered to perform the same; and that unless such performance or offer had been made, or waived, or settlement proved, the action could not be sustained on the award." To come to a satisfactory conclusion respecting these instructions, it will be necessary to consider the legal effect of the award. So much of it, as awarded, that the plaintiff should pay half of $59,78, "in property, as good as he had received," and that the defendant should pay to the plaintiff the amount, which he had paid to Rigby, "in as good property, as he paid said Rigby," must be void for uncertainty, and because the award was not final and conclusive. Those sums were to be paid in property and not in money. The kind and quality of that property is left undetermined. And if any description and quality of property might be used for that purpose, there is no provision to ascertain by reference or otherwise, whether the property offered in payment would be as good, as that, which the defendant received, or that, which the plaintiff paid. The whole matter was left by the award in a condition to cause further contest and difficulty. An award to do some act, other than the pay-

ment of money, to be good, should be so certain, that a specific performance could be decreed.

The only other matter embraced in the award, was the money alleged to have been received by the defendant of Southwick. That was awarded to be paid in money, and the amount was determined. An award may be good for part and bad for part; and the part, which is good, will be sustained, if it be not so connected with the part, which is bad, that injustice will thereby be done. The money received of Southwick did not arise under the obligation, but was "a certain other claim." If that part of the award, which is good, be sustained, that other claim will be finally determined, and all contest respecting it closed. And all their respective rights arising from the obligation will remain undetermined for future adjustment. These rights and that other claim do not appear to be in any manner connected. The plaintiff may therefore recover the $32,89 received by the defendant of Southwick, without injury to their other rights. But he cannot in this action recover on the money counts for one half of the note for $30, which originated from the business provided for by the obligation; for there is no evidence, that the obligation does not remain open and executory. As the plaintiff upon this construction of the legal effect of the award will have nothing on his part to perform, the instructions must be regarded as erroneous.

Exceptions sustained, and new trial granted.

JOHN PEARSON *& al. versus* STEPHEN S. CROSBY *& tr.*

Since the statute of April 1, 1836, concerning assignments, went into operation, all assignments which provide only for such creditors as shall consent to release the assignor from all claims and demands, excepting so far as they can realize any portion thereof under the provisions of the assignment, are void.

BARKER, who was summoned as the trustee of Crosby, admitted in his disclosure, that he had effects, which had belonged to the debtor, in his hands, but claimed the right to

retain the same by virtue of an assignment thereof to him for the benefit of certain creditors of Crosby who had become parties to the assignment, dated July 12, 1839. The plaintiffs had never been parties to it. The assignment appeared to have been in conformity with the requirements of the statute of April 1, 1836, on that subject, unless because it provided, that the property assigned should be distributed but among such of the creditors of the assignor, as should become parties within three months, *and should release their demands in full and receive their dividends only.*

The District Judge decided, that the trustee should be discharged; and the plaintiffs filed exceptions to this decision.

Hobbs, for the plaintiffs, said he was aware of the decisions in the cases, *Todd* v. *Buckman*, 2 Fairf. 41; *Halsey* v. *Fairbanks*, 4 Mason, 206, and of what was reported to have been a decision of the U. S. District Judge of this State, in the matter of Holmes, in 5 Law Reporter. Opposed to these, however, were other authorities, which he considered exhibited the true principle, that a provision of this character rendered the assignment void, where there were no statutes regulating the subject. Of these are an earlier opinion of Judge Ware, found in his Reports, 232, and cases there cited; *Hyslop* v. *Clark*, 14 Johns. R. 458; and *Austin* v. *Bell*, 20 Johns. R. 442. The counsel commented upon several of the cases, and contended, that the latter class had the best of the argument.

But he did not consider it necessary for him to maintain that proposition. He should contend, that under the assignment act of April 1, 1836, a clause in an assignment, providing that a creditor must release all his claims in order to have any benefit under it, makes such assignment void. Such condition is a violation of the requirements of the statute. It is an attempt to coerce creditors to release their debts, or receive nothing, a course of proceeding which the statute does not permit. If it be in violation of the statute provisions in any essential particular, the assignment is entirely void. *Wakeman* v. *Grover*, 4 Paige, 24. As the plaintiffs are not parties to the assignment, it is competent for them to contest its valid-

ity. 20 Maine R. 301. To be valid, the assignment must have been so at the time it was made. The statute of 1836, however, is not repealed by the Revised Statutes. Rev. St. 804.

Moody, for the trustee, considered the question as settled in his favor in this State by the case *Todd* v. *Bucknam*, 2 Fairf. 41. It is sufficient that such is the law in our own State, whatever it may be in New York, or elsewhere. But the weight of authority and of argument is decidedly in our favor. *Halsey* v. *Fairbanks*, 4 Mason, 206, and cases collected in Metc. & Perk. Dig. 262.

The statute of 1836, respecting assignments, is wholly silent on this point; and in such case the law is not altered.

The opinion of the Court was drawn up by

WHITMAN C. J.—Barker, the supposed trustee, claims to hold the estate of the defendant under an assignment to him, made by the defendant, and, as he contends, in pursuance of the statute concerning assignments, of the first of April, 1836. The plaintiffs contend, that the assignment is not in conformity to the provisions of the statute, and is therefore void. The assignment, in effect, provides only for such creditors as shall consent to discharge the assignor from all claims and demands, except so far as they can realize any portion thereof under the provisions of the assignment. The question is, did this condition render the assignment void? Before the passage of the above statute, it had been adjudged, in this State, that it did not. *Todd* v. *Bucknam*, 2 Fairf. 45. We are now called upon to determine whether, under the statute, our adjudication should be otherwise. There had been much diversity of opinion on the question among jurists before the passage of the statute. The learned Judge of the U. S. District Court for the District of Maine, had intimated, very distinctly, that such a condition in any assignment rendered it void under the statutes of the 13 and 27 of Elizabeth. Ware's R. 232. And Mr. Justice Story, in *Halsey & al.* v. *Fairbanks & trustee*, 4 Mason, 206, in the absence of adjudications, and a usage in

Massachusetts to the contrary, would seem to have been strongly inclined to the same opinion. And in New York the decisions on the point are opposed to those in Pennsylvania. Under the provisions in the before named statute of 1836, such a condition in an assignment seems to us to be wholly inadmissible. That statute provides, that all assignments, made by debtors in this State, for the benefit of their creditors, shall provide for an equal distribution of all their estate, real and personal, among such of their creditors as, after notice, as therein provided, shall become parties to the same, in proportion, &c. Thus, but one condition is prescribed, and that is, that the creditors, upon being notified, shall become parties thereto within three months. It is not that they shall become parties thereto, and release the debtor from further claim within three months. A full discharge of the debtor does not seem to have been in the contemplation of the legislature. A distribution of the debtor's effects *among all his creditors*, without restriction or distinction, seems alone to be provided for. To bring the assignment within the statute it must conform to its terms, when these terms are, as they seem to be in this instance, explicit and clear. And the statute is equally clear and explicit that if it does not, it will be void. We are therefore of opinion that the exceptions should be sustained, and that the trustee is chargeable.

ALBERT HOLTON *versus* CITY OF BANGOR.

By the tax act of 1842 an inhabitant of this State was liable to be taxed in the city or town of his residence for shares held by him in a cotton manufactory in another State, to the extent of his proportion of the value of the machinery owned at the time by such company.

If such shares were over valued in the tax, the remedy is by an appeal to the county commissioners, and not by an action against the city or town.

THE action was assumpsit for money had and received, and was submitted to the Court on the following statement of facts.

The plaintiff seeks to recover back the sum of $67,80, with

interest from April 5, 1843, being the amount of taxes assessed by the assessors of said city for the year 1842, upon six shares in the "Bartlett Steam Mill Company," a corporation established at Newburyport in the Commonwealth of Massachusetts, which taxes were paid at the above date under protest, and to prevent a distress upon the plaintiff's property.

It is admitted that said tax was legally assessed, provided the shares were liable to taxation at their full value by said assessors. Said company was incorporated by the legislature of Massachusetts as a cotton manufactory, and has ever been exclusively employed as such. Its capital stock paid in is $300,000, all of which is invested in mills and factories, and in the machinery in the same; $87,886 have been invested in the former, and $246,283, in the latter, the company being still in debt for the amount thus expended over and above their capital. The relative proportionate value of the real estate and machinery remains the same as they originally cost. In the assessment in question the shares were taxed at their full par value.

Under the laws of Massachusetts the corporation was actually taxed for all its property, in the town of Newburyport, where the company is located.

It is agreed that if this action is maintainable, that the Court shall render judgment on the above statement of facts, according to the legal rights of the parties.

A. W. Paine, for the plaintiff, said that the property was taxable by the laws of Massachusetts, wherein it was situated, and was actually taxed there. The shares themselves have no value independent of this property. It is against the spirit and policy of our laws, that the same property should be assessed twice. The legislature has no power to pass such acts.

Real estate of a corporation is to be taxed in the town wherein it is situated. 10 Mass. R. 514; 17 Mass. R. 461; 5 Greenl. 139. The personal estate may be taxed wherever the legislature of the State, where it is situated, may di-

rect. This was by law taxed in Newburyport. No person is liable to be taxed here for land owned in another State.

Nor can the holder of shares be legally taxed on account of the machinery. That is exempted from taxation by the tax act of 1842, under which the tax on the shares was assessed.

We are entitled to recover, if either the real or the personal property was not liable to be taxed. The remedy by appeal to the county commissioners, is only when too high a valuation is put on property liable to be taxed, and not where the property taxed was not the subject of taxation.

A. G. Jewett, for the defendants, said that the question was to be determined solely by the laws of this State; and that the laws of Massachusetts, and doings under them, have no bearing on the question. The shares in the company are personal estate, and are to be assessed as such on the owner at the place of his residence, unless the law otherwise provides. 10 Mass. R. 518; 5 Greenl. 139. The tax act of 1842, makes such shares taxable at the place of the owner's residence, although it is otherwise by the act of 1843. The machinery excepted from taxation, is only such as is within this State.

If the plaintiff was liable to be taxed for any thing, the action cannot be maintained. The remedy for an overtax is by an application to the county commissioners for an abatement. 6 Pick. 100.

The opinion of the Court was drawn up by

Shepley J. — In a legal sense and to accomplish certain purposes, personal property is considered as having no locality. It follows the person of the owner; and is governed and subjected to burdens by the law, which governs him. Real estate is controlled and subjected to burdens by the *lex rei sitae.* These rules having become parts of the *jus gentium,* no legislators can be supposed to intend to violate them. For it cannot be supposed, that they would knowingly violate rules founded in justice and approved by the general practice of

civilized society. By doing so one State or community must necessarily interfere with the rights of another State or community; or must act oppressively upon individuals, and injure their rights. If a State should however assume to subject the personal property of one having no domicile within its jurisdiction to burdens, it must expect, that the State, in which such person's domicile is established, will, in disregard of such laws, proceed in the exercise of its own just rights, leaving the State chargeable with having injured the individual, to adjust the matter with him according to its own sense of duty. There may be cases of just exception to these general rules. If a person chooses to employ his visible and tangible personal property within a jurisdiction, where he has no domicile, thereby receiving, it may be, peculiar favor from its laws, and subjecting them to the charge of its protection, it may not be unjust or unreasonable, that it should be subjected to taxation within that jurisdiction, although it may in law be considered as following the person of the owner, and subject to taxation there also. The State must be the judge of its rights and duties in such cases; and the persons may relieve themselves from the possibility of a double burden by a disposition of their property, or by a change of their domicile.

The act of 1842, c. 55, § 2, by virtue of which the tax in this case was assessed, provided for the assessment of shares in any incorporated company, possessing taxable property, according to the just value thereof. The shares named in the agreed statement will be embraced in this provision, and be liable to taxation, unless they were exempted by another clause, which excepts machinery in cotton and woollen manufactories. And it is contended, that such proportions of the value of the shares, as were derived from such machinery, were exempted. The language of the act, although general, is necessarily limited in its operation to the jurisdiction of the State. It could not and was not intended to act upon machinery not employed within it. It is not within its sphere of duty to attempt by its legislation to encourage the manufactures of another State. And such cannot be considered the

intention of its laws regulating the assessment of taxes; and the exemptions there enumerated must be considered as limited by its jurisdiction. The shares might therefore be legally taxed according to the principles before stated for such portion of their value, as was derived from the machinery, that being personal property. If the intention of the legislature was, that shares in an incorporated company, possessed of taxable property, should be taxed according to the just value thereof, estimating that value upon the taxable property only, that portion of their value derived from real estate not subject to taxation in this State, would be exempted. And in favor of such a construction would be the consideration, that the act would then be in conformity to the just rights of the State, and would not act oppressively upon any individual. But if it were adopted, the plaintiff could not maintain this suit. The shares were liable to be taxed for their value, as represented by the personal property, and the case therefore is at best but one of over valuation. And the remedy is by an appeal to the County Commissioners according to the provisions of the statute, c. 14, § 21.

Plaintiff nonsuit.

DAVID BUGBEE *& ux. versus* EDWARD SARGENT *& al.*

If a legacy be a charge upon land, it is a trust, within the equity jurisdiction of this Court; and where an estate is devised on condition of, or subject to, the payment of a sum of money, or where the intention of the testator, to make an estate specifically devised the fund for payment of a legacy, is clearly exhibited, such legacy is a charge upon the estate; and a Court of Equity may follow the legal estate, and decree that the person in whom it is vested, shall execute the trust.

The misjoinder of parties defendant in a bill in equity, is no sufficient cause for a dismissal of the bill as it respects other parties than those improperly joined.

If a devise of an estate be rejected by the devisee, and there is no other disposition of the estate in the will, it will descend to the heirs at law.

The principle of election of devises, or bequests, is not applicable to a single devise only, but to a plurality of gifts or devises to a party, who is entitled to enjoy but one.

When the object of a bill in equity is single, to establish and to obtain relief for one claim in which all the defendants may be interested, it is not multifarious, although the defendants may have different and seperate interests.

An action at law cannot be maintained by a legatee for a legacy charged upon land devised to another in the same will, if the devisee has rejected the devise, and is not in possession.

BILL in equity. The substance of the bill, and the grounds taken in defence, in support of the demurrer, appear in the opinion of the Court.

A. W. Paine argued for the defendants, citing Rev. Stat. c. 96, § 10; *Given* v. *Simpson*, 5 Greenl. 303; 2 Story's Eq. § 1085; Story's Eq. Pl. 224 to 234.

M'Crillis argued for the plaintiffs, citing Story's Eq. Pl. 349; 1 Story's R. 384; 1 Mason, 178.

The opinion of the Court was by

SHEPLEY J. — This case is presented for consideration upon a demurrer to the bill; which alleges in substance, that Edward Sargent, deceased, by his will, which has been approved, gave to Sarah Hasty, now the wife of the plaintiff, Bugbee, a legacy of three hundred dollars to be paid, two thirds by his nephew,

Edward Sargent, and one third by his nephew, Benjamin Sargent, in one and two years from the time, when they should come into possession of land under his will. That the testator devised to Edward, his heirs and assigns, two undivided third parts of half an acre of land in the city of Bangor, called the Wilder garden lot, on condition, that he should pay to Sarah Hasty two third parts of that legacy; and to Benjamin, the other third part of the same lot upon condition, that he should pay the other third part of it. That although more than two years have elapsed since the will was approved, the devisees have not taken possession of the lot, and that they neglect and refuse to pay the legacy. That Betsey Sargent, the executrix of the will, has also refused to pay it, alleging that the devisees refuse to accept the devise. That the plaintiffs have no means of ascertaining, whether they accept or reject it.

The devisees, executrix, and heirs at law of the testator, are made parties defendant. The prayer of the bill is in the alternative, that the devisees may be required either to accept or reject the devise, and that in case of acceptance the plaintiffs may have a decree for payment of the legacy, or other adequate relief; and that in case of its rejection, they may have a decree for its payment by the heirs at law, or that the lot of land may be charged with the payment of it, and that it may be sold for that purpose.

The grounds of demurrer presented by the counsel for the defendants are, in the first place, that the limited jurisdiction in equity of the Court does not embrace the case; and that the Court has no power to afford the relief desired. The Court has jurisdiction in cases of trust; and if the legacy be a charge upon the lot of land, the beneficial interest in it, which the plaintiffs have, while the legal title is in others, constitutes a trust. And when an estate is devised on condition of, or subject to, the payment of a sum of money, or where the intention of the testator, to make an estate, specifically devised, the fund for payment of a legacy, is clearly exhibited, such legacy is a charge upon the estate. *Knightley* v. *Knightley*, 2 Ves. jr. 331; *Lupton* v. *Lupton*, 2 Johns. Ch.

R. 623; *Harrison* v. *Fly*, 7 Paige, 421. And a court of equity may follow the legal estate and decree, that the person, in whom it is vested, shall execute the trust. Butler's note, 249 to Co. Litt. 290 (b.); *Rogers* v. *Ross*, 4 Johns. Ch. R. 494.

It is further insisted, that if the devise be rejected, the estate does not descend to the heirs at law, and that the devisees would still be entitled to any beneficial interest, which might remain after paying the legacy; and that the heirs at law were therefore improperly made parties. If this position were correct, the misjoinder of parties defendant would be no sufficient cause for a dismissal of the bill as it respects other parties than those improperly joined. *Cockburn* v. *Thompson*, 16 Ves. 321; *Covenhaven* v. *Shuler*, 2 Paige, 123. But the position is not correct. If the devise of an estate be rejected by the devisee, and there be no other disposition of the estate in the will, it will descend to the heirs at law. *Townson* v. *Tickell*, 3 B. & A. 31; *Doe* v. *Smyth*, 6 B. & C. 112. The cases where a different rule may prevail, as stated in 2 Story's Eq. § 1085, cited by defendants' counsel, arise under the doctrine of election and satisfaction, which supposes a plurality of gifts, or devises to a party, who is not entitled to enjoy more than one, but may elect between them. When as in this case there is a single devise only, the doctrine of election is not applicable to it. The law presumes, that it will be beneficial to the devisee, and that he will accept it, until there be proof, that it has been rejected.

It is further insisted, that the bill should be dismissed because it is multifarious. When the object of the bill, as in this case, is single, to establish and to obtain relief for one claim, in which all the defendants may be interested, it is not multifarious, although the defendants may have different and separate interests. *Brinkerhoff* v. *Brown*, 6 John. Ch. R. 157; *Varick* v. *Smith*, 5 Paige, 160.

It is further insisted, that it is a fishing bill, and that it does not show, that the plaintiffs have not an adequate remedy at law. It was decided in the case of *Beecker* v. *Beecker*, 7

Johns. R. 99, that an action of assumpsit for the recovery of a legacy might be maintained upon an express promise of a devisee in possession of the estate, which was charged with the payment of it. And in the case of *Swasey* v. *Little*, 7 Pick. 296, that such an action might be maintained under a statute of Massachusetts against statute and other purchasers in possession of an estate, thus charged, without an express promise. But such an action could not be maintained upon the facts presented by the bill in this case, where the devisees, it is suggested, are not in possession, and have rejected the devise. The bill is quite informal, and so deficient in the proper allegations to meet difficulties, which may arise, that the plaintiffs may on that account, possibly, fail to obtain relief. But as the grounds of demurrer prove to be insufficient, the demurrer is overruled.

STEPHEN G. LOVEJOY *versus* CHARLES HUTCHINS.

The return by an officer of an attachment of personal property, *as made by him* "*at the risk of the plaintiff*," does not affect the rights of the creditor, or relieve the officer making the attachment from any portion of his responsibility.

When an officer has attached personal property on a writ, the conveyance of it, without his assent, out of the limits of his precinct, does not prevent his pursuing it any where, and vindicating his special property in it; and does not excuse him from his liability to the creditor, to keep the property to be taken on the execution.

In a suit by a creditor against an officer for neglecting to keep personal property attached on mense process, so that it might be taken on execution, such officer is not entitled to have a reduction made from the full value of the property, in mitigation of damages, for the expenses *which might have attended the keeping*, had it been kept safely.

THIS was an action on the case against the defendant, as late sheriff of the county of Hancock, for the alleged default of Sewall Lake, in not keeping logs attached by him, on a writ in favor of the plaintiff against Greene & Welch, to be taken on the execution issued on the judgment. A copy of the officer's return follows.

"Hancock, ss. April 29, 1837. By virtue of this writ, at the risk of the plaintiff, I have attached all the right, title and interest that the defendants had in a lot of pine and spruce logs, lying in Brewer pond, marked thus, M, (the same having been attached by me on three former writs,) and at the same time I gave to each of the defendants a summons for their appearance at Court. Sewall Lake, Dep. Sheriff."

Judgment was rendered Nov. 27, 1838, and the property was demanded Dec. 14, 1838, and not delivered.

The defendant contended that the return of the officer did not hold him responsible for any thing further than the debtor's interest in the logs. The District Judge ruled that his return held the officer to account for the value of the logs themselves, when they were demanded on the execution, if they belonged to the judgment debtors, and submitted that question to the jury. The defendant then offered to prove, that at the time of said return and attachment, the logs were in a body, with a boom around them in Brewer Great pond on their way from the county of Hancock and near the line of the county of Penobscot, and that the current of the water and power of the wind were so great, that the said Lake, with any force he could command, could not stop the logs in the county of Hancock, and that the parties in possession of them, were able, and did successfully resist his taking or holding possession of the logs until after they had arrived in the county of Penobscot, which was within two or three hours; which testimony was excluded by ALLEN, District Judge, who presided at the trial.

It appeared, that Lake returned these logs on two other writs, at the risk of the plaintiffs, the debtors interrupting him.

The defendant contended that he was liable, if at all, only for the value of the logs, after deducting what would have been the necessary expenses for taking and keeping said property from waste, deterioration and loss. The Judge ruled, that he was liable for the value of the logs at the time they were demanded, to be taken in execution, without any deduction for any such non-existent expenses. The defendant further con-

tended, that by said return the logs were at the risk of the plaintiff. But the Judge ruled, that they were at the risk of the defendant and that he was responsible for them when demanded on the execution, if they were the logs of the judgment debtors, which fact was submitted to the jury. The verdict was for the plaintiff, and the defendant filed exceptions.

It was agreed, that the case should be argued in writing, but no argument on the part of the defendant was furnished.

A. G. Jewett, for the defendant.

J. Appleton, for the plaintiff, said that the officer was estopped by his return from showing, that no goods were attached. 15 Mass. R. 83; 10 Mass. R. 313; 4 Mass. R. 478; 1 Fairf. 263; 4 Verm. R. 506.

The evidence that the logs were carried into the county of Penobscot, was properly excluded. Having attached the goods, the officer is responsible for their safe keeping. Com. Dig. Retorn, D. 6. The attachment would not be dissolved by the carrying of the property out of the county. 1 Pick. 233; 3 Fairf. 328; 6 Verm. R. 586.

The instructions that the risk as to the ownership of the property was on the plaintiff, and as to the safe keeping on the officer making the attachment, was correct.

The opinion of the Court was drawn up by

WHITMAN C. J. — It does not appear to be controverted, that the property attached by Lake, the defendant's deputy, was the debtor's as whose he attached it. And there does not seem to be any question as to the rendition of judgment in the case, in which the attachment was made; nor of the due issuing of the execution thereon; nor of the seasonableness of the demand upon Lake and the defendant, by virtue thereof, of the property attached to be levied upon.

The counsel for the defendant, at the trial, would seem to have placed his defence upon two grounds; first, that Lake returned the attachment as made at the risk of the plaintiff. This objection cannot be regarded as well taken. Such a re-

turn could not affect the rights of the creditor, or relieve the officer making the attachment from any portion of his responsibility. He was bound to attach the property, and to keep it safely.

The second objection is, that Lake was unable to keep and retain the property attached within his precinct. It was offered to be proved by the defendant, that, by reason of the current in the water, in which the property attached, viz., mill-logs, lay, and the resistance of the owners of it, he was unable to keep it within his precinct. The Judge at the trial did right in rejecting such evidence. No such occurrence could excuse him from liability. He had his remedy against any one who might wrest it from his possession. The conveyance of it out of his precinct did not absolve him from liability. He could have pursued it, and have reclaimed it, anywhere. By the attachment he acquired a special property in it, the right to which he might have vindicated.

A third exception was taken to the ruling of the Judge in reference to the amount of damages to be recovered. The defendant contended, that all the expenses, which might have attended the keeping of the logs, ought to be deducted from their value, although none in fact had been incurred. This the Judge very properly overruled. Lake having remedy against those, who took the logs from him, might have recovered their full value; or, if taken by the debtors, and if the logs were more than sufficient to have discharged the execution, at least, to the extent of his liability thereon.

The exceptions therefore must be overruled, and judgment be entered on the verdict.

BULAH FRENCH *versus* JAMES CROSBY.

The Judge of Probate has no power to assign dower to the widow out of any lands purchased of the husband during his lifetime, or where an heir or devisee, or person claiming title under an heir or devisee, disputes her right of dower in such lands.

It was not intended, that any question of title should be submitted to the decision of the Judge of Probate.

In determining whether the Probate Court has power to assign dower anew to a widow who has been "evicted of lands assigned to her as her dower," the fourteenth section of Rev. Stat. c. 95, should be considered in connexion with the second section of the same statute.

ON March 29, 1842, Bulah French presented her petition to the Probate Court in this county, alleging that on August 30, 1831, her dower in the estate of her late husband, Zadock French, deceased, was assigned to her by proceedings in the Court of Probate, and that she went into possession thereof; that on March 29, 1842, she was evicted from a portion thereof by force of a mortgage made by her late husband, she having released her claim to dower in the mortgage deed; and prayed that a new assignment of dower might be made. Notice was ordered, and James Crosby appeared, and objected to the assignment:

1. Because her dower had been once legally assigned; that at the time of the assignment, the petitioner had full knowledge of the incumbrance of the mortgage; that the estate of Zadock French was solvent, and the administrator had abundant funds in his hands to have redeemed this mortgage; that her remedy was by taking measures seasonably to have had the incumbrance removed; and that she ought not to have an assignment of dower in the estate of which the said Crosby had become a *bona fide* purchaser, deriving his title from the intestate and from his heirs at law.

2. Because the Probate Court had no jurisdiction of the subject matter.

3. Because she had not surrendered, or waived her rights to the other lands assigned to her as part of her dower.

After notice and a hearing, the Judge of Probate decided,

that the prayer of the petitioner should not be granted; from which she appealed to the Supreme Court of Probate, and filed as reasons:

1. Because the facts set forth in her petition are proved to be true, and she is thereby entitled to be endowed anew, according to the provisions of Rev. Stat. c. 95, § 14.

2. Because the jurisdiction over the subject matter is vested exclusively in the Probate Court.

3. Because this is the most appropriate mode of proceeding to obtain relief.

4. Because the respondent is not rightly before the court as an adverse party, as he claims by title subordinate to the rights of the petitioner.

5. Because her present claim to have a new assignment of dower, is not disputed by heirs or devisees of the said Zadock French.

This case was to have been argued in writing, but no arguments have been furnished.

Moody, for the petitioner.

J. A. & H. V. Poor, for the respondent.

The opinion of the Court was drawn up by

Shepley J. — This is an appeal from the Court of Probate for this county. It appears that dower was assigned to the petitioner out of the real estate, of which her late husband died seized, by the Probate Court on August 30, 1831, and that she entered upon and continued in the enjoyment of it until March 29, 1842, when she was evicted from a part of it by virtue of a mortgage made by her late husband, in which she joined to relinquish her dower. She now seeks to have her dower assigned anew by the Probate Court. The respondent appeared in that court, and denied her right to have dower assigned anew in lands purchased by him in part from the husband during his life, and in part from his heirs at law, since his decease. The petitioner relied upon the provisions of the statute, c. 95, § 14, in these words. "If a woman be lawfully evicted of lands assigned to her as her dower, or settled upon

her as jointure, or be deprived of the provision made for her by will, or otherwise, in lieu of dower, she may be endowed anew in like manner, as though no such assignment or provision had been made." This section must be considered in connexion with the second section of the same chapter, which provides, that "the Judge of Probate for the county, in which the estate of the husband is settled, may assign dower to the widow in the lands of which the husband died seized in whatever counties they may be, where her right of dower is not disputed by the heirs or devisees." It is quite certain, that the Judge of Probate could have no power to assign dower to the widow out of any lands purchased of the husband during his lifetime, for of such lands he did not die seized. The history of the statute law by virtue of which Judges of Probate assigned dower in lands, of which the husband did die seized, is stated in the case of *Sheafe* v. *O'Neil*, 9 Mass. R. 9. In that case it is said, "but in contested cases, and especially where the intestate was not at his death the tenant of the fee, where his heirs have no interest or concern in the assignment of dower, and where strangers, not presumed to be conusant of the proceedings in the Probate Court, have the whole interest and property, subject to the claim of dower; where the Probate Court is incompetent to any other purpose of partition, a jurisdiction to assign dower would be as inexpedient, as it is unnecessary." Accordingly in the Revised Statutes the jurisdiction of the Judge of Probate is extended only to cases, "where her right of dower is not disputed by the heirs or devisees." It may be said, that no heir or devisee disputes her right of dower in this case. The person who does, claims title under an heir; and the intention of the statute was not to refuse the jurisdiction because a particular person disputed the right, but because the right was disputed by the owner of the land, out of which the dower was claimed. There is another difficulty. It was not the intention to submit any question of title to the decision of the Judge of Probate. And the defendant denies the right of dower in such a manner

that the question, whether the widow was legally evicted by an elder and better title, may arise.

The fourteenth section declaring, that "she may be endowed anew in like manner," was not intended to authorize the same court to assign dower anew, but only to declare her rights. It appears therefore, that the Judge of Probate had no jurisdiction over the case, and the decree must be affirmed with costs.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTIES OF WASHINGTON AND AROOSTOOK.

ARGUED AT JULY TERM, 1843.

THE COMMERCIAL BANK *versus* ST. CROIX MANUFACTURING COMPANY.

If an incorporated manufacturing company, by their agent, draw a bill upon their treasurer and indorse the same, a demand upon him, and his refusal to make payment, have the effect against the company, in order to charge them as indorsers, of both demand and notice.

If the agent of an incorporated manufacturing company be clearly authorized to issue negotiable business paper, indorsees, not privy to its origin, would not be bound to look into the particular transaction giving rise to the existence of a note or draft; but would have a right to presume that it had been drawn in pursuance of the authority delegated.

ASSUMPSIT on three bills of exchange, purporting to be drawn by the defendants, by N. Smith, jr. their agent, on B. F. Copeland, their treasurer, by him accepted, and indorsed by the defendants in the same manner, and by others, and discounted by the plaintiffs, an incorporated bank in New Brunswick, and sent for collection to a bank in Boston.

A demand of payment was regularly made by a notary on Copeland, but a question was raised, whether due notice was given.

The defendants also denied the authority of Smith to bind the company, in the drawing and negotiating of these bills. Smith was the agent of the company. The authority conferred upon him by vote was as follows:

"Boston, July 6, 1837. It was also voted, that all notes, drafts or contracts, made by the agent, Noah Smith, jr. to pay any liabilities of the company, or to purchase goods, or to raise money for the use of the company, shall be valid and binding on this corporation." The facts appear sufficiently in the opinion of the Court. A default was entered by consent, judgment to be rendered thereon, if the action could be maintained; and the default to be taken off, and a nonsuit entered, if it could not.

J. Granger argued for the defendants, citing on the first point, *Freemen's Bank* v. *Perkins*, 6 Shepl. 292; Bayley on Bills, 269; 3 Wend. 276. And on the second point, Story's Ag. 158; 1 Pick. 215; 7 Wend. 31; 7 Conn. R. 214.

Bridges argued for the plaintiffs, citing Chitty on Bills, (7th Ed.) 184; 11 Wend. 87; 3 Fairf. 354; 14 Maine R. 444; 1 Pick. 373; 16 Maine R. 439.

The opinion of the Court was by

WHITMAN C. J. — The reliance to sustain this action is upon three bills of exchange, accepted by the treasurer of the defendants, and payment having been duly demanded of him. No question can fairly arise in the case concerning notice. The treasurer is the disbursing officer, having of course the possession of the funds of the defendants. His knowledge that the drafts had been dishonored must be considered as notice to them.

It is objected, however, that Smith, who, as agent to the defendants, drew the bills in question, did it for the accommodation of Duncan Barber & Co., and without authority for the purpose; and that he only had authority to draw bills to raise money for the use of the company, and not for the accommodation of others. But the mode, in which Smith was to raise

money for the company, was without any limitation or specification, except that it was to be by notes or drafts. He was therefore authorized to raise money, as the necessities of the company might require, in any mode usually adopted among men of business in such cases. If it was by obtaining loans of banks, it must ordinarily be by the aid of friendly indorsers, or accommodation drawers; and this is a mode often adopted by business men to raise funds. If the defendants, by their agent, adopted this course, the favor might ordinarily be expected to be reciprocated. Hence it might, perhaps, be deemed within the scope of the authority delegated to the agent, to interchange the names of the defendants with others upon accommodation papers; and, if such should be deemed to be the case, the authority given to Smith might authorize him to make the draft in question.

But whether so empowered or not, he was clearly authorized to issue business papers, in the form of this draft, and when so issued it would be negotiable; and indorsees, not privy to its origin, would be bound only to look to the general scope of the authority delegated to the agent to draw; and finding it sufficient, would not be bound to look into the particular transaction giving rise to the existence of the draft. They would have a right to presume that it had been drawn in pursuance of the authority delegated. Smith appearing to be the general agent of the defendants, and fully clothed with all their power in reference to the object specified; and the defendants being a corporation which could not act otherwise than by its agent, it was right for the plaintiffs, seeing a draft of the defendants in circulation, to conclude that it had been issued in pursuance of the powers delegated. Smith may fairly be considered as having the same power, as to making notes and drafts, that partners have in reference to each other. One partner might make a note or bill in the partnership name, for his own private debt, and put it in circulation; and in the hands of innocent indorsees it would be available against the firm. The reason is, that each of them has the power generally to issue paper in the name of the firm; and when issued

and put in circulation, indorsees, not privy to its origin, are under no obligation to inquire farther than to ascertain that they are general partners. The maxim here applies, that he, who, although without intentional fraud, has put it in the power of one man to impose upon another innocent person, shall himself sustain the consequences of his own misplaced confidence. Here the defendants had put into the hands of Smith the most plenary power to draw in their names, and put in circulation such drafts as he might draw. They are then, the authors of the power, without intentional fraud to be sure, which Smith had to impose upon other innocent persons; and the plaintiffs, being such innocent persons, must have a right to recover against them, if there be no other ground of defence; although it should be admitted that Smith may have abused his authority in causing the drafts to be issued.

But in this case the drafts do not appear to have been drawn wholly for the accommodation of Duncan Barber & Co. The witness, Green, testifies, that he believes one half of the money realized from the negotiation of the draft was received by the defendants. Green was evidently in a situation to become possessed of a knowledge of the proceedings of the defendants. He was their clerk and book-keeper. He, moreover, says these drafts, as he believes, were taken account of, and entered in the books of the defendants. If the facts were otherwise, than as Green believes them to have been, it would certainly be easy for the defendants to disprove them by Smith, and by Barber & Co., and by a production of their books. It is true Green speaks only as to his belief; but considering his opportunity for knowing the facts, and the absence of any effort on the part of the defendants to prove the contrary, it cannot be doubted that the facts were in accordance with his belief.

Judgment on the default.

JOHN A. BECKWITH & *al. versus* ST. CROIX MANUFACTURING COMPANY.

The protest of a notary public of another State, wherein he states, that he sent a notice of the dishonor of a bill to the drawer on the next day after the demand and refusal, "and by the first practicable mail thereafter," is competent evidence to prove the facts thus stated.

ASSUMPSIT on two bills of the following tenor.

"$1050. Calais, June 12, 1839.

"Ninety days after sight, value received, pay to the order of D. Barber & Co. one thousand and fifty dollars, and place the same to account, as per advice.

"Noah Smith, Jr., Ag't. St. Croix Manf. Co.

"Benj. F. Copeland Esq. Tr. St. Croix Manf. Co."

The bill was accepted by Copeland, Treasurer, July 10, 1839, and indorsed by Duncan Barber & Co. Thomas Baillie and the plaintiffs.

"$1000 Calais, June 12, 1839.

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

"Noah Smith, Jr., Agt. St. Croix Manf. Co.

"Nath'l. Dewey, Esq. New York."

This bill was accepted by Dewey July 12, 1839, and indorsed by Barber & Co., Baillie and the plaintiffs.

Copeland was admitted to have been treasurer of the company, and that he resided at Boston. Dewey resided at the city of New York, and Barber & Co. and the plaintiffs resided at Fredericton, New Brunswick. These bills were discounted, and were paid by the plaintiffs, who then commenced this suit against the drawers.

Several questions were made at the trial before TENNEY J. which have become immaterial, as the decision turned on the question whether there was a sufficient demand and notice. To prove demand on Copeland and notice to the defendants, the plaintiffs introduced the protest of Alden Bradford, a notary at Boston, wherein he stated, that on October 11, 1839,

he presented the bill to Copeland, and demanded payment, and that payment was refused, the accepter saying that he had no funds, and that on the next day, he sent by mail notices to the several indorsers, one of which was, "To Noah Smith, Jr. Calais." To prove a demand and notice as to the other bill, the plaintiffs introduced the protest of J. R. Livingston, a notary of the city of New York, wherein he stated, that on October 12, 1839, he demanded payment of the accepter, who refused, saying that he had no funds, and that "on the fourteenth day of the same October, being the Monday after the demand and refusal of payment, and by the first practicable mail thereafter, I did put into the postoffice in this city a notice of the non-payment and protest of the said bill of exchange, addressed to Noah Smith, Jr. Agent of the St. Croix Manufacturing Company, Calais, Maine." The Judge ruled, that the demand and notice were sufficient, and the defendants filed exceptions.

J. Granger, for the defendants, said that the protest of Bradford did not show, that legal notice was given to the defendants. By saying merely, that he sent the notice the next day, is not sufficient, as it does not appear, that it was sent by the first mail of that day. The direction was not sufficient, as it did not mention in what State Calais was.

As to the protest from New York, it is not competent evidence of any fact, excepting demand and notice. It is not evidence to prove when the mails went out, or whether the notice was sent by the first one. He can only state in his protest his own acts, and not other facts. The statute of 1821, c. 101, was in force at the time, and that does not make it evidence of the facts stated therein, as the Revised Statute on the subject does.

Bridges, for the plaintiffs, said that a notice to the treasurer would have been sufficient, and of course a demand on him, and his refusal to pay, would be in itself notice to him.

The notary has power to do every thing necessary to a legal demand and notice, and should state his doings in his protest.

The protest is the proper evidence to prove the acts of the notary. The law requires him only to send the notice as early as the first practicable mail of the next day. It is his duty to determine that question, and he should state the fact in his protest, as much as he should the day on which it was done. The Revised Statute on the subject, making the protest evidence of the facts contained therein, is only in affirmance of the common law.

The opinion of the Court was drawn up by

TENNEY J. — The defendants' counsel attempt to sustain their exceptions on two grounds. 1st. That on the dishonor of the bill drawn upon the treasurer of the defendants, no sufficient notice of that dishonor was given to them. The treasurer being the disbursing officer of the company, a legal demand on him for payment, and a refusal was notice to the defendants of the dishonor, sufficient to make them liable, as was decided in the case of the Commercial Bank against these defendants, *ante* p. 280.

2d. The other bill declared on was drawn on Nathaniel Dewey of New York on whom demand was made at its maturity, being Saturday, the 12th of October, 1839, and payment refused; and as it appears by the notary's certificate, notice of the dishonor was given to the agent of the defendants "on the fourteenth day of October, being the Monday after said demand and refusal of payment, *and by the first practicable mail thereafter.*" It is contended, that the evidence of the time, when notice was sent, was incompetent, inasmuch as it was no part of the notary's duty, to determine what was the first practicable mail. If a statement of the same fact in the same terms had been made by a witness on the stand, without objection, it would have been evidence. A witness may give testimony of a fact, though it may be the result arising from the existence of other facts, especially if it is in relation to those matters, concerning which he is supposed from his profession or business to possess peculiar knowledge. What is practicable may depend upon several facts and circumstances,

but it does not therefore follow that a witness may not state, what in his judgment is or is not practicable. It does not appear, that the certificate of the notary in this case was objected to as incompetent evidence; and by the Rev. St. c. 44, § 12, "the protest of any foreign or inland bill, or promissory note, or order, duly certified by any notary public, under his hand and official seal, shall be legal evidence of the facts stated in such protest as to the same, and also as to the notice given to the drawer or indorser in any court of law. Statute of 1821, c. 101, § 3; 16 Maine R. 246, and 259.

Exceptions overruled.

EDWARD L. JARVIS *& al. versus* ST. CROIX MANUFACTURING COMPANY.

The holder of a bill or note has a right to adopt a private conveyance, instead of the mail, for the receipt and transmission of notice to a drawer or indorser of the dishonor thereof; but in such case, it is incumbent on the holder to show, that due diligence was used.

ASSUMPSIT against the defendants as drawers of a bill of exchange, dated Aug. 10, 1839, on N. Dewey of the city of New York, payable in 60 days after sight, accepted by Dewey on Aug. 26, 1839, and indorsed by the defendants, and by the plaintiffs.

The plaintiffs resided at St. John, New Brunswick, the place of business of the defendants was at Calais in this State, and the accepter resided in the city of New York.

The bill was protested in the city of New York, for non-payment by the accepter, on Oct. 28, 1839, and a notice, addressed to the defendants, informing them of the dishonor and protest, was, at the request of the plaintiffs, placed in the postoffice at Eastport on the eleventh day of November, 1839. It was agreed, that the mail was at that time five days in passing from New York to Eastport; that the mail between St. Andrews and St. John passed three times each week, leaving the former place on Monday, Wednesday and Friday, and

returning on Tuesday, Thursday and Saturday, leaving each place early in the morning, and arriving late in the evening; that the mail between Eastport and Calais then passed on alternate days, and on said eleventh of November passed from Eastport to Calais, leaving before the notice was put into the office; that letters to and from the Province of New Brunswick meet through that mail; and that letters from St. John for Calais would not go by the way of Eastport, but directly from St. Andrews to Robbinston and from thence to Calais. The Court, upon this evidence, were authorized to draw any inferences which a jury would be authorized to do, and to order a nonsuit or default, as justice might require.

D. T. Granger argued for the plaintiffs, citing 3 Dana, 128; 2 Hall, 12; *Farmer* v. *Rand*, 4 Shepl. 453; Chitty on Bills, (6th Ed.) 226.

J. Granger argued for the defendants, citing *Freemen's Bank* v. *Perkins*, 6 Shepley, 292; Bayley on Bills, 269, and note; 3 Wend. 276.

The opinion of the Court was by

WHITMAN C. J. — Notice of the non-payment of the draft in this case could not have reached the defendants before the 16th or 17th day after its dishonor. Instead of sending it directly from St. John to Calais, by due course of mail, the plaintiffs seem to have preferred sending it to Eastport; and there to have it mailed for the defendants at Calais. This was on the 16th day after its dishonor in New York. The mail was five days in reaching Eastport from New York. This accounts for five days of the time. How it should happen that eleven days more were necessary to forward it from thence to St. John and back to Eastport does not appear. It does not seem, by the course of the mails between Eastport and St. John, that more than four or five days need be occupied in the transmission of a letter and the return of an answer. It is true that the plaintiffs had a right to adopt a private conveyance for the receipt and transmission of notice. But it is clearly incumbent on them to show that due diligence was

used. The evidence in the case is entirely silent as to how it should have happened that so much greater delay took place than we can see, from the evidence, to have been necessary. It was incumbent on the plaintiffs to have removed any reasonable doubts upon this point; and, not having done so, we think a nonsuit must be entered.

JAMES W. LYMAN *versus* JOHN R. REDMAN *& als.*

To render a person liable as owner of a vessel, it is not necessary to show that he was such by the register, or by bill of sale, or other instrument in writing; but for that purpose, the ownership may be proved by parol evidence.

The taking of the vessel by the master, his victualing and manning her, paying a portion of the port charges, and having a share of the profits, do not of themselves constitute him the owner *pro hac vice*. It is the entire control and direction of the vessel, which he has the power to assert, and the surrender by the owners of all power over her for the time being, which will exonerate them from their liability for the contracts of the master relating to the usual employment of the vessel in the carriage of goods.

It is not competent for the master of a vessel, by virtue of his power as such, to bind the owners in the purchase of a cargo; and before they can be holden for the payment therefor, there must be satisfactory proof of prior authority to purchase, or subsequent ratification of his acts.

If the owners of a vessel receive her from the master, with a cargo on board, knowing it to have been purchased on credit for the benefit of the vessel and owners, and send the same to another port under charge of another master for the purpose of making sale of the cargo, and on this voyage a part of the cargo is thrown overboard for the security of the remainder and of the vessel, and the residue is sold at the port of destination, and the proceeds thereof are applied to the repair of the vessel, the owners are liable to those who furnished the cargo for the price thereof.

To determine whether an instruction, given by the Judge to the jury, at a trial, be correct, it should be considered in connexion with the evidence and the other instructions to them on the same subject.

ASSUMPSIT against John R. Redman, Joseph Walker and Benjamin Rea, as the owners of the schooner Clio of Brooksville, to recover the value of 192 tons of plaster, purchased

by the master of the plaintiff at Lubec, and taken on board the Clio, and as the master, Otis Roberts, who was a witness, on being released, stated, "on the security or credit of vessel and owners, as is usual in such transactions." Roberts went with the vessel and cargo to Brooksville, where he was dismissed by the owners as master, and Darby, the mate, made master. The Clio proceeded with the cargo to Philadelphia in October, 1839, and the plaster was there sold, "about fifteen casks having been thrown overboard on the voyage in consequence of having got ashore on the way out," by Darby, the master. Darby states in his deposition, "that the proceeds of the plaster I laid out on the vessel at Philadelphia after landing the plaster, and on my return I was wrecked on Cape Cod." Witness testified, that the Clio was purchased of Carleton, the former owner, by the defendants, and that they actually controlled and managed the vessel. The bill of sale was made by Carleton to Erastus Redman, and on the papers he appeared to be the sole owner. The defendants objected to the admission of such parol evidence of ownership in the defendants, but the objection was overruled by the presiding Judge. There was evidence introduced relative to the question, whether the Clio was, or was not sailed by the masters on shares.

The counsel for the defendants requested the Judge to instruct the jury:

1. That it is not competent for the master of a vessel, in his capacity of master, to bind the owners to pay for a cargo purchased by him on their account, without express authority from the owners.

2. That where a vessel is let to the master on shares, he victualing and manning her, paying a portion of the port charges, and having the control of the vessel for the time being, and yielding to the owners for her hire a certain share of the net earnings, the liability of the general owner ceases, and the master is placed in their stead during the time the vessel thus continues under his control.

3. That if they shall find, that Roberts or Darby, or either,

had the vessel on shares at the time of the purchase of the plaster, victualing and manning her, paying a portion of the port charges, having the control of the vessel for the time being, and yielding to the owners for her hire a certain share of her net earnings, that this action cannot be maintained.

4. That if they shall find, that Roberts, at the time of the purchase of said plaster, had no authority to make such purchase, other than that incident to his office and capacity as master of the vessel, that the general owners would not be liable to pay therefor, notwithstanding it should not be proved that Roberts or Darby had the vessel on shares.

5. That before the plaintiff can recover, it is incumbent on him to prove that the defendants were the owners of said schooner Clio at the time of the purchase by Roberts of the cargo, and that the ownership of a vessel must be proved by other evidence than acts of ownership.

6. That if they shall find that Darby, without authority from the defendants or the plaintiff, carried the cargo to Philadelphia and sold it there, and without the knowledge and consent of the plaintiff or defendants, applied the proceeds to the repairs of the vessel for injuries she had received on her outward voyage, and while Darby had her on shares, that the defendants would not be liable to the plaintiff on the ground, that the money had been expended for their benefit; and that they would not, under the circumstances, be liable in this action on any of the money counts.

TENNEY J. presiding at the trial, instructed the jury, that if the contract for the plaster was between the plaintiff and the master of the vessel, or any other than the defendants, or if the master of the vessel alone or with another had the possession and entire control and direction of her, so that the defendants, for the time being, had no right to interfere with her management, the plaintiff could not recover in this action. But if the defendants were jointly the acting owners of the vessel, professing to control her, although they might not in fact be the real owners, and the master alone, or with another, had not the entire control and management of her to the ex-

clusion of the former, and the plaster was purchased in pursuance of the directions of the defendants, express or implied; or if the same was not purchased by the master on his own account, or on account of himself and some other person, but by him acting for the vessel and owners, and the defendants took possession of the vessel and the plaster, being informed in what manner and of whom the latter was obtained, the jury would inquire, whether the defendants had not adopted and ratified the purchase, and if so, the plaintiff would be entitled to a verdict; or if the purchase was not made by the master on his own credit, or on that and of another, but by the master acting as aforesaid, and the plaster went for the benefit of the defendants or of the vessel, or was thrown overboard in part, to prevent the destruction of the vessel, or the remainder of the cargo, after Roberts left her, he not being liable for repairs subsequently made, even if he had taken her on shares, the action would be maintained; and in addition to the price of the plaster, the jury would add interest from the time when payment was to have been made, if they should find for the plaintiff. And the instructions requested were withheld, unless so far as they were embraced in the instructions given.

The verdict was for the plaintiff, and the defendants filed exceptions, and also a motion for a new trial, because the verdict was against law and evidence.

J. A. Lowell, for the defendants, contended that the first instruction requested, should have been given. The master's power relates merely to the carriage of goods, and to supplies and repairs requisite for the ship; and he can bind the owners of the vessel in contracts relative to her usual employment only. He has no power to purchase a cargo on account of the owners without express authority from them. 17 Maine R. 147; 14 Maine R. 183; 8 Greenl. 356.

The second request should have been granted. Such is believed to be the well settled law. 15 Mass. R. 352; 16 Mass. R. 336; 4 Greenl. 264; Abbott on Ship. 23 in notes; 3 Kent, 133 to 138.

The third should have been given. The master can in no case bind the owners for the cargo without express orders, as has before been said; and the master could bind none but himself, because he had become owner for the voyage, and therefore the responsibility of the general owners had ceased. Abbott, 23, 91; 16 Maine R. 413; 17 Mass. R. 581.

The fourth should have been given. 3 Kent, 163; Law Summary, 273; 17 Maine R. 147; 10 Mass. R. 26; 6 Pick. 131; 4 Pick. 145.

The fifth request should have been granted. Possession and acts of ownership do not establish a title to a vessel. If it were so, Roberts and Darby were the owners, for they had the one, and exercised the other. The title to a vessel must be proved by writing. 3 Kent, 130; Abbott, 1, 13; 15 Mass. R. 352.

The sixth was improperly withheld. The hirer of a chattel cannot, without special authority for the purpose, create a liability in the owner for costs of repairs or supplies furnished by direction of the hirer, and to aid him in deriving advantage from the thing hired. 20 Maine R. 213; 3 Kent, 136; Abbott, 22, 100; 5 Pick. 422; 16 Maine R. 413; 18 Maine R. 132.

He contended also, that the instructions given did not substantially comply with the requests made, and were, in themselves, in many respects erroneous or irrelevant.

J. C. Talbot, Jr. said that the first request was in substance complied with. The evidence to prove the authority, may be positive or presumptive, by direct instructions, general usage, or subsequent ratification. 8 Greenl. 356; 17 Maine R. 147; Abbott on Ship. 98, note 3; 11 Mass. R. 99.

As to the second: the Judge substantially instructed the jury, that in order to constitute the master the owner, *pro hac vice*, so that the liability of the general owners would cease, he should have the possession and entire control and direction of the vessel, and that the general owner should have no right to interfere. This is in strict accordance with the law. 4

Greenl. 407; 15 Mass. R. 370; 16 Mass. R. 336; 7 Greenl. 261; 4 Greenl. 264; Abbott, 22, note 1.

The third is the same as the second.

The fourth request was given in substance. The qualification, unless the owners had adopted or ratified his acts, was right. 8 Greenl. 356.

As to the fifth. The evidence introduced to prove the ownership was legally admissible, and was legally submitted to the jury. 8 Pick. 86; 16 Pick. 401; 16 Mass. R. 336; 6 Greenl. 474; 20 Maine R. 213; 3 Wash. C. C. R. 209; Abbott, 60, note 1; 5 Mass. R. 42; 10 Mass. R. 192; 12 Mass. R. 54; 1 Mason, 306; Phill. on Ins. 95; 7 Johns. R. 308; 2 Hall, 1. The persons from whom the master derives his authority, and whose agent he is, are liable as owners, although they may not have the absolute legal title. Abbott, 100; 15 Mass. R. 370. One not registered as owner, but holding himself out as such, is liable. 2 Stark. Ev. 942, and cases there cited; Abbott, 19; 2 Bingh. 179; Greenl. Ev. § 494, and note; 3 Kent, 149.

In relation to the sixth. Under the instructions, the jury must have found, that the defendants knowingly took possession of the vessel and cargo, by their agent Darby. They then had the benefit of the cargo, and were liable for the proceeds thereof.

The opinion of the Court was drawn up by

TENNEY J. — To charge the defendants in this action, it is not necessary to show, that they were the registered owners or the actual owners of the schooner Clio. A bill of sale, or other instrument in writing, is not essential to the transfer of a ship more than for any other chattel; but ownership may be proved by parol. Actual possession by the party in whom the interest is alleged to be, and acts of ownership by him, are in cases of vessels, as with other personal property, presumptive evidence of title. The papers at the custom house showed Erastus Redman to be the sole owner, but there was evidence submitted to the jury, tending to show that the defendants not

only had the possession of the schooner, employed the master, consulted together about her management, and settled with him, but that they purchased her in the first part of the season of 1839.

The fact has been settled, that the master had not the control of the vessel, so that he could legally prevent the interference of the defendants in her management. This results from the instructions of the Judge and the verdict. The cases are numerous, which show, that the taking the vessel by the master, victualing and manning her, and paying a portion of the port charges, and having a share of the profits, do not of themselves constitute him the owner *pro hac vice.* It is the entire control and direction of the vessel, which he has a right to assert, and the surrender by the owners of all power over her for the time being, which will exonerate them from the liability of the contracts of the master, relating to the usual employment of the vessel in the carriage of goods. The expense of victualing and manning the vessel and receiving compensation for his services and disbursements in a share of the profits by the master, are by no means inconsistent with the right of the employer or owner, to have the general direction of the business in which she is engaged.

The verdict has also established the fact, that the master did not purchase the plaster on his own account, but on account of the vessel and the acting owners. It was not competent for him by virtue of his character as master to bind the defendants in the purchase of a cargo; and before they could be holden therefor, there must be satisfactory proof of previous authority so to purchase, or subsequent ratification of his acts. It would be by one or the other alone, which would make them chargeable. But the evidence to show either, as in any other contract, may be express or implied, circumstantial, as well as positive and direct. The intention of the parties is to be ascertained, and when known, to prevail. Before the jury were authorized, under the instructions, to find a verdict for the plaintiff, they were to be satisfied, that the master had power previously given, to purchase for the defendants, or that

they had afterwards adopted and ratified the contract, which he made in their behalf.

The last instruction was substantially, that if the purchase was made by the master, not on his own account, but by him acting for the defendants, and the plaster went for their benefit, or that of the vessel, or was thrown overboard in part, to prevent the destruction of the vessel, and the remainder of the cargo, after Roberts left her, the action could be maintained. This instruction must be looked at, like all others, in connection with the evidence and the other instructions upon the same subject, and will be qualified thereby. The fact having been established, that the master made the purchase on account of the defendants, and it being a result of the verdict and the instructions, that Roberts left the vessel before any part of the cargo was thrown overboard or sold, it follows, that some one must have been in charge of the vessel after he left, and when the cargo was thus disposed of. The evidence is all reported, and is full, clear, uncontradicted and unimpeached, that one of the defendants who acted for the owners had entrusted the vessel and cargo to Darby. There is no evidence that Roberts after this, claimed, or that the defendants admitted him to have had any interest whatever in the plaster. No suggestion is made, that he gave any directions concerning its destination, that it was carried as his freight or that he was advised of the result of the voyage. The one in charge of the vessel testifies that he took her upon shares, and farther we are not informed of the terms of the contract between him and the owners. There was no evidence on which the jury could have returned a verdict, that Roberts was the owner of the plaster after he left the vessel, or that Darby was the owner *pro hac vice.* The defendants having been found to be the acting owners, they are to be considered as having the control, until evidence of the contrary was in the case, and we have seen that taking the vessel on shares does not have this effect. Darby then became the agent of the defendants, and in the default of proof to the contrary, is presumed to have observed their directions in all things, connected with

the charge, and to have conducted with fidelity; and whatever were his acts in the premises, were their acts, and so to be treated. They received the cargo into their possession; the proceeds of the part sold, after throwing overboard a portion for the security of the remainder and the vessel, they have received, and it has been appropriated to make repairs upon the vessel, and they have offered to account to no one. The language of the defendants, when they requested the master to go to Lubec, previous to the last voyage, the manner in which they treated similar purchasers previously, the reception of the cargo, when there is evidence that they had knowledge that it was purchased on their account, were facts for the jury to consider, on which they have passed in the inquiry whether the acts of Roberts in their name were authorized or ratified.

The instructions requested by the defendant's counsel which were not substantially given, were properly withheld, the principles contended for in the latter, not being warranted by law, or not coming in question by any evidence in the case.

The verdict was well rendered upon the facts in the trial and the

Exceptions and motion are overruled.

EDWIN PLUMMER *versus* CHARLES JARVIS *& al.*

The resolve of Jan. 24, 1839, authorizing and requiring the Land Agent to prevent "all persons found trespassing on the territory of this State, as bounded and established by the treaty of 1783," and with force, if necessary, from committing such trespasses, is equally applicable to such as may commit them on the lands of private persons and to such as trespass upon the public lands of the State.

TRESPASS for breaking and entering the camp of the plaintiff in the county of Aroostook, and taking and carrying away various articles in use in lumbering operations. There was also a count for a trespass on the person, and false imprisonment.

Jarvis, at the time of the alleged trespass, was provisional

Land Agent of the State, and as such justified the acts complained of under the authority of the resolves of 1839, and especially that of Jan. 24, 1839. The other defendant acted under Jarvis.

The plaintiff was once an inhabitant of this State, but at the time of the breaking up of his camp and lumbering operations, and for about eleven years prior thereto, he had lived in New Brunswick. Before the commencement of this suit, he had come over the lines into this State. The plaintiff, at the time of the alleged trespass, was lumbering on the Plymouth township, a few miles from Fort Fairfield; which township was originally granted by the Commonwealth of Massachusetts to the town of Plymouth and to Gen. Eaton, and was at this time unsettled, and the property of private persons living within the States of Massachusetts and Maine. The acts complained of were there committed. The lumber hauled off by the plaintiff was hauled into the Aroostook river within the limits of New Brunswick, which, however, was the most convenient point of landing the timber.

Tenney J. then presiding, instructed the jury, that if they were satisfied that the place where the articles were alleged to have been taken, was a part of the territory in dispute between this State or the United States and Great Britain, evidence having been adduced for the purpose of showing that fact, the defendants were justified under the resolves of the State. The jury returned a verdict for the defendants, and, in written answers to certain inquiries put to them by consent, found; that the defendants did take the property of the plaintiff, named in his writ, of the value of $513,47; that at the time the articles were taken, the plaintiff was engaged in cutting timber on lands within the territory of this State, and was upon the territory in dispute between the United States and Great Britain; that the plaintiff was not then cutting timber on land belonging to the State, but to certain individuals; that he had no authority from the owners of the land or the timber, or from any of them; that at the time he had his residence in the Province of New Brunswick and obtained his supplies for

carrying on his lumbering operations from St. John in that Province; that he had taken up his residence in New Brunswick as a permanent home, and had resided there about eleven years; that it was necessary, in the opinion of the Land Agent, to break up the plaintiff's camp to prevent trespasses on the lands owned by the State; that the defendants, in the acts complained of, acted in good faith; that the plaintiff was engaged in cutting said timber, when he was taken and carried to Fort Fairfield; and that he sustained no damages thereby.

The verdict was to be set aside, altered, or amended, as the legal rights of the parties might require.

B. Bradbury, for the plaintiff, said that these resolves gave great and extraordinary powers to the Land Agent, and should therefore be construed strictly. But they do not justify these acts of the defendants. They relate exclusively to the public lands. The title of the resolves so say; and the true construction is, that they relate only to the public lands within the disputed territory.

If it be said, that the acts were done to prevent his committing of trespasses on the public lands, the answer is twofold; the resolve does not authorize it; and it could not be done legally, without first having offered compensation. *Comings* v. *Bradbury*, 1 Fairf. 447.

T. J. D. Fuller, for the defendants, said that the resolves were remedial, and therefore to be construed liberally, if any construction were to be given to the language beyond its natural import.

The State is as much bound in justice to protect the land of individuals from the lawless depredations of foreigners, if not foreign enemies, as their own, and the language applies equally to both. The authority was given for the express purpose of preventing the trespassers from New Brunswick from plundering the lands in Maine, whether belonging to this State, to Massachusetts, or to private persons.

The defendants acted strictly within their orders from the State, and therefore are not liable. *Hodgson* v. *Dexter*, 1 Cranch, 345.

The opinion of the Court was by

WHITMAN C. J. — The case made out by the evidence, on the one side and on the other, does not exhibit the plaintiff as having sustained any injury, which could well excite the sympathy of honest men in his favor. He appears to have been a citizen of the United States; but, at the time of the injury complained of, had, for eleven years, been domiciled in the province of New Brunswick; and at the time of the alleged trespass, was committing depredations upon lands within this State, to which he had no pretence of title. It was in the winter of 1839; at a time when the British, having asserted, what can scarcely be denominated otherwise than an impudent claim to a large extent of the territory of this State, and when all but actual war existed between the British authorities in New Brunswick and us, in which we were endeavoring to defend our just rights, that the plaintiff, who had expatriated himself, was seizing upon the occasion, while the confusion upon our Eastern Boundary was at its greatest height to commit depredations upon our territory; and his complaint is, that he was interrupted, and his nefarious project broken up by the defendants, acting under the authority of our government.

It would seem, now, that he places reliance upon the fact, that the place, which he pitched upon for the scene of his lawless operations, was not then owned by the State but by individual citizens of this or some other of the United States.

But there was very little chance, under this subterfuge for him to shelter himself from responsibility; for surely the government of this State is as much bound to protect the territorial right of individuals within its bounds as it is to protect its own. Indeed it is one of the primary objects in all governments to protect and insure to all their individuals the uninterrupted enjoyment of property. No government could shrink from the performance of such a duty without abandoning the object of its formation. Again, the plaintiff questions the authority of the defendants, as officers of the State, to interfere and break up his operations. It would seem that he

thinks the resolve of Jan. 24, 1839, under which they acted, did not reach the case, and authorize them to disturb trespassers; unless they were actually committing strip and waste upon lands belonging to the State. The language of the resolve is, "that the Land Agent be and is hereby authorized and required to employ forthwith, sufficient force to arrest, detain and imprison all persons found trespassing *on the territory of this State, as bounded and established by the treaty of* 1783. And that the Land Agent be and is hereby empowered to dispose of all the teams, lumber and other materials in the hands and possession of such trespassers."

It was before a part of the general duty of the Land Agent to prosecute trespassers on the *public* lands. This resolve was passed to extend his powers for the purpose of meeting the emergency, and to render them more efficacious. It had become as indispensable, that measures should be taken to protect the property of individuals from depredation, as that of the public. Language in this resolve is used, which clearly shows, that the Legislature had in view not merely the public lands, but the territory of the State. Now what is the territory of a State? Clearly that which is comprised within the limits of the State. The word territory is used as synonymous with country and dominion, and lexicographers so define it; and in the resolve in this instance it is clearly so used. All our legislation will show that when the public lands only are intended, a different language is used, clearly indicating a distinction, constantly in view, between the territory of the State, and the interest of the public in portions of its soil; the appropriate phraseology to describe which is the public lands. That the word territory was used in the resolve as synonymous with dominion, if any thing further be necessary to show the intent of the Legislature, is rendered certain by the words, "as bounded and established by the treaty of 1783," added next after the word "territory." The use of such language, and the absence of any language tending to show that a view was had only to the public lands, seems incontrovertably to show that the resolve was designed to meet in a national point

of view, the crisis in the difficulties in which the State was then involved. No other mode was left to ward off the dangers, which then threatened in a great measure to destroy not only the prosperity of the State, but also that of individuals which the State was equally bound to secure from lawless outrage and depredation.

Judgment on the verdict.

WILLIAM B. BRADFORD *& al. versus* GEORGE W. MCLELLAN.

By our process of attachment the officer serving a writ, when so ordered in writing, is bound to attach sufficient to secure the payment of what may finally be recovered, provided property belonging to the debtor can be found to such an amount; but he is not bound to attach any, but such as does belong to him.

Personal property found in the possession of the debtor, may be presumed to be his, if nothing appears to the contrary; and the burthen of proof is on the officer, if he omits to attach it, to show that in fact it was not the property of the debtor.

If there be external *indicia* of ownership in the debtor, the officer cannot be excused from making an attachment, when necessary to the security of the creditor, by any thing but eventual proof that the property did not belong to the debtor; or in case of reasonable grounds of suspicion, by a refusal of the debtor to furnish security for an indemnity.

CASE against the defendant, as late sheriff of the County of Washington, for neglecting to attach sufficient personal property to respond the judgment on a writ in favor of the plaintiffs against L. C. White. The writ was placed in the hands of the defendant for service with written directions thereon, "to attach sufficient personal property." On Dec. 22, 1838, the defendant returned an attachment of a share in one corporation; on Jan. 19, 1839, three shares in another corporation; and on Feb. 8, 1839, one share in another corporation. Judgment was rendered in favor of the plaintiffs at the July Term of the S. J. Court, 1840, for $594,13, and $44,58, costs, and an execution duly issued thereon, on which the whole of the property attached was taken and sold, according to law, for the sum of $100,75. A further sum had been

indorsed by the plaintiffs, received on a note left as collateral security, leaving a balance still due. There was testimony introduced by the plaintiffs tending to show, that the defendant in that suit was the owner of a large quantity of goods subject to attachment, and which, with ordinary diligence, could easily have been found and attached; and also evidence on the part of the defendant that it was not commonly known that White was the owner of the goods, and that the goods were in fact under the incumbrance of a mortgage. The plaintiffs introduced evidence for the purpose of showing that the mortgage on the property was fraudulent and void as to creditors. It did not appear that the mortgage was known to the officer or to the creditors at the time of the attachment.

The counsel for the plaintiffs requested the Judge to instruct the jury, that the defendant was bound to make diligent search and inquiry for property, and to attach any property, in White's possession and apparently his; that if he had any doubts whether he might do so safely it was his duty to notify the plaintiffs of his doubts and call on them to show him property, or give him a bond of indemnity; that if he did not give such notice, or call for such indemnity, he was bound to attach the stock in White's store, and cannot now excuse himself for neglecting to do so, by proving that it was then under a mortgage, unless he shows that he then knew that fact, and gave the plaintiffs notice thereof; nor can he excuse himself, under such circumstances, if it now appears that such mortgage was a fraud upon White's creditors.

Tenney J. then presiding, did not give these instructions, but did instruct the jury, that the defendant was not bound to exercise any extra diligence, but only common diligence, such as men of common prudence ordinarily would exercise; that it was his duty to attach any property in White's possession, unless he had good reason to believe that some other person had a claim upon it, and that if it turned out that there was a mortgage thereon, the jury might suppose that he was notified of it; that it was not the defendant's duty to give notice, such as was contended for by the plaintiffs' counsel; and that he

was bound to look for property wherever he had reason to believe it was to be found, but was not required to search places not in the possession of the debtor, unless there were reasons to induce him to look elsewhere. The verdict was for the defendant, and the plaintiffs filed exceptions.

D. T. Granger argued for the plaintiffs, contending that the presiding Judge erred in refusing to give the instructions requested; and that those given were in themselves wrong, and injurious to the plaintiffs. He cited 7 Mass. R. 123, and 6 Shepl. 79.

Hayden, in his argument for the defendant, endeavored to show, that the instructions requested were erroneous, and therefore were rightly withheld; and that the law was correctly stated to the jury by the presiding Judge. He cited Story on Bailm. 390, and 1 Mason, 96.

The opinion of the Court was drawn up by

WHITMAN C. J. — This case comes before us upon exceptions taken to the instructions given to the jury at the trial. Attachments upon mesne process are unknown to the common law; and depend upon statutory provision. Hence we cannot look abroad for precedents to guide us in ascertaining what may be the duties of officers in such cases. By our process of attachment the officer serving a writ, when so ordered, is bound to attach sufficient to secure the payment of what may finally be recovered; provided, property belonging to the debtor can be found to such an amount. He is clearly bound to attach none but such as does belong to him. But personal property, found in the possession of the debtor, may be presumed to be his, if nothing appears to the contrary. If an officer omits to attach property so situated, when necessary for the creditor's security, he will be responsible to him for the injury sustained from such an omission; unless he can prove, that, notwithstanding such appearances, the property was not in fact that of the debtor; and the burthen of proof will be upon the officer to establish such fact. And, if he clearly shows such to have been the fact, he will have done right in

not having attached it, as in attaching it he would have been guilty of a trespass.

To ascertain who is the actual owner of personal property, notwithstanding what may be the indication arising from acts of ownership, is often attended with difficulty. Officers ought not to be holden to proceed to make attachments, where there is imminent peril in so doing, without an indemnity. If there be the external *indicia* of ownership the officer cannot be excused from making an attachment, when necessary to the security of the creditor, by any thing but eventual proof that the property did not belong to the debtor; or in case of reasonable grounds of suspicion, by a refusal of the debtor to furnish security for an indemnity. In the present case the property of the debtor was, so far as it could have appeared to the defendant, the property of the debtor. The defendant, if he would be excused for not attaching it, should prove either, that the property was not in fact in the debtor, or that, upon exhibition to the creditor of well grounded suspicions of danger, to be apprehended from making the attachment, he refused an indemnity. The instructions to the jury not having been substantially to this effect, the exceptions are sustained, and a new trial granted.

SARAH PRESCOTT *versus* NATHANIEL BROWN.

If the wife survive the husband, she cannot maintain an action for her personal labor, performed for another during the coverture, and for which the husband had not received payment, where there is no express promise of payment to herself.

ASSUMPSIT for services alleged to have been by her performed for the defendant in washing clothes. The plaintiff, at the time of the commencement of the suit, was the widow of David Prescott, whose estate was insolvent. The plaintiff proved the services charged to have been performed personally by her, while she was the wife of said David, but did not show any promise by the defendant to pay her personally. The defendant filed in set-off an account against her late husband,

and proved a greater amount to be due to him, than the claim in suit. CHANDLER, Judge of the Eastern District Court, presiding at the trial, directed a nonsuit, to which the plaintiff filed exceptions.

Fuller, for the plaintiff, contended that as the plaintiff was the meritorious cause of action, and as the claim was not paid during the life of her late husband, it survived to her. The husband having deceased before payment, and the plaintiff's legal disability having been removed by his death, she may sustain the suit in her own name. Chitty on Pl. 19; Chitty on Con. 42; 1 Swift's Dig. 37; 1 Black. Com. 349; 2 Conn. R. 564; 2 Verm. R. 302; 17 Mass. R. 57; 20 Pick. 517, 556; 1 R. & M. 102; Cro. Jac. 77, 205; 2 M. & S. 396; 16 Mass. R. 480; 3 N. H. R. 129.

B. Bradbury, for the defendant, said that it was well settled, that the earnings of the wife during coverture are the property of the husband. The right in the husband is absolute, and on his decease, the cause of action must be enforced by the administrator, and does not survive to the wife. Reeves' Dom. Rel. 60, 130; 7 Pick. 65; 8 Pick. 211; 10 Pick. 463; Bac. Abr. Baron & Feme, K.

The opinion of the Court was drawn up by

SHEPLEY J. — The plaintiff, being the widow of David Prescott deceased, brings this suit to recover for services performed in washing for the defendant, while she was a feme covert residing with her husband.

The counsel for the plaintiff contends, that, she being the meritorious cause, an action might have been maintained for those services in the name of the husband and wife during the life of the husband. And that, when the wife may be joined, the cause of action survives to her. The elementary writers cited appear, to sustain these positions, with this qualification, that she may be joined, when the cause of action being for her personal labor there is an express promise to her. In the case of *Pratt & ux.* v. *Taylor*, Cro. Eliz. 61, an action by husband and wife was maintained on an express promise to

the wife by the defendant, that he would repay to her, if he did not marry her daughter, ten pounds, which he had before received from her. In the case of *Brashford* v. *Buckingham & ux.* Cro. Jac. 77 & 205, the action was sustained by a husband and wife, on a promise made to the wife to pay her for her services in curing a wound. And in *Weller* v. *Baker*, 2 Wil. 424, this case is approved, and it is stated, that a like doctrine was held in the case of *Holmes & ux.* v. *Wood.* And it is stated by Comyn, that where the wife cannot have an action for the same cause, if she survive her husband, the action shall be by the husband alone. Com. Dig. Baron & Feme, W. In *Buckley* v. *Collier*, 1 Salk. 114, it was decided, that the husband and wife could not maintain an action for the labor of the wife in making a peruke, without an express promise to the wife. If these authorities were admitted to state the law in all respects with entire accuracy, the result would seem to be, that the wife, surviving her husband, would have the right to recover for her personal labor, performed for another during the coverture, if payment had not been made to the husband, and to apply the proceeds to her own use, if she could prove an express promise to herself. And her right of property in such personal labor would depend upon her obtaining such a promise.

By the common law the service and labor of the wife during coverture becomes the property of the husband for their support, for which he is bound to provide. It is difficult to perceive, how she can be said to have a property in such personal labor, which survives to her, when the right of property therein was appropriated to the husband by the marriage. And in the case of *Buckley* v. *Collier*, it is said, "the advantage of the wife's work shall not survive to the wife, but goes to the executors of the husband." And no case has been noticed in which a different doctrine has been held. But whatever may be the rule of law in this respect, the plaintiff cannot maintain this suit without proving an express promise to herself, and the testimony does not furnish any such proof.

Plaintiff nonsuit.

LORING F. WHEELER *versus* THE FRONTIER BANK.

The statute of 1836, c. 233, entitled "Further to regulate Banks and Banking," does not render stockholders in a bank, who had become proprietors of their stock before the passage of that act, personally liable for the debts of the bank.

THIS case came before the Court upon a statement of facts of which the material parts appear in the opinion. If in the opinion of the Court the action could be maintained, a default was to be ordered; and if it could not be, then the plaintiff was to become nonsuit.

B. Bradbury and *Hayden* argued for the plaintiff.

In support of the position, that all statutes on the same subject should be considered in connexion, in giving a construction to any one of them, they cited 1 Bac. Abr. Stat. I. And to show that all the parts of a statute are to be examined, and that the general intention should govern, regardless of particular words, they cited Co. Lit. 381 (a); 1 Kent, 461; 2 Gall. 204; 2 Cranch, 33; 1 Pick. 248. They also cited the various statutes in relation to banks, with comments, and particularly, St. 1836, c. 233, and Rev. St. c. 77.

And in support of the position, that if the act of 1836 was retrospective and embraced the present case, it was thus far unconstitutional and void, they cited 3 Story's Com. on the Const. § 1370, 1379; 9 Cranch, 43; 8 Wheat. 1; 2 Greenl. 28 and 275; 6 Greenl. 112; 8 Mass. R. 445; 15 Mass. R. 447; 16 Mass. R. 76.

D. T. Granger in his argument for the defendants commented upon the statutes in relation to this subject, and contended that the act of 1836, in its terms, clearly embraced the present case.

The act was constitutional. The Court will not declare an act of the legislature to be unconstitutional, unless it be clearly so. 14 Mass. R. 340; 16 Mass. R. 270; 2 Fairf. 284.

He contended that the statute of 1836 created no new liability of stockholders in banks, but merely provided a remedy for a creditor to avail himself of the liability created by the prior

statute of 1831. The books are full of cases to show, that an act of the legislature providing a remedy in such cases is constitutional. Among them are 1 Metc. & P. Dig. 559, 554, 563; 4 Wheat. 122; 12 Wheat. 370; 2 Pick. 158; 19 Pick. 48; 21 Pick. 169, 230; 22 Pick. 430; 2 Fairf. 284; *Oriental Bank* v. *Freese*, 6 Shepl. 109.

The opinion of the Court was drawn up by

WHITMAN C. J. — The plaintiff appears to have been the owner of fourteen shares of the capital stock in the bank of the defendants, on which a dividend of thirty-one dollars and fifty cents had been declared; and which had been by him demanded of them before the institution of this suit. He has also been the owner of four shares, the par value of which was four hundred dollars, in the Washington County Bank, ever since its incorporation in March, 1835; which bank was indebted in a large amount to the defendants; who had demanded the same, as provided in the statute of 1836, "Further to regulate Banks and Banking;" and more than fifteen days had elapsed thereafter, when the defendants commenced a suit to recover the same against that bank; and in pursuance, as was supposed, of a provision for the purpose, in the same statute, attached the plaintiff's shares in the capital stock in the defendants' bank, valuing them at four hundred dollars, being the equivalent for the par value of the plaintiff's four shares in the Washington County Bank. This attachment was made before the said dividend was declared; and, if authorized by law, the after dividends would be included in it.

The plaintiff contends, that his stock was not liable to be so attached, his ownership in the stock of the Washington County Bank having had its commencement anterior to the passage of the act aforesaid, which provides, that the individual stockholders in banks shall be liable for the debts of banks, in which they are stockholders, to the amount of the stock by them owned; because it was not competent for the legislature to create a liability, where none existed before, by an act having a retrospective operation. It may be well in the first place to

ascertain whether the legislature, in passing the act of 1836, intended it should have a retrospective operation; if not, the defendants cannot resist the claim of the plaintiff. The language of it is general; without limiting it to those, who might thereafter become owners of stock; but, what they had not authority to do, we may well suppose they did not intend to do; and we cannot think that it requires the citation of authorities, or an elaborate course of reasoning, to prove that the legislature cannot have power to create a liability of an individual, for a debt for which he was not before liable; nor can they authorize the attachment of the property of any one, and the disposition of it, to pay a debt, which he had not before contracted to pay. After the passage of the act of 1836, those, who became owners of stock, might well be considered as having become so with a view to, and an acquiescence in, the liability created by the act. But those who previously had become owners of stock, when no such liability had been provided for, would certainly have a right to complain if their stock could be taken from them to pay a debt, for which they had not before been in any manner liable. It may be urged that stockholders, who receive a dividend of the capital stock, may be rendered liable in equity to contribute towards the payment of debts due from the corporation, in proportion to the amount of stock owned by each; but this is a very different affair from that of taking by execution the whole of an individual's shares, when no such dividend has taken place, to satisfy a debt due from the corporation. However general the expressions may have been in the act of 1836, the conclusion, that it could not have been intended to subject the owners of shares in the capital stock of banks, who were such before the passage of that act, to liability to have their shares seized on execution for the debts of the corporation, it seems evident, that the legislature could not so have intended; for upon a revision of that enactment (Rev. Stat. c. 77, § 41) it is provided, that the private property of individual stockholders of banks, to the amount of such shares as they may have acquired in a bank, after the taking effect of the said act

of 1836, shall be liable to be attached on mesne process, and levied upon in suits against the banks in which they are respectively interested. This can scarcely be regarded otherwise than as a legislative construction of the act of 1836 in this particular; and comes strongly in aid of what it would, independently, seem to be presumable as to the intention of that act. We come therefore unhesitatingly to the conclusion that the plaintiff's shares were not in this case liable to attachment. The defendants, therefore, are, as agreed by the parties, to be defaulted, and judgment is to be entered for the amount of the dividend claimed, with interest thereon from the date of the writ.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF HANCOCK,

ARGUED AT JULY TERM, 1843.

JONATHAN OSGOOD *& al. versus* HENRY S. JONES.

Where the defendant had agreed to re-convey to the plaintiffs certain estate when they should pay four notes, made by them and by the defendant as their surety to a third person, and the plaintiffs afterwards paid the notes, and their attorney sent a letter to the defendant, merely "describing a memorandum and requesting a re-conveyance of said premises," and the defendant thereupon replied by letter, that "if any such agreement was in the hands of said attorney, it was a forgery," *it was held*, that an action on the agreement could not be maintained on such evidence.

Where the plaintiffs were charged by the defendant, in a settlement of accounts between the parties with a sum of money as having been indorsed on a note to him from one of the plaintiffs, but which indorsement had never in fact been made; and the defendant had brought a suit upon the note, and recovered upon default the full amount thereof, the action having been once continued on the motion of the defendant, but the attorney and the present plaintiffs then supposing that the indorsement had been made; *it was held*, that the amount might be recovered back.

An offer to indorse the same amount upon the execution, at the time of the trial of the action to recover back the money, does not vary the rights of the parties.

THE two first counts in the declaration were founded upon a memorandum of which the following is a copy. "Know all men by these presents, that I, Henry S. Jones, do hereby bind myself to re-convey to Jonathan Osgood and Samuel P.

Osgood a certain parcel of land this day conveyed to me by them, and also the goods in their store this day sold me, when they, the said Jonathan Osgood and Samuel P. Osgood, shall or do pay Charles Warren & Co. four certain notes of hand, bearing even date with these presents, amounting in all to the sum of five hundred and ninety-two dollars, which notes I have signed as surety. Mount Desert, Aug. 12, 1837. Henry S. Jones." The other facts in relation to these two counts appear in the opinion of the Court.

The third count was for money had and received, and the fourth was upon a note given by the defendant to the plaintiffs. The plaintiffs and the defendant, as the report of the case states, on April 27, 1840, settled an account between them, in which the latter charged the plaintiffs with "indorsed on Jonathan Osgood's note, 57,27½." That sum was allowed on the adjustment. The statement of the proceedings in the suit in favor of Jones against Jonathan Osgood before judgment is thus. "Said note had subsequently been put in suit, and after appearance of defendant by counsel, and a continuance, judgment upon default had been rendered upon it for the whole amount, no indorsement of said sum having been made; and neither the plaintiffs, nor their counsel, at the term when said action was continued, nor at the term when it was defaulted, had any knowledge that such sum had not been indorsed upon said note." The other facts appear as full in the opinion as in the report of the case.

F. Allen and *C. J. Abbott* argued for the plaintiffs, and on the point, that if the demand for a deed was informal, the reply amounted to a waiver of any objection to it, cited 9 Mass. R. 277; 1 Peters, 455; 2 Greenl. 1; 6 Greenl. 208; 2 Fairf. 258 and 475; 3 Fairf. 332; 14 Maine R. 335; 17 Maine R. 34 and 296; 16 Pick. 327; 18 Pick. 16; 19 Pick. 13; 21 Pick. 396.

And to the point, that as the defendant had made a false assertion, that the sum was indorsed on the note, and had thus caused a mistake on the part of the plaintiffs, it could be

recovered in this action, they cited *Fowler* v. *Shearer*, 7 Mass. R. 14; *Rowe* v. *Smith*, 16 Mass. R. 306.

Hathaway argued for the defendant, and on the point, that it was the duty of the plaintiffs to furnish a deed and offer it to the defendant, and request him to sign it, cited For. 61; 6 M. & W. 6 and 385.

The opinion of the Court, SHEPLEY J. having been attending to the trial of jury causes in the county of Washington at the time of the argument, and taking no part in the decision, was drawn up by

WHITMAN C. J. — As to the two first counts, depending on a memorandum of an agreement in writing to reconvey real estate, upon the payment of certain notes held by Messrs. Charles Warren & Co. on which the defendant was but a surety, the defence is, that this action was prematurely commenced, before notice to the defendant that the notes had been paid, and before a demand had been made upon him for a reconveyance. The reliance on the part of the plaintiffs, in reply to this defence, is, that their attorney wrote to the defendant, "describing a memorandum and requesting a reconveyance of said premises," to which the defendant replied, by letter, that, "if any such agreement was in the hands of said attorney it was a forgery." It does not appear that the defendant was apprised, by letter or otherwise, that the notes had been paid; nor does it clearly appear that the memorandum was so described to him, that he was not justified in supposing it could not be genuine. The statement is that *a* memorandum was described to him. If the notes taken up had been exhibited to him, together with the memorandum and a deed prepared to be executed, and he had refused to execute it, he would have been liable; but we cannot know, if such a course had been taken, and which the plaintiffs should have pursued, that it would not have been successful. As the case is presented to us, it cannot be considered, that the allegation in the defendant's letter, that the "agreement" was a forgery forms a sufficient ground to infer, that, if proper steps had

been taken to convince the defendant of the justice of the claim against him, he would not have yielded to the demand. Upon a discontinuance as to these two counts the plaintiffs will have ample opportunity to place themselves in a condition to compel a specific performance of the contract.

We see no good reason why the plaintiffs should not recover on the other two counts. The $57,27½ was charged to the plaintiffs by the defendant, in a settlement of accounts, as having been indorsed on a note, which Jonathan Osgood, one of the plaintiffs, had given to the defendant, which indorsement had never in fact been made. This then was clearly an error in the settlement of accounts between the parties. It was an allowance of an item under the influence of a charge actually false, made by the defendant. It is true that judgment had been recovered on the note, before the commencement of this action, upon default, against the said Jonathan; and it may be that he might have compelled the defendant to have allowed the item in set-off against the note; but we are not by any means prepared to say that, under the circumstances of this case, he was bound to have done it; especially as he was, by reposing confidence in the defendant's false representation, led to the belief that the item had been actually indorsed; and had no knowledge to the contrary till execution came against him: This is a much stronger case for the plaintiffs than were those of *Fowler* v. *Shearer*, 7 Mass. R. 14; and *Rowe* v. *Smith*, 16 *ib.* 306. The offer to indorse the amount on the execution of *Jones* v. *Osgood*, made at the trial could not vary the rights of the parties in this action.

The plaintiffs, therefore, as to the two first counts, have leave to discontinue; and as to the other, a default is to be entered; and on the $57,27½ interest will be allowed from the time of the settlement of the accounts.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF WALDO.

ARGUED AT JULY TERM, 1843.

Mem. — SHEPLEY J. was employed in holding the Court in the county of Washington for the trial of jury causes, and could not attend at this term, and took no part in the decisions.

COTTON WARD *versus* GEORGE BAILEY.

If the jury have through a misconception of the meaning of legal terms returned a verdict the reverse of what they intended, and such verdict has been affirmed, the papers may be again delivered to the jury by direction of the presiding Judge, before they have separated or left their seats, and the Judge may explain to them the meaning of those terms, and they may correct their verdict, although the writ in the next action may have been read to them.

WRIT of entry. The cause was submitted to the jury, and they came into Court and returned a verdict, that the defendant did not disseize the demandant, &c. and it was affirmed.

Another action for trial between other parties was called, and the writ was read to the same jury, when the counsel for the demandant in the first case suggested to the Court, that he apprehended that the jury had by some mistake returned a different verdict from what they intended. SHEPLEY J. presiding at the trial, informed the jury of the legal effect of their finding; and the foreman of the jury, by leave of the Judge,

stated that they found the location of a monument in controversy as contended for by the demandant. The Judge then directed the papers in the case to be delivered back to the jury, the counsel for the tenant objecting thereto. The jury consulted together and returned a verdict, that the tenant did disseize the demandant, and this verdict was thereupon affirmed in the place of the other. The jury did not separate, or leave their seats from the time of their returning the first verdict until after they had returned the last. The tenant filed exceptions.

W. Kelley, for the tenant, contended that after the verdict was once delivered into Court by the jury, and affirmed and recorded, that it could not be altered. The only way of correcting the error, if any there be, is by sending the case to a new trial. *Little* v. *Larrabee*, 2 Greenl. 37; 6 Johns. R. 68; 7 Johns. R. 32.

W. G. Crosby, for the demandant, said that there was a very wide distinction between the cases cited and this. Here the jury had not separated, and they were permitted merely to make their verdict express the decision already made by them, which, by mistake, it did not do, as it then stood.

The opinion of the Court was drawn up by

WHITMAN C. J. — The case of *Little* v. *Larrabee*, cited and relied upon by the counsel for the defendant, is distinguishable from the case at bar. In that case the jury had separated; and were liable to be influenced by conversations with the parties or others. It would, manifestly be unsafe, after such an opportunity for foul practices, to allow a jury to alter a verdict, which had been delivered and received in Court. In this case no such opportunity had been afforded. The jury had not left the stand. No undue influence could have been exerted over them. It is true their verdict had been received, and entered on the docket. But it appeared, on questioning the foreman, that they had misconceived the meaning of the terms used in their verdict. They were, thereupon, permitted to correct the mistake; and the minutes of the clerk were altered accord-

ingly. It would be a reproach to the law, if a mistake thus occurring, and thus corrected, should be deemed sufficient to send the cause back to a new trial. There are no authorities to warrant it. The cases cited from the 6th and 7th of Johns. R. do not apply.

That before the correction another cause had been begun upon, before the same jury, when the mistake was discovered, could not reasonably form the slightest ground of objection to the correction.

Exceptions overruled and judgment on the verdict.

JAMES READ *& al. versus* THE FRANKFORT BANK.

If the charter of a corporation be legally repealed by the legislature, as it respects that corporation, in accordance with a provision in the charter reserving that right on a certain contingency, a creditor of the corporation can interpose no valid objection to the constitutional power of the legislature, on the ground that such act would prevent the prosecution of the remedy of the creditor to collect his demand by a suit against the corporation, then pending, where property had been attached.

The remedy for a party may be changed by the legislature, although such change may affect suits then pending, without contravening the constitution of the United States.

The mere service of a copy of the writ, in a suit then pending, upon the receivers of the effects of an insolvent bank, is not a compliance with the provisions of the act of April 16, 1841, that creditors must bring in and prove their claims, if they would receive their share of the effects.

ASSUMPSIT against the defendants as indorsers of two promissory notes. The plaintiffs introduced the proof necessary to charge the defendants as indorsers.

The defendants thereupon contended that the action could not be maintained by reason of the provisions of the additional act of April 16, 1841, repealing the charter of the Frankfort Bank, which required all claims to be presented and proved before the receivers, appointed to take charge of the effects of the bank, prior to July 1, 1842, as it had not been shown, that

the plaintiffs had complied with such provision. The plaintiffs then proved, that the action was commenced Feb. 2, 1841, and that property was attached on the same day. And that on June 17, 1841, a copy of the writ was duly served upon the receivers.

SHEPLEY J. who presided at the trial, ruled that the service of the writ upon the receivers was not such presentation of the claim and proof, as the statute required, and that the action could not be maintained. The plaintiffs filed exceptions.

Hathaway and *Hubbard*, for the plaintiffs, contended that as the action was commenced before the repeal of the charter, and the debt secured by an attachment of property, their right became vested, and that the legislature had no constitutional power to pass acts affecting their rights injuriously. Metc. & P. Dig. 555; 8 Mass. R. 43; 2 Gallis. 141; 2 Greenl. 294; 3 Greenl. 326; Story's Com. on Const. c. 34.

They also contended, that the service of the writ upon the receivers was in substance a compliance with the requirements of the statute in relation to proof of the claim.

W. Kelley and *Merrill*, in the defence, said that the legislature reserved in the charter the right to repeal it, on the happening of a certain event, which it is admitted has taken place in this case. This is clearly a constitutional act. When the corporation ceased to exist, the action was gone. This is decisive against the present case. The legislature, however, did provide a remedy by taking possession of the effects of the corporation, and making an equal distribution thereof among all the creditors, who would bring in and prove their debts. The plaintiffs have less ground for setting up a claim to vested rights, than the creditor who has attached the property of an insolvent man, who dies during the pendency of the suit.

Merely giving the receivers notice of the suit, cannot be considered as presenting and proving the claim.

The opinion of the Court was prepared by

TENNEY J. — By the statute of March 29, 1841, c. 139, the act incorporating the Frankfort Bank was repealed, and

provision made for the appointment of receivers, who were required, when qualified to act, to demand and receive of the officers of the Bank the property to the same belonging. On the 16th of April, 1841, an additional act was passed requiring all creditors, in order to entitle themselves to a distributive share of the assets, and to prevent their claims from being barred, to exhibit and prove them to the receivers on or before the first day of July, 1842.

This action was commenced and an attachment of property made previous to the repeal of the charter of the Bank; and it is insisted that thereby a right became vested in the plaintiffs to proceed with the suit under the laws, which were in force at the time of its commencement, and that the same cannot constitutionally be affected injuriously by any act of the legislature. But if the repeal was not in contravention of the constitution, it is contended that the plaintiffs have substantially complied with the statute of the 16th of April by causing a copy of the writ to be served on the receivers on the 17th of June, 1841, a time long before that, when the claim was to have been barred, if the same had not been exhibited and proved to the receivers.

By the act of 1831, c. 519, entitled "an act to regulate Banks and Banking," § 32, the legislature reserve to themselves, in cases therein named, after certain proceedings, the right to declare charters of Banks forfeit and void. The Frankfort Bank, incorporated after the enactment of this statute, was subject to its provisions, which were a part of its charter. It is not contended that the Bank had not exposed itself, so that its charter was properly revoked, or that all the necessary steps were not taken by the legislature agreeably to the general statute of 1831, previous to the repealing act; and in default of evidence to the contrary, it must be so presumed. Neither is it contended, that the Bank did not submit to the provisions of the repealing statute, acknowledged the authority of the receivers, and surrendered to them its books and its property.

After this, the creditors of the Bank cannot object to the constitutionality of the Act, dissolving the corporation, when

it was done for causes, which by the charter were sufficient for the purpose, and when the repeal was conclusive upon the Bank. Indeed, it is not seen how *any* objection can be made by those, who had no other connexion therewith, than that of being its creditors. Whoever entered into contracts with it, exposed himself to losses which might arise from its dissolution, as he would with natural persons, by their death. No security was provided in the charter, or other statute, against such an exposure to injury.

The Bank having ceased to exist, excepting so far that the receivers could prosecute any suit pending in its name; and could use the name of the Bank in any suit, which might be necessary to enable them to collect any of the debts due to the Bank, there is no party whom the plaintiff can prosecute or take judgment or execution against, unless it be in a court of equity. The Bank as such have no longer the power to sue or to be sued; the receivers alone are the successors of the corporation, and they take all the property for the purposes specified in the act of repeal, and for those purposes only. Their appointment and the power given to them in no wise infringe the previously existing rights of the plaintiffs. It is by and through them, that the property is to be made available in the payment of the debts against the Bank. If the receivers had not been appointed, the plaintiffs could have no better prosecuted their suit, than they are now able to do. The repeal of the charter has presented the obstacle to their further proceedings, by dissolving the party against whom they had commenced them.

The obligation of the contract between the plaintiffs and the Bank was not impaired by the repeal of its charter, but the mode of obtaining indemnity for its violation was changed. The bank was created by the legislature, and by the charter, there was no provision made for the prosecution of suits against it, if that charter should be declared by the same power forfeit and void; but a mode has been provided in the repealing act, by which creditors are enabled to obtain satisfaction for their claims, to the extent of the means existing therefor. A

remedy for a party may be changed or wholly taken away by the legislature without contravening the constitution of the United States. *Thayer* v. *Seavey*, 2 Fairf. 284; *Oriental Bank* v. *Freese*, 18 Maine R. 109. And such a change may constitutionally affect suits pending at the time, when it is made.

Have the plaintiffs saved themselves from the operation of the limitation contained in the act of April 16, 1841? We are satisfied, that they have not; though we do not perceive how a decision of that question can influence this case. For if we have taken the correct view of the effect of the act of repeal, this action can be no farther prosecuted, in any court. The claim of the plaintiffs in this case is upon two notes of hand indorsed by the Bank. The writ was the legal process to obtain a judgment upon this claim. In order to bring the affairs of the Bank to a close within the time prescribed, the receivers were to be made satisfied of the existence of the demands and the legal title of the claimants to payment. The writ could not tend in the least to do either, and the service of the same by a copy, was not such an act as to take the case from the effect of the limitation.

Nonsuit confirmed.

FRANKFORT BANK *versus* BENJAMIN JOHNSON *& al.*
SAME *versus* SAME.

No action can be maintained against the sureties on an official bond of the cashier of a bank, where the breaches assigned are all for unfaithfulness in office after a reappointment, and after the giving and acceptance of a new bond.

THE first of these actions was debt upon a bond dated Aug. 16, 1836; and the second upon another bond, dated October 20, 1838. There was a third bond given by Johnson, as cashier of the bank, on October 7, 1839, on which a third suit had been brought. The sureties were not the same in the two first bonds as in the last. The facts are given at the commencement of the opinion of the Court.

SHEPLEY J. presided at the trial, and ruled that the action could not be maintained for the recovery of damages sustained by the unfaithfulness of the cashier after he had been reappointed and had given a new bond. The verdict of the jury in the first action was for the defendants; and in the second, under the same ruling, the defendants offered no evidence, and a nonsuit was ordered. The plaintiffs filed exceptions.

W. Kelley and *Merrill* argued for the plaintiffs, contending, that there was nothing in the law which made it necessary, that there should be an annual election of cashier of a bank, but merely, that a new bond should be taken annually. By the condition of the bond, the obligors were holden so long as the principal should be cashier of the Bank. The new bond is not a substitute for the old one, but merely an additional security to the plaintiffs. *Dedham Bank* v. *Chickering*, 3 Pick. 335; 1 Metc. & P. Dig. 390.

Hathaway and *Hubbard* argued for the defendants, contending, that when a new election was made and a new bond was given, that the first bond could be a security, only for the good conduct of the cashier until the giving of the second bond. It is like the case of an election of a city or town treasurer for a second and third year, where the sureties are liable but for the defaults happening during their year.

The opinion of the Court was by

WHITMAN C. J. — These are actions of debt upon two several bonds. The defendant, Benjamin Johnson, was, in 1836, when the bank of the plaintiffs went into operation, elected its first cashier; and as such gave the bond, with the other defendants, as his sureties, declared upon in the first of these suits, conditioned that he should faithfully perform the duties pertaining to that office during his continuance therein. It does not seem to have been then contemplated, that any new election would be annually necessary. In 1838, however, an act was passed, making it the duty of the directors of the several incorporated banks in this State, to require of their cashiers a renewal of their official bonds, in the month of

October, annually. The directors of this institution thereupon, in the month of October of that year, proceeded to a new election of a cashier; and said Johnson was then duly re-elected; and, as provided in the statute, gave a new bond, on which the second suit is founded. And in 1839, another election of cashier took place, and Johnson was again reelected; and gave a new bond, as by law required. No default occurred, it seems, till after the last reelection, nor until after the execution of the third bond; and these two suits are instituted to recover for defalcations, which subsequently took place. And the case of the *Dedham Bank* v. *Chickering & al.* 3 Pick. 335, is supposed to be an authority decidedly supporting the claim. This authority is entitled to very great respect, considering the source from whence it comes; but, the decision having taken place since we were separated from Massachusetts, if not convinced of the soundness of the reasoning in support of it, we should not hold ourselves absolutely concluded by it. The Court in that case do not consider the occurrence of a new election of the cashier as, of itself, interrupting the continuance in office under the former election. To us it seems that this conclusion may not be entirely free from doubts of its correctness. But, however that may be, we think the case at bar distinguishable from that case. In that case no new bond had ever been given upon a reelection. It does not distinctly appear, therefore, that the cashier ever accepted of any new appointment; in which case it might be reasonable that his liability, and that of his bondsmen should be considered as continuing; for when elected, without reference to an annual appointment, he might be considered as holding under his first appointment, till qualified under a new one. But when a new appointment was made and accepted, and a bond given for the faithful discharge of the duties under it, his former appointment might well be considered as having terminated, and all liability under it as ceasing thereafter to accrue.

Again, if each set of bondsmen were to be holden answerable for all the defalcations, taking place after the giving their

respective bonds, the consequence might be at law, that the plaintiffs would recover for the same defalcation as many times as there were sets of bondsmen anterior to its occurring. Neither performance nor accord and satisfaction could be pleaded by those against whom a recovery had not been had. Such consequences could never have been fairly in contemplation by the parties; and contracts must be construed in conformity to what must be believed to have been intended by the parties. In doing this the subject matter to which the contract relates, and the circumstances and situation of the parties, to which it has reference, will be taken into view. The defendant, Johnson, had been elected cashier of a Bank. The bonds have reference to him as such; and to the duties, which were to be required of him in such an office. If the office were depending on an annual election the bond might well be deemed to have reference to such a tenure; especially in the absence of explicit stipulations to the contrary. And if it were for an indefinite period, it might well be understood, that the liability of his bondsmen should not extend beyond the time for which he should be allowed to hold the office under it. It would seem to be difficult to believe that these plaintiffs, when they made a new appointment of the defendant, Johnson, and took a new bond of him, could have fairly contemplated holding the former bondsmen responsible for defalcations, which might thereafter accrue. And moreover the Legislature, when they required the renewal of the bonds annually, cannot well be believed to have contemplated that the bondsmen of each year should be holden responsible for the fidelity of cashiers, except for the year for which the bonds were taken.

We are, therefore, of opinion that in the first suit the exceptions must be overruled, and that judgment therein be entered upon the verdict; and as to the second, that judgment be entered upon the nonsuit.

STEPHEN RAND *versus* ROBERT SARGENT.

If an officer, having a writ in his hands, goes to the debtor, and finding him in the actual possession of goods, informs him that he is directed to make an attachment thereof, and shall do so, but does not in fact interfere with the goods or take them into his custody, and the debtor informs the officer that the goods belong to a third person and not to him, but still procures one, other than the owner, to give a receipt therefor to the officer; this does not amount to such conversion of the goods by the officer as will enable the owner to maintain action of trover therefor against him.

TROVER for a pair of oxen.

A witness called by the plaintiff testified, that the oxen were purchased by the plaintiff, and left in the possession of the witness, subject to the call of the plaintiff; that while they were so in the personal care of the witness, the defendant said to him, that he had a precept against him, with orders to attach those oxen as his property; that he informed the defendant, that they were not his property, but belonged to the plaintiff; that the defendant replied, that he was indemnified, and instructed to attach them on a writ against the witness: "that the defendant than suggested the expediency of procuring a receipter for the oxen, to which witness assented, and they thereupon left the oxen, and went together to Aaron Nickerson, who receipted for them; that said oxen were not taken from the sled, or in any way interfered with by the defendant, except by saying he must attach them, and did attach them as aforesaid; and that the oxen have since remained in the possession of the witness." After the witness had testified, the testimony was turned into a statement of facts. There was nothing in the case to show, whether any return was or was not made upon the writ by the defendant of an attachment. It was agreed that such judgment should be rendered by the Court, on the statement, as the law required.

J. Williamson, for the plaintiff, contended that when property was attached, that the officer became a trespasser by the act, unless he could justify himself by the precept under which he acted. It is the attachment of the property, which constitutes a conversion of it; and it is immaterial, whether he

makes a return upon the writ, or not. 7 Johns. R. 254; 8 Wend. 610; 10 Wend. 110.

Crosby, for the defendant, said here was not the slightest intermeddling with the property. It was a mere statement that he would take the oxen unless something should be done. The taking of a receipt for the property does not constitute an attachment. There has been no act done from which a conversion can be inferred. *Boynton* v. *Willard*, 10 Pick. 168; *Lathrop* v. *Cook*, 14 Maine R. 414.

The opinion of the Court was drawn up by

WHITMAN C. J. — The oxen alleged to have been converted by the defendant to his own use, were never actually in his possession. He merely said to the person having them in custody, and who was alleged to be the debtor in the precept, which the defendant had in his possession for service, that he was ordered to attach them as his property, and must do so, and that he did attach them; and thereupon the alleged debtor procured a person, not being the plaintiff, to give a receipt for them, stipulating to deliver them to the defendant, as usual in cases of attachment of personal property on mesne process. It does not appear that the defendant ever returned them as attached on his precept. If he had, in the case of *Boynton* v. *Willard*, 10 Pick. 166, Mr. Justice Wild, in delivering the opinion of the Court, even in the case of the return by an officer of an attachment of property, says, "we think, therefore, that it cannot be maintained, as a proposition universally true, that the return of an attachment of personal property conclusively proves the taking, so as to subject the officer to an action of trespass." It is undoubtedly true, as laid down in the elementary works cited, that the slightest actual interference, disturbing another in his enjoyment of the possession of his property, unlawfully, is a trespass. But the defendant in this case never for a moment disturbed the possession of the person having the oxen in custody.

The plaintiff relies mainly upon the authority of the cases of *Bristol* v. *Burt*, 7 Johns. 254, and *Phillips & al.* v. *Hall*

& *al.* 8 Wend. 610, as supporting the action. In the former, a customhouse officer had placed armed men near a store, in which the plaintiff's goods were stored, and forbade the removal of them; and caused them, against the will of the plaintiff, to be detained for months. This was clearly a tortious conversion. The customhouse officer had taken them under his own control, and had excluded the owner from any exercise of dominion over them. There could be no doubt in such case, that trover would well lie against the defendant, the customhouse officer, he having no justifiable cause for the interference. In the latter case, the owner of goods in a store had been induced to procure receipters for them, who undertook to have them forthcoming or to pay a certain sum, being the amount necessary to discharge a debt due from one not the plaintiff, as whose, the defendant, an officer, had claimed a right to attach them. The owner had undertaken, of course, to indemnify the receipters. The Court held that, being so bound, he was entitled to recover of the officer the amount, which the receipters were under obligation to pay him.

The case at bar is very distinguishable from either of these; from the first, as the defendant here never interrupted the possession of the plaintiff, or his agent, for a moment; and from the last, inasmuch as the plaintiff did not procure the receipters and was not, so far as appears, liable to them in any event. It was the debtor, named in the process, who had procured the receipters, and who, for aught that appears, was alone answerable to them for any loss arising from their liability. And it was his possession alone, if of any one, which had been disturbed. The plaintiff's rights were in nowise affected to his injury. The oxen remained where he had placed them; and he could at any time resume his actual possession of them. They were, according to the testimony of his witness, at his control. To allow him, under such circumstances, to recover the value of them, or the amount for which the receipters stood responsible, would be to allow him to keep his oxen, and yet to recover pay for them of the defendant.

But, as the law in Massachusetts, before separation, and in Maine, ever since, has been holden to be, even receipters for goods attached, not claiming property in themselves, may, in defence, show, that the same were not the property of the person as whose they were attached, and that they had been reclaimed, and taken possession of by the rightful owner. Hence the receipters in this case were in no danger of being rendered liable, even if they had been procured by the owner of the oxen; and so no damages could have accrued to him, he not having been divested of the possession of them. *Learned* v. *Bryant*, 13 Mass. R. 224. The consideration for their undertaking would have utterly failed.

Plaintiff therefore, according to the agreement of the parties, must become nonsuit.

JAMES JOHNSON *versus* JOHN HEAGAN.

If there be a writing on a note, under the signature, put on at the time of the making thereof, varying its terms, and this has been taken from the note by an indorsee and not produced, it will be presumed to have been a material and valid part of the contract, which could not be taken from the note without rendering it void, unless the holder shows clearly and satisfactorily that the removal of the writing from the note made no material alteration.

Where there was written at the bottom of a note, at the time it was made, a memorandum that it was not to be collected until a person named "should take it up himself," as the maker "had paid (such third person) for the same," such memorandum constitutes a part of the contract, neither repugnant nor immaterial, and cannot be taken from the note by the payee or indorsee without rendering the note void.

THE plaintiff, as indorsee brought his action against the defendant on a note given by him to Harriet Treat, dated March 8, 1838, for $28,82, payable on demand with interest. The consideration of the note was two small notes from the defendant to Nathaniel Treat, given up at the time to the defendant by the agent of Harriet Treat. When the note was made, and at the time it was indorsed to Johnson, the follow-

ing memorandum, as the subscribing witness to the note recollected it, was at the bottom of the note, and had been taken therefrom before the time of trial. "This note not to be collected until Nathaniel Treat takes it up himself, or sees about (something like that) as Mr. Heagan has paid said Treat for the same." It was agreed by the parties, that the Court should order a nonsuit or default, as in the opinion of the Court might be proper.

Kelley and *Pierce*, for the plaintiff, contended that this memorandum was no part of the contract. 4 M. & S. 505; Bayley on Bills, 34, 53, 94; 4 Campb. 217; 16 East, 110; 5 Taunt. 30. And that if it were otherwise, that it was wholly immaterial, and its removal could not affect the validity of the note. 17 Pick. 418; 10 Conn. R. 192; 1 N. H. R. 97; 15 Pick. 230; 10 Wend. 93. But if we are mistaken here, it is repugnant to the note, and so void.

Hubbard, for the defendant, contended that the memorandum was a part of the note, and that the taking it off by the plaintiff destroyed the note. 10 Pick. 228, 303; 13 Pick. 165; Bayley on Bills, 14; Chitty on Bills, 17.

The note was not payable at all events, and therefore not negotiable. Bayley on Bills, 14, 17; Chitty on Bills, 154, 160.

The opinion of the Court was by

WHITMAN C. J. — The plaintiff sues as an indorsee of a promissory note, made by the defendant to one Harriet Treat. At the time of the transfer of it to the plaintiff it is agreed, that there was a memorandum, as mentioned in the deposition of Lewis C. Kelly, on the note. The statement of Kelley is, that he signed the note as a witness to the signature of the defendant, and also, that there was a memorandum on the bottom of it, which he witnessed; that the words of the memorandum were these, "this note not to be collected until Nathaniel Treat takes it up himself or sees about (something like that) as Mr. Heagan has paid said Treat for the same."

Where there appears to be a writing on a note, under the signature, varying its terms, it becomes necessary to ascertain

whether it formed part of the note when signed or was merely a memorandum made by the one party or the other, aside from the main design and object of the note. The witness, Kelley, states, that, at the time he witnessed the note, he witnessed the memorandum also. It was, then, on the note when signed by the defendant, and delivered to the promissee. We cannot, therefore, regard it as having been otherwise than a part of the contract. Whatever it was, it is agreed, that it has been cut off from the residue of the note since it came into the plaintiff's hands.

But it is insisted by him, if it was a part of the original contract, that it was an immaterial, and nugatory part of it; and, therefore, that the cutting it off was, at most, but an immaterial alteration; and so that the note was not thereby affected. If it be perfectly clear that he is right in his premises, his conclusion may follow. But, if it were immaterial or nugatory, why should he cut it off? Without seeing it, or an exact copy of it, the Court cannot well conclude whether it was so or not. The witness relied upon to state it cannot be sure of the exact language of it. He states that it was in certain words, or "something like that." The memorandum itself is, or ought to be in the possession of the plaintiff; and, having himself removed it from the note, if it be immaterial, it is for him to make it out. Otherwise the presumption should be against him. If he leaves the Court in the least uncertainty on the question, when it is in his power to remove it, he ought not to complain if the conclusion should be unfavorable to him. The tampering with a contract, by a party interested in it, must always be viewed with suspicion.

But, even if the import of the memorandum were what it would seem, from the testimony of the witness, that it may have been, we might well hesitate before coming to the conclusion, that it was either immaterial or nugatory. It is competent for the parties to make their contracts as may seem to them to be proper; and Courts must construe them in such a manner as, if practicable, to effectuate their intentions.

Here there was an absolute promise to pay on demand. The memorandum, if of the import supposed by the witness, may be deemed but a modification of that promise, viz. to call upon a third person for payment, who was understood by the parties to have received of the defendant the amount due for the purpose. In *Heywood* v. *Perrin*, 10 Pick. 228, the Court held, that, to a note payable on demand, a memorandum subjoined, that it was to be paid half in 12 and half in 24 months, merely limited the generality of the terms *on demand*, and was not repugnant to them. And in *Wheelock* v. *Freeman*, 13 Pick. 165, to certain notes payable on demand, it appeared, a memorandum was subjoined, that the one half should be payable in one year in stock, or the whole in two years in money. The Court held this to be but a modification of the contract, and not repugnant to it. The memorandum in the case at bar, if as supposed, would not be repugnant, but rather a designation of the person and fund to be resorted to for the payment of the money, at least in the first instance; and would therefore constitute a part of the contract, neither repugnant nor immaterial to the promise of payment, but in furtherance of it, and explanatory of the views of the parties. The abstracting it, therefore, must be regarded as rendering the note void.

Judgment of the Court below reversed.

Plaintiff nonsuit.

ALEXANDER BARRETT *versus* NATHANIEL TWOMBLY.

Where the plaintiff and defendant entered into a written agreement, under seal, to refer to the determination of certain persons named, the amount due from the defendant to the plaintiff, "to be paid in good, saleable neat stock at cash price, to be paid on Sept. 1841, and said B. (the plaintiff) is to leave the premises peaceably, with his family, the fifteenth of Sept. 1841"; and the referees heard the parties and before Sept. 1, made their award, under seal, fixing the amount due; and the plaintiff, on Sept. 10, 1841, made a demand of the neat stock, but payment was refused by the defendant; *it was held*, that the demand was not made too early; that the amount became payable in money, on demand and refusal of payment; and that an action of debt could be maintained therefor.

THE parties agreed to a statement of facts. The action is debt upon an award, the writ bearing date Oct. 19, 1841. The plaintiff had agreed to carry on the defendant's farm on certain conditions, and a dispute arose between them in relation thereto, and they made a written agreement under seal to refer the same to the decision of certain persons, containing this provision. "Award to be paid in good, saleable neat stock at cash price, to be paid on Sept. 1, 1841, and said Barrett is to leave the premises peaceably, with his family, the fifteenth of Sept. 1841." The referees met and heard the parties, and made the report, on which this action is brought, on the tenth of August, 1841. On Sept. 10, 1841, the plaintiff presented the report of the referees to the defendant, and demanded performance thereof and the defendant wholly refused. On Sept. 15, 1841, the plaintiff and his family removed from the premises. If in the opinion of the Court, on the foregoing statement, this action can be maintained, the defendant is to be defaulted, and the damages are to be assessed by the clerk of the Court; and if the action cannot be maintained, the plaintiff is to become nonsuit. No copy of the agreement to refer, or of the award of the referees, is to be found in the papers.

Merrill argued for the plaintiff, contending that debt was the proper form of action, as there were no covenants on which an action of covenant broken could be brought.

The time of payment is a distinct matter from the time of removing from the premises. It was the duty of the defendant to notify the plaintiff of his readiness to deliver the neat stock, but here there was a demand and refusal to perform. The defendant then became bound to pay in money. Chipman on Spec. Con. 109, 115, 120; 24 Pick. 168.

Kelley, for the defendant, said there were two objections to the plaintiff's recovery. One, that the action of debt was improper. The paper being under seal, and containing no penalty, the action should have been covenant. The other is, that the suit was prematurely brought. It was necessary that there should first be a publication of the award, and then a demand made of the specific articles. The time of payment was not until the fifteenth, and therefore the demand on the tenth was unavailing.

The opinion of the Court was drawn up by

TENNEY J. — The liability of the defendant could not depend upon the performance of the agreement on the part of the plaintiff to leave the farm, because the latter was to take place subsequently to the payment by the terms of the contract. The referees agreed upon by the parties to determine the sum, due from the defendant to the plaintiff met and heard them and made their award the tenth of August, 1841, and the same was presented to the defendant and payment demanded and refused on the tenth of September, 1841; all which was long before the bringing of this action. We see nothing, which can lead us to the conclusion, that the action was prematurely commenced.

It is insisted that the plaintiff has mistaken the form of action; that it should have been covenant and not debt.

The agreement is not in its nature a contract to arbitrate and to abide by the award; but is one where the defendant was to pay at a stipulated time and in a certain manner a sum to be fixed by the referees. The sum was fixed on the tenth of August, 1841, and report made. The sum claimed in this action was one, which was liquidated, and by the omission on

the part of the defendant to make payment, it became fixed and determinate, payable in money, depending on no subsequent valuation. 3 Bl. Com. 154; Ch. Pl. 102.

The defendant must be defaulted, and judgment to be made up by the clerk according to the agreement in the statement of facts.

HENRY ROOP *versus* PORTIOUS JOHNSON.

Under the Rev. Stat. c. 94, the return of the officer of a levy upon land, that the debtor's agent, named in the return, selected an appraiser, is regarded as *prima facie* evidence of the authority of the agent to select an appraiser, and that the debtor was virtually notified for the purpose; especially where it does not appear, that there was any privity between the execution debtor and the demandant.

If the justice certifies, that certain persons named, personally appeared and made oath, in proper form, as appraisers of real estate, the certificate furnishes sufficient evidence, that the appraisers were sworn by him, although he may omit the words, usual in such cases, preceding his signature, "Before me."

Nor will the levy be void, if the appraisers, in the certificate of the magistrate and in the return of the officer, are denominated "persons," and not "men," in the language of the statute, the names of the persons indicating that they were males, and not females.

It is a sufficient proceeding with the officer to view and examine the land, by the appraisers, under Rev. Stat. c. 94, § 6, if they proceed under the direction and supervision of the officer.

The true construction of the seventh section of the same statute is, that whatever the nature of the estate may be, it shall be described by metes and bounds, or in such other mode, as that the same may be distinctly known and identified.

THIS was a writ of entry. The tenant claimed a part of the premises under one White, whose title thereto depended upon the validity of the levy of an execution in his favor thereon, as the property of Benjamin Johnson.

The facts in relation to the several objections appear in the opinion of the Court.

W. Kelley argued for the demandant. His objections, to the title under the levy, are stated in the opinion of the

Court. He cited Rev. Stat. c. 94, § 4, 5, 6, 7; 2 Mass. R. 154; 8 Mass. R. 284; 7 Greenl. 146; 12 Mass. R. 348; 14 Mass. R. 403; 17 Mass. R. 299; 11 Mass. R. 163; 16 Maine R. 209.

Hubbard, for the tenant.

The opinion of the Court was by

WHITMAN C. J. — The defendant holds, and defends a part of the demanded premises under one Turrell White, who levied an execution thereon. If the levy was well made the defence, as to such part, is admitted to be good. But the plaintiff alleges it to be defective in several particulars. The first is, that Benjamin Johnson, the debtor in the execution, was not notified to select an appraiser; and the second is, that it is stated in the return of the officer that an appraiser was selected by the debtor's agent, one Portious Johnson. These two objections may be considered together. It is certain that what a man may do himself, he may generally do by his agent; and we cannot doubt that a debtor might delegate his power, to receive notice and appoint an appraiser, to an agent. The statute, it is true, does not, in terms, prescribe that the notice may be to an agent, or that an appraiser may be appointed by an agent; nor does it prescribe in terms that notice may, in any event, be given to an attorney. It merely says, if the debtor shall neglect to appoint an appraiser, after notice *given him* by the officer, if the debtor or his attorney be living in the county, where the land lies, the officer shall appoint one for him. There can, nevertheless, be no doubt, but that it was in contemplation of the legislature, if the debtor did not live in the county, and the attorney did, that he should be notified; nor that he, in such case, might appoint an appraiser. Now an attorney is but an agent; and attorney and agent are used as terms nearly, if not quite, synonymous. *Pratt & al.* v. *Putnam*, 13 Mass. R. 365. Mr. C. J. Parker in that case says, "it ought not to be in the power of the sheriff, who uses one instead of the other, by ignorance or design, to defeat the creditor's title." Although the statute speaks only of notice

to the debtor, and of his selecting an appraiser, yet it has been held that notice to the guardian of a spendthrift, and a selection of an appraiser by him, was sufficient. *Bond* v. *Bond*, 2 Pick. 382. It is provided further in the statute, that the officer shall deliver seizin and possession to the creditor or his attorney; but it was remarked, in the case of *Pratt & al.* v. *Putnam*, that no reason was apparent why any person, who might act in this respect for the creditor, should not be considered as his attorney for the purpose; and that a subsequent ratification might be sufficient. We thus see that the letter of the statute, is not solely to be regarded; and that a reasonable and practicable construction may be adopted, whenever the manifest object of the statute shall clearly require it. And indeed it is well known that instances are not unfrequent, where a departure from what may seem to be the literal import of a statute becomes indispensable, in order to effectuate the intent of the legislature. It is sufficient that it appears substantially, that the debtor had notice. No particular form of giving it is prescribed, and therefore none need be specified in the officer's return. Hence it has been holden that the return of the officer, that the debtor neglected to appoint, &c. implied that he had been notified; for the officer would be guilty of a false return in saying the debtor neglected, if he had not been notified. *Blanchard* v. *Brooks*, 12 Pick. 47. On the whole we cannot see reason to doubt, that the return of the officer, that the debtor's agent, named in the return, selected an appraiser, must be regarded as *prima facie* evidence of the authority of the agent to select an appraiser, and that the debtor was virtually notified for the purpose; especially as it does not appear in the case, that there was any privity between the execution debtor and the plaintiff.

The third objection is, that it does not appear, by the certificate of the justice of the peace, that the appraisers were sworn before him. And it is true that, in the conclusion of his certificate, he has omitted to prefix to his signature the words, usual in such cases, "before me." Hence it is contended, that, although the justice has certified that they were

sworn, yet that it might have been done before some one else. The certificate begins, "Then personally appeared," &c. With such a beginning, and considering that the magistrate, if he did not administer the oath himself, would be guilty of gross malversation in his office, which is not to be presumed upon slight grounds, it would be irrational to doubt, that the duty was performed by him personally. This objection therefore is unfounded.

It is next objected that the appraisers, in the certificate of the magistrate, and in the return of the officer, are denominated "persons," and not "men," in the language of the statute; and, therefore, may have been females. It is undoubtedly true, that the certificate of the magistrate, and return of the officer should be explicit to a common intent. And when they are so they must be deemed sufficient. In the certificate they are named Josiah Fernald, Nathaniel H. Hubbard and F. L. B. Goodwin; and they are all entitled esquires; and the return refers to the persons named in the certificate. The christian names of two of them clearly indicate that they were males; and the titles of each have the same tendency. Besides, the gross absurdity of the supposition, that females were selected for appraisers, negatives any other supposition, than that the word persons, was used as synonymous with the word men. This objection therefore we must regard as originating in an excess of hypercriticism.

Again; — it is objected, that it does not appear, by the return, that the appraisers proceeded, as the language of the statute is, with the officer to view and examine the land. The return is, that the appraisers entered upon and viewed the premises, the same having been shown to them by the creditor, White. The officer makes his return under his official sanction; and, as we are bound to believe, from his own knowledge of the facts by him set forth. Now, how could he officially know that they entered upon, and viewed the premises, and appraised the same, &c. unless he was there with them, and, of course, they with him. But we cannot well regard this part of the statute as intending any thing more, than that

the appraisers should proceed under the direction and supervision of the officer. And this they appear satisfactorily to have done. This objection, therefore, also fails.

The only remaining objection is, that the nature of the estate, whether fee simple or a less estate, &c. is not set forth; and § 7 of c. 94 of the statutes is relied upon in support of it. This section, like the others in the same chapter, is inartificially worded; and, taken in parts detached from each other, may seem a little obscure. The first part would seem to imply that the nature of the estate alone was in contemplation to be described; but, on recurring to the latter part, it is manifest, that, taken in connexion with the other, nothing more is intended, than to say, whatever the nature of the estate may be, it shall be described by metes and bounds, or in such other mode, as that the same might be distinctly known and identified.

As the parties have agreed, the defendant is to be defaulted; but judgment is to be entered up, that the plaintiff recover only so much of the demanded premises as is not covered by the said levy.

CHARLES CROOKER *& al. versus* CHARLES PENDLETON.

Grants, not now to be found, may be presumed to have existed from mere lapse of time, as well against the State as against individuals.

It would seem, however, that a presumption of a grant might not avail against a State so readily as against an individual. Against the State, no precise number of years appears to have been fixed, as a rule in all cases; but a much shorter period, accompanied with circumstances tending to fortify the presumption of an ancient grant, will suffice to establish it, than would otherwise be requisite.

WRIT of entry demanding an island in Penobscot Bay, called Job's island. The demandants claimed under a release procured from the Land Agents of Massachusetts and Maine, dated Dec. 20, 1829. The tenant traced his title from Job Pendleton, who purchased the island of William Pendleton about 1765, before called "Little Long Island," and in that

year erected a house thereon ; and he and those deriving title from him have lived thereon ever since, claiming to be the sole owners thereof. There was testimony that an ancient and large paper, under seal, conveying this island to the Pendletons, was seen in an old chest, formerly belonging to Job Pendleton, with other papers, over thirty years before the trial, and that the papers have been since lost. There was also evidence that Job Pendleton had stated that he had a grant of the island. There was much testimony on the trial.

Shepley J. presiding at the trial, stated that in his opinion, the jury would be authorized, upon the deeds and testimony in the case, to infer or presume, that Job Pendleton had derived title by grant from the sovereign power, or from some person or persons to whom the same had been granted from the sovereign power. It was then agreed by the parties, that the case should be submitted upon the evidence for the opinion of the Court, who should enter a nonsuit or default, as their opinion might be.

Crosby, for the demandants, contended that there were no facts upon which a jury would be authorized to infer that Job Pendleton or the other Pendletons ever had any title from the government. He purchased of the other Pendletons, and there is nothing which goes to render it even probable that he had title from any other source. Nor is there any pretence that the other Pendletons had any. Prior to 1765, the government never granted lands by deed, but by resolves only. If there had been any resolve in their favor it might have been easily found. It has never been decided in this country, as far as his research extended, that mere possession for any length of time could give title against the State or sovereign. And no English cases have been found, which permit a presumption of a grant from the government by possession for such length of time as is here shown.

Ruggles and *C. R. Porter* argued for the tenant, and contended, that there was sufficient evidence to justify a jury in inferring that there was an actual grant from the government, which had been lost by time and accident.

They also contended, that a grant might be presumed from the government from the long, exclusive and uninterrupted possession of the tenant and those under whom he shows title, although no grant had been seen, and no traces of it could be discovered. They cited, with commentaries on some of them, the following authorities. 5 Taunt. 326; 7 Wheat. 109; 2 Stark. Ev. (Ed. in 2 vols.) 663; Cowp. 215; 3 T. R. 159; 12 Co. R. 4; 11 East, 279 and 487; Math. on Pres. Ev. 195; 2 Hen. and Mun. 381; 10 Johns. R. 377; 1 T. R. 399; 3 Serg. & R. 590; 3 Dane, 608; 5 Cranch, 262; 7 Johns. R. 5; Greenl. Ev. 50.

The opinion of the Court was drawn up by

WHITMAN C. J. — This is a writ of entry, brought to recover possession of an island in Penobscot Bay, called Job's Island. The plaintiff's claim is under a deed of release from the States of Massachusetts and Maine, made by their agents, on the twentieth of December, 1829. The defence set up by the defendant is, that he and his ancestors, under whom he derives title, have been in the peaceable and uninterrupted possession of the premises demanded ever since 1766; at which time he alleges that his great grandfather, Job Pendleton, under a grant which has been lost by time and accident, from the then colonial government of Massachusetts, had entered and became possessed thereof. Evidence was introduced at the trial, strongly tending to establish the presumption of such a grant; and as the Judge presiding intimated an opinion, that in connexion with the lapse of time, a presumption would be authorized, that a grant had been made, the parties agreed, if such should be the opinion of the whole Court, that judgment should be entered for the defendant; otherwise that a new trial should be ordered.

It is believed to be well settled, at this day, that grants, not now to be found, may be presumed to have existed, from mere lapse of time, as well against the State, as against individuals. Greenl. on Ev. 50, and cases there cited. Against the State, however, it may be, that they would not so readily be presum-

ed from mere lapse of time. But a much shorter period, accompanied with circumstances tending to fortify the presumption, will suffice to establish it, than would otherwise be requisite. In this case the facts proved do strongly tend to fortify the presumption of an ancient grant to Job Pendleton; or to those of whom he purchased. It is not essential that it should appear, beyond a doubt, that a grant had been made. The presumption may be deemed one rather of law than of fact, although it is usual to refer it to the jury to make the inference. The object is to quiet ancient possessions, and to promote repose, after such a lapse of time, as that it may well be deemed difficult, if not impossible, to prove the existence of a regular grant. *Jackson* v. *McCall*, 10 Johns. R. 377. The presumption is bottomed upon the same principle as the statute of limitations, and is analogous to it; and the length of time necessary to establish it is often referred to the limitations prescribed in that statute. If this were a claim under individual grants the plaintiffs, by that statute, would have been barred long ago. But as the plaintiffs set up a claim under the States of Massachusetts and Maine, against whom the statute is supposed not to run, and especially against the latter, they contend, that they are not barred by any lapse of time, running against them; and so that they have a right to recover. And there may be good reasons why a presumption should not avail against a State, so readily as against an individual. The State cannot be so much upon the alert to look out for its interests, as would be expected of individuals. Individuals therefore, would be barred in twenty years, without corroborating circumstances. In this case more than sixty years had elapsed; and strong circumstances, tending to render it probable, that a grant had been originally made, are established. We cannot think it unreasonable, therefore, that the defendant should remain unmolested against such a dormant title. In *Jackson* v. *McCall*, before cited, after the existence of a similar possession for forty-one years, it was held, that a grant from the State might be presumed. The corroborating circumstances in that case were not more cogent than in this. In Pennsylvania a mere naked

possession for 90 years was holden sufficient. *Mather* v. *Trinty Church*, 3 S. & R. 590. In *Goodtitle* v. *Baldwin*, 11 East, 480, in which there had been a possession of fifty-five years duration; and in which a nonsuit had been entered, from a supposed impossibility of presuming any title, which could have been derived from the crown, the court granted a new trial: Lord Ellenborough remarking, that, "with respect to the general impossibility of presuming a grant against the crown, the courts were in the daily habit of presuming grants from the crown, as of markets and the like. We are therefore clearly of opinion that judgment should be entered for the defendant.

REUBEN RICH *versus* BENJAMIN SHAW *& al.*

The statute of 1831, "to regulate banks and banking," c. 519, § 28, gives a remedy only to creditors of a bank, as holders of its bills or otherwise, and not to the stockholders, against the directors thereof for losses arising "from the official mismanagement of the directors."

THE plaintiff was a stockholder in the Frankfort Bank, and brought this action against the defendants as directors of the same bank, under the provisions of Stat. 1831, c. 519, § 28, regulating banks and banking; alleging that he had lost the value of his shares in the capital stock, through the misconduct of the defendants, as directors thereof.

The defendants contended that the action was not maintainable at law; and thereupon the parties agreed, that if in the opinion of the Court the action could not be maintained, the plaintiff was to become nonsuit; but if it might be maintained, should the allegation be proved, the action was to stand for trial.

Crosby, for the plaintiff, contended that this was not only the right mode of proceeding, but the only remedy a stockholder has, under our statute, if the directors have destroyed the capital stock of the bank by their own misconduct. If this section does not extend to them, they have no remedy whatever.

Hathaway and *Hubbard*, for the defendants, contended that the action could not be maintained under this or any other section of the statute. The twenty-eighth section provides a remedy only for creditors of the bank, as holders of bills or otherwise. The thirtieth section gives a remedy merely to such stockholders as have been compelled to pay debts of the bank in consequence of their being stockholders.

If any remedy exists, it is by bill in equity. 23 Pick. 112.

The opinion of the Court was drawn up by

TENNEY J. — This action founded upon Stat. c. 519, § 28, 1831, is in favor of a stockholder against certain of the directors of the Frankfort Bank, for the recovery of damages, alleged to have been sustained by the former, in a loss or deficiency of his capital stock by reason of mismanagement by the latter in their official conduct.

In the act referred to, the legislature evidently intended to secure the public against losses, which might arise from a deficiency of the capital stock of banks, holding a charter under the authority of the State; and from an examination of the section relied upon by the plaintiff, we are satisfied, it was their design to afford thereby a protection to the creditors of banks, and not to furnish a remedy to stockholders for injuries occasioned by the want of judgment or fidelity in the directors of their own appointment.

A loss or deficiency in the capital stock creates a liability in the stockholders as well as in the directors, in the event of the inability of the directors. If the section cited was the provision of a remedy to those, owning capital stock in a bank, in cases of loss or deficiency, one stockholder can resort to another in suits at law, in the contingency named, and thus each proprietor may in turn be a creditor and a debtor, one to the other. This involves an absurdity, which cannot be admitted as the result of a deliberate act of legislation.

The Court in Massachusetts, in the case of *Harris* v. *First Parish in Dorchester*, 23 Pick. 112, cited by the defendants, regard a similar provision as a protection to bill holders and creditors of the bank. ***Plaintiff must become nonsuit.***

WILLIAM PRESCOTT *versus* NATHAN ELLINGWOOD.

There can be no *legal* assignment of a mortgage by parol.

After performance of the condition of a mortgage by the mortgagor, before entry for condition broken, the mortgagee cannot maintain a writ of entry upon the mortgage against a third person, although there was a parol agreement between the mortgagee and mortgagor, that the name of the former might be used for the benefit of the latter.

THIS was a writ of entry wherein the demandant claimed under a mortgage of the premises by Samuel Merrill to the demandant and David Sears, since deceased. The parties agreed to submit the action for the decision of the Court upon the facts stated in certain depositions; and that if the action could be maintained, a conditional judgment was to be rendered for such amount as the Court should find to be due; but that if the action could not be supported, the demandant was to become nonsuit. The facts are sufficiently stated in the opinion of the Court.

W. Kelley argued for the tenant.

To the point, that parol evidence was inadmissible to show, that when the money secured by the mortgage was paid to the creditor, and his receipt taken therefor, the mortgage was still to be considered in force, he cited *Richards* v. *Killam*, 10 Mass. R. 239; and *Brigham* v. *Rogers*, 17 Mass. R. 571.

That the payment of the debt by the mortgagor to the mortgagee, is a discharge of the mortgage. Rev. Stat. c. 125, § 10; *Eaton* v. *Simonds*, 14 Pick. 98; *Wade* v. *Howard*, 6 Pick. 492, and 11 Pick. 289; 2 N. H. R. 300; 4 N. H. R. 357.

Merrill argued for the demandant.

To his point, that where it is for the interest of the person paying the debt secured by the mortgage, the mortgage will be upheld for his benefit, and not be considered as discharged, he cited *Freeman* v. *Paul*, 3 Greenl. 260; *Hatch* v. *Kimball*, 14 Maine R. 9, and 16 Maine R. 146.

The opinion of the Court was drawn up by

TENNEY J. — The demandant in this action seeks to obtain a conditional judgment as on mortgage. It is brought for the benefit of one claiming an interest derived from Samuel Merrill, the mortgagor of the land described. The mortgage introduced, dated Aug. 16, 1813, is to David Sears, (since deceased) and William Prescott, or the survivor of them, and for the security of the sum of $166,00 and interest thereon from the date of the mortgage, being a part of the amount of two notes given by Merrill several years before. About the year 1824, Samuel Merrill sold to Mason Shaw his interest in the land described in the mortgage, and took from him an agreement to pay the sum secured thereby. Afterwards, Merrill being called upon in behalf of the mortgagees, to pay the sum secured by the mortgage, the residue of the notes having been previously paid by him, on the third of May, 1827, paid to the demandant's agent the sum remaining due, and took his receipt therefor; and the agent at the same time agreed, that if Shaw should not pay the same for the benefit of Merrill, that he should be entitled to the use of the mortgagee's name to enforce payment from Shaw or his tenants, who might be in possession, and this advance of the money should not discharge or invalidate the mortgage. The sum so received was credited by the agent to the demandant, who afterwards gave his receipt therefor, not knowing the agreement between the agent and Merrill. The receipt was delivered to Merrill. The notes and the mortgage remained in the agent's hands, and payments were made by Shaw, and indorsed on the notes, which payments were passed into the hands of Merrill. In six or seven years from the time, when Merrill took the demandant's receipt for the amount, Shaw having paid the larger part of the sum secured by the mortgage, the mortgage deed and notes were delivered to Samuel Merrill, and he delivered up the receipt; the mortgage was neither assigned or discharged, and it was not intended by the demandant's agent or Merrill, that this transaction should operate as a discharge, as it was still understood between them,

that Merrill could use the name of the surviving mortgagee to enforce the payment of the balance remaining unpaid from Shaw. It appeared also, that the demandant had received the whole amount of the two notes given in 1810, and had no pecuniary interest in the suit; and that it was prosecuted in pursuance of the agreement between the agent and Merrill.

The payments made by Merrill, were on a debt, which he alone was holden to the demandant to discharge. And when he made the first payment, leaving an amount unpaid equal to the sum secured by the mortgage, it was clearly the understanding of the agent and him, that the mortgage was not affected thereby. Shaw had agreed to pay the balance, and neither he nor any one holding under him can complain, that the sum so paid did not extinguish the mortgage. But it is contended for the tenant, that the debt secured by the mortgage has since been paid by the mortgagor, and that by the Rev. Stat. c. 125, § 10, this is a defence to the action. In answer to this, the demandant invokes the principle, well established, that in special cases where the legal and equitable titles arising under a mortgage are united in the same person, and the intention of the party is distinctly declared at the time, or when something just or beneficial requires it, in a case in which the party has not declared or cannot declare his intention, the charge will be preserved, and the union of the two interests will not operate to merge the equitable in the legal title.

It is apprehended, that this principle will not apply to a case, in which there is not a union of the two in the same person. The cases referred to, in support of the position, were those in which there was a union of the legal and equitable title by assignment by deed, will, or other instrument in writing, or by record, sufficient to pass the title to real estate. It has been held in New York, that the transfer of the notes secured by the mortgage, being in writing, the mere delivery of the mortgage security was a sufficient assignment; and Judge Spencer remarked, "that mortgages are not considered conveyances of lands within the statute of Frauds." *Green*

v. *Hart*, 1 Johns. R. 580. But the Courts in Massachusetts and this State have not so held; it has been regarded, that a mortgagee's right could be assigned only by deed. In *Parsons* v. *Welles & al.* 17 Mass. R. 419, Mr. Justice Wilde remarks, in reference to the opinion expressed by Judge Spencer, "I know that this opinion has prevailed in courts of equity, but I have not been able to find any decided case to support it at law; and it appears to me against the letter and intent of the statute." In the case of *Hatch* v. *Kimball*, 14 Maine R. 9, the equitable presumption was allowed, that the mortgagor purchased in the title arising from his own mortgage, to keep on foot the mortgage, and thereby obtain a title to the land; but the assignment was by deed, to him, his heirs and assigns.

In the case at bar, there had been no entry by the mortgagee; there was no assignment of the mortgage, that it might be upheld to enforce the obligation of Shaw. Indeed, the counsel does not insist, that the equitable and legal title are united in the one, for whose benefit the suit is prosecuted, but that both the debt and the security are outstanding at the present time. But we cannot doubt, that the debt has been paid, and that the mortgage is extinguished.

The maker of the note was called upon for payment; he put into the hands of the demandant's agent the amount due, taking his receipt therefor, which was soon afterwards exchanged for that of the demandant, who had no knowledge of any agreement between his agent and Merrill. Subsequently Merrill took his notes and the mortgage and delivered up the receipt for the money. There was the understanding between the agent and Merrill, that all this should not discharge or invalidate the mortgage. But this understanding was founded upon no consideration, and cannot defeat the legal operation of the transaction. The money, after the notes were given up, was held by the demandant as payment, the same was paid and the notes taken, to discharge the liability of the maker. The demandant has no pecuniary interest in the suit. An action in his name on the notes could be defended on the

ground of payment, and a suit by Merrill for the money paid, could be defeated by the fact, that the notes were obtained therefor. Where every thing was intended by the demandant and Merrill to be settled and closed as between themselves, can the whole be kept open, so that the demandant can in his own name compel the payment on a contract to which he is a stranger? The now demandant in this case can have derived no interest from the one, who is nominal only, which the latter did not possess. It was in the power of Merrill to have taken security on the land for the fulfilment of Shaw's obligation. But where he trusted to his personal responsibility alone, he cannot add thereto, the security of a mortgage, which as between the parties to it, is extinguished. The conditional judgment, if the demandant is entitled to such, must be for the sum found due on the mortgage. Nothing remaining due, the judgment cannot be entered. According to the agreement,

The demandant must become nonsuit.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF CUMBERLAND.

ARGUED AT APRIL TERM, 1844.

JAMES MAKIN *versus* THE SAVINGS INSTITUTION AT PORTLAND.

An action at law can be maintained by a dispositor of money therein against an incorporated savings institution, after due demand of payment and refusal, to recover the amount of his deposit, where such institution by its laws and regulations, assented to by all the depositors, provided that twice every year a payment of two per cent. interest should be made; "that although four per cent. is promised, yet every fifth year, all the extra income, which has not before been paid out and divided, will then be divided in just proportion to the length of time the money has been in, according to the by-laws;" and that as "people may become sick, or otherwise want their money, after they have put it in; it is provided, that they may take it out, when they please; but the days of taking it out are the third Wednesdays of January, April, July and October;" — although there has been a loss, without fault or neglect on the part of the institution or its officers, of one half of the amount of the funds deposited; and although the by-laws provided that the trustees might, "at any time divide the whole of the property among the depositors in proportion to their respective interests therein," no division in pursuance thereof having been ordered.

Where many persons have, individually, deposited money with such corporation, the relation of partners does not exist between the parties; and the law of partnership is not applicable.

THE plaintiff was a depositor of money with the corporation, and on June 17, 1839, gave the regular notice of his intention to withdraw the same. On July 17, 1839, the plaintiff made a regular demand on the treasurer for the amount

deposited. Payment was refused, and this suit was commenced.

At the trial before SHEPLEY J. at Nov. Term, 1841, the defendants offered to prove, that the whole liabilities of the Institution amounted to $94,703,43; that the sum of $5,043,54 had been collected, and dividends to the amount of that sum declared; that the assets of the institution, after deducting the sum last mentioned, were of the value of $42,231,52 only; and that the losses, by which the value of the assets had been so reduced, had not arisen from any neglect or fault on the part of the institution or its officers.

The presiding Judge was of opinion that such testimony would not operate in any manner as a defence to this action, and rejected the evidence. Thereupon a verdict was taken for the plaintiff, which was to be set aside, if the testimony should have been admitted, or if the Court should be of opinion that upon the facts the action could not be maintained.

The act of the Commonwealth of Massachusetts, of June 11, 1819, incorporating the defendants, by the name of the "Institution for Savings for the town of Portland and its vicinity," and the by-laws of the institution, were referred to as part of the case.

The case was argued on April 21 and 22, 1842, by

Preble & Daveis for the defendants, and by

Codman & Fox, for the plaintiff.

WHITMAN C. J. being a relative of one of the depositors, did not hear the argument, or take part in the decision.

The opinion was delayed until 1845, and was then delivered by

SHEPLEY J. — It appears from the report and documents, that during the years 1837 and 1838, Judith Makin deposited with the treasurer of the institution certain sums of money upon the terms and according to the regulations prescribed by it. The plaintiff proved his intermarriage with the person, who made the deposit, and that he had given notice of his intention to withdraw the money; and that at a subsequent

time, and on one of the days designated for that purpose, he had demanded payment, which was refused.

The defence presented was an inability to pay all the moneys deposited, arising out of losses by which the value of the assets had been reduced fifty per cent. or more, without any neglect or fault on the part of the institution, or of its officers. Whether this can be considered a legal defence, must depend upon the contract between the parties; which is to be ascertained from the charter of the institution, and from its by-laws and regulations prescribed for making deposits.

The third section of the charter contains these words. "The principal of such deposit may be withdrawn at such reasonable times, and in such manner as the said society shall direct and appoint." The fifteenth by-law recognizes the right of the person making the deposit to withdraw it, and prescribes the times and manner of doing it. It contains, among others, these words. "Money deposited shall only be drawn out by the depositor, or by some person by him legally authorized; but no person shall receive any part of the principal or interest without producing the original book, that such payments may be entered therein, unless the trustees shall otherwise determine. No money can be withdrawn except on the third Wednesdays of January, April, July, and October; and one week's notice before the day of withdrawing must be given to the treasurer; and no sum less than ten dollars of the capital of any deposit shall be withdrawn, unless the whole sum deposited by such person shall be less than that amount." The twenty-third by-law states, "the act of making a deposit shall be considered a sufficient assent on the part of the depositors to the by-laws and regulations of the institution." The fourteenth by-law is, "All deposits shall be entered in the books of the corporation, and a duplicate shall be given to each depositor, in which the sum paid by him shall be entered, and which shall be his voucher and the evidence of his property in the institution." The regulations or terms, upon which deposits are to be made, are found in the duplicate book given to the person, who has made the deposit. The following state-

ments are found among the regulations on the fourth and fifth pages of the duplicate book given to Judith Makin. "But people may become sick, or otherwise want their money, after they have put it in. It is provided, that they may take it out, when they please; but the days of taking it out are the third Wednesdays of January, April, July and October; and they must give one week's notice before those days, that they intend to call for their money. The reason of this rule is this. If the money could be called for any day in the year, the trustees could not lend it out, or employ it to the advantage of those, who put it in." "When moneys are called out, this book given to the depositor, must be brought to the office to have the payment entered. Persons may take out the money themselves, or in case of absence or sickness it will be paid to their order, properly witnessed and accompanied by the book."

Among other arguments presented in the defence, the plaintiff was met by one *in limine*, that it was not intended, that a person, who had made a deposit, should be legally entitled to withdraw the money against the will of the institution. And that it had not given an unconditional assent, that it should be withdrawn on certain days at the pleasure of the depositor. This argument is so obviously at variance with the language of the charter, by-laws and regulations, already quoted, that it might be sufficient simply to refer to them. But as it seems to be derived by inference rather from the organization and design of the institution, than from the language alluded to, it may be useful to consider, whether these authorize any such conclusion. And whether such a construction would not be subversive of the design, and destructive of the objects, or some of them, intended to be accomplished. The declared designs as stated in the charter are, to enable the institution to receive "any deposit or deposits of money, and to use and improve the same for the purposes, and according to the directions herein mentioned and provided." And among the directions named in the charter are the following, "and the net income or profit thereof shall be by them applied and divided among persons making the said deposits, their executors, or

administrators, in just proportions, and the principal of such deposit may be withdrawn at such reasonable times and in such manner as the said society shall direct and appoint." Does a proper and legal construction of this language permit the institution to make by-laws or regulations, which would prevent a depositor from withdrawing his money at all without its consent? Or does it only permit the institution to regulate the time and manner of doing it, leaving in other respects the decision of the question to the depositor's pleasure, whether it should or should not be withdrawn? Clearly the latter is the correct construction, and so the institution appears to have regarded it, and to have formed its by-laws and regulations accordingly. "The object of the institution (says the first by-law) shall be to provide a safe and profitable mode of enabling industrious persons of all descriptions to invest such part of their earnings or property, as they can conveniently spare, in a manner, which will afford them both profit and security." And the same in substance is repeated in the regulations. Nothing is said here respecting the time, during which it should remain invested; but the institution has itself declared it to be until "people may become sick, or otherwise want their money." It is not easy to make language state more explicitly, than the charter, by-laws and regulations have stated, the design of the institution to be, to hold out inducements to the improvident and others to deposit something, which they could then spare, that it might be preserved and increased, and yet be in a condition to be recalled once in three months, and applied to administer relief to their necessities, when sickness or misfortune should come upon them, or when they should want it for other purposes. And it is not difficult to perceive, that the charter and the proceedings under it look to this as the great object to be accomplished. And to carry out that object and make the deposit available for such purposes, it is necessary, that it should be liable to be withdrawn at stated times at the pleasure of the depositor. And it would not be too much to say, that the object would be so nearly defeated by a different construction, that few de-

posits could have been expected from the class of persons, who were invited to deposit, if it had been the declared purpose of the institution not to give the depositor a perfect right to withdraw his money at his own pleasure on certain days designated and made known to him. And such a claim on the part of the institution now is in direct conflict with its statement to the depositors, "that they may take it out, when they please."

Another position taken in defence is, that the institution is to be considered as the trustee and the depositors as the *cestui que trusts*, and that the losses therefore fall upon them. That some or all of them must bear the losses, when the institution cannot pay all, is undoubtedly true. And so must those persons, who have claims against any other corporation, which is in a like condition. But that the institution is to be regarded as assuming merely the responsibilities, which attach to a common trustee, who takes the money of the person to be benefitted, and invests it for him, and accounts to him by delivering to him the money, or what remains after deducting losses, or the property, in which it has been invested, with its increase, cannot be admitted. Such a trustee makes no engagement, and none is implied by law, beyond that of acting prudently and faithfully in preserving, investing, and restoring the property, or what may not be lost without his fault. Such a trustee could not present the motives necessary to induce a deposit in a savings institution. Nor carry into effect the purpose of enabling the class of persons intended to be benefitted to have their money placed, where it might be preserved and increased, and yet be returned to them whenever wanted to meet unexpected and necessitous calls. To present the motives and to accomplish the design held out by the institution, it was necessary, that it should assume additional and more onerous and responsible duties, than attach to a common trustee. Accordingly it is found, that the institution had undertaken to act in a different manner; and to assume liabilities of a peculiar character, and suited to carry into effect its special purposes. It proposed to proceed, not upon the well known principles of

a common trust, but upon a system of its own benevolent devising, by which it will receive and invest his money not alone and separate, as in common trusts, but with that of an unlimited number of others; that from all these investments it will obtain an interest, of which no exact part can be decided to belong to any one as accruing from his money; that it will at stated times pay out to him, not even his share of the whole interest earned, but a designated portion, only reserving, it may be, a residue; that it will pay him four per cent. or at that rate without any condition annexed, whether it has or has not earned it; that it will pay out not what may be found to belong to him upon an adjustment of profit and loss, but the sum deposited; and that it will not account with him by a delivery of the property in which his money may have been invested, but will pay it out as provided in the fifteenth by-law, which states, that "all moneys received by the treasurer shall be specie or such bills as are received on deposit at the Portland banks, and all payments shall be made by him in the same manner." It proposed to reserve the increase of interest, if any, over four per cent.; and this might operate as a compensation to the continuing depositors for any injury, which such a course might bring upon them. This was to be divided among those, who for five years might have been subjected to this process of paying out to one not precisely his own money or property, or its increase, but a certain interest and the full amount of his deposit in cash from the common fund of the institution. To this course the institution has pledged itself by its charter, by-laws and regulations, and all the depositors have pledged themselves by the very act of making the deposit. And all the depositors in effect agree, that one, who pleases to call for his money may receive it in full and in cash; and that they will look to the remaining funds for their rights. In all these particulars the rights and duties of the depositors and of the institution are different from those of common trustees and *cestui que trust*. And well might it be said on a former occasion, that it assumed other and greater duties and liabilities, than those properly ap-

pertaining to a trustee. And it would seem, that their obvious character might have operated as an excuse for omitting to set them forth at large. And the corporation having assured, and repeated the assurance, as has been seen, that the depositors might take out their money on certain days, when they pleased, without annexing any condition, or requiring any adjustment of accounts, or losses and gains, it might be said with perfect accuracy, that it did in effect assume the whole risk of losses, for it undertook at all events to pay a stipulated interest, and to repay the principal sum. But it is said by one of the counsel, that this cannot be correct, for the seventh by-law provides, that "the trustees of this institution shall receive no emolument therefrom, and while engaged to a conscientious and upright discharge of their duties, they are not to be held responsible for any losses, which may happen from any cause whatever, except their wilful and corrupt misconduct." The error lies in considering the trustees as personally assuming to perform the engagements of the institution. While this argument as presented by the other counsel is, that the by-law is applicable to the corporation itself, excusing it from the risk of losses. And that by "some confusion of ideas" the trustees were named, when the corporation was intended. The by-law however is neither of doubtful meaning nor obscure. The design was not to provide a protection for the corporation against losses, which it did not seek, except in one event to be hereafter noticed. But it was to protect the persons, who might be trustees from being called upon to make up losses, as is clearly shown by the following provision in that by-law; that "those trustees only, who may be concerned in such misconduct shall be answerable for the same."

It was also asserted in argument, that the funds of the institution were to be considered as a partnership fund. And it was proposed to apply the law applicable to partnership property to regulate the rights of all interested. But the doctrines of that law can have no proper application to this case. There is no union of interests or of rights between the plaintiff and the corporation. On the contrary, they are separate and

distinct. They depend upon mutual stipulations, but the share of them undertaken by each is different. And if the several depositors can in any other sense, than as interested in the same fund, be considered as partners, they have consented by the act of making their deposits, as before noticed, that each may, according to the regulations, withdraw his money. And have done this without any limitation or condition, that there should first be an adjustment of profit and loss. To have waited for such an adjustment in each case before payment would have been so vexatious and impracticable, as to be destructive of all the benevolent purposes of the institution. The results promised from the ordinary action of the institution, as declared in the by-laws and regulations made by it and assented to by all the depositors, may at the expense of a repetition, be stated in the very language of the institution; and thus stated they are; that "twice every year, namely, on the third Wednesdays of July and January, a dividend or payment of interest of two per cent. or two dollars on a hundred will be made;" that "although four per cent. is promised yearly, yet every fifth year all the extra income, which has not before been paid out and divided, will then be divided in just proportion to the length of time the money has been in according to the by-laws;" that "people may become sick, or otherwise want their money, after they have put it in;—it is provided, that they may take it out, when they please; but the days of taking it out are the third Wednesdays of January, April, July and October." These are engagements, among others, which the institution has entered into with its depositors, and they are not accompanied by any condition or limitation, or made to depend on any contingency, so far as it relates to its ordinary action. And without their being carried into effect the design of the institution could not be accomplished. It would be defeated. If the institution by its regulations and offers has undertaken more, than it finds itself able to accomplish, it is only in a position, which is often the result of human arrangements. No blame necessarily attaches to it, or to those by whom its affairs have been managed. It could

not be expected to have provided against losses, which might have fallen upon the most wise and prudent. And it may well be excused, if it has been seduced by a desire to benefit the improvident to propose to confer a greater benefit, than it was able to do, under the state of things, which has happened. All this, however, can afford no legal protection against the performance of all, which it has undertaken to perform. If it cannot pay all, it must do what it can to fulfil its engagements, and pay in conformity to the requisitions of the laws, which govern other corporations and persons. And it cannot justly complain, if the course may be the same as in many, if not most other cases under our laws, that its effects are distributed unequally. Especially as it reserved to itself the power to provide for such an extraordinary contingency as has happened in a manner, that might have secured an equal distribution. This is done by the twenty-second by-law, which says, "the trustees may by a vote of the major part of the whole number, at any time divide the whole of the property among the depositors in proportion to their respective interests therein, upon giving three months notice thereof; and shall also for the like purpose be at liberty to refuse to receive any deposit at their pleasure." This appears to be the only provision made to change the ordinary action of the institution into an extraordinary one. And until the institution has acted under it, the rules and responsibilities of its ordinary action are binding upon it. The institution in the year 1838 declined to receive any more deposits, and authorized the treasurer to pay to any depositor the full amount of his deposit "in any of the bank stock held by the institution at the cost." And it afterward, in consequence of losses, voted, that the by-laws requiring semi-annual dividends be suspended. But it has never proceeded to divide the whole of the property among the depositors according to their respective interests therein. If the trustees, before the commencement of this suit, had determined by a regular vote, under that provision of the by-laws, to divide the whole property, an equal distribution might have been secured by the common consent of all the depositors,

expressed by their assent to the by-laws. And all the depositors having consented, that each on the days named should withdraw his deposit at pleasure to be paid out in cash, they can have no just cause to complain that their interests are limited to the residuum, unless they should think, that the institution unnecessarily neglected to interpose under the twenty-second by-law to prevent its being governed by the regulations for its ordinary action; and to place it under regulations better suited to its present condition. The legal rights of the parties now before the Court can only be considered; and there is no legal defence presented.

Savings Institution *versus* James Makin *& al.*

This Court, acting as a court of equity, may compel trustees to execute a trust assumed by a corporation according to the scheme prescribed; but has no power, unless specially conferred by statute, to sequester the funds of a corporation, and deprive it of them, and dispose thereof, as the Court may judge to be equitable and just, among those beneficially interested.

Equity is not the Chancellor's or the Judge's sense of moral right, or his sense of what is just and equal, but is a complex system of established law. The maxim, that equality is equity, can only be applied according to established rules.

The act of 1842, c. 32, "in relation to institutions for savings" is not unconstitutional.

That statute confers on this Court, as a court of equity, the power to sequester the whole assets of an incorporated savings institution, upon application of the trustees or of a depositor, and place the same in the hands of a receiver, to the end that a just and equitable distribution may be made thereof among all the depositors according to the respective amounts justly due them, whenever such institution shall not have sufficient assets to pay and discharge in full all just and legal claims upon it.

A saving clause in a statute, in the form of a proviso, restricting in certain cases the operation of the general language of the enacting clause, is not void because such proviso may be repugnant to the enacting clause of the same statute.

This was a bill in equity, and after its address to the Court, commenced thus: "Complain your orators, Stephen Longfellow, Joshua Richardson, Albert Newhall, Eliphalet Greely,

William Swan, Levi Cutter, William Pitt Preble and William Willis, as they are the board of trustees of the Institution for Savings for the town of Portland and its vicinity, that the said institution for savings was duly incorporated by the legislature of the Commonwealth of Massachusetts, by an act entitled "An act to incorporate the Institution for Savings for the town of Portland and its vicinity," passed the eleventh day of June, in the year of our Lord one thousand eight hundred and nineteen." In another part of the bill it is said, "*as the several depositors, as well as your orators and the said Institution for Savings*, are remediless in the premises at and by the direct and strict rules of the common law, and cannot have adequate relief save in a court of equity." The bill appears to have been brought by the gentlemen who were trustees of the corporation, but as the entry in Court was made in the name of the "Savings Institution," as plaintiffs, and the trustees have no personal interest, the corporate name is retained, in place of that of the plaintiffs.

The main provisions of the act of incorporation and of the by-laws, will be found in the opinion of the Court in this case, and in the preceding case of *Makin* v. *The Savings Institution;* and it is unnecessary to repeat them here. The substance of the bill and answers is also stated in the opinion.

The case was argued on April 21 and 22, 1843, by

Longfellow and *C. S. Daveis*, for the plaintiffs; and by

Codman & Fox, for Makin; and by

Morgan, for Gardner.

On June 7, 1845, the opinion of the majority of the Court, WHITMAN C. J. dissenting, was delivered by

SHEPLEY J. — This is a bill in equity filed by eight persons describing themselves as the board of trustees of the institution for savings for the town of Portland and its vicinity. It alleges, that the institution received from its depositors an amount of money exceeding one hundred thousand dollars; that it invested the greater portion of it in the stocks of incorporated banks of good credit; that those banks have since that time

sustained losses, and that the stocks purchased by the institution are not worth, upon an average, more than fifty per cent. of their cost; that a smaller portion of the money was loaned to individuals upon personal security, then esteemed to be good, from which nothing has been obtained; that the parties to that paper have become insolvent; that twenty per cent. of the principal has been paid out to the depositors; that all the property and assets of the institution at their market value are not sufficient to pay fifty per cent. of the whole sum still standing on the books of the institution to the credit of the depositors; that certain of the depositors named have caused suits to be commenced against the institution and its property to be attached, with the design to obtain the full amount due to them to the injury of the other depositors; that the institution is a trustee for each and all of the depositors; that each depositor ought to bear his just proportion of the losses; that the trustees are desirous of making a just and equitable distribution of the assets among all the depositors; and that such a distribution cannot be made without the interposition of this Court. There is a prayer in the bill, that the assets of the institution may be sequestered; that a just and equal distribution of them may be made among the depositors; and that those depositors, who have commenced suits at law against the institution, may be enjoined from the further prosecution of them.

The only persons who have entered their appearance after notice to all persons interested, are James Makin, in his own right, and as administrator of the estate of Luke Makin deceased, and Jane Gardner. The answer of Makin states, that he had commenced a suit against the institution and obtained a verdict, and another suit as the administrator of the estate of Luke Makin, in which a default had been entered, before the passage of the act of March 18, 1842, c. 32. It craves the benefit of the proviso contained in the fourth section of that act. Jane Gardner demurs to the bill; and her counsel has signified, that no further defence will be desired, if her demurrer should be overruled.

The counsel for the trustees insist upon their right to maintain this suit, and to obtain a decree for an equitable distribution of the assets of the corporation, without reference to the provisions of the act of March 18, 1842. The trustees or managers of the corporation are in this bill the parties plaintiff. The corporation does not thereby become a party to it. It has not been made a party. The Court cannot properly act upon its rights and property independently of that act, sequester the property, and deprive the corporation of its use, without affording it an opportunity to be heard. *Verplanck* v. *Mer. Ins. Co.* 2 Paige, 449. But waiving the consideration of a defect of parties for such a purpose, the question arises, whether the equity powers of this Court would authorize it to make such a decree before the passage of that act. It had power to hear and determine all cases of trust. To ascertain the extent of its power over this corporation by virtue of its jurisdiction in cases of trust, it will be necessary to notice the character of the corporation, and its relation to its depositors. The institution for savings is a body corporate, created by an act of the legislature of Massachusetts, approved June 11, 1819. Twenty-five persons named in the act, with such other persons as they might associate with them, were incorporated into a society by a corporate name. The corporate body was to be continued and perpetuated by the members named by the election of other persons from time to time as their associates. The act provides, "that they and such others as may be duly elected members of said corporation, as in this act is provided, shall be and remain a body politic and corporate forever." The fourth section of the act is in these words. "Be it further enacted, that the said society and corporation shall at their first and their annual meetings in July, have power to elect by ballot any person or persons as members of this society." There is no provision in the act requiring, that the members of the corporation should be depositors of money or have the least interest in the funds of the corporation. Neither the charter nor the by-laws make any provision, that those, who should deposit money, should thereby become

members of the corporation or have any right to vote or act in any manner in the choice of its officers or in the conduct of its affairs. It was not the design, that they should become members. Poor and improvident persons, females, and minors, were the persons to be especially benefitted. They would be ill qualified to be the managers of their savings, and equally ill qualified to select others for that purpose. The corporators were not designed to be, and there is no proof that any of them were, in fact, the persons, who were interested in the funds held by the corporation. In this respect the organization and character of the corporation differs entirely from banking, manufacturing, and other corporations, created for the transaction of business for the benefit of the corporators. In such corporations persons by a purchase and transfer of shares become members of the corporation without election. The corporators or members are the persons beneficially interested. Not so in this corporation. The persons beneficially interested are not members of the corporation, and cannot interfere with or control any of its proceedings. The corporation and its corporators are wholly independent of the depositors. The only connexion between them is to be found in the stipulations, to which they have mutually agreed. In all of them the depositor is one party, and the corporation another and different party, as well in essence as in name. Any attempt therefore to show, that the regulations prescribed by the corporation were in effect the regulations of the depositors in any other manner, than by their assenting to them; and that the depositors were in effect both promisors and promisees in their contracts, made with the corporation, must utterly fail. Such an idea could only arise out of a misapprehension of the organization and character of the corporation by erroneously supposing the depositors to be members of the corporate body, and as such able to elect its officers and regulate its affairs.

A corporation may, if its charter permit, assume a trust, and act in the character of a trustee for persons other than its stockholders and creditors. Eleemosynary corporations hold their funds in trust to accomplish certain charitable purposes;

and their managers may be compelled in different modes by visitors and legal tribunals to execute such trusts; and to apply the funds according to their prescribed rules. The Lord Chancellor in England has, as such, a peculiar jurisdiction or power over them. While the jurisdiction of the Court of Chancery is limited to the control of the managers of the revenues or funds, to prevent abuse or misapplication of them, and to compel them to execute the trust. *Att. Gen.* v. *The governors of the foundling Hospital*, 2 Ves. jr. 47; *Same* v. *Dixie*, 13 Ves. 533; *The mayor and commonalty of Colchester* v. *Lowten*, 1 V. & B. 245; *The Berkhamstead free school, ex parte*, 2 V. & B. 138; *Att. Gen.* v. *Utica Ins. Co.* 2 Johns. Ch. R. 389. If this bill had been filed by a party beneficially interested, and had alleged, that the trustees had mismanaged or misappropriated the funds of the corporation, it might have presented a case within the power of the Court. But the trustees claim to have faithfully executed and performed all their duties; and they ask the assistance of the Court, not to enable them to continue to perform their duties, and execute the trust according to the charter, by-laws and regulations, but to enable them to make a disposition of the funds destructive of the further execution of the trust, and not authorized, except upon a contingency, which has not happened. The twenty-second by-law would have authorized them to divide the whole of the property among the depositors in proportion to their respective interests therein, upon giving three months' notice thereof. This course might have been pursued, and the present object have been accomplished without the aid of the Court. As there has been no action under that by-law, it remains wholly inoperative for the present purpose. The Court can derive no power from it. While the Court may compel trustees to execute the trust assumed by a corporation according to the scheme prescribed, it has no power, unless specially conferred by statute, to sequester the funds of a corporation, and deprive it of them, and dispose of them, as it may judge to be equitable and just, among those beneficially interested. *Corp. of Salop* v. *Att. Gen.* 3 Bro.

P. C. 241; *Taylor* v. *Dulwick Hospital*, 1 P. Wms. 655; *Att. Gen.* v. *The Bank of Niagara*, Hopk. R. 354; *Same* v. *The Bank of Chenango*, idem, 598; *Verplanck* v. *Mer. Ins. Co.* 1 Edw. 84; *Robinson* v. *Smith*, 3 Paige, 222. The Court may, however, in case of gross abuse, deprive a corporation or other trustee of the funds, and commit the administration of them to other hands. *Att. Gen.* v. *The Earl of Clarendon*, 17 Ves. 499. But this power does not authorize the Court to annihilate the charity by a distribution of the funds; or to appropriate them in any manner not in accordance with the scheme prescribed for the administration of the charity. The cases already referred to show, that the relation of trustee and *cestuis que trust*, does not ordinarily exist between a corporation and its corporators. While it does exist between the trustees or managers of the corporation and those interested in its funds. But such a relation no more authorizes a court of equity, than a court of law, to take possession of the funds and appropriate them according to its own arbitrary sense of what would be just and equal. Equity is not the chancellor's sense of moral right, or his sense of what is just and equal. It is a complex system of established law. Mr. Justice Story appropriately remarked, in the case of *Greene* v. *Darling*, 5 Mason, 215; "if by an equity is meant a mere dictate of natural justice in a general sense, it is not worth while to discuss it, because this Court is not called upon to administer a system of mere universal principles." The maxim, that equality is equity, can only be applied according to established rules. It cannot be applied even in the marshaling of assets so as to make an equal distribution of them, without some rule of law authorizing it, unless they are equitable assets. 1 Story's Eq. § 60.

The plan of the institution, in the case of *Pearce* v. *Piper*, 17 Ves. 1, was found to be defective. It operated as a felo-de-se. It was arranged by articles of agreement. There was no corporation. The Court may deal very differently with the property of individuals, whose respective rights to it are secured by contract, from what it can with the property of a

corporation, the charter of which controls the disposition of the property. That case furnishes no authority for the Court to interpose, as it is desired to do in this case. If the inability of a corporation to fulfil all its contracts had authorized a court of equity, without any statute provision for that purpose, to take possession of its property, close up its affairs, and distribute its assets among its creditors and shareholders, upon the application of its managers, there would doubtless have been found many reported cases showing the exercise of such a power. Yet no such case has been presented; while there are cases, in which the power has been distinctly denied. The case of *Bryant* v. *Russel*, 23 Pick. 534, authorizes no such proceeding. So far as it can be applicable to this case, it only decides, when a trust fund is subject to the disposal of the Court, and is found to be insufficient to pay all the claims upon it in full, that payment is to be made *pro rata* to the parties legally entitled to be paid.

It is contended, that this corporation assumed no other or greater responsibilities, than those incurred by a common trustee, and that it is only obliged according to its charter, by-laws and regulations to deliver to the depositors the funds, which remain in its possession. The character of the corporation and the contract made with each depositor, have been the subjects for consideration and decision in a case at law between Makin and the corporation, recently decided, *ante* 350; and it is unnecessary to do more than refer to the opinion in that case for the reasons of the conclusion, that the institution assumed responsibilities greater and more onerous than those, which attach to a common trustee. To the argument, that the law regulating the rights of partners might authorize the Court to dispose of the assets among the depositors, a like answer may be given. It was considered in the case at law, and the conclusion was, that the relation of partners could not be considered as existing between the parties.

The next inquiry is, whether the Court is legally authorized by the act of March 18, 1842, c. 32, to sequester the assets and make the decree prayed for in the bill. The first section

of that act not only confers the power in the most ample manner, but it requires the Court to exercise it, when properly called upon by a suitable process to do so. It authorizes the trustees to file the bill. It authorizes a general notice to all interested, that they may appear and show cause against it. The corporation might have appeared upon that notice, but has not. Its rights therefore must be considered as submitted for decision.

The counsel for Jane Gardner resists the exercise of such a power on the ground, that the act is unconstitutional and void, among other reasons, because it impairs the obligation of the contract between her and the corporation. The act, however, does not operate upon the contract or attempt to impair or alter its effect. It still remains valid and subsisting. There is nothing in the act to prevent a recovery of judgment against the institution for any balance, that may be due to her, after she has received her dividend under the provisions of the act. Such a judgment, it is true, might not be of any value, because the corporation would have no property, from which satisfaction could be obtained. It was doubtless this consideration, that induced the legislature to declare, that a decree of sequestration should operate as a stay or supersedeas of an execution on a judgment recovered. But this provision, as well as that which dissolves attachments, acts only upon the remedy. The effect of the act is to afford to the depositors a new and different remedy for the recovery of the amount due to them, instead of the remedy before provided by the laws for that purpose. It is in principle the same as the statute c. 77, authorizing this Court in certain cases to appoint receivers to take possession of the assets of banking corporations, and cause them to be distributed among those legally entitled to them. Enactments involving the same principles have for a long time existed in the State of New York; and her Courts have exercised the powers thus conferred upon them. *Matter of Niagara Ins. Co.* 1 Paige, 258; *Ward* v. *Sea Ins. Co.* 7 Paige, 294. The demurrer of Jane Gardner is overruled. Her defence fails; and she must be regarded as submitting to a proper decree.

The effect of the proviso in the fourth section of the act of March 18, 1842, will next be considered. That proviso is in the following words. "Provided that this act shall not interfere with or apply to the suit of any depositor, which shall have been defaulted, or upon which a verdict shall have been rendered for the plaintiff, prior to the passage of the same." The suit commenced by Makin in his own right, and that commenced by him as the administrator of Luke Makin, are saved from the operation of the act by the proviso. It is said, that the proviso is inoperative, because it is repugnant to the enactments, which require that there should be a just and equitable distribution of the assets among the several depositors in proportion to their respective claims. It has not been an unfrequent mode of legislation to frame an act containing general language in the enacting clause, and to restrict its operation by a proviso. It would often be found difficult to limit the language in the enacting clause, so as to admit every exception or limitation designed to be introduced into the section in its finished state. If such limitations are to be adjudged void for repugnance, a great number of statutes must receive such a construction, as will impair or destroy the title to a very great amount of property, as well as a very great number of valuable and important rights. The mischief would be incalculable. Take for example a recent act of legislation establishing a uniform system of bankruptcy throughout the United States. The enactments in the five first sections are restricted by one, two, or three, limitations of each section in the form of a proviso. The household furniture, wearing apparel, and other necessaries for the bankrupt, were saved from the operation of the general language of the enacting clause of the third section by a proviso. And there can be no doubt, that the language of the proviso is repugnant to the general language of the enacting clause. So the rights of married women and minors, and liens, mortgages, and securities on property, were saved from the operation of the general language of the act by the third proviso of the second section. All such saving clauses in the form of a proviso have been

considered by judicial tribunals to be valid and effectual. No case will be found, which decides otherwise. It is the misapplication of a principle to insist, that such saving clauses in the form of a proviso are void, because their language is repugnant to that contained in the enacting clauses. No such doctrine will be found in Plowden, 565. The case there referred to by Chancellor Kent in his commentaries (1 Kent, 461) was this. The act of 38 H. 8, for the attainder of the Duke of Norfolk, was declared by the act of 1 Mary to be no act, but utterly void. In the latter act there was a proviso, that it should not extend to take from the patentees of the king any lands of the duke held by them. The proviso was decided to be inoperative to save the rights of the patentees, not because it was repugnant to the enacting clause of the act in which it was found, but because the act of attainder having been declared to be void, no title could be derived under it, and the proviso would not give title. But the text of Kent only authorizes the conclusion, that a saving clause would be void, when it could not stand "without rendering the act inconsistent and destructive of itself." Not when the saving clause only excepts certain rights from the operation of the act, leaving it to accomplish its principal object. This is shown by his reference to Alton Wood's case, 1 Co. 47, (a) as an illustration of the rule.

There can be no possible doubt, that it was the intention of the legislature to except the suits of depositors, in which verdicts had been obtained for the plaintiff, and in which defaults had been entered, before the passage of that act, from its operation. It is declared in language too explicit for elucidation. No ingenuity of reasoning can make such intention appear to be doubtful, or obscurely exhibited.

The result is, that this Court may by virtue of the power conferred upon it by the act of March 18, 1842, c. 32, make a decree to sequester and dispose of the assets of the institution for savings according to the provisions of that act. The case calls for its interposition, and the Court decrees, that all the assets and funds of the institution, which remain after pay-

ment of the sums due to James Makin in his individual and representative character, be sequestered; and that a receiver and commissioners be appointed, who are to proceed, under the direction of the Court, according to the provisions of that act.

A decree is to be drawn up accordingly.

A dissenting opinion was delivered by

WHITMAN C. J.—By the statutes of this State, general equity jurisdiction over trusts has, for a number of years past, been conferred upon this Court. Power so conferred embraces whatever is incidental thereto, and necessary to accomplish the object for which the power may have been conferred. Accordingly it was held in *Buck* v. *Pike*, 2 Fairf. 23, that the equity powers of this Court extended, as well to implied as to express trusts. In general the jurisdiction of a court of equity over trusts is held to be exclusive. In Story on Equity the jurisdiction of courts of equity is divided into two classes; one in which they have with the courts of common law concurrent; and the other, in which they have exclusive jurisdiction; and trusts are set down as belonging to the latter; and it cannot be questioned, but that there are numerous cases of trusts, in which courts of law are quite incompetent to administer adequate relief.

The bill of the plaintiffs discloses a case of a pure trust, in which the institution represented by them are the trustees. They were to perform their duties gratuitously; and, of course, were not guarantors further than for their own fidelity. They were destitute of power to make gain for their *cestuis que trust*, other than what the deposits afforded, aided by faithful management on their part. The institution was one of pure benevolence and charity; originating in the kindest feelings, and fondest expectations; having it in view to aid individuals of small means to turn their surplus earnings to a profitable account. In this case it is admitted by the counsel for the defendant, Makin, that those hopes and expectations have been sadly disappointed, by the loss of at least forty per centum of

the aggregate amount of the deposits. It is not, nevertheless, suggested, nor is there the least proof tending to show, that the management of the plaintiffs has been otherwise than in accordance with every degree of prudence and foresight, which could reasonably be expected. The melancholy reverse of times, which occurred in 1837 and 8, was not foreseen or apprehended by many of the shrewdest and keenest calculators among our men of business. It was in its effects a visitation, not unlike that of a tempest or a whirlwind, prostrating and demolishing every thing before it.

The plaintiffs, on entering upon their trust, made certain regulations or by-laws. These would seem to indicate, that nothing but gain was to be expected; that the idea of a failure or loss scarcely occured to their minds. These were enacted, nevertheless, in perfect good faith. Among other things it was provided, that a depositor should, upon certain terms, have a right to withdraw his deposit; and upon certain other terms, should have a right to do so with four per cent. interest; and, finally, that he should, if he continued his deposit, be entitled, not only to his four per centum interest, but also to his share of the surplus profits. These, it has been contended, amounted to a promise obligatory upon the plaintiffs. But who are the plaintiffs? They are but the trustees; and, as such, the agents of each and every of the depositors. The regulations were made as and for them, and in their behalf. These were, then, in effect, the regulations of the depositors themselves. The funds of no one else were to be affected by them. The individual corporators are not responsible; nor are their funds individually, to be affected. If there be a promise, then, who is the promisor? and who the promisee? The depositors are both. It must be deemed to be a case of implied mutual undertaking between them. The regulations amount to an agreement, that they are to divide the profits between them, if any there may be; and, as it would seem to follow of course, to share in the losses, in case any should occur. To effectuate this the plaintiffs are the trustees, agents and factors of the depositors. The case of *Bryant & al.* v. *Russel & al.* 23

Pick. 508, shows very clearly in what light the promises of trustees are to be viewed. That was a much stronger case of a promise than the one here. It was an unqualified promise to pay certain classes of debts, of a certain firm, a deposit having been made with the promisors for the purpose. Yet the Court held them responsible only for a *pro rata* division of the fund; regarding them as mere trustees, and as having made the promise under a mistaken apprehension, that the funds received were sufficient. This case shows further, that, when trustees are so answerable, a court of equity will cause equal and exact justice to be done; and not allow any one creditor to avail himself of more than his equitable proportion of a fund so held.

The marshalling of assets in the hands of trustees, is believed to be no uncommon occurrence in equity jurisprudence. Executors and administrators are viewed as trustees. Estates of deceased persons are held by them in trust; constructively so at least. In England they are always so viewed. Having no statute law there, directing how the estates of deceased debtors shall be distributed, when there happens to be a deficiency of assets, application is made, either by a creditor or the executor or administrator, to the Court of Chancery, which will prevent a scramble among the creditors; and cause a *pro rata* distribution to be made, similar to what was effected in the case before cited of *Bryant & al.* v. *Russell & al.*

That trustees are under the protection of a court of equity, as well as accountable under its administration, the authorities clearly show. They may, whenever in difficulty, apply to such Court for aid and direction. *Dimmock & al.* v. *Bixby & al.* 20 Pick. 368. The plaintiffs are in this predicament. They are trustees, having in their hands funds, belonging to a great number of individuals, in different proportions, according to the amount of the deposits of each. They are sued at law by some of those individuals, who claim to have the whole of their deposits, with interest, returned; and are in danger, from the rules of law, of having an undue proportion of the funds abstracted by those individuals, to the injury of the other de-

positors. This can be neither equitable nor just. They, therefore, apply to this Court for its interposition, to secure the equal rights of all concerned. And it is a case in which, it seems to me, a court of equity could not refuse to interfere. It is equal and exact justice, which we are bound to administer. It is a trite but true maxim, that equality is equity. It would be monstrous to allow the one half of the depositors to exhaust the whole fund, leaving the others without any resource whatever. The right of each depositor to his just proportion of the fund is absolute, and vested. A right in equity, where equity jurisdiction exists, and, especially, where it is exclusive, is as much a vested right as a right at law; and it is not in the power, it is believed, even of a legislative act to take it from one man and vest it in another. In the case of a partnership between two or more individuals, each having a right to so much of the joint stock as might remain after the payment of debts, it would not be competent for the legislature to enact, that one of the partners should be permitted to abstract and retain from the other more than his just proportion of the stock; or, if he had got into his possession any greater proportion, that he should be permitted to retain it; and that the other partners should be entitled only to a division of the residue. Nor in the case of a general average of a loss occasioned at sea by jetson, would it be competent for the legislature, after a loss had occurred, to undertake to determine, that either the ship, freight or cargo should be protected in a claim to more than its just and average proportion of the contribution. The case at bar is very similar. A loss has occurred of the joint adventure. It is a loss no more of one of the concern, than of every other. It is necessarily the loss of each, in proportion to his outlay; and no power can say that it should be otherwise borne. The legislature cannot say, that what is justly due and owing to one man shall be paid to, and become the property of another. The statute of 1842, c. 32, is confirmatory of these principles, and renders them applicable in an especial manner to savings institutions.

But it is said, by my associates, in the opinion delivered by them, that a court of equity "has no power, unless specially conferred by statute, to sequester the funds of a corporation, and deprive it of them, and dispose of them as it may judge to be equitable and just, among those beneficially interested." This, as a general principle, in the abstract, is not intended to be controverted. But if this corporation is clothed with a mere naked power in trust for others, as seems to be undeniably the case, I do not understand why, upon the application of the trustees in behalf of the institution, a court of equity, for the reasons before given, may not afford its aid in enabling the trustees to do precisely that, which, under existing circumstances, it has become indispensable to have done. The Court in such case do not act *in invitum;* and we have before seen that trustees are entitled to the aid of a court of equity to enable them suitably to manage trust estates.

Again it is said in the opinion, that the trustees seek for aid "to enable them to make a disposition of the funds, destructive of the further execution of the trust, not authorized but upon a contingency, which has not happened." It seems to me that this can hardly be said to be the case. It is true that the contingency referred to has not happened. But a contingency has happened of a much more imperious character. By inevitable accident it has manifestly become impossible for the institution to accomplish the benevolent objects originally in view. This Court having decided, that the institution is liable to a suit at law by each and every of the depositors, and that each and every of them is entitled to judgment for the full amount of his deposit, a door is thrown open to a general scramble to abstract the funds from the control of the institution. Can it be that trustees, though acting under the form of an act of incorporation, are not, under such circumstances, at liberty to resort to a court of equity for relief? The cases cited in the opinion in reference to this point seem to me to be wholly inapplicable to a case like the present. The corporators here are not the proprietors of any stock, or of any funds. The institution, though factitious, is the merest

agent and trustee imaginable. It was intended to act exclusively for others, who were to be the sole beneficiaries to be provided for. The corporation is *sui generis* unlike any, it is believed, that has ever before been the subject of an adjudication. Cases precisely applicable are not therefore to be looked for in the reports.

The opinion seems to contemplate, that the individuals, who have preferred the bill, styling themselves the board of trustees of the institution, are acting for themselves; and that they are not to be identified with the corporation; and that the corporation might be considered as an independent party: For it says that the corporation might have appeared upon the notice given, but has not. Its rights therefore must be considered as submitted for decision. It seems to me it would be much more correct to say, that the individuals named apply as representatives of the corporation, and that not having appeared upon notice given, to question the authority of the petitioners to act in their behalf, they must be regarded as virtually the plaintiffs in equity. This is by no means the first instance of an appearance of one or more individuals in behalf of others; and the statute of 1842 manifestly contemplates that savings institutions should so appear in Court. It seems to me therefore that the corporation "has not been made a party" is incorrect.

The defendant, Makin, in his individual behalf, and as administrator of the estate of Luke Makin deceased, in his answer opposes the granting of the prayer of the plaintiffs' bill, alleging that he has two suits, one for himself, and the other as administrator, pending in this Court against the plaintiffs; that in one of them a default has been entered; and in the other, that a verdict has been returned in his favor; and sets forth the act above referred to, and relies upon a proviso in the same contained, which purports to exempt from the operation of the enacting part of the act, all suits wherein a default has been entered or a verdict had been returned for the plaintiff; and insists that this Court has no authority to proceed, under this application, but by virtue of that statute; and is therefore concluded by the proviso contained in it.

What has already been said is believed to be sufficient to show, that this Court, as a court of equity, had jurisdiction generally over trusts; and that the case stated in the bill, is purely a case of trust; and that such cases are peculiarly under the supervision and regulation of a court of equity; and that such court is vested with ample powers to accomplish, substantially, all that, by virtue of the above statute, was in contemplation of the legislature, with the exception, however, of what is contained in the proviso. As such court, it clearly had no right to exempt Makin, and his intestate, from the operation of the principle, that equality is equity. The whole of the enacting part of the statute shows most clearly, that the legislature emphatically recognized the principle, that equality is equity; and expressly provides, that the Court shall cause the net funds, in cases like the one here presented, to be "distributed and paid, according to equity and good conscience, to and among the several depositors *in proportion to their respective claims.*" It moreover provides, upon the sequestration authorized and provided for therein, that the same "shall operate at law, and in equity as a dissolution and discharge of any and all attachments of any goods, effects, rights and credits of such institution, which shall be, or *may have been made*, in any suit at law, brought against any such institutions, by *any creditor or depositor*, or their legal representatives, and shall further operate as a stay and supercedeas of *any execution on any judgment*, which is or may be recovered in any such suit." Nothing can be more directly repugnant to such language, than the seeming import of the proviso relied upon.

But it does sometimes happen that the legislature do not express themselves in conformity to what, from the context, must be taken to be their meaning. The enacting part of the statute is generally considered as more clearly expressing what is intended, than the preamble, or the saving clauses. It is the most natural and satisfactory mode of arriving at the true exposition of a statute, to construe each part of it in connexion with every other part, for that best expresses the meaning of the makers; and such construction, says the 1st Inst. 381, is

ex visceribus actus. In *Archer* v. *Bokenham*, 11 Mod. 161, Lord Holt says, "In doubtful cases we may enlarge the construction of acts of Parliament, according to the reason and sense of the lawmaker, expressed in other parts of the act, by considering the frame and design of the whole." And in the 10 Mod. 115, it is said, "the purview of an act may be qualified or restrained by a saving in the statute." But in the 1 Kent's Com. 462, it is laid down that "a saving clause in a statute, where it is directly repugnant to the purview, or body of the act, and cannot stand without rendering the act inconsistent and destructive of itself is to be rejected." These authorities do but show, that laws must be interpreted according to what, on the whole, must have been the intention of the law maker; and such intention may well find support when found manifestly in accordance with the rules of equity and justice. Plowden, 465, note.

From the purview and body of the act in question, nothing can be more obvious than, that the legislature were impressed with a profound sense of the entire justice of an equality of distribution among the depositors, in proportion to the amount deposited by each. Yet the proviso would be directly opposed to such a principle; and destructive of the object of the act, and in violation of its express language in other parts; and, moreover, of the principles of the soundest equity; and indeed in utter disregard of the vested rights of certain of the depositors. To give effect to the proviso taken literally, one or two of the depositors are to be permitted to receive nearly or quite double the amount of their just and equal dividend; and, the additional amount to make it up, is to be taken from the just proportions of the other depositors. The bare statement of such a proposition is enough to show, that it never could have been in accordance with the deliberate will of the legislature.

But it is contended that Makin, for himself, and as administrator, has litigated his claims, and has obtained a verdict in one case, and a default in another, and that thus his legal rights are *res judicata*; and that it is not competent for the Court to interpose, and interrupt his progress. But no act is

more common, perhaps, in a court of equity, than that of an interposition, by way of injunction, to stay proceedings at law; even when they have progressed to execution, if the proceeding, according to the course of the common law, is tending to produce an unjust result. The rules of proceeding in common law courts are simple and precise, and not sufficiently flexible to accomplish the ends of justice in every possible case. And hence the origin of courts of equity; whose rules are more flexible; and adapted to supply the defects incident to proceedings under the rules of the common law. The very act relied upon by the counsel for Makin, is predicated upon the ground, that power exists to prevent injustice by staying proceedings at law. The act itself goes much further. It undertakes, in one part of it, to annul all judgments obtained against an institution in the condition of that of the plaintiffs. Whether such an act is within the scope of legislative power it is unnecessary here to inquire. It is certainly incident to a court of equity to stay proceedings at law, whenever it becomes necessary to do so in order to effectuate purposes within its legitimate jurisdiction. Although the act is silent on the subject of authority to issue injunctions, yet, as it is a power belonging to a court of equity ordinarily, and as the act distinctly recognizes our right, in cases of this kind, to proceed according to the rules of equity, I can have no doubt of our power to issue injunctions as prayed for in the bill.

Jane Gardner, one of the depositors, appears also as a defendant; and has filed a demurrer to the bill, denying the authority of the Court to take cognizance of the subject matter of the bill; and questioning the constitutionality of the aforesaid act, upon the ground that it is *ex post facto*, and tending to impair the obligation of a contract, which she contends she had made with the plaintiffs. She had, before its passage, commenced a suit to recover her deposit against the plaintiffs. I can but regard this defendant as having entertained an erroneous view of the subject. Her contract with the plaintiffs was only, that they would be faithful in the management of her funds, deposited with them as her trustees and

factors. Of the want of such fidelity no complaint is made; and the act does not propose to interfere with any such liability. If she had deposited her money with an individual, as a trustee, to be employed for her benefit, and he had by inevitable misfortune, or notwithstanding the exercise of due care on his part, lost it, she would be without any right of claim against him. Her claim against these plaintiffs is merely equitable; and as such must be subject to the rules of equity. Although an action for money had and received will lie in such a case, as held in *Makin* v. *The Institution for Savings*, 19 Maine R. 128; in which a plaintiff may be allowed to recover such an amount as in equity and good conscience he is entitled to receive, that being a proceeding in the nature of a bill in equity, yet the appropriate remedy is in a court of equity, which has power to adjust all the cross equities between the parties, and ascertain such balance as may reasonably be recoverable.

The proceeding of the plaintiffs in this case is not in strictness an adversary suit against the depositors. It is rather a proceeding in their behalf, seeking for them the best means to secure a restoration to each and every of them, of what, in equity and good conscience, they should receive. In this view the plaintiffs may be regarded as the agents of the depositors, the *cestuis que trust* in this case, who have virtually, in their behalf, assented to the above named act, which seems to obviate any objection on account of its supposed interference with the rights of the depositors. This assent, on the part of the plaintiffs, will surely authorize the Court to adopt the provisions of the act, and to exercise the powers in equity as therein prescribed. Her demurrer therefore, should be overruled. And as her counsel has intimated, that in case the demurrer should be overruled, she had no further defence to make, the bill as to her may be taken *pro confesso*.

Unless the plaintiffs had culpably mismanaged the funds of the institution, or were likely to do so, it would be unprecedented, it is true, without their consent, to disturb them in the discharge of their appropriate functions; and we should be authorized only to lend them our aid in furthering the objects

of the institution. But in this instance, they pray that a receiver may be appointed to receive and disburse the funds of the institution, as in and by said act seems to be directed; and that a commission may be instituted, as in the same act is contemplated; and it seems to me that those who have appeared as defendants should be enjoined from proceeding further at law. And on the whole, I cannot entertain a doubt of the suitableness of the course suggested to accomplish the ends proposed. But my associates, for whose discriminating powers I entertain great respect, have taken a different view of the matters in controversy; which led me to hesitate, and carefully to re-examine those taken by me, without being enabled to discover their fallacy. And a decree must be entered according to their decision.

SEWALL F. BELKNAP *versus* SIMON MILLIKEN.

The owner of goods stolen cannot maintain a civil action for the injury, till after the conviction or acquittal of the party charged with the taking.

THIS case came before the Court upon the following bill of exceptions from the Western District Court, GOODENOW J. presiding.

Trover against the defendant for one barrel of beef, one barrel of pork, four barrels of flour, and five and a half bushels of corn.

The plaintiff alleged that on Saturday evening the nineteenth of February, 1842, one Patrick Kelley, a sub-contractor under the plaintiff, who was the contractor for the construction of the Portsmouth, Saco and Portland rail road, feloniously stole the property in question with other articles from the plaintiff, at Wells, and afterwards, on the next day, about eleven o'clock, A. M. sold the property in dispute to the defendant, at Scarborough. The articles in question were obtained at the office or store of the plaintiff, and were delivered to the said Kelley by the plaintiff's clerk, and charged to him upon the plaintiff's books, in which he charged goods sold and

delivered to others at work on said rail road, but as the plaintiff alleged, under such circumstances as to constitute larceny. To prove the larceny by Kelley, the plaintiff offered to prove, that one Murray, a partner with Kelley in his job on the rail road, at the time Kelley was obtaining the property in question from the plaintiff, went to one John Belknap at Elliot, with carts and horses belonging to the plaintiff, and represented to him that he was sent to obtain other articles, similar to those in question, by the clerk of the plaintiff, that the articles were delivered to Murray, and that after obtaining them, he joined Kelley with the property the same night, and proceeded with him to Portland, where the last named articles were concealed, and had not since been found, said Kelley and Murray having both absconded, and that the representations of said Murray to said John Belknap were false. The Court, GOODENOW J. presiding, rejected the evidence as inadmissible.

The plaintiff, to show the felonious taking by Kelley, further offered to prove that horses and carts, the property of the plaintiff, and the same in which the alleged stolen property was brought from Wells, were concealed by said Kelley in various places in Portland, that other and different articles were taken at the same time and manner by said Kelley, and the same description of articles with the initials of the plaintiff, and the marks of the Rail Road Company on them, but not otherwise identified, were found concealed away in various places in Portland, but the presiding Judge rejected the testimony.

The Judge, in his charge to the jury, instructed them that a sale of the articles, made in good faith by Kelley to the defendant on Sunday was valid, if there was no other objection to it, and would pass a good title to the defendant. The jury found a verdict for the defendant.

To which rulings the plaintiff excepted.

Codman & Fox argued for the plaintiff, citing 4 Shepl. 469; 2 Russ. on Cr. 698; 3 Fairf. 518; 4 Greenl. 172 and 320; 1 Kent, 467; 5 B. & Cr. 406; 4 Bingh. 84; 5 B. & Ald. 335; 6 Ver. R. 219; 6 Watts, 231; 2 Conn. R. 541.

H. B. Osgood, argued for the defendant, citing 22 Pick. 18; 20 Wend. 267; 16 Maine R. 77; 18 Maine R. 393; 15 Maine R. 236; 10 Mass. R. 312; 13 Wend. 425; 15 Pick. 465; 16 Pick. 250; 17 Pick. 106.

The opinion of the Court was by.

WHITMAN C. J. — It is not easy to perceive how it could have happened, that this cause, which is an action of trover, should have been suffered to proceed to a verdict in the District Court, and to an argument in this Court, upon exceptions taken in that Court, without the slightest reference to the well known principle, that it is against the policy of the law to suffer a civil action to proceed, when it is attempted to be supported upon the ground, that the plaintiff had been deprived of his property by means of a felonious taking, without proof, at the same time, of any conviction or acquittal of the felon. The bill of exceptions sets forth, that the plaintiff alleged, that one Patrick Kelley feloniously stole the property in question from the plaintiff, and sold it to the defendant. If so the cause of action was so far merged in the felony, that it cannot be maintained, until after due proceedings had *criminaliter*, against the felon, which shall have resulted in his conviction or acquittal. This point was fully considered, and so ruled, in the case of *Boody* v. *Keating*, 4 Greenl. 164. To sustain the exceptions in this case would therefore, be availing to the plaintiff, as the decision of the cause, if a new trial were granted must be the same in effect as it was in the District Court. The plaintiff, therefore, not having been aggrieved by the decision in that Court, his exceptions must be overruled, and judgment on the verdict affirmed.

NOTE BY THE REPORTER. — By the Statute of March 16, 1844, it was enacted, "that in all actions now pending, or which may hereafter be commenced, for the recovery of stolen property, or the value thereof, such action may be maintained by the party injured against any party legally accountable, although the offender may not have been convicted of the theft or larceny.

GEORGE EMERSON *versus* EZEKIEL LAKIN.

When there is a defect or omission in the declaration, and the issue joined is such as to require, on the trial, proof of the facts defectively stated or omitted, such defect or omission is cured by a verdict.

And when there has been a trial on issue joined before a magistrate, his decision in favor of the plaintiff must be considered as evidence equivalent to the verdict of a jury, that the plaintiff was entitled to recover upon the testimony introduced; and a defect or omission in the declaration is cured as well by the judgment of the magistrate as by the verdict of a jury.

A declaration in an action to recover of a private a forfeiture for his neglect to appear at a company training or regimental review, should state that the privates composing the company were ordered to appear at the time and place by their commanding officer, or by some competent authority; but the omission is cured by the judgment of the magistrate, after trial of the issue.

But if the penalty was incurred by neglect to attend a regimental review, it is not necessary to allege also, that the commanding officer of the company issued his order in obedience to one from his superior officer.

Parol evidence is admissible to show, that a company of militia has been known by different names.

A magistrate has no authority at a trial to permit the clerk of a militia company to amend his company roll; but the clerk has power to make such amendment under the sanction of his official oath.

THIS was a writ of error brought to reverse a judgment, rendered by a justice of the peace in an action of debt, in favor of Lakin, as clerk of a company of militia, against Emerson for neglecting to appear at a regimental review and inspection on September 9, 1840.

The errors assigned, which were relied upon in the argument, are stated in the opinion of the Court. The parties agreed that the case should be argued in writing in 1841, but from accident the arguments did not reach the Court until April, 1844.

Howard & Osgood argued for the plaintiff in error in support of the sufficiency of the errors assigned to reverse the judgment. In support of the position, that the limits of the company were not proved by legal testimony, they cited *Gould* v. *Hutchins*, 1 Fairf. 145; and *Avery* v. *Butters*, 2 Fairf. 404.

Carter argued for the respondent. In support of the principle, that a direct averment is not necessary, if it be a necessary inference or legal presumption from such facts as are averred, he cited 13 Mass. R. 406; 14 Mass. R. 157.

If there is a defect in the declaration, by an omission to aver a fact, proved by the evidence, it becomes good by pleading the general issue, and by the trial and judgment. 6 Pick. 409; 7 Greenl. 63.

That parol evidence was admissible to prove that the company H. and the one of which the selectmen of the town defined the limits were the same. *Richardson* v. *Bachelder*, 19 Maine R. 82.

That the roll might be amended, and as amended was sufficient. 14 Maine R. 121 and 205; 19 Maine R. 111.

The opinion of the Court was drawn up by

SHEPLEY J.—The first error assigned is, that the declaration was too defective to authorize a judgment in favor of the original plaintiff. It is contended, that it should have contained an averment, that the privates had been ordered to appear at the time and place appointed for the review by the commanding officer of the company, and that such order had been issued in obedience to the orders of his superior officers; because they alone were authorized to determine the time and place for the review.

The declaration is quite unskilfully drawn. It states, that the "said company was drawn forth to assemble at Enoch Gammon's house in Naples, at six o'clock, A. M. on the ninth day of September, 1840, for the purpose of regimental inspection and review." This does not necessarily imply, that the privates composing the company were ordered to assemble at that time and place by their commanding officer, or by any competent authority. By the act then in force, c. 44, art. 28, a forfeiture was incurred by a private, "who being duly ordered," should unnecessarily neglect to appear at any inspection or review. But it does not follow, that the judgment must be reversed because the declaration was thus defective. The

magistrate could not have found the private guilty of a breach of the law without proof, that he had been duly ordered to appear. And the rule is well established, that when there is a defect or omission in the pleadings, and the issue joined is such as to require on the trial proof of the facts defectively stated or omitted, such defect or omission is cured by the verdict. It is said, however, that it is cured only by a verdict. But the rule is founded upon the necessity, that there should be proof of the facts defectively stated or omitted; and the verdict is only referred to as evidence, that such proof must have been introduced. And the reason, why the rule does not apply to cases of judgment by default, is, that in such cases the introduction of proof is not required; and the judgment would not therefore show, that the plaintiff had made out a case, on which he was entitled to recover. When there has been a trial on an issue joined before a magistrate, his decision in favor of the plaintiff must be considered as evidence equivalent to the verdict of a jury, that the plaintiff was entitled to recover upon the testimony introduced. And in such cases the defect or omission in the declaration is cured as well by the judgment of the magistrate as by the verdict of a jury. An averment, that the commanding officer of the company issued his order in obedience to one from his superiors, was not required. He was authorized by the act to order his company to be paraded for review at such time and place, as should be designated by his superior officers. And the forfeiture was imposed for disobedience to his lawful order. The law will presume the order to have been lawfully issued until the contrary be proved.

Another error assigned is, that parol testimony was admitted "to prove, that the H company had always been considered to be the same company as described in the document signed by the selectmen as Capt. James Ross' company." Such testimony did not determine or vary the limits of the company, which were proved by the proper testimony. It only proved, that the same company had been known by different names.

The point was decided in the case of *Richardson* v. *Batchelder*, 1 App. 82.

Another error assigned is, that the testimony introduced to prove, that the plaintiff in error had been duly enrolled as a member of the company was illegal and insufficient. The document received for that purpose was described as the "Record of the roll of the company of infantry in the second regiment, first brigade, fifth division, under the command of Capt. Lovell V. Foster, as corrected on the first day of May, 1840." The defendant in error was appointed clerk on August 25, 1840, by another captain, who had been qualified on that day. The roll, without any authentication by any former officer or clerk of the company, appears to have come to the possession of the defendant as clerk, and to have been used on that day. At the time of the trial it was first authenticated as the roll of the company by the clerk as the one used and corrected on that day. The magistrate could not authorize any amendment or authentication of it. The clerk might make the necessary certificate under the sanction of his official oath. And this he might do at a later time as of the date of the transaction, as appears to have been decided in the case of *Cox* v. *Stevens*, 2 Shepl. 205. The other errors assigned have not been insisted upon in the argument.

Judgment affirmed.

ROBERT I. ROBINSON *& al. versus* THOMAS R. SAMPSON *& al.*

The general rule in equity is, that the answer of one defendant cannot be used as evidence against another.

But an order of court may be obtained to examine one of several defendants as a witness in the case, subject to cross examination by the other defendants.

In equity the cancellation of a mortgage on the records is only *prima facie* evidence of its discharge, and leaves it open to the party making such objection to prove that it was made by accident, mistake, or fraud. On such proof being made, the mortgage will be established, even against subsequent mortgagees without notice, if they became such anterior to the cancellation.

THIS was a bill in equity against T. R. Sampson, A. Sampson and C. C. Mitchell, and was heard upon bill, answers and proof.

The view of the case taken by the Court renders it unnecessary to state the facts more fully, than they appear in the opinion of the Court, or to notice some of the positions taken in the argument.

Deblois and *O. G. Fessenden*, for the plaintiffs, contended, that the discharge of the first mortgage had been obtained through fraud or mistake, it being immaterial which; and that the Court should set aside the same in a bill in equity seeking this relief, and place that mortgage in the situation in which it stood before the discharge. *Harding* v. *Randall*, 3 Shepl. 332; 1 Story's Eq. 201, 202; 2 Bro. Ch. R. 385; 10 Ves. 475; 1 Vern. 136; 1 Ves. & B. 355; 1 Vern. 9; 1 P. Wms. 240; 3 Peere Wms. 129; 1 Story's Eq. § 197; 2 Atk. 33 & 203; 1 Munf. 330; *Daniels* v. *Mitchell*, 1 Story's R. 172.

The discharge of the mortgage should be rescinded, and the parties placed, as they before stood, because of the concealment of the fact of the existence of the second mortgage. He was bound in duty to have disclosed that most material fact. 1 Fonbl. Eq. B. 1, c. 2, § 8; 1 Vern. 19; 6 Ves. 173; 2 Wheat. 178; 2 Shepl. 363; 4 Shepl. 30; 1 Sch. & Lefr. 209; 6 Yerger, 108; 4 Mason, 375.

W. P. Fessenden, for Mitchell, said that the whole facts, so far as within Mitchell's knowledge, are stated in his answer. He derived no advantage from the transaction, acted uprightly in the whole matter, and should in no way be injured or put to expense in the business. If justice can be done between the other parties, he has no objection.

Codman & Fox, for Abigail Sampson, contended that the plaintiffs did not rely upon any statements of T. R. Sampson, but examined the registry of deeds for themselves, and acted on the information there obtained. A. Sampson had nothing to do with these transactions, and had no knowledge of them. If there was any mistake under which the parties acted, it was the mistake of the register. If any false representations were made by T. R. Sampson, they must have been relied on by the plaintiffs, or he can have no remedy on that account. 1 Story's Eq. § 191.

But there is no evidence, that T. R. Sampson made any false representations. There is nothing of the kind found, excepting in the answer of Mitchell; and that is not evidence against the other defendants, as there is no partnership or joint interest between them pretended.

Deblois, in reply, considered the answer, as evidence in the whole case, circumstanced as this is; but contended, that there was sufficient evidence of the fraud without it.

The opinion of the Court was drawn up by

WHITMAN C. J. — The allegations in the plaintiffs' bill, aside from the pretence of a design to defraud the creditors of T. R. Sampson, if substantiated by proof, would be abundantly sufficient to entitle them to the relief prayed for, on surrendering the security, and cancelling the mortgage they now hold. But the proof, at present, is entirely deficient; for the answer of C. C. Mitchell, one of the defendants, is not evidence against the defendant, Abigail Sampson. The answer of one defendant cannot be used as evidence against another. *Field* v. *Holland*, 6 Cranch, 8, 24; *Clark's Ex'ors* v. *Van Reimsdyke*, 9 ib. 153, 156. This is the general rule.

There are exceptions; but this case does not come within them, the defendants not being copartners, nor in a situation to authorize the admissions of one to become evidence against the other. The reason of the rule is, that the defendant sought to be affected, could have had no opportunity for cross-examination.

An order might have been obtained to examine C. C. Mitchell, as a witness; in which case he would have been subject to a cross examination by the other defendants; and if he had testified unqualifiedly to the facts contained in his answer, and his testimony had remained unaffected by discrediting testimony, we could have had no doubt, that, therefrom, in connexion with the other testimony in the case, the cancellation of the mortgage held by him, was an act done entirely through mistake, arising from false and deceitful representations made to him by the defendant, T. R. Sampson, and by the accidental oversight, notwithstanding due precaution taken to avoid it, in not discovering the record of the second mortgage, made by the said T. R. Sampson to his mother, the said Abigail. It is observable in this connection, that Abigail Sampson did not advance any thing, by way of consideration, to induce the cancellation; and was in nowise instrumental in procuring it to be done; and that, if the cancellation were annulled, she would be precisely in the condition she would have been in, if the mortgage held by C. C. Mitchell had been assigned, uncancelled to the plaintiff, instead of the making of the new mortgage; and which would have been done, but for the mistake originating as before mentioned.

There is not a more appropriate head of equity jurisprudence, than that of mistake. And the jurisdiction in such cases in equity is expressly conferred upon this Court. Human sagacity is inadequate to the attainment of a perfect knowledge and comprehension of every combination of circumstances, under which it may become necessary to act, and especially when the influence of the acts and wiles of the designing and knavish are superadded.

The language of the learned Chancellor of New Jersey, in *Trenton Banking Co.* v. *Th. L. Woodruff & al.* 1 Green's C. R. would be precisely applicable to this case, if the proof were, as it seems probable it might have been. He says, "It has been settled in this Court, that the cancellation of a mortgage on the record is only *prima facie* evidence of its discharge, and leaves it open to the party making such objection to prove, that it was made by accident, mistake or fraud. On such proof being made the mortgage will be established, even against subsequent mortgagees without notice." To this position we cannot hesitate to yield our assent, if the subsequent mortgagee, as in this case, becomes such anterior to the cancellation.

But as the case here, as now presented to us, is, we do not feel ourselves authorized to conclude, that the plaintiffs were lulled into security by reason of influence, arising from misrepresentations on the part of T. R. Sampson, or that they ever examined the registry of deeds, before taking their mortgage, to ascertain whether any conveyances were there recorded, which could interfere therewith; and therefore should not be warranted in coming to the conclusion that any thing was done by them otherwise than in conformity to what was intended between the parties. And unless the case can be opened to a re-examination of testimony, so that the testimony of C. C. Mitchell can be introduced against the other defendants, or the facts set forth in the bill be otherwise legally established, making out a clear case of accident or mistake, or both, in reference to the cancellation of Mitchell's mortgage, the bill must be dismissed.

IRA CROCKER *versus* EDMUND GETCHELL.

It is sufficient for the holder of a bill or note to notify his immediate indorser, without any limitation as to the place of his residence, and he is under no obligation to do more, unless he desires to charge other parties; and such indorser, on receiving the intelligence, should in due season notify the next preceding indorser, and those whom he would charge. And this course may be followed by all the parties however numerous.

And if the holder of a note or bill leaves it with a bank or an individual, residing in a different city or town, as an agent for the collection thereof, such agent is for that purpose to be considered as a party, and is bound only to notify his principal in due season.

But if the holder of the note should employ agents whose residences, or places of business, are so distant from those of the parties to the paper, that the transmission of notices through them would necessarily occasion great and unnecessary delay, it might be evidence of a want of due diligence, or even of a fraudulent or vexatious attempt to injure a party, under the pretence of using due diligence.

A mistake in a notice of the dishonor of a bill or note, does not render it invalid, if it do not mislead the party to whom it is directed.

If an agent makes sale of property of his principal, and in payment to the owner therefor indorses a note, which was not taken for the property sold, or any part thereof, such agent cannot set up want of consideration in defence of an action against him as indorser.

Parol testimony cannot be received to vary the legal effect of an indorsement in blank upon a bill or note.

THE facts in the case appear in the opinion of the Court. The notice to which objection was made was as follows:

"Augusta, Dec. 29, 1836.

Sir — Please to take notice, that Wheeler & Perkins' note, dated August 25, 1836, for fourteen hundred and ninety-one dollars and ninety cents, payable in four months, became due this day, and is protested for non-payment, and that the holder looks to you as indorser for the same.

"D. Williams, Not. Pub.

"Edmund Getchell, Esq."

Howard & Shepley, for the plaintiff, contended:

That the Cumberland Bank was to be considered the real holder of the note for the purpose of receiving and transmitting notices, although it was held for collection only. Chitty on Bills (8 Am. Ed.) 520.

The notary was agent of the holder, and should cause the notices to be transmitted to his principal, although direct notice to the indorser would reach him sooner. The agent is not required to look beyond his principal. Bayley on B. 267; 5 Mass. R. 169; 8 Pick. 54; 9 Pick. 549; *Lord* v. *Appleton*, 3 Shepl. 270; *Warren* v. *Gilman*, 5 Shepl. 360; 5 Cowen, 305; 1 Hill, 264.

The notice was sent sufficiently early. Each party is entitled to one day to transmit notice to a prior indorser. Chitty on B. 519; Bayley on B. 263; 4 Shepl. 453; 5 M. & S. 68; 9 East, 347.

A mistake in the notice does not invalidate it, if it do not mislead the party. Bayley, 253; 12 Mass. R. 6; 1 Pick. 401; 3 Metc. 498; 2 Peters, 543; 2 Hill, 593.

Mere delay to call on the principal does not discharge an indorser. *Page* v. *Webster*, 3 Shepl. 249.

The legal effect of a blank indorsement is well known and established, and can no more be contradicted by parol evidence, than the direct expressions of the contract. 9 Pick. 550; 8 Greenl. 213; 8 Johns. R. 148; Bayley, 150.

The consideration is sufficient. The defendant had sold logs belonging to the plaintiff, and had become accountable to him for the amount of sales. This note was not taken for the plaintiff's property, but for the defendant's own, and indorsed in payment of a debt.

Fessenden, Deblois & Fessenden, for the defendant, contended: — That the defendant was not liable, because he was not seasonably notified that a demand had been made on the promisors, and that they had refused or neglected to pay.

Notice should have been sent directly from Augusta to Waterville. *Freeman's Bank* v. *Perkins*, 6 Shepl. 292; 20 Johns. R. 372; 3 Hill, 560. And more especially as in this case the notary knew where the defendant resided.

The notice does not state that a demand had been made, as it should. 3 Metc. 495.

If the party employs an agent, he can have no more time than if he performed the act in person. If the plaintiff had

made the demand personally, he must have sent by the next mail to Waterville, or gone and given personal notice. The party is not at liberty to make as many agents as he chooses, and send over the country. This would operate oppressively and unjustly. An agent is not a party, or entitled to the privileges of one, but a mere servant, acting for his master. 4 Car. & P. 200; 6 Shepl. 292; 5 Cowen, 303; 23 Pick. 331.

It does not appear, that the notices were sent by the first mail of the succeeding day as the law requires. 15 Maine R. 70; 20 Maine R. 24; 17 Maine R. 381.

The demand, if any, was made one day too late. 3 Metc. 495. If the notices were to be given to the defendant from Portland, they should have given their own, and not have sent those of the notary.

There was no consideration for the indorsement of the paper. The indorser may set up want or failure of consideration against his immediate indorsee. 2 Stark. R. 145 & 270; 1 Esp. R. 261; 5 Mass. R. 302; 5 Pick. 391; 6 Pick. 259; 7 Johns. R. 384; 9 B. & Cr. 241.

The defendant was not bound to make himself liable, as he acted merely as the agent of the plaintiff. 1 Campb. 100; Chitty on B. 81; 3 Campb. 376; 4 Metc. 475; 5 Cowen, 474; 4 Greenl. 542; 3 Shepl. 340; 6 Shepl. 361; 5 Pick. 7; 3 Mason, 232.

Nor can it be objected to the showing of this want of consideration, that the note being indorsed in blank without any qualification, parol evidence cannot be admitted to show the want or failure of consideration. 10 Johns. R. 231; 7 Cowen, 322; 4 Johns. R. 301; 6 Mass. R. 431; 11 Conn. R. 213.

The opinion of the Court was drawn up by

Shepley J. — The plaintiff as indorsee has brought this suit against the defendant as indorser of a promisory note, bearing date on August 25, 1836, made by Messrs. Wheeler & Perkins of Augusta, payable to the defendant or order in four months, and by him indorsed in blank. It was also indorsed by Ira D. Bugbee, as cashier of the bank of Cumber-

land, and transmitted to the cashier of the Augusta Bank for collection. Mr. Williams testified, that he received it from the cashier on December 28, 1836, after bank hours, and as a notary presented it to the makers for payment, which was refused; and that he made out notices to the defendant and to Bugbee, and delivered them to the cashier of the Augusta Bank with his protest. That the notices were intended to show the true date of the protest, and that he had no reason to doubt, that they did. The notice directed to the defendant was produced at the trial, and was dated December 29, 1836, the day after the last day of grace. It was directed to the defendant by the notary without designating his place of abode, and on the back it was directed to the defendant at his place of residence in Winslow, Me. in the handwriting of Bugbee. The post mark upon it was "Portland, Me. Dec. 31." It was admitted, that the mail was at that time carried daily from Portland to Augusta, and from that place to Waterville, leaving Portland at six o'clock, A. M. and from Augusta to Portland daily; leaving Augusta about one o'clock, P. M. The jury have found, that payment was demanded of the makers on the last day of grace. It may be, that the notices were not made out until the next morning, and that they bear the true date of the day, on which they were made. And that would be in season, if they were forwarded by the mail of the day following the day of dishonor. That the notice directed to the defendant must have been sent to Portland as early as by the mail of the 29th, is apparent; for it could not otherwise have been received in Portland on the morning of the 30th, and have been delivered to Bugbee, after the mail for that day had left for Augusta, and have been by him directed to the defendant at Winslow and returned to the postoffice on the same day, that it might be forwarded to Augusta by the mail, leaving Portland on the morning of the 31st. The notice was therefore transmitted to the defendant in due season, if the mode adopted of forwarding it first to the cashier at Portland was authorized by law. The indorser of negotiable paper is presumed to know, that the very purpose to be ac-

complished is, to facilitate its transfer from man to man in the usual course of business, without any limitation as to the places of their residence. It is sufficient for the holder to notify his immediate indorser, and he is under no obligation to do more, unless he desires to charge other parties. And such indorser on receiving the intelligence, should in due season notify the next preceding indorser, and those, whom he would charge. This course may be followed by all the parties however numerous. And the first indorser may thereby receive notice many days later, than he would, if the holder were required to notify him. If the Augusta Bank therefore be regarded as the holder of the note, it was under no legal obligation to notify the defendant, if his place of residence were well known; but might notify the Bank of Cumberland as the last indorser. And a notice from the latter bank sent by the mail of the day following that, on which it received intelligence of the dishonor to the defendant, would be in season. If the banks be regarded as the agents of the plaintiff, employed to collect the notes, must a different course be pursued? The plaintiff, had he presented the note for payment in person, must have forwarded a notice to the defendant by the mail of the following day. And it would seem to be an enlargement of his rights to allow him to employ an agent to do it, and thereby avoid that responsibility, and it may be to the injury of the defendant. And yet a bank or other holder of numerous bills and notes, could not be expected to be at the residence of each acceptor or maker to present the paper for payment. Agents must of necessity be employed. Such agents or special messengers could not always be safely entrusted to prepare and forward the notices in case of non-payment. If bankers were employed as agents, they would regard their duties as performed by forwarding notice to their customers. And the rule has been established in England, that it is sufficient for the banker to send notice to his customer, and for him on the receipt of that intelligence to give notice by the mail of the next day to such parties, as he would charge. *Langdale* v. *Trimmer*, 15 East, 291; *Haynes* v. *Birks*, 3 B. & P. 599; *Daly* v. *Slater*, 4

C. & P. 200. And the mercantile law appears to have been conformed to mercantile convenience, so far as to allow other agents to be employed upon like responsibilities. *Church* v. *Barlow*, 9 Pick. 549; *Mead* v. *Engs*, 5 Cowen, 305; *United States Bank* v. *Goddard*, 5 Mason, 366. The counsel for the defendant insist, that the latter case may be distinguished from this, because the bank presenting the note for payment was ignorant of the residence of the indorser, and did not undertake to notify him. But neither that, nor the other cases, appear to have been decided upon any such distinction. On the contrary Mr. Justice Story says, "the doctrine is laid down without exception, that the agent is not bound to give notice; and if any exception had existed, it could not for so long a period have been overlooked." The remark of Weston C. J. in the case of *Freeman's Bank* v. *Perkins*, 6 Shepl. 295, "if either knew the residence of the indorser, his notice should have been sent to him directly at Hallowell, through which the mail passes, in its transit to Augusta," it is apparent, was designed rather to exhibit their duties, than to declare the law; for he had before stated in the same opinion, that "the cashier of the Suffolk Bank would have done his duty, if he had caused notice to be given to the plaintiffs, of whom he received the bill." The Augusta Bank, therefore, if regarded as an agent for collection, performed all its duty by sending a notice to its principal by the mail of the day after the dishonor. And the Bank of Cumberland in the place of the plaintiff performed all the duties incumbent on him by forwarding a notice to the defendant by the mail of the day following the reception of such intelligence.

It is however contended, that it should have forwarded a notice made out and signed by its cashier instead of sending the notice made out by the notary. There was no delay occasioned by the use of the notary's notice. And the notice of a notary or of any other party to the note forwarded in due season would be sufficient. *Bank of the United States* v. *Carneal*, 2 Peters, 543; *Chanoine* v. *Fowler*, 3 Wend. 173. It is not intended to decide, that the holder may employ banks

or other agents for the purpose of collection, whose residences or places of business are in distant cities or places, so far from the residences of the parties to the paper, that the transmission of notices through them would necessarily occasion great and unnecessary delay. Such a procedure might be evidence of a want of due diligence, or even of a fraudulent or vexatious attempt to injure a party under the pretence of using due diligence.

It is also contended, that the notice sent to the defendant was not sufficient, because it did not state, that a demand had been made upon the makers, and because it stated, that the note became due this day, bearing date on the 29th. It stated, that the note "became due this day, and is protested for non-payment, and that the holder looks to you for the same. In the case of *Mills* v. *The Bank of the United States*, 11 Wheat. 431, the language used in the notice was, that the note "on which you are indorser has been protested for non-payment, and the holders thereof look to you." And that was decided to convey sufficient notice, that payment had been demanded and refused. The note in that case was dated "20th July, 1819." The notice stated, that it was "dated 20th day of September, 1819," and in all other respects described it correctly. The description in the notice was considered to be sufficiently accurate to convey to the party knowledge of the particular note, which had been dishonored. In this case the error in stating the time when it became due, could be discovered from the other parts of the description, and was therefore little suited to mislead.

Another point made in defence is, that the indorsement was made without consideration and under such circumstances, that the defendant should not be held accountable upon it. The defendant appears to have been employed by the plaintiff and by other persons to take charge of their logs then floating in the Kennebec river, and to sell them for cash or on credit. This duty he performed. The logs were sold to different purchasers, whose notes he received as payment payable to himself or order. The persons interested in the logs assembled for a

settlement with the defendant, who produced the notes and permitted the owners of the logs to select such, as they preferred. The plaintiff selected this note, and the defendant indorsed it and delivered it to him. There is no testimony in the case to prove, what proportion of the consideration of this note arose out of sales of the plaintiff's logs to the makers. Or even that any part of it did. The defendant would not have been at all events liable to pay the plaintiff the amount, for which his logs had been sold, because he had sold them in connexion with the logs of other persons, and had taken a note to himself for the gross amount of the sales. But to be exempted from making such payment he must prove, that he had sold some of the plaintiff's logs to the makers of the note, and that he had been unable to obtain pay for them. The difficulty attending this point in the defence is, that there is no proof, that this note was received in whole or in part in payment for logs owned by the plaintiff and sold to the makers. It might or it might not have been so. The defendant has left it wholly uncertain; and the burden of proof was upon him. As the case is presented, the defendant appears to have been accountable to the plaintiff for logs, which he had sold to other persons as his agent. And that on a settlement of that claim he indorsed and delivered this note to him. The discharge of that liability was a valuable consideration for such delivery and indorsement. If there had been proof, that this note had been taken in payment for sales of the logs of the plaintiff only, and that the indorsement had been made to transfer to the plaintiff the legal title of that, to which he was before beneficially entitled, it might well have been otherwise.

The defendant exhibited testimony to prove, that he stated to the plaintiff at the time, when the note was indorsed, "that he was not going to make himself personally liable," and that remarks were made by the plaintiff in answer indicating an assent to such a mode of transfer. It has been decided in this State in accordance with the law as administered in most of the other States, that such testimony cannot be received to vary

the legal effect of an indorsement in blank. *Fuller* v. *M'Donald*, 8 Greenl. 213.

There is no proof, that the indorser has been discharged by giving time to the makers. The proof of their ability to pay for some time after the note became payable does not have that effect. *Judgment on the verdict.*

DANIEL BURNHAM *versus* DANIEL BROWN.

When a note is made payable in several annual payments, the cause of action for the first payment accrues so soon as it becomes payable, and the statute of limitations begins to run against it from that time, and not from the time when the latest sum should be paid.

ASSUMPSIT upon a promissory note, of which the following is a copy.

"$375. May 20, 1835. For value received I promise to pay Daniel Burnham or order three hundred and seventy-five dollars, with interest annually, payable in three yearly equal payments. "Daniel Brown."

The suit was commenced Dec. 5, 1842. The statute of limitations was pleaded as a bar to the recovery of the first yearly payment and the interest for the first year. The defendant was defaulted, subject to the opinion of the Court, whether the recovery of any part of the note was barred by the statute of limitations; and of what part, if any.

W. Goodenow, for the plaintiff, admitted that an action could have been maintained for the first payment and the first year's interest, at any time before the residue of the note became payable; but said it was quite as well settled, that after the last payment became due, only one action must be brought, and that must be for the whole amount, and not an action for each instalment. After the note becomes wholly due, the right of action for the first instalment is extinguished, and a new one for the whole amount accrues. The statute of limitations is no bar to this last promise to pay the whole amount of the note.

Howard & G. F. Shepley, for the defendant, said that when the first payment became due, the plaintiff's cause of action for that amount, and for the annual interest, accrued. The right was as perfect, as if each payment had been in a separate and distinct note. And the same difficulty, which is urged now, that one suit must cover the whole payments, would have applied then. But one suit could have been commenced, after each had fallen due, unless at the plaintiff's own expense. The plaintiff's own delay cannot prevent the operation of the statute. The statute may as well be objected to this as to some of the items of an account, where part are within and part beyond six years.

The opinion of the Court was drawn up by

TENNEY J. — The note in suit was made payable in three yearly instalments; and this action was commenced after the expiration of six years from the time, when the first became due; and it is insisted by the defendant, that the statute of limitations upon which he relies, will apply to the first instalment.

The statute provides, that actions founded on contract shall be commenced within six years next after the cause of action shall accrue and not afterwards. Stat. 1821, c. 62, § 7; Rev. Stat. c. 146, § 1. Did the cause of this action, so far as its object is for the recovery of the first instalment, accrue within six years before its commencement? The cause of an action of assumpsit is a promise, and its breach.

The promise in the note declared on is entire, but to be performed at different times, applying equally to every payment to be made. It was broken immediately on an omission to pay the first instalment, at the time specified in the note, as much as by the failure to fulfil the whole promise after every instalment became due. For this breach, before the others occurred, an action could have been maintained. The declaration would have been upon the promise, and the omission to fulfil it, in such an action, as it would have been for all the breaches, after they had been made. The right to maintain

such a suit is well established. In *Tucker* v. *Randall*, 2 Mass. R. 283, which was an action upon a note payable in several instalments, for the recovery of the whole amount, commenced after a part, but before all the instalments became due, Mr. Justice Sedgwick says, "the promise and breach being well alleged, the rest is surplusage," and judgment was rendered for the instalments payable before the date of the writ. Mr. Chitty, in his treatise on Bills, p. 662, says, "the plaintiff is entitled to judgment for the instalments due, when the action was commenced." *Cooley* v. *Rose*, 3 Mass. R. 226, and *Hastings* v. *Wiswell*, 8 Mass. R. 455, were actions for interest, which accrued before the principal became due, and were maintained.

It is insisted in behalf of the plaintiff, that the promise being entire and to pay a single debt, though at different times, the right of action for the first breach is not a permanent right; and as a distinct right, ceases, when other instalments in the same note become payable. If it be true, that the cause of action does not stand alone, and distinct, after other causes arise, or the original cause is enlarged, the first cause is not suspended; it remains unimpaired, notwithstanding another may be joined with it. There has been no time, when an action could not be maintained upon it, from the time it accrued.

Suppose the second and third instalments had been promptly paid, and indorsed as such, and this action had been brought upon the note, would not the statute of limitations be a bar? And does the liability on the first depend upon a liability upon the second and third?

If a tender had been pleaded in this action to the two last instalments, and the statute of limitations to the first, and the former had been proved, and kept good, we apprehend, the action would be entirely barred. By omitting to bring an action for the first payment, till all became due, the time may be shortened within which the action for the whole can be commenced without exposure to be barred by the statute, but this consequence is to be imputed to the parties who make

such a contract, and also to the holder thereof, who exercises an indulgence to his debtor, which neither the contract or the law requires.

Judgment for the two last instalments and interest thereon.

STATE OF MAINE *versus* WILLIAM S. DAVIS.

When one man is indicted for being a common seller of spirituous liquors, without license, another who was to participate in the profits of the business, cannot claim for that reason to be exempted from testifying to the commission of the offence.

All who take it upon them to be common sellers of spirituous liquors, without being licensed therefor, in less quantities than twenty-eight gallons at a time, are liable to the penalty provided by the statute, whether they take it upon themselves to be common victualers or not.

At the hearing in this Court upon exceptions from the District Court, no questions are open but such as appear in the bill of exceptions to have been taken in that Court.

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

This was an indictment against the defendant as a common seller of spirituous liquors, at Portland, without license, from May 15, 1842, until March 1, 1843.

The County Attorney called certain citizens of Portland as witnesses, to prove the charge in the indictment, who were objected to as incompetent witnesses, but the objection was overruled, and they were received as witnesses.

True W. Pettengill, also called by County Attorney, stated, on the voir dire, that he was connected with Davis in business, so far, and so far only, as that his compensation depended on the amount of profits made in the store; all expenses were to be first paid, and witness was to have a portion of the profits remaining for his services, and that if the defendant were convicted, the fine and expenses would be deducted from the profits, and he would have a portion of what remained. He also testified that he was not a general partner, and was

not liable in any way for any of the debts that accrued in the business, and that the stock was purchased by the defendant.

The witness declined to testify unless so ordered by the Court; and was also objected to by the defendant. The presiding Judge ruled that he must testify in the cause. Upon his examination he testified that spirituous liquors were kept in the store and sold, from day to day, from July 1842 to the day of finding the indictment, by retail and in less quantities than twenty-eight gallons. It was a common thing for them thus to be sold. The defendant was attentive to his own business. On cross-examination, Pettengill testified, that he had never seen the defendant sell any spirituous liquors within the time alleged; that the defendant kept large quantities of fruit and a general eating shop, during that time, where country people and others were in the habit of calling for their meals, and was in daily attendance to his business in said shop. There was no evidence, that Davis was licensed for any purpose.

Upon this testimony, the defendant's counsel requested the Judge to instruct the jury, that if the defendant as a common victualer kept for sale ardent spirits in his shop to be drank upon the premises in less quantities than twenty-eight gallons, he was not subject to an indictment as a common seller. The presiding Judge declined to give these instructions, but charged the jury, that if they were satisfied that the defendant was a common victualer, he would not have any right to sell to others than those he might victual, and that the evidence that liquors in less quantities than twenty-eight gallons were kept for sale and sold in the store occupied by the defendant, in the manner stated by Pettengill, if sanctioned by the defendant, was evidence of his being a common seller, if believed, to change the burden of proof upon him, to show that the purchasers were those whom he had victualed; and that the presumption was that he was a common seller.

The jury found the defendant guilty, and he excepted to the ruling and instructions.

Codman & Fox, for Davis, contended that the witness had a positive interest, and therefore should not have been compelled to testify. 15 Maine R. 292; 7 Mass. R. 131; *Bank of Oldtown* v. *Houlton*, 21 Maine R. 501. Besides by testifying he would criminate himself.

The instruction requested should have been given. It was in the language of the Court in *State* v. *Burr*, 1 Fairf. 438.

The Instruction given was erroneous. The burthen of proof is always on the government, and is never changed to the respondent. *Commonwealth* v. *Thurlow*, 24 Pick. 374.

Bridges, Attorney General for the State, said that the case did not show, that the witness refused to testify on the ground of interest in himself. But he could have no interest. The agreement under which the interest is alleged to have arisen, was illegal and void. 1 Stark. Ev. 104.

The requested instruction was not applicable to the facts. Burr was a licensed victualer, but Davis had no license whatever.

The only objection to the instruction of the Judge is, that it was too favorable to the respondent. The case was completely made out, and the instruction permitted him to escape, erroneously, if he could have proved certain facts, which he failed to do. He was not a licensed common victualer, and therefore selling spirit to such as he victualed, would not have excused him.

The opinion of the Court was by

Whitman C. J. — This is an indictment against the defendant, for being a common retailer of spirituous liquors, without license; and comes before us upon exceptions taken, in the Court below, to the rulings and instructions of the Judge presiding there, on his trial. The first ground of exception, viz. that the Judge admitted certain citizens of Portland, where the offence was alleged to have been committed, to testify, was not insisted upon in argument, the same point having been recently decided, in another county, in conformity to the ruling of the Court on the trial in this case.

The principal reliance of the defendant's counsel, was upon the supposed error in the ruling, that True W. Pettengill should be compelled to testify. It appeared that he was employed in the retailing of spirituous liquors, in the victualing cellar of the defendant; and that his compensation was to depend on the profits of the business; and he alleged, that, if the defendant should be compelled to pay a fine and costs, it would go to lessen the net profits, and that thereby his compensation would be diminished, and it was insisted that he was not compellable to testify under such circumstances. The Judge, on the trial, ruled that he was bound to testify; and we think very properly. It would be singular indeed, if, when one man commits a crime, another, who was to participate in the profits of it, could claim, for that reason, to be exempted from testifying against him. The law admits of no such ground of objection. In the argument it was contended, that the witness should not have been compelled to testify, because his testimony would tend to criminate him; but no such position appears in the bill of exceptions to have been taken; and of course the argument in this particular was irrelevant.

The Judge was requested to instruct the jury, that, if the defendant was in the exercise of the occupation of a common victualer, he would not be amenable to the law if he sold ardent spirits to his customers. We think the Judge did right in refusing to give this instruction. The statute is general in its terms. All who take it upon them to be common sellers of spirituous liquors, without being licensed therefor, in less quantities than twenty-eight gallons at a time, are liable to the penalty, whether they take it upon themselves to be common victualers or not.

Exceptions overruled.

NATHANIEL JORDAN *versus* SAMUEL J. SYMONDS *& al.*

The lessor of the plaintiff, in an action of trespass *quare clausum*, wherein soil and freehold in the premises are pleaded by the defendant in himself, on being released from all claims under the covenants of the lease, is a competent witness for the plaintiff to disprove the title set up by the defendant.

TRESPASS *quare clausum* for breaking and entering the close of the plaintiff in Raymond, and taking hay therefrom. The defendants pleaded soil and freehold in Orsimus Symonds, one of the defendants.

S. J. Symonds was once the owner of the premises, as admitted by each party, and on March 15, 1830, mortgaged the same to the school fund in Raymond. On May 5, 1834, S. J. Symonds conveyed his right to redeem to James Jordan, who conveyed the same to Orsimus Symonds, then a minor, on Nov. 15, 1839.

The right of Samuel J. Symonds to redeem the premises was sold on execution by one of his creditors on Dec. 19, 1840, and purchased by the plaintiff. On Dec. 28, 1841, the plaintiff conveyed the premises, with other lands, to Ephraim Brown by deed of warranty. On April 19, 1842, Brown leased the premises to the plaintiff, for the term of one year, and the alleged trespass was committed during the summer of that year.

At the trial the plaintiff contended that the conveyances from S. J. Symonds to J. Jordan, and from J. Jordan to O. Symonds were fraudulent and void as to creditors, and to prove his case called Brown as a witness. He was objected to as interested, and the plaintiff released him from all claims under the covenants of the lease. The objection was renewed by the counsel for the defendants, but was overruled by SHEPLEY J. presiding at the trial, and Brown testified.

The verdict was for the plaintiffs, and the defendants excepted to the admission of Brown.

Fessenden, Deblois & Fessenden, for the defendants, said that the question in issue was, whether the land in dispute was

the soil and freehold of O. Symonds or of Brown, and that in it Brown was directly interested. He cannot be disinterested, when every word he testifies confirms him in his title. Where the judgment is to confirm the witness in the enjoyment of an interest, or to place him in the immediate possession of a right, he is not a competent witness. 1 Greenl. Ev. § 392; 9 B. & Cres. 549; 4 Esp. R. 164.

A tenant in possession is not a good witness to support his landlord's title, because it is to uphold his own possession. For a similar reason, a landlord should not testify, for it is to uphold his title. 2 Cowen, 621; 1 Strange, 632.

J. C. Woodman, for the plaintiff.

The opinion of the Court was by

WHITMAN C. J. — The exception is to the admission of a witness. The action being trespass *qua. clau.* and soil and freehold being pleaded, and issue joined thereon, the grantor of the plaintiff, who was his lessee, was offered as a witness to disprove the defence set up; and the plaintiff, the case finds, having released to him his covenants contained in his lease, the Court admitted him to testify. It is argued, that he thus came to support his own title, and therefore was an interested witness. It may be admitted that he had a strong temptation to pervert the truth; but this is always the case with witnesses, who come to support a title depending upon facts precisely like those on which they must rely for the support of their own. Yet they are not considered as within the rule excluding witnesses on account of interest. The witness, after he had been released, had no interest in the event of this particular suit. He was merely interested in the question of title, as it might arise on some other occasion. To exclude a witness he must have a present, certain and vested interest; and this must be either in the matter of the suit pending, or in the judgment to be recovered. The witness was not in either of these predicaments. He could not have been entitled to any part of the fruits of the judgment; nor could he avail himself

of the decision in any suit involving the title between himself and the defendants.

The decision in the case of *Smith* v. *Chambers*, 4 Esp. R. 164, would have been directly in point for the defendants, if the lessor had in that case been released from his covenants. He was rejected as a witness for his lessee solely upon the ground, that he was under either an express or an implied covenant of warranty as to the title. As it is, the case is virtually an authority the other way; for it is manifest, that, but for the covenants, which remained uncancelled, the decision would have been in favor of the admissibility of the witness. Indeed grantors are often admitted to support the titles of their grantees upon being released from liability upon their covenants. *Jackson, ex. dem. Mapes* v. *Frost*, 6 Johns. R. 135; *Van Hoesen* v. *Benham*, 15 Wend. 164.

The cases cited of lessees in possession of demanded premises, who were not admitted as witnesses to support the titles of their landlords thereto, afford no ground upon which to question the correctness of the ruling of the Judge at the trial. While they remained lessees in possession, they clearly had a direct interest in the event of the suits. The decisions against their landlords would have caused them to be ousted of their tenancies.

Exceptions overruled, judgment on the verdict.

OVERSEERS OF THE POOR OF THE TOWN OF WINDHAM *versus* THE CITY OF PORTLAND.

Where a physician visited a person in need of relief, and without ability to make payment therefor, residing in another town, and afterwards informed one of the overseers of the poor of the town wherein the sick man had his residence, who was authorized to act for the whole board, that he was visiting the man, stated his situation, and said that he should look to the town for payment of his bill, but the overseer made no reply; it was held, that the town was not thereby made liable, on an implied contract, to pay the bill.

And if the services of the physician were rendered before the patient had resided five years within the town, and his bill was paid by the town after the five years had elapsed, it does not amount to such furnishing of supplies as will prevent the gaining of a settlement by such residence.

THIS was a complaint under the statute, originally instituted before a justice of the peace, wherein the complainants allege, that one Samuel Rand, whose legal settlement was in Portland, was found in distress and in need of immediate relief in Windham, and prayed that the lawful settlement of Rand might be adjudged to be in Portland, and that he might be removed to that city. The complaint was dated June 22, 1842. The facts are stated at the commencement of the opinion of the Court.

Codman & Fox, argued for the complainants; and cited *Corinna* v. *Exeter*, 1 Shepl. 321; *East Sudbury* v. *Waltham*, 13 Mass. R. 460; *East Sudbury* v. *Sudbury* 12 Pick. 1; *Windsor* v. *China*, 4 Greenl. 298.

W. P. Fessenden, argued for the defendants, citing *Standish* v. *Gray*, 18 Maine R. 92, and *Miller* v. *Somerset*, 14 Mass. R. 396.

The opinion of the Court, the parties having agreed upon the record that the Judges residing in Portland should sit in the case, was drawn up by

TENNEY J. — This is a complaint in behalf of the inhabitants of the town of Windham for the removal of Samuel Rand and his family, alleged to have their settlement in the city of Portland. No removal can be adjudged, unless at the

time of the final adjudication, the settlement is established to be as alleged in the complaint.

The settlement of Samuel Rand was in Portland on the 11th of September, 1837, on which day he had supplies as a pauper from the town of Windham, where he and his family then dwelt and had their home. They continued to reside in Windham, till the 16th of September, 1842, a period of more than five years. This was sufficient to transfer their settlement from Portland to Windham, unless they had assistance as paupers within that time; and this the complainants contend was the fact.

Doctor Buzzell, an inhabitant of Gorham, visited the family as a physician on the 9th of February and the 16th and 28th of March, 1842, and furnished them with medicine; they stood in need of these services and medicine, and Rand was unable to pay therefor. On his return from the first visit, Doctor Buzzell informed one of the overseers of the poor of Windham, that he was visiting the family of Rand, told him their situation, and that he should look to the town for compensation, but he gave no notice to either of the overseers of his visits on the 16th and 28th of March, till April, when he called and obtained an order of the overseers for his bill. He never was requested by Rand to call on the town, never demanded payment of Rand, and did not inform him, that he had made the charge to the town. When the overseer was notified, the reply thereto was not recollected by the witness; but it appeared that he inquired, what was the matter with the wife of Rand, the patient visited, and about the health of the family, and that he did not forbid the Doctor from attending her at the expense of the town.

By chap. 32, § 48, of the Revised Statutes, "every town shall be held to pay any expense, which may be necessarily incurred for the relief of a pauper by any inhabitant, &c." Assuming that the expense for the relief of the family of Rand was necessarily incurred, and that a part of it at least was after a notice and request made to the overseers of the town of Windham, the individual, who furnished the supplies and

rendered the assistance was not an inhabitant of that town, and therefore the town could not be liable for the expense incurred.

The evidence relied upon by the complainants is not sufficient to imply a contract between the physician and the overseers of the town. After the first visit, he informed one of the overseers, who it appears was authorized to act for the whole board, that he was visiting Rand's family, named their situation, and that he should look to the town for payment of his bill. It does not appear that there was any word or act, signifying the consent of the overseer, that the visits should be continued at the expense of the town, and does not appear that any visit was made for more than a month subsequent thereto. No contract can be inferred from this evidence.

The physician's bill was settled and paid by the town of Windham, and it is insisted that therefore the family of Rand received supplies as paupers, which interrupted the residence of five years, so as to prevent a change of settlement. The question whether Rand and his family were paupers, in consequence of the assistance rendered by Doctor Buzzell, must depend upon the facts existing at, before and after the aid was given, connected with supplies furnished, and not upon any voluntary subsequent act of the overseers. It may have been proper, that the physician should be paid, but if he did not render the service under such circumstances as to make the town liable, no other town could be affected by the acts of the overseers after the whole expense was incurred.

Nonsuit confirmed.

EDWARD CREHORE *versus* MOSES MASON, Jr.

The statute of limitations of 1821, c. 62, was repealed by the first section of the act to repeal the statutes which were revised.

The fourth section of the latter act, however, provided, that all the provisions of the laws revised, so far as they might apply to any limitation of any contract already affected by such previous laws, should be deemed to remain in force, notwithstanding such repeal.

If a person whose home is permanently established within this State during the time, goes without the State, and there makes a contract, and a cause of action thereon accrues against him before his return home, such contract does not come within the provisions of the twenty-eighth section of the statute of limitations of the Rev. Stat. c. 146, that "the time of his absence shall not be taken as any part of the time limited for the commencement of the action."

ASSUMPSIT upon an instrument in writing of which a copy follows.

"Mem. Due Edward Crehore seven hundred and ten dollars for seventy-one shares in the Androscoggin Canal and Mill Company. Washington, Jan. 10, 1836.

"Moses Mason, Jr."

With the general issue the statute of limitations was pleaded. The replication alleged, that the note was given in the city of Washington, and District of Columbia; and that the defendant was at that time out of the State, and so remained until July, 1836, and that he was again out of the State from December, 1836, to April, 1837.

The defendant had his home and usual place of abode in Bethel, in the county of Oxford, for the last thirty years next before the trial, and he was the owner of a dwellinghouse and real and personal estate in that town. The defendant was at that time a member of the House of Representatives of the United States, and as such attended the sessions of Congress during the times mentioned in the replication, returning to his home in Bethel at the close of each session.

The writ was dated June 6, 1842.

Fessenden, Deblois and *Fessenden* argued for the plaintiff, contending that as the contract was made out of the State, and the cause of action accrued while the defendant was at

Washington, that the action was not barred by the statute of limitations. They cited and commented upon the statute of limitations and the repealing act in the Revised Statutes, and in the course of their remarks cited also *Oriental Bank* v. *Freese*, 18 Maine R. 111; *Battles* v. *Fobes*, 18 Pick. 532; *Holmes* v. *Fox*, 19 Maine R. 107; *Hopkins* v. *Benson*, 21 Maine R. 399.

Howard & G. F. Shepley insisted that the action was barred by the statute of limitations, and commented on the limitation acts of 1821, and the Revised Statutes, and also upon the repealing act in the latter. In support of the position, that a statute should not be construed to have a retrospective operation, if it will admit of any other, and that it should have no retrospective effect, they cited 7 Johns. R. 499; 2 Mod. 310; 3 Dall. 386; 2 Gall. 139; 3 N. H. R. 473; 18 Maine R. 109; 2 Greenl. 275; 12 Wheat. 213.

That statutes of limitation affect the remedy only. Story's Conf. of Laws, § 576, 577; 8 Peters, 361; 11 Pick. 36; 6 Wend. 485; 4 Cowen, 508; 2 Kent, 462.

The opinion of the Court was drawn up by

Shepley J. — This suit was commenced on June 6, 1842, upon a note or memorandum made by the defendant at Washington, in the District of Columbia, on January 10, 1836. The statute of limitations was pleaded. The former statute, c. 62, was repealed by the first section of the act to repeal the statutes, which were revised. The fourth section of the latter act provides, that the provisions of the laws, which were repealed, shall be deemed to remain in force for certain purposes. Retaining so much of the language of that section only, as may be applicable to the limitation of suits, and the idea intended to be communicated may be expressed in these words. All the provisions of the laws revised, so far as they may apply to any limitation of any contract already affected by such previous laws, shall be deemed to have remained in force, notwithstanding such repeal. If this be correct, it is not perceived, that the former statute would continue to be applicable to this con-

tract; for it had not been "already affected" by it. The contract, at the time of the revision of the statutes, remained wholly unaffected, the right and the remedy remaining complete and perfect. On a former occasion it was stated, that the design of the revision was, to substitute the revised enactments for the acts repealed, except where an explicit provision was made to the contrary. And that there could be no constitutional objection to their operation upon the remedies provided by law for enforcing the performance of contracts. *Morse* v. *Rice*, 8 Shepl. 53.

This suit is barred by the provisions of the Revised Statutes, c. 146, § 1, unless, as the counsel for the plaintiff contend, it is exempted from the operation of those provisions by being brought within the provisions of the twenty-eighth section of the same chapter, by the facts agreed in the case. Are the words of the first clause of that section, "if at the time, when any cause of action mentioned in this chapter shall accrue against any person, he shall be out of the State, the action may be commenced within the time herein limited, after such person shall come into the State," to receive a literal construction without reference to the latter clause of the same section, which provides, "and if after any cause of action shall have accrued, the person against whom it shall have accrued, shall be absent from and reside without the State, the time of his absence shall not be taken as any part of the time limited for the commencement of the action?" If the construction should be, that the mere fact, that a person having his domicil established within the State was absent from it for a few days or weeks, when the cause of action accrued, would prevent the statute from commencing to run until after his return into the State, the effect of it would be great inconvenience and expensive litigation. Under such a construction, whenever persons residing within the State, and being without it, should make contracts, on which the right of action would instantly accrue, the statute of limitations would commence to run on their return into the State. And each case, after the lapse of six years or more, might present a contest upon testimony be-

fore a jury to determine, on what day the person, who had made such a contract, first came within the limits of the State. And when the citizens of this State happen to be absent from it, when their contracts made payable after a certain time shall become due, the effect might be the same. It is scarcely credible, that such a troublesome and expensive system of litigation could have been intentionally introduced. And there could be no occasion for it to protect the rights of the holders of the contracts. For by our laws, they would commence suits against persons residing within the State, although absent from it, without leaving attachable property within it. Doubtless the mischief intended to be provided for was, that the statute would in certain cases commence running, while the holders of contracts could not commence suits upon them, or could not do it without being subjected to the inconvenience of doing it in another State. And although suits might be commenced against persons residing out of the State and having attachable property within it, yet it might in many cases be doubtful, whether such property could be safely attached, or whether its existence would become known to the party. And if holders, in such cases, were required to commence suits to preserve their rights, they might be subjected to loss or litigation. And the intention appears to have been to relieve them in such cases from the consequences, which might otherwise have resulted from their neglect to commence them. By considering both clauses of the section in connexion, and the mischiefs, for which a remedy was to be provided, and the mode in which it was proposed to be accomplished, there will remain little of doubt, that the former clause was designed to apply only to cases, in which the cause of action shall accrue against a person, and he shall at the time be residing out of the State.

The defendant having his residence permanently established within the State at the time, when the cause of action accrued and ever since, the plaintiff cannot maintain his action by virtue of the provisions of the twenty-eighth section, although the defendant was out of the State, when the cause of action accrued. *A nonsuit is to be entered.*

ELIZA L. THAYER *& al. versus* SAMUEL M'LELLAN.

The demandant in a writ of entry can recover only on the strength of his own title, and not by the failure of title in the tenant.

The owner of the premises will not become disseized thereof by a survey, allotment and conveyance thereof, and by recording the deed, without any open occupation or improvement of any part of the estate purporting to be conveyed by the deed.

THE facts in this case are stated in the opinion of the Court,

Adams argued for the demandants. In support of the position, that a conveyance of one half of the lane created a tenancy in common therein, he cited *Adams* v. *Frothingham*, 3 Mass. R. 352.

That the conveyance under which the tenant claims the lane, is void as to that part of it, being upon a contingency. *Welsh* v. *Foster*, 12 Mass. R. 93.

That nothing passed to the tenant by his deed, because his grantor was at that time disseized thereof. *Small* v. *Procter*, 15 Mass. R. 495; *Delesdernier* v. *Mowry*, 20 Maine R. 150; *French* v. *Rollins*, 21 Maine R. 372.

That the tenant is estopped to deny that there is such lane. *Parker* v. *Smith*, 17 Mass. R. 413.

The grantor of the tenant, and those claiming under him, are estopped from setting up any title to this land, by standing by and seeing it sold under Robinson's title, without giving any notice of claim thereto. *Hatch* v. *Kimball*, 16 Maine R. 146.

W. P. Fessenden, for the tenant, said that the demandants must show title in themselves, or they cannot prevail. This has not been done. The conveyances give them no title whatever. Nor do the facts show, that they had acquired title by disseizin. *Little* v. *Libby*, 2 Greenl. 242.

The opinion of the Court was drawn up by

SHEPLEY J. — This is a writ of entry brought to recover a lot of land in Portland, numbered five on a plan of the Robinson estate, made by Edward Russel. The tenant disclaims

all but a small strip of land hereafter noticed. The late Arthur Mc'Lellan appears to have been formerly the owner of a tract of land on the southwesterly side of Park then called Ann Street, and to have caused a part of it to be surveyed into four lots bounded northeasterly by the street, three rods each, and extending southwesterly eight and a half rods, and bounded on that end by a lane of the width of one rod. On the southeasterly side of the tract another lane of like width was extended from the street to the southwesterly line of the tract. That part of the tract not included in the four lots, or in the lanes, was situated southwesterly of the rear line of those lots, and was separated from them by the lane first mentioned, and was bounded northeasterly by it twelve rods, and southeasterly by the other lane three rods. This lot was numbered forty, and with the two most northerly lots adjoining Ann street, numbered twenty-nine and thirty, was conveyed on July 8, 1806, to Thomas Robinson, and described as follows. "Also lot number forty, bounded in front by a lane of one rod in width, which runs in the rear of the above named lots, on Ann street, and extending along the said lane twelve rods, and being in depth three rods." The most southerly of the four lots adjoining Ann street was conveyed to one Elkinson, from whom the tenant derives his title. It was described as follows. "Beginning at a stake standing on the southwesterly side of Ann street nine rods northwesterly from York street, thence running northwesterly adjoining Ann street three rods to a lot formerly owned by Nathaniel F. Fosdick, which he purchased of Arthur Mc'Lellan, thence southwesterly at right angles with Ann street adjoining said Fosdick lot eight rods and a half rod to a lane of one rod wide, thence southeasterly adjoining said lane three rods, thence northeasterly adjoining another lane of one rod wide eight rods and one half to the bounds first begun at, together with one half part of said lanes adjoining said lot, provided the lanes shall hereafter be discontinued." About ten years before this suit was commenced the tenant enclosed with his lot the northeasterly half of the lane in the rear of and adjoining it. In the year

1832, the estate of Robinson, including lots numbered twenty-nine, thirty and forty, was surveyed into lots by a different allotment, and the lots were numbered on a plan made by Edward Russel. The lane in the rear of the four lots adjoining Ann street was included as being a part of the estate of Robinson. The southeasterly part of lot numbered forty, and the lane between the same and the lot of the tenant, was designated on Russel's plan as lot number five, and by that description was sold to the ancestor of the demandants. They can recover only on the strength of their own, not on the failure of title in the tenant. And it may not be necessary to inquire, whether the tenant has or has not acquired any title. If the demandants have any title, it must have been acquired by the purchase of lot numbered five, or by disseizin. The half of the lane demanded is not the southwesterly half adjoining lot numbered forty, but the northeasterly half adjoining the lot of the tenant, and Robinson could not have acquired any title to that half by the conveyance of lot numbered forty as bounded on the lane. And when it was included as a part of the Robinson estate by the survey and plan of Russel, it did not constitute any part of that estate. It was included in the conveyances made to the ancestor of the demandants on June 21, 1832, but he would not thereby obtain any legal title to it. Nor does it appear, that the demandants, or those under whom they claim, have acquired any title by disseisin. There is no evidence of any attempt on their part to claim or to occupy it prior to the year 1832. The only acts named in the agreed statement, from which a disseisin could be inferred, are the survey, allotment, and conveyance of it, as a part of the Robinson estate. If the grantee, or his heirs or assignees, had entered upon any part of the land conveyed as lot numbered five, the title deeds having been recorded, and had continued openly to occupy and improve it, the owner of the premises would have been thereby disseised. But the agreed statement says "the residue of said lot number five, as described on Russel's plan, has never been taken open and visible possession of, but has laid open and unenclosed from

the time of its conveyance to demandants' ancestor to the present." The demandants fail therefore to exhibit any valid title either by disseisin or conveyance.

Judgment as on a nonsuit.

INHABITANTS OF BRIDGTON *versus* HUGH BENNETT.

The statement of an attorney that he has been retained by a corporation, is received as sufficient evidence of his employment; but this does not authorize a person to maintain a suit in the name of the corporation, when it is instituted and conducted without the authority of such corporation.

Under the Rev. Stat. (c. 97) "any party aggrieved by any opinion, direction, or judgment of the District Court in any matter of law, in a cause not otherwise appealable, may allege exceptions to the same," as well when the suit is by statute process, such as a complaint under Rev. Stat. c. 32, § 7, to compel certain kindred of a pauper to contribute towards his support, as where it is according to the course of the common law.

Exceptions may be taken to a decision of the District Court, upon the right of a town to maintain a suit upon certain testimony.

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

This was a complaint under Rev. Stat. c. 32, for the purpose of compelling Hugh Bennett to support his father, an alleged pauper of Bridgton.

The counsel for the respondent called for the exhibition of the authority of the counsel to appear for the town, and contended that the complaint was improperly brought without authority of the town, and ought to be dismissed.

On May 13, 1842, Rufus Gibbs of Bridgton entered into a contract with the overseers of Bridgton "to take charge of and support all the persons of whatever age, supported in whole or in part by the said town of Bridgton," for the term of one year, in a particular manner pointed out; and "promises and agrees to clear the town for the said term of one year from all pauper expense, both on account of such paupers as now receive or require aid, and of such as may hereafter become paupers, and to hold the town wholly harmless from all

and every kind of expense arising from or on account of paupers, whether within the town or without, for the term aforesaid," with the exception of one insane person named. It was agreed on the part of the town to pay Gibbs a sum of money therefor, "said Gibbs, or his assigns, to have the entire benefit of the services and labor of said paupers, and of such furniture as they or any of them possess, to be returned at the end of the term." There was nothing said in the agreement with respect to compelling others, whether towns or individuals, to support paupers, or in relation to the recovery of expenses incurred for the support of paupers. The exceptions state, that "it did not appear that there was any vote of said town in relation to said complaint, nor that it was brought by the selectmen or overseers of the poor of Bridgton, nor by the authority of the agent of said town; but it did appear that the complaint was commenced by said Rufus Gibbs for his own benefit."

The counsel for the respondent objected, that the complaint could not be maintained. The presiding Judge decided, that there was sufficient authority shown, and proceeded to hear and try the complaint. Judgment was rendered for the complainants, "that the respondent pay the sum of sixty dollars up to the present time," Oct. 1843; and the respondent filed exceptions to the rulings and judgment.

Howard & G. F. Shepley, for the respondent, contended that the complaint was not commenced for the use or benefit of the town, nor by its authority, and could not therefore be maintained for that reason. It was but the suit of Gibbs, for his own benefit, without any right under the town. Towns only can bring such complaints. Rev. Stat. c. 32, § 7; *Salem* v. *Andover*, 3 Mass. R. 436; *Sayward* v. *Alfred*, 5 Mass. R. 244.

When this complaint was made, Gibbs had been at no expense for the support of the alleged pauper, and the damages were estimated to a time beyond the expiration of his year. Gibbs could not prosecute this suit and recover on his own

account by virtue of his contract. And the contract gives him no advantage of any right the town might have to recover of others.

H. Carter, for the complainants, considered that the only question to be decided was this; will the Court reverse the decision of the District Court, allowing of the appearance of the plaintiffs' attorney?

The complaint is by the town, and not by Gibbs. The authority of the attorney to appear for the town was called for, and the District Judge, after hearing evidence, permitted the counsel to appear for the plaintiffs. This is a discretionary power in deciding upon a matter of fact, and this Court will not interfere. Rule 5 of the District Court; *Penobscot Boom Corp.* v. *Lamson*, 16 Maine R. 224.

The opinion of the majority of the Court, WHITMAN C. J. dissenting, was drawn up by

SHEPLEY J. — The statement of an attorney, that he has been retained by a corporation, is received as sufficient evidence of his employment. This, however, does not authorize a person to maintain a suit in the name of a corporation, when it appears to have been instituted without its authority. The bill of exceptions states, that Rufus Gibbs on May 13, 1842, entered into a contract with the overseers of the poor of the town of Bridgton to save the town harmless from all expense on account of paupers having a legal settlement in that town for one year from that date; and that this complaint "was commenced by him for his own benefit." And that "it did not appear, that there was any vote of said town in relation to said complaint, nor that it was brought by the selectmen or overseers of the poor of Bridgton, nor by authority of the agent of said town."

The only ground, upon which Gibbs could claim to maintain this process against the respondent, would be, that the benefit, which might be derived from a judgment against him had been assigned to Gibbs by his contract made with the overseers of the poor. By that contract he was entitled to

the benefit of any service, which could be performed by the paupers; to the use of such furniture, as they might possess; and to a definite sum of money to be paid quarterly. It did not authorize him to institute suits in the name of the town to recover compensation from the paupers for their support, in case they or any of them were or should become able to repay the amount expended for their benefit. Nor did it authorize him to institute suits against their relatives to compel them, if of sufficient ability, to contribute to their support. Nor does he appear to have been entitled by his contract to any benefit, which the town might derive from such sources.

This complaint therefore appears to have been instituted under a misapprehension of his rights under that contract; and without any authority to institute it for the benefit of the town.

A question has arisen, since this case has been under consideration, whether it has been presented in such a manner, as to enable this Court to take cognizance of it.

This question should not be determined by the statute provisions, by which a bill of exceptions was first allowed; or by the subsequent provisions of statutes of other states. The decisions respecting their construction may be of use, so far as a similarity of language and provision may be found in those statutes and in ours, and no further. The effect and use of a bill of exceptions must be determined by our own statute provisions, which are in some respects quite different from those of ancient statutes upon the same subject. Formerly a bill of exceptions was allowed only in a civil action, in which the proceedings were according to the course of the common law. Its use was to lay the foundation for a writ of error. By our statutes it is alike applicable in civil and in criminal process and proceedings. Its use is different. It does not lay the foundation for a writ of error, but arrests all further proceedings in the district court, after the cause is prepared for judgment, that it may be transferred to the superior tribunal. No writ of error can be maintained in such a case; because no judgment can be rendered by the District Court. c. 97, §

18, 21; c. 172, § 40. There does not appear to be any reason therefore to conclude, that the legislature in this State could have designed to limit the use of the bill of exceptions to causes, in which the proceedings were according to the course of the common law, from a consideration, that a writ of error can be maintained only in such cases. It is certainly undesirable that our statutes should receive such a construction, as would deprive a party of all remedy whatever for any error occurring in the District Courts, in those numerous and often very important cases, in which the proceedings are not according to the course of the common law, when the errors would not be exhibited by the record. If exceptions cannot be legally taken in the District Court, and sustained in this Court, for matters arising in that Court in such causes, which matters would not be exhibited by an inspection of the record, such must be the rusult. For the writ of *certiorari* can only introduce the record of an inferior tribunal, and that will not exhibit the testimony upon which the judgment was rendered, or enable this Court to determine, whether it was legal or illegal, or whether it was sufficient or insufficient, or whether the law was correctly or incorrectly administered in the most numerous class of such cases. A construction, which would have such an effect upon the rights of parties, should be adopted only from necessity, and because the language would admit of no other rational interpretation. It is difficult to conceive, that a Court, which should adopt it by a strained construction of the language to make it conform to decisions made upon other statutes, containing language similar in many respects, but used under different circumstances, would not be chargeable with the error of preferring the symmetry of the law to its administration in a manner best suited to afford and secure to parties a full examination and fair decision of their rights. Especially, when a literal construction of the language would afford the parties an adequate remedy without producing any serious difficulty or inconvenience. The statute should be found to contain very strong language to authorize a Court to come to the conclusion, that it was the intention of the leg-

islature to deprive a party of all remedy in the class of cases before alluded to. It appears to be admitted, that none such is to be found in our statute; and that a literal interpretation of their language would entitle a party to take exceptions in that class of cases. That it would do so, appears to be too plain to require or to admit of an extended argument. By the eighteenth section of chapter ninety-seven, an aggrieved party is authorized to except to "any opinion, direction, or judgment, of the District Court in any matter of law in a cause not otherwise appealable." It will not be denied, that the term cause is sufficiently comprehensive to include suits by statute process. A term more comprehensive could not have been readily selected. That the word action contained in the nineteenth section was used to include the same causes, and without any intention to restrict or limit the language used in the eighteenth, is shown by the use of the word cause again in the nineteeeth with reference to the same description of suits. But if the word action could be considered as the efficient one granting the right, it would not admit of an interpretation, which would limit it to civil actions, in which the proceedings were according to the course of the common law. An action is but the legal demand of a right without regard to the form of the proceedings, by which that right may be enforced. Or as Bracton defines it. *Actio nihil aliud est quam jus prosequendi in judicio quod alicui debetur.* When there is an intention to limit its signification and apply it only to include common law and civil suits, it becomes necessary to use some other word for that purpose with it, such as personal, real, or mixed.

There are no decisions of this Court, which require a departure from the literal interpretation. The case *Sayward* v. *Emery*, 1 Greenl. 291, only decided, that a bill of exceptions could not be taken by virtue of the statute of 1817, to a judgment rendered upon a general demurrer to a plea. And the remarks made by the members of the Court are only applicable to that statute. The language used in the act passed Feb. 4, 1822, with reference to a bill of exceptions, and that used in

the Rev. Stat. is not precisely the same. But no question arose or was decided respecting its construction, in the case of *Dennett* v. *Kneeland*, 6 Greenl. 460. That case was brought before the Court by a writ of *certiorari* presenting the record only. Whatever may be the true construction of the statutes, that will continue to be an appropriate remedy in such cases, when there is no desire to present any thing to this Court dehors the record, and when no exceptions are allowed.

In the case of *Tillson* v. *Bowley*, 8 Greenl. 163, no question arose or was decided respecting a construction of the statute, or the proper mode of presenting the case. It appears however, that the case was either incorrectly presented or acted upon. For several questions, which could not have been presented by the record without the aid of a bill of exceptions, were thus presented and decided, after the record had been presented by a writ of *certiorari*. If no bill of exceptions could be legally allowed under that statute in cases, in which the proceedings were not according to the course of the common law, those exceptions were unauthorized, and the matters thereby presented constituted no part of the record. If those exceptions were properly allowed, the statute required, that further proceedings should have been stayed in the Court of Common Pleas, and that the case should have been presented on the exceptions. This did not affect the decision upon the merits. The case of *Loring* v. *O'Donnel*, 3 Fairf. 27, was heard upon a petition for a writ of *certiorari*. Nothing was presented dehors the record, which appears to have been made up from the pleadings and a demurrer to them. The case of *Endicott, pet.* 24 Pick. 339, was decided upon a construction of the statute of Massachusetts, passed in the year 1820. The reason assigned for the conclusion, that the right of alleging exceptions was "confined to cases where the proceedings are according to the course of the common law," is stated to have been, that "in such cases only has this Court the power to re-try the action." And that would seem to have been a most important, if not a conclusive, reason for such a construction. But no such reason can be assigned for such a

construction of our statute; for the nineteenth section provides, that "the Supreme Court shall have cognizance of the cause, and determine the same, as they may actions originally commenced in that Court, and render judgment, *or grant a new trial as in such cases.* The right therefore to try the cause anew, should it be necessary, and to render the proper judgment, whatever that may be, is as fully provided for here, as in any case, that can come before the Court.

There are several decided cases in this State, in which bills of exceptions, allowed under our statutes in cases when the proceedings were not according to the course of the common law, have been entertained and acted upon in this Court. And our existing statute cannot now receive a different construction without overruling them.

The cases of *Keniston* v. *Rowe*, 16 Maine R. 38; *Bradford* v. *Paul*, 18 Maine R. 30; *Woodward* v. *Shaw*, *id.* 304; *Low* v. *Mitchell*, *id.* 372, were presented by bills of exceptions exhibiting matters, which would not have appeared otherwise on the record, and which could not have been properly presented in any other mode. If they could not have been presented in that manner, the parties could not have obtained a decision upon the questions presented by them in this Court.

The cases of *Burrill* v. *Martin*, 3 Fairf. 345; *Jones* v. *Pierce*, 16 Maine R. 411; *Seidensparger* v. *Spear*, 17 Maine R. 123; *Rackley* v. *Sprague*, *id.* 281; *Barnard* v. *Libbey*, decided in the County of Cumberland in 1843; were founded on complaints for flowing lands, and were presented by bills of exceptions. A construction of the statutes, which would have prevented the allowance of bills of exceptions in those cases, would have occasioned consequences like those before named. Many of these cases had been decided before the statutes, by which the bills of exceptions were allowed and entertained, were re-enacted in the revised code; and this Court has decided, that when a statute is thus re-enacted, the judicial construction is presumed to have been adopted by the legislature.

This Court is not deprived of its jurisdiction and right to entertain and decide this case by the provisions of the statute

c. 32. It is true, that the District Court, by that statute, has exclusively original jurisdiction of it. But this is true also in many cases, which may be legally transferred to this Court by exceptions. The rule is well established, which authorizes a Court, when it has rightfully obtained jurisdiction of a cause, to exercise it in the determination of all incidental matters, that may arise out of it. This Court may therefore make any further order respecting this matter according to the provisions of the ninth and twelfth sections. There is, undoubtedly, conferred upon the District Court by the seventh and eighth sections, an authority to perform certain acts named in the exercise of a judicial discretion. And no exceptions can be taken to its exercise, because there would not be a direction or judgment "in any matter of law." The statute provides for exceptions only, when the Court is required to proceed according to established laws; and not, when it acts upon its own judicial discretion; as in the acceptance or rejection of reports of referees; in the grant or refusal of new trials upon petition, and of continuances upon motion. If the exceptions in this case had been taken to the exercise of the discretion conferred by the seventh and eighth sections, they could not have been sustained. But they were taken to the decision of the Court upon the right of the town to maintain the process on the testimony introduced; and upon that right the Court was obliged to decide according to the rules of law.

The exceptions are sustained; and if no further testimony can be adduced showing, that the town prosecutes the complaint for its own benefit, it must be dismissed.

A dissenting opinion was delivered by

WHITMAN C. J. — The first question to be considered is, will exceptions lie in a case of this kind. If not, we cannot be at liberty to contravene the rules of law by entertaining them. Exceptions, in reference to matters not appearing of record, were first introduced by the statute of Westminster 2. (13 Ed. 1, ch. 31.) This statute authorized the taking of exceptions in all actions, whether real, personal or mixed, 2 Inst.

427; and to all pleas dilatory, peremptory, prayers to be received, oyer of records and deeds, challenge of jurors, and any material evidence offered, and overruled. *Id.* and 1 Ld. Raym. 486. These bills of exceptions were tacked to the record, and laid the foundation for a writ of error. But they were not considered as allowable, except in proceedings had according to the course of the common law; for error would not lie except in such cases. *Groenvelt* v. *Burwell*, 1 Salk. 263; *Melvin* v. *Bridge*, 3 Mass. R. 305. In a proceeding under that statute a judgment could only be reversed or affirmed. If reversed, the plaintiff therein, to obtain redress, must begin *de novo*. It was certainly desirable that this inconvenience should be removed.

Accordingly a statute was enacted (ch. 185 of 1817,) in Massachusetts, Maine being then a part of that State, that any party, thinking himself aggrieved by any opinion, direction or judgment of any Court of Common Pleas in any matter of law, may allege exceptions to the same; and that the Supreme Judicial Court should "have cognizance thereof, and consider and determine the same action in the same manner as they are authorized to do in respect to actions of law reserved in any of the modes prescribed by law, by any one Justice of the Supreme Judicial Court; and shall render judgment and issue execution thereon; or may grant a new trial at the bar of said Court as law and justice shall require."

This language was very comprehensive, and ordinarily would seem to be sufficient to embrace every error supposed to be committed by that Court. It was not limited or restricted by the use of the words "action" or "cause of action," which if used, might seem to imply, that it should be confined to a common law proceeding; yet the generality of the operation has not been adjudged to be co-extensive with the literal import of the enactment. It not unfrequently happens that general terms used by the Legislature, must be taken in a comparatively limited sense. If it were not so, much mischief would sometimes ensue. Cases will arise, which will come within the letter of an enactment, and yet be foreign to

what could have been in the contemplation of its authors. Various matters, decided in the Court of Common Pleas, have been held not to come within the purview of this statute. One class of which consisted of matters depending upon the exercise of powers confided necessarily to its discretion. *Reynard* v. *Becknell*, 4 Pick. 302; *Whitney* v. *Thayer*, 5 ib. 528; *Gray* v. *Bridge*, 11 ib. 189. Another class consisted of such actions as were manifestly intended to be confined to the jurisdiction of that court. *Dean* v. *Dean*, 2 Pick. 25; *Gile* v. *Moore*, ib. 386.

Mr. Justice Preble, in *Sayward* v. *Emery*, 1 Greenl. 291, says, the filing of summary exceptions "should be limited to cases where exceptions may be filed by our common law." Mr. C. J. Mellen, in the same case, expressed his concurrence in the view taken by his associate. The same statutory provision was re-enacted in Massachusetts, in 1820, c. 79, § 5; in reference to which Mr. Justice Morton, in delivering the opinion of the Court, in *Endicott, pet'r.* &c. 24 Pick. 339, admits, that the expressions of the statute are broad enough to cover all cases; yet he says, "we are of opinion that the right of alleging exceptions is confined to cases, where the proceedings are according to the course of the common law; for in such cases only has this Court power to re-try the action."

Since the separation of this State from Massachusetts the same enactment, and substantially if not precisely in the same terms, has been several times repeated. And in our Revised Statutes, c. 97, § 18, the language is, "any party aggrieved by any opinion, direction or judgment of the District Court, in any matter of law, in a cause not otherwise appealable, may allege exceptions." And if exceptions are sustained this Court (§ 19) are to "have cognizance of the same, as they may actions originally commenced" therein. This delegation of power, in this particular, is believed to be identical in substance with that contained in the previous statutes on the same subject. The word "cause," in § 18, was doubtless used as a synonym with the word "action," in § 19. The Legisla-

ture are not supposed to be very precise or technical in the use of language. The subject matter seems to show, that in the use of these different terms they had the same thing in view.

The Revised Statutes have been enacted since the explanations in the cases cited had occurred; and the sections first quoted must be believed to have been enacted with a full understanding of the expositions, which had been made; and the makers of the law in question must be regarded as being content therewith. If not so, it is certainly inexplicable, that the enactment should have been so continued, without variation or further explanatory provision. It is believed, that it is commonly, if not invariably, considered, when a statute is in the same terms re-enacted, after judicial construction has been expressly given to it, that the construction is adopted with it.

Whenever the District Court may be vested with special powers, to be exercised without the intervention of a jury, and its proceedings therein are not in any event to be according to the course of the common law, and this Court is not specially authorised to execute the same powers, summary exceptions will not lie; for this Court, in such case, upon sustaining exceptions, could not proceed to trial as if the prosecution had been originally commenced in it. In case of an application, like the one preferred in this instance, the powers delegated to the District Court are to be exercised by it in a good measure according to its discretion. No trial by jury, according to the course of the common law, can be had in reference to any part of the proceeding. By § 7 of the statute upon which this process is founded, that Court, *in the county* in which any of such kindred to be charged shall reside," on due hearing, may apportion and assess "such sum as *they* shall judge reasonable," with costs, to be apportioned *at their discretion* among the respondents. By § 8, "*the said Court* may further assess and apportion upon the said kindred, such weekly sum for the future as *they* shall judge sufficient," &c. By § 9, "the *said Court*, may further order with whom of such kindred, that may desire it, such pauper

may live, and be relieved; and for such time with any or either as *they* shall judge proper." And by § 12, "*the said Court*, may take further order, from time to time in the premises, upon application from any party interested," &c. These powers are all special, and particularly confined to the District Court. The Supreme Judicial Court is not intrusted with any one of them; and they are inappropriate to its general common law jurisdiction and modes of proceeding.

In the case, *ex parte Pierce*, 5 Greenl. 324, in which an appeal was claimed from the decision of the Court of Common Pleas, which this Court refused to sustain, it was, in addition to another reason for refusing to sustain it, said, "that in this case moreover the statute contemplated further proceedings, from time to time, in the Court of Common Pleas, to increase or diminish the amount assessed, for which purpose it was necessary that the record should remain in that Court."

By § 16, of the same act, the overseers of the poor are authorized to apply to the District Court, "in the county where their town is," in reference to paupers bound out as apprentices or servants, against the master of such apprentice or servant, alleging abuse, ill-treatment or neglect; and the Court thereupon may discharge the person so bound or not; and award costs at their discretion "as the complainants may appear to be justified by probable cause or not." Again; — by § 23 and 25, further powers of a similar character are conferred upon the District Court. In none of these instances could it ever have been intended, that exceptions should be taken so as to bring the applications into this Court, to be here proceeded in: and yet no reason is perceived why they should stand on a different footing from the cases before us.

In *Gile* v. *Moore*, 2 Pick. 306, it was held that summary exceptions would not lie in a process of bastardy; and in *Dean* v. *Dean*, *ibid.* 25, that they did not lie in the case of the acceptance or rejection of a report of referees, on a submission entered into before a justice of the peace. These two decisions were doubtless based upon the principle, that the proceedings in them were not according to the course of the

common law; and also upon the position, that powers were conferred, particularly in the former, expressly to be executed by the Court of Common Pleas. They were, however, made in Massachusetts, since this State was separated from it, and are, therefore, not authoritative with us, although entitled to very great respect. But the law here was understood to be in conformity to them, until lately; and it may not be quite clear, that, upon the question being directly made to the Court, it would not now be so considered. Anterior to 1839, the process by *certiorari* had been resorted to, uniformly, to bring questions in a process of bastardy before this Court. *Dennett* v. *Kneeland*, 6 Greenl. 460; *Tilson* v. *Rawley*, 8 *id.* 163; *Loring* v. *O'Donnel*, 12 Maine R. 27. And in *Cook, pet. &c.* 15 Pick. 234, the Court say expressly, that where a writ of error will lie *certiorari* will not; and this is believed to be an undeniable proposition. A writ of error is suable at the pleasure of the party of record; but a *certiorari* only at the discretion of the Court. A party having a right to sue out a writ of his own mere motion, can have no right to apply to the Court for a writ, grantable only at their discretion, to accomplish one and the same object.

But in 1839, *Kenniston & ux.* v. *Rowe*, 16 Maine R. 38; and in 1840, in *Bradford* v. *Paul*, 18 *id.* 30; *Woodward* v. *Shaw*, *id.* 304; *Low* v. *Mitchell*, *id.* 372, all processes in bastardy, exceptions were taken and allowed; and the causes were brought into this Court. In neither does it appear, that it occurred to the counsel or the Court to consider of the propriety of such a procedure. The exceptions, however, in each case were overruled; and so it became less material to consider whether exceptions in such cases should be entertained or dismissed; and the Court were thereby relieved from considering what it would have become indispensable that they should do in case the exceptions were sustained; and how they should have disposed of the provisions, expressly requiring the proceedings, till the case had proceeded to judgment, to be in the Court below; and that the verdict, (c 131, § 10) there returned should be final. There has, therefore,

been no decision upon a question raised, and directly presented to the Court, that exceptions could with propriety be allowed in such a case. And until such a question shall be made, so as to require a decision directly upon it, we may well abstain from any opinion upon the point. One thing we must admit, however, which is, that a *certiorari* could not with propriety have been allowed in the former cases, or that exceptions were erroneously allowed in the latter.

If it should be supposed, that the cases of the flowage of lands, under the act of 1821, c. 45, in which exceptions in several instances have been allowed in the Court below, and entertained in this Court, were analogous to the case at bar, it may well be replied, that the trial by jury, which is a common law proceeding, is there provided for, and an appeal expressly allowed from a decision in such cases, under certain circumstances, to this Court; so that a common law proceeding is contemplated therein; and, when an appeal was allowable, it would bring with it every subsequent incident, which could take place under the process. There was in that act no indication, as in the one on which the case at bar is founded, that all the proceedings were to be confined to the Court below; and to a trial therein without a jury.

Besides; in two of those cases decided in this Court, viz. *Burrell* v. *Morton*, 3 Fairf. 345; and *Jones* v. *Pierce*, 16 Maine R. 411, the exceptions, as were those in the processes in bastardy, were overruled; and without any allusion to the question, as to whether they should have been allowed or not; and without reference to the decisions in Massachusetts, while we were a part of that State; viz. in *Vandusen* v. *Comstock*, 3 Mass. R. 184; *Lowell* v. *Sprague*, 6 *id.* 398; and *Commonwealth* v. *Ellis*, 11 *id.* 462, in which a process by *certiorari* was adopted for a similar purpose. And in two others, viz. *Seidensparger* v. *Spear*, 17 Maine R. 123; and *Rackley* v. *Sprague*, *id.* 281, in this Court, exceptions had been taken, in reference to matters, in regard to which the statute clearly contemplates that this Court should have cognizance; and it is not apparent why the cases should not have come here by

appeal; and why, for that reason, no exceptions should have been allowed.

On the whole, it seems to me very clear, that the exceptions in the case before us should be dismissed.

NATHAN HARRIS *versus* THOMAS SEAL *& al.*

Referees being judges agreed upon by the parties, their mere errors in judgment afford, ordinarily, no ground for a recommitment of their doings.

And if the errors complained of originated from oversight or accident, they should be so alleged by the party objecting, and distinctly pointed out; and unless this is done, the District Court may well refuse to go into evidence concerning them.

By the Rev. St. c. 38, the decision of a District Judge, accepting or rejecting a report of referees, are subject to revision in this Court by exceptions.

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

This was an award under a rule of reference, entered into before a justice of the peace pursuant to the provisions of the Revised Statutes.

The defendants objected to the acceptance of the award, and offered to prove that great and manifest errors were made by the referee, by which the defendants were greatly damnified, and that various items of claims proved by them against the plaintiff were not allowed by him as evidence, that his opinion and judgment were under the influence of prejudice or partiality, but they expressly disclaimed any imputation of corruption or general want of integrity. This evidence the Judge refused to admit, and ruled, that the report could be neither recommitted or rejected for either of the reasons the defendants moved, unless the referee should testify that he had become satisfied that errors or mistakes existed in his award which rendered a revision of it necessary. The report had been once before recommitted on motion of the defendants.

To the foregoing rulings and directions of the Judge the defendants excepted.

Codman & Fox, for the defendants, said that this was not a submission at common law, or by rule of Court, but under the Rev. St. c. 138, and was not binding and conclusive upon the parties until judgment was duly entered upon the report according to law. The Court may accept, reject, or recommit the report. By § 13 it is provided, that either party may file exceptions to any decision of the District Court accepting or rejecting a report, and that the Supreme Judicial Court, upon a hearing of the cause, may give such judgment as the District Court ought to have rendered. We contend, that the evidence offered shew a good cause for recommitting the report. The report is, in fact, outrageously oppressive and unjust upon the defendants. And whatever may have been the general character of the referee for integrity, if his judgment in this particular case was influenced by partiality or prejudice, the report should be rejected, or at least recommitted, that the facts may be laid before the Court. *North Yarmouth* v. *Cumberland*, 6 Greenl. 25.

D. Hayes, for the plaintiff.

An award will not be set aside, unless fraud, clear mistake, corruption, or want of power is clearly made to appear. *Brown* v. *Bellows*, 4 Pick. 179; *Spear* v. *Hooper*, 22 Pick. 145; *Dean* v. *Coffin*, 17 Maine R. 52; *Tyler* v. *Dyer*, 13 Maine R. 41.

An award will not be set aside, unless some illegality appear on the face of the award itself. 8 Com. L. R. 265; 17 Com. L. R. 129.

An award is to be construed liberally. *Spear* v. *Hooper*, 22 Pick. 145.

The question as to recommitment, acceptance or rejection of an award is one of discretion, and not of law, and is not subject to be brought to this Court by exceptions. *Walker* v. *Sanborn*, 8 Greenl. 288, *Cutler* v. *Grover*, 15 Maine R. 159; *Clapp* v. *Hanson*, 15 Maine R. 345.

An award is the decision of Judges of the parties' own choosing, and has all the conclusiveness of other judgments. 16 Maine R. 380; 17 Maine R. 173.

Mere intimations, that referees have conducted fraudulently, will not be regarded. Objections to referees should be made before proceeding with the hearing; and are waived by proceeding without objection. 10 Pick. 275; 18 Maine R. 372; 20 Maine R. 98.

The opinion of the Court was drawn up by

WHITMAN C. J. — The parties entered into a rule of reference before a justice of the peace, as provided by the Revised Statutes, c. 138. The referee agreed upon made his report, which was presented for acceptance in the District Court, where objections were made by the defendants to its acceptance, which were overruled; and the case is now before us upon exceptions taken to the decision.

The District Court is authorized to accept, reject or recommit such a report. In the case of *Walker* v. *Sanborn*, 8 Greenl. 288, it is said, that a motion to recommit a report of referees, under a rule of Court, is addressed to the discretion of the Court; and no doubt a report of referees, under a rule entered into before a justice of the peace, must be regarded as in a similar predicament. If a motion to recommit, in the one case, is addressed to the discretion of the Court, it must be equally so in the other. It is similar to a motion for a new trial at common law, in granting which a Court will exercise a sound discretion. A motion to recommit is the only remedy, which a party has in case of important oversights on the part of the referees, operating to produce injustice; or in the case of newly discovered evidence, which would essentially alter the state of the case. Motions to *reject* a report for such causes would not be listened to. A party, then, if he has important newly discovered evidence, or can substantiate the existence of material oversights on the part of referees, must have a right to move for a recommitment. If allowed an investigation upon his motion, and he should fail to convince the Court, that justice would be promoted by a recommitment, and it should be, thereupon, refused, as decided in the case above cited, there would be no legal ground for exceptions.

The language used in deciding that case, however, seems to go further, and to hold, that a refusal to enter into an investigation upon such motion, is not exceptionable. But the motion in that case was predicated upon objections, which were clearly untenable. The Court might, in such case, well refuse to hear evidence in support of them; and the decision, as applicable to that case, was undoubtedly correct. But if a motion were made for causes, which, if substantiated, should induce a recommitment, or a new trial, and the Court should refuse to entertain the motion, we can but think it would be error in law, and that, under our statutes, summary exceptions should be sustained, if taken to such ruling.

In the case at bar, the defendants moved for a recommitment, and for a rejection also, of the report. To induce a recommitment, it may be presumed, that the allegation, offered to be proved, that "great and manifest errors were made by the referee," was relied upon. These errors were not designated. Whether they were from accident or mistake, or were errors in judgment, does not appear. If of judgment it would ordinarily afford no ground for a recommitment. The parties having agreed upon a referee as their judge, must be content with his adjudication. If the errors originated from oversight or accident, they should have been so alleged, and have been distinctly pointed out. Till so pointed out the Court might well refuse to go into evidence concerning them; and *a fortiori* might refuse to go into an examination under such a general allegation of errors as is contained in the bill of exceptions.

The motion for a rejection of the report, we must suppose, was grounded upon the allegation of prejudice or partiality in the referee, and preceded the motion for a recommitment; for it would savor of absurdity to move for a recommitment to a referee affected with prejudice or partiality, such as could have induced him to do injustice in the first instance. This allegation appears to have been made, in connexion with a declaration disavowing "any imputation of corruption, or general want of integrity" in the referee. That a person may be under the influence of prejudice or partiality, without being corrupt,

may be admitted, perhaps; but to be so much under the influence of either as to induce him to make a wrong decision in a case referred to him, without being liable to an imputation of corruption, may not be so readily admitted. What the degree of prejudice or partiality intended to be imputed was; whether productive of an erroneous decision or not, is not stated. It is said in the authorities, that an award may be set aside for gross prejudice and partiality; meaning no doubt such a state of feeling, towards one party or the other, as can be believed to have been productive of an unjust decision. It may be doubted whether any cause was ever decided by jury, some one or more of whom were not under the influence of some degree of prejudice or partiality; yet who ever heard of a motion to set aside a verdict for such cause, unless the prejudice or partiality was gross; and manifested by some overt act or declaration? Jurors, nevertheless, are not selected by the parties. Referees are selected by them. They know or ought to know what reliance for intelligence and integrity can be placed upon them, before agreeing upon them as their judges. The belief, after a decision of a tribunal so constituted, that they were swayed by prejudice or partiality should be admitted with caution; and never, without its effects are manifested by unequivocal and specific acts. On the whole we are of opinion, that the matter of grievance, set forth in the bill of exceptions, is not sufficient to authorize us to overrule the decision of the Judge in the Court below.

Exceptions overruled.

STEPHEN W. ANDERSON *versus* NATHANIEL H. SWETT.

Under the Militia Act of 1834, c. 121, no penalty is incurred by a private for disorderly conduct while with the company on duty *after sunset*, unless in time of war, or public danger, or for choice of officers.

The vote of a majority of the members of a militia company to continue on duty at a company training until after sunset, cannot alter the law, or affect the rights of the other members.

ERROR to reverse a judgment of a justice of the peace, imposing a fine upon Anderson for disturbing the company of which he was a private, and showing contempt to the officers thereof by loud talking, while the company was under arms for improvement in military acts and exercise, on Sept. 21, 1842.

One of the seven errors assigned was, that it appeared by the record of the justice, that at the time when the alleged disturbance and contempt took place, if any occurred, it was after sunset.

The facts sufficiently appear in the opinion of the Court.

W. P. Fessenden, for the plaintiff in error.

Codman & Fox, for the original plaintiff.

The opinion of the Court was drawn up by

SHEPLEY J. — The original suit was instituted in the name of the defendant in error, as clerk of a company of militia, against the plaintiff in error to recover a forfeiture alleged to have been incurred by disorderly conduct while on duty. The original defendant contended, that he was not legally on duty, when the alleged offence was committed.

The act of 1834, c. 121, § 21, provided, that no private should be compelled to perform any duty in the militia after sunset except in time of war, or public danger, or for choice of officers. The case did not come within either of the exceptions. And the commander of the company could not legally detain the private or require the performance of duty from him after sunset. By the twentieth article of the forty-fourth section the forfeiture is incurred only for misconduct

"while under arms or when on duty." And the private after sunset could not be considered as legally under arms or on duty. The vote of a majority of the members of the company could not affect his rights. They were not clothed with authority to suspend or alter the law.

The record exhibits the testimony introduced to prove, that the alleged disorderly conduct occurred before, and that it occurred after sunset. If the magistrate had decided, that it occurred before or after sunset, his decision upon the fact would have been conclusive. Instead of making such a decision, the record states, that he considered "the proof about the sun being down was so conflicting, that it was doubtful, whether it was down or not." And that he expressed an "opinion, that the said defendant would have been holden under all the circumstances, even if the sun had been down." The burden of proof being upon the original defendant to establish, that by the lapse of time he had become released from the further performance of military duty on that day, he would remain liable and might incur the forfeiture, unless he had established the fact, that the alleged disorderly conduct occurred after sunset. And if the magistrate had decided on this ground, that the forfeiture had been incurred, there would have existed no legal cause of complaint. But the decision appears in effect to have been, that it was unimportant, that he should decide, whether the disorderly conduct occurred before or after sunset, because the defendant must be found guilty, if the proof should establish the fact, that it occurred after sunset. And the error consisted in coming to the conclusion, that such a fact, if proved, would not excuse the defendant or prevent his incurring the forfeiture. There is reason to believe, if he had not acted under this erroneous impression, that the judgment might have been different. It is not necessary to consider the other errors assigned.

Judgment reversed.

BENJAMIN GARLAND *versus* ROBERT HILBORN, JR.

Where hay was attached that grew on land which had been in the occupation of the debtor for about six years under a sealed agreement, that when the debtor should have paid to the owner the price agreed upon for the farm, that it should be conveyed to him, and that the produce should be the owner's until such payment was made, but that the debtor should have the management thereof, and that whatever the same might net and be realized therefrom by the owner, should be credited towards payment for the farm; and the hay was during that time, cut by the tenant and put into the barn, and there attached as his property; *it was held*, that the hay was subject to attachment as the property of the tenant.

CASE against the defendant for neglecting to deliver five tons of hay, to be taken on an execution in favor of the plaintiff against one Dennin, the same having been attached by the defendant as the property of Dennin on a writ in favor of the plaintiff.

The agreement between Little and Dennin, referred to in the opinion of the Court, was in these terms.

"It is agreed between Edward Little and Simeon Dennin, Jr. that the produce on the farm said Dennin lives on, is to be Edward Little's until the farm is paid for, and said Dennin to have the management of the same, and whatever it nets, and is turned to said Edward, is to be credited towards payment for the place, and said Dennin hereby acknowledges, that two red steer calves and a sow are pledged to said Edward for the payment of Dennin's notes to said Little, and said Dennin is to have the care and management of them, and whatever they turn to and net, and is paid over to said Edward, is to be allowed in payment, on said Dennin's notes to said Little.

"Edward Little.

"July 11, 1840." "Simeon Dennin.

D. Dunn, for the plaintiff, considered the law to be well settled in his favor by the cases, *Butterfield* v. *Baker*, 5 Pick. 522; *Bailey* v. *Fillebrown*, 9 Greenl. 12; *Turner* v. *Batchelder*, 17 Maine R. 257; *Sherburne* v. *Jones*, 20 Maine R. 70.

J. C. Woodman, for the defendant, contended that at the time of the attachment of the five tons of hay by the defend-

ant, the hay was not the property of Dennin, the debtor, as whose it was returned as attached, but was the property of Edward Little. This furnishes a perfect defence to this suit. According to the written contract, the produce was not to be the property of Dennin but of Little. Dennin was the mere agent of Little, and he was to allow the proceeds, after paying all expenses, towards the notes. *Kelley* v. *Weston*, 20 Maine R. 232; *Lewis* v. *Lyman*, 22 Pick. 437; *D'Wolf* v. *Brown*, 15 Pick. 462.

The opinion of the Court was by

WHITMAN C. J. — The defendant as an officer attached, on mesne process, a quantity of hay as the property of one Dennin, of which he did not keep possession, so as to have it forthcoming to satisfy the execution, subsequently issued on a judgment obtained in the same suit. His defence is, that the hay was not Dennis's, but was the property of one Edward Little. It appears, that Little was the owner of the farm on which Dennin lived, and on which the hay was raised; and that Dennin had entered into possession thereof about six years before the attachment, under an agreement by bond, that, when he should have paid the price agreed upon for the same, it should be conveyed to him. It was, at the same time, agreed between Little and Dennin, "that the produce on the farm" should be Little's, until the farm was paid for, but that Dennin should "have the management of the same;" and whatever the same might net, and be realized therefrom by said Little, should be credited towards payment for the farm. This agreement, afterwards, on the 11th of July, 1840, was reduced to writing, and signed by the parties. The hay in question was a part of the produce of the farm, and was raised after the agreement was so reduced to writing.

The case comes before us upon an agreed statement of facts. The question raised is one of title. Was the hay, when attached, the property of Little or of Dennin? If of Little, then the plaintiff is to become nonsuit; if of Dennin, then judgment is to be entered upon default.

Whether property has vested in an individual, so as to become attachable for his debts, is often a question involved in difficulty. The circumstances connected with apparent ownership are of every shade of variety. This arises, not unfrequently from sinister purposes. Sales designed to be merely colorable, are but too common. To such sales the utmost semblance of genuineness will be given. And sales, also, that are *bona fide*, and intended to be absolute, by reason of some regard to the vendor's accommodation, or sympathy for his misfortunes, or some other cause, are left to be attended with indications of continued ownership in him. Cases have been, from the earliest times, continually arising, in which courts of justice have been employed in determining when property has, and when it has not passed from one individual to another. In the case before us, it is not to be denied, that there is very plausible ground for supporting either side of the controversy. The analogous cases cited by the counsel for the plaintiff, are deemed by him entirely conclusive in his favor; while those cited on the other side are deemed equally so for the defendant.

The cases of *Butterfield* v. *Baker*, 5 Pick. 522; *Bailey* v. *Fillebrown*, 9 Greenl. 12; and *Turner* v. *Batchelder*, 17 Maine R. 257, cited for the plaintiff, arose in reference to the rights of lessors, who had endeavored to secure their rents by a lien upon the products of the premises leased. But in each case it was holden, that, until actual delivery of the products to the lessors, no property therein passed, so as to be valid against the rights of creditors, who had caused the same to be attached. In the case of *Sherburne* v. *Jones*, also cited for the plaintiff, it seems only to have been decided, that the evidence offered did not sufficiently show property in the plaintiff. The three first cases show very manifestly, that there are difficulties in the way of securing to landlords an ownership in chattels to be produced, by agreements previously made with their tenants, so as to secure the same, without actual delivery, from the claims of the creditors of their lessees.

The case before us exhibits a tenancy upon condition, on the part of Dennin. While he continued to manage the farm in a husbandlike manner, and caused the net proceeds to be applied towards paying for it, it must have been the understanding of the parties to the agreement, that he should remain undisturbed in the occupation of the farm. Whatever he could raise thereon was the product of his labor and outlay, and of the farm conjointly, and was for his benefit. It was the net amount thereof, realized by Little, that was to be accounted for in payment for the farm. Such an agreement was undoubtedly valid between the parties, and, whenever violated by Dennin, his tenancy might be terminated. But when the rights of creditors came in conflict with the execution of such an agreement, something more would be requisite, than a simple reliance upon such an agreement, to so vest the property in the products in Little as to defeat the claims of the creditors of Dennin to have the same appropriated, by due course of law, to the discharge of their demands.

It is however said, in the first clause of the agreement, that the whole of the products was to remain the property of Little; but in the subsequent clause it appears, that such could not actually have been intended to be the case. It was only the net amount, actually realized, which was to be accounted for; and, until so accounted for, and credited, the consideration for it would not have passed from Little to Dennin. The agreement recognizes the management of it, until realized by Little, to belong to Dennin. The net amount, therefore, to be realized by Little, was to be what Dennin might find himself able to turn over, or appropriate to Little's use. And besides; the nature of the occupation renders it unquestionable, that the outlay and labor of Dennin was not wholly to be diverted from supplying his necessities in the meantime. The calls for subsistence for himself and family must be yielded to.

This case is very unlike that of *Kelly* v. *Weston*, cited for the defendant. There the tenant had agreed to cultivate a field of hops, and to cure and bag them for his landlord, in consideration that the latter would suffer the former, as whose

property the hops had been attached, to live on, and have the use of the residue of the farm, on which the hops grew. This was no otherwise than a hiring of the tenant, by the landlord, to perform for him a specific job of work, on a particular portion of his farm, and remunerating him by the use and occupation of another portion of it. The tenant had no interest in the hops. For his labor bestowed upon them he was otherwise compensated. He could not have appropriated any portion of them lawfully to his own use.

In the case of *Lewis* v. *Lyman*, next cited for the defendant, the hay attached as the property of certain lessees, was raised on a farm, which they occupied under and by virtue of a special agreement, that the lessor should stock the farm principally, the lessees furnishing a portion thereof; and that the hay cut thereon should, thereupon, be expended in feeding the stock. It was not stipulated that any of the produce or income, before a division, of which according to the agreement, the hay was not to be susceptible, should be exclusively the property of the lessees. They had no other right or interest in the hay than to have it fed out to the stock on the place. It was holden in that case that the lessees had no attachable interest in the hay. In the case here, nothing is said in the agreement about having the hay spent upon the place. And, although it seems to have been the practice of Little to send his cattle there to consume, at least, a portion of the hay, yet Dennin, in his contract, was not bound in the management, which was expressly reserved to him, so to appropriate it. It would seem that he might have taken any other mode to obtain the net proceeds, to which Little was entitled, whether by sale or otherwise.

In the case of *D'Wolf & al.* v. *Brown*, cited for the defendant, the plaintiff's testator had agreed with his son, for a certain amount of compensation, to manage his farm, and to take his pay in the produce of it. In that case the Court held, that the property in the produce did not vest in the son till appropriated in payment of the amount stipulated to be paid. That, in effect, was but a case of hiring on the one side, and

agreeing upon a particular mode of payment on the other; a case very dissimilar to the one before us.

On the whole, from a review of the authorities cited, and of the reasoning upon which they are grounded, and from the nature of the tenancy of Dennin, and the structure of his agreement with Little, and taking into consideration the statement, that he was in destitute circumstances, and actually insolvent, we are led to the conclusion, that the agreement was made with an understanding, that Dennin should be allowed the enjoyment of the fruits of his labor to the extent of what his necessities might absolutely require for the subsistence of himself and family; and to secure as far as might be practicable the appropriation of the surplus to reduce the amount agreed to be paid for the farm, and that this must have been what was meant by the net produce, which Little might realize to be allowed in payment, &c. In such case the property in the produce must have vested in the tenant, in the first instance, and so have remained until otherwise disposed of. The hay attached had not been delivered over to Little, or appropriated to his use, so that he could be made accountable to Dennin for its value towards the demands which Little held against him. The defendant, therefore, must be defaulted, and judgment must be entered for the value of the five tons of hay at seven dollars per ton, as agreed by the parties, with damages for the delay in obtaining satisfaction of the plaintiff's execution against Dennin equal to six per centum per annum from the time it became returnable.

OLIVER P. HASKELL *versus* EBENEZER ALLEN *& al.*

This Court has equity jurisdiction in all suits to compel a specific performance of contracts in writing, made since February 10, 1818, when the parties have not a plain and adequate remedy at law. But where the agreement has been carried fully into effect, and no further act is to be done under it, there can be no decree, under the equity powers of the Court to compel a specific performance of contracts, that other acts for the convenience or security of the parties should be done.

Where the parties agreed in writing under their hands, that a person designated by them should ascertain and mark the lines between their respective estates; and where the service was performed and the lines marked, and the parties occupied according to those lines for several years, when one of them entered beyond the line, thus marked as his boundary, and took timber and wood therefrom, *it was held*, that the party injured thereby could not maintain a bill in equity, either to compel releases of the land beyond the line thus marked, to be given, or to obtain compensation in damages for the injury sustained.

BILL in equity. The facts appear in the opinion of the Court.

Fessenden, Deblois & Fessenden argued for the complainants under these general positions.

By the common law the plaintiff is without remedy. *Whitney* v. *Holmes*, 15 Mass. R. 152.

But equity will relieve and decree that such agreement be carried into effect, and the parties be compelled to pass such releases as will effectuate the agreement. 1 Story's Eq. § 131; 1 Atk. 10; 1 P. Wms. 726; 1 Swanst. 152; 1 Ves. & B. 23; 2 Story's Eq. § 715, & 80; Jeremy's Eq. 422.

We pray for an injunction; and courts of equity will grant one, where the injury is irreparable. 1 Paige, 447; 1 Litt. 148; 2 Johns. C. R. 463; 2 Story's Eq. § 929; 15 Ves. 138; 17 Ves. 136; 6 Ves. 147.

F. O. J. Smith, for the defendant, in support of his demurrer, cited 17 Maine R. 404; Story's Eq. § 72, 73, 74, 616.

And in support of his answer, relied on the original agreement and the report of Lothrop Lewis under it, as conclusive

against the plaintiff's bill; and to show that his remedy is at law, and not in equity.

The opinion of the Court was drawn up by

TENNEY J. — The complainant alleges in his bill, that on the fourth day of January, A. D. 1819, Daniel Haskell, his father, was seised in his own right in fee, of a certain farm in Windham, and consisting of a part of the following described lots of land in the second division of hundred acre lots in said Windham, to wit: five-sixth parts of lot numbered one hundred and twelve, off of the northerly part of said lot, and three-fourth parts of the lot numbered one hundred and twenty, off of the northerly side of said lot, and ten acres, part of lot numbered one hundred and twenty-one, and that said Ebenezer Allen on the same day was seised in his own right in fee of lot numbered one hundred and eleven in the second division of lots in Windham, and adjoining the land of said Daniel Haskell, and that previous to said fourth day of January, disputes and controversies had arisen between the said Daniel Haskell and the defendant, Ebenezer Allen, in regard to the place where the true division line between the respective lots was, and had been run and ought to be; and that similar disputes had also arisen between other proprietors of other lands lying in the vicinity, or adjoining the lots numbered one hundred and eleven and one hundred and twelve; and that those several proprietors on said fourth day of January, entered into a mutual contract under seal, each with the others, that the lines of their several lots should be run in a manner therein stated, according to the proprietors' records, by Lothrop Lewis; and that he should make a concise report of his doings in the premises, and the report and the agreement should be recorded in the office of the Register of Deeds in the County of Cumberland; and said report should forever settle said lines and corners of the lots, and be taken by the contracting parties to be the true lines and corners by them, their heirs and assigns forever. The bill alleges that the lines were run by Lewis in May, 1819, a report made, which, with the original agreement,

was recorded according to the agreement; and also that the father of the complainant, and the defendant, Ebenezer Allen, "did continue to possess, hold, occupy and enjoy their several and respective lots of land in conformity to the report, and survey and award of Lewis," the former until January 28, 1834, when he conveyed to the complainant "by deed of general warranty, the premises so as aforesaid, in the bill of complaint described and set forth," and the latter until the 12th day of January, A. D. 1829, when he conveyed to Nathan Allen, the other defendant, describing the same in his said deed as follows; "a certain piece or parcel of land situated in said Windham, being part of lot one hundred and eleven in second division of one hundred acre lots in said Windham, and being the piece of land, I purchased of Isaac Mayberry and others, the heirs of Thomas Mayberry, deceased, late of said Windham, by sundry deeds at several times, and being the same said Isaac Mayberry has formerly occupied and improved, and being all of said lot, excepting the part, that I conveyed to Edward Cobb, containing fifty acres more or less." The bill further alleges, that after the conveyance made to him by Daniel Haskell, he entered on the land, described in the deed, and peaceably claimed and occupied the same according to the lines run by Lewis. But that Nathan Allen, regardless of said lines, entered upon a portion of the land of the complainant, included within the lines so run and established by Lewis, and cut down and carried away a large quantity of timber and wood, and subverted the soil, and continues to assert a claim to the land by virtue of the deed from Ebenezer Allen. The bill prays that the defendants be decreed to execute deeds of release of all their right, title and interest to any and all lands, to which Daniel Haskell had a claim, according to the lines run and established by Lewis under the agreement, and that Nathan Allen pay a fair value for all the timber by him cut, and damage done. To this bill the defendants put in a demurrer; and also an answer, admitting the agreement and report of said Lewis and recording the same, as alleged in the bill, but denying that any dispute respecting

the division lines between the said Allen and Daniel Haskell was settled or adjusted by virtue of said agreement, or that said Lewis was authorized by the same to run and establish said division line, or ever did so run or establish the same, or assume so to do; or if he did assume so to do, he had no commission or authority therefor, or that the defendants, or either of them, have been bound or affected thereby.

The jurisdiction of courts of equity from a very ancient date extended to decrees for a specific performance of agreements, when the party relying thereon could not otherwise be fully compensated. 2 Story's Eq. 23. This jurisdiction is not dependent upon or affected by the form or character of the instrument. What these Courts seek to be satisfied of is, that in substance the transaction amounts to and is intended to be a binding agreement for a specific object, whatever may be the form or character of the instrument. *Id.* 22. But when the agreement does not show that any further act was contracted to be done, or in contemplation of the parties, it would be absurd to say, that there could be a decree under this head of equity jurisdiction.

Courts possessed of general equity powers, decline the exercise of a jurisdiction, to decree specific performance, when the proper relief is in damages, which can alone be ascertained by a jury, since it is the appropriate function of a Court of law, to superintend such trials. 1 Story's Eq. 89. And when they are authorized to decree specific performance, they will not ordinarily do so, excepting when damages will be an imperfect remedy. 2 Story's Eq. 24.

This Court have equity jurisdiction in all suits to compel specific performance of contracts in writing, made since Feb. 10, 1818, when the parties have not a plain and adequate remedy at law. Rev. Stat. c. 96, § 10. If the complainant is entitled to the decree, that the defendants release to him all their right, title and interest to any and all lands, to which Daniel Haskell had a claim according to the lines run and established by Lewis by virtue of the agreement, it must be under this head of the powers conferred.

It is manifest, that the parties, in order to protect themselves from difficulty which might arise in future from the uncertainty of the boundaries of their respective estates, entered into their mutual agreement of Jan. 4, 1819, that they should be ascertained and marked by the person designated by them. It was not contemplated by them, that the lines to be run would in any degree interfere with their several titles, and no power was given to the person appointed to disregard the then existing legal rights; but he was to run the lines according to the proprietors' records, and erect monuments on the westerly corners of the lots mentioned. The lines were run and marked "pursuant to the submission," and the agreement and report were recorded according to the terms of the agreement. The boundaries ascertained by Lewis were satisfactory to the complainant's father and grantor, and to Ebenezer Allen one of the defendants, as they governed themselves thereby for a long time in their respective occupation. After the agreement and the report was put upon record, the contract which they had entered into to make known and to secure their rights, derived from their respective titles, was perfected. No conveyances or releases were required under the agreement. Each party held and intended to hold under the title, which he had, before the submission. The agreement and the report of the commissioner indicated with certainty, where the real boundaries had been and were to continue. There is nothing in either showing that there was the least deviation from the ancient lines. There is no allegation in the bill, that the lines run gave to the complainant's grantor land to which he had not a title by the deeds under which he claimed. The grantors of the complainant and of the defendant, Nathan Allen, conveyed to them according to the title, which they held before the agreement, and not by any new lines, for it is manifest that one was considered identical with the other. The contract was unlike those, where a deed is to be given by one to carry into effect his contract with another upon a condition which is performed. In such cases a decree of specific performance may be made, if the remedy at law is inadequate. But where no

intention to do any such act can be drawn from the agreement, the limited jurisdiction of this Court as a court of equity will not authorize the decree first prayed for.

The injury complained of in the bill is for cutting and carrying away timber and wood, and subverting the soil. The only remedy for this, which can be obtained, or which is sought, is in damages to be awarded. For these there is a plain and adequate remedy at law.

Bill dismissed with costs for the defendants.

JOHN WARREN *& al. versus* JOSEPH WALKER.

A written agreement to waive all defence which a party might otherwise make under the statute of limitations, is not sufficient as an acknowledgment of indebtedness, or as an express promise, to take the case out of the operation of the statute.

But a party is bound by his written agreement, made for a sufficient consideration before the statute could operate as a bar, not to set up the statute of limitations as defence to a claim against him.

If a District Judge decides rightly, but gives erroneous reasons for his decision, no sufficient ground is thereby afforded for sustaining a writ of error, or bill of exceptions. (*S. P. Ellis* v. *Jameson*, 17 Maine R. 235.)

Parol evidence is admissible to prove the consideration of a written contract, where none is expressed therein.

Where evidence as to matter of fact, within the province of the jury, although appearing to be unimportant, is erroneously admitted at the trial, objection being made thereto, and this Court have no means of ascertaining that it did not have an influence upon the minds of the jury, exceptions to such admission must be sustained.

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

On February 5, 1842, the plaintiffs brought their action on an account annexed to the writ for the rent of a certain mill for sawing lumber.

With the general issue the statute of limitations was pleaded.

The plaintiffs offered in evidence the account, at the foot of which was a note signed by H. C. Babb, and a memorandum signed by the defendant. A copy follows.

"Capt. Joseph Walker to J. & N. Warren and Benjamin Roberts, Dr.

"1835, Dec. 9. To use of Crowfoot mill, so called, for sawing 62,388 feet of lumber, at 3s. per M. $31,19.

"Saccarappa, Dec. 10, 1835.—Capt. Joseph Walker will pay this bill. H. C. Babb."

"Dec. 7, 1841.—I hereby waive all defence which I might otherwise make to the above bill by law under and by virtue of any statute of limitation. Joseph Walker."

Babb had before testified, but he did not appear to have been authorized by the defendant to act for him in the matter.

The counsel for the defendant objected to the admission of the note signed by Babb, but the objection was overruled, and the whole was read to the jury.

W. Goodenow, was called by the plaintiffs, and testified, that when the memorandum was signed by the defendant it was done in consideration of an agreement by the plaintiffs to delay commencing a suit on the account. The defendant told Mr. Goodenow, that he need not sue the demand, that he wanted to see the plaintiffs; that he would not take advantage of the statute of limitations; that the agreement was signed; and that the delay was given. The defendant objected to the admission of this testimony, but the objection was overruled.

Testimony was introduced to show, that originally the defendant was liable, and also that he was not.

The counsel for the defendant requested the Judge to instruct the jury: 1. That the memorandum on the account annexed to the writ, signed by the defendant, was not such an acknowledgment of the debt, or promise to pay the same, as the statute of limitations requires.

2. That upon the evidence, the plaintiffs and defendants were partners in the lumber sawed, and this action could not be maintained at law.

3. That if maintainable against the defendant otherwise, yet that this action could not be maintained, because too many plaintiffs were found, the mill being leased only to John Warren.

As to the third request, the presiding Judge left the matter of fact to be decided by the jury, merely instructing them, that if there were too many plaintiffs, it would be fatal to the action. As to the other two, the instruction was, that the memorandum signed by the defendant, as proved, was a sufficient acknowledgment of the debt by the defendant, or promise to pay the same, under the statute of limitations, whether it was signed by him before or after the six years had expired from the time the cause of action had accrued.

The defendant then requested the Judge to instruct the jury, that if, when the defendant signed the memorandum on the account, he supposed the demand was not barred, when in fact it was, that the statute was a good defence. The Judge refused to give this instruction.

The verdict was for the plaintiff, and the jury found specially, that the memorandum signed by the defendant was made within six years from the time the cause of action accrued.

The defendant filed exceptions to the rulings and instructions of the presiding Judge.

Deblois and *O. G. Fessenden*, for the defendants, contended, that the memorandum signed by the defendant is not such an express acknowledgment of the existence of the debt, or a promise to pay the same, as the Rev. St. c. 146, § 19, requires. The acknowledgment must be one of the debt. Merely waiving the defence of the statute of limitations is no acknowledgment of the debt.

Such an acknowledgment under the present law must be an express one to be sufficient, although prior to it, this was not required. Dane, c. 161, § 1. An express acknowledgment of the debt dispenses with the necessity of any further proof; but a mere promise not to take advantage of the statute would not. The proviso in the English statute of limitations of 9 Geo. 4, c. 14, § 1, is in these words. "Unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." That in the Massachusetts Rev. St. is the same in substance and in

nearly the same words. "Unless such acknowledgment or promise be made or contained by or in some writing signed by the party chargeable thereby." That in this State is, "unless such acknowledgment or promise be an express one, and made or contained in some writing, signed by the party chargeable thereby." If then the decisions on this subject in England or in Massachusetts are in our favor, they are in point, although they might not be, if against us, as our statute requires more. Chitty on Bills, (8th Am. Ed.) 610, 611, and notes; 9 C. & P. 209; 6 B. & Cr. 566; 21 Maine R. 433; 4 C. & P. 173; 3 Metc. 218; 2 Pick. 368; 22 Pick. 219; 21 Pick. 324.

The Judge erred in not excluding the memorandum signed by Babb. Even if he was the agent of the defendant, it was not admissible, because it was not made in the discharge of any duties as agent. 13 Maine R. 386; 15 Johns. R. 239.

The testimony of Mr. Goodenow was inadmissible, inasmuch as it tended to explain and aid that which the statute intended should appear only in writing.

W. Goodenow, for the plaintiffs, considered the statutes of Massachusetts and Maine, in this respect, alike in substance. He could see no difference between a promise in writing and an express promise in writing.

A man may be willing to continue all the rights, which another may have, without acknowledging the existence of the debt. That is the case here. The promise is express and in writing, and that is all the statute requires. *Webber* v. *Williams College*, 23 Pick. 302. The Court will not permit a man to take advantage of a defence, which he has expressly waived.

Goodenow's testimony was admitted merely to prove a consideration for the promise. All the authorities agree, that parol evidence is admissible for such purpose, where nothing is said on the subject in the writing.

The memorandum by Babb could not be taken from the paper without destroying it. The contents of the memorandum were verified by Babb as a witness at the trial. It was

not admitted as evidence of indebtedness, and could have had no influence for such purpose. That was abundantly proved by other evidence.

The opinion of the Court was drawn up by

WHITMAN C. J. — This is an action of assumpsit upon an account for services done and performed. The defendant, in the Court below, pleaded the general issue, and filed a brief statement, setting up the statute of limitations in defence. The plaintiff on the trial there produced a memorandum, subjoined to a bill of particulars of his account, in these words, "Dec. 7, 1841, I hereby waive all defence, which I might otherwise make to the above bill by law, under and by virtue of any statute of limitations;" which was signed by the defendant; and contended that it amounted to a written acknowledgment of the indebtedness of the defendant; or to an express promise by him to pay the debt, thereby taking the case out of the statute of limitations, in conformity to the provision in the statute of 1841, c. 146, § 9, and the presiding Judge so ruled. At the conclusion of the trial the defendant filed exceptions to this, and several other rulings of the Court.

Whatever may be the impression, as to the honor and uprightness of the defendant, in setting up the statute of limitations, after having signed such a memorandum, still it will be incumbent upon us to be guided by the rules of law in our decision in reference to it. It is the right of every citizen to have the law administered according to the just import of its terms. The law of the land must necessarily be comprised of a body of general rules. In their adoption it cannot be foreseen how they will operate in every possible case that may arise; and though in general they will be sure to be promotive of equal and exact justice, yet cases may occur under them, in which undue advantage may, and by those not under the control of a strict moral sense, will be taken. To avoid such results Courts are sometimes strongly tempted to put a construction upon enactments, of which the terms would other-

wise seem hardly to be susceptible. Whether the Judge in the Court below, in view of the unreasonableness of setting up, under the circumstances, of this ground of defence, was under any such amiable influence, for such it may be termed, it is unimportant for us to inquire; but we can entertain no doubt, that his construction of the memorandum, introduced by the plaintiff, was not in strictness correct. To test its correctness we may inquire whether the memorandum, according to its terms, could have stood in the way of any defence, other than that of the statute of limitations. If it contains an acknowledgment of indebtedness, or a promise to pay the debt, it surely would do so. But the defence, which the defendant agreed to waive, was only that, which he had, "under and by virtue of any statute of limitations." He did not agree to waive the defence of payment, or of the non-performance of the services as charged, or indeed of any other defence, which he might have had to the original cause of action. There could not, then, have been implied, in the memorandum, any absolute, or even conditional acknowledgment of indebtedness, and much less any absolute or conditional promise to pay the debt. Upon this ground, therefore, the memorandum could have no effect to obviate the defence under the statute of limitations.

But there was another ground upon which the memorandum may be considered as effectual for that purpose. When the defendant agreed to waive any defence, which he might have had, "under and by virtue of any statute of limitation," it must be understood to be an agreement never to set up any such defence. Now a covenant not to sue an obligor in a bond is tantamount to a release of the obligation; and an agreement in writing never to sue on a parol contract, has a similar effect. *Foster* v. *Purdy*, 5 Metc. 442. By a parity of reasoning the memorandum in this case should preclude the defendant from setting up this defence. This view of the subject is very much strengthened by the case of *Webber* v. *Williams College*, 23 Pick. 302. In that case Webber held a note, purporting to be signed by a person acting as agent

for the defendants. When it had stood nearly six years the plaintiff demanded payment. The treasurer of the defendants wrote to the plaintiff, saying if he would forbear suing then he should have the same rights he then had for one year more; and this the plaintiff complied with. The Court considered this agreement to be a waiver of the defence, afterwards attempted to be set up under the statute, as it was entered into before the limitation was complete. In the case at bar the jury found that the limitation of six years had not elapsed when the memorandum was signed. The two cases, therefore, are very nearly, if not quite parallel; and the former is strongly in point for the plaintiff; and we are inclined to acquiesce in the reasons for such a decision.

The question will now be, whether, as the Judge assigned a wrong reason for suffering the memorandum to operate against the statute bar, it is competent for us to overrule the exception under consideration or not. It has been considered, that, if a Judge decides right, though he may give erroneous reasons for so doing, yet that no ground is thereby afforded for sustaining a writ of error, and we have repeatedly decided, in such case, that the excepting party was not, in the language of the statute authorizing the filing of summary exceptions, aggreived; and when, in such case exceptions have been taken we have overruled them; and we do not perceive that such a rule might not well be applied in this case.

Exception was taken to the testimony of William Goodenow. It became necessary, it would seem, to prove that the memorandum, signed by the defendant, was not executed without a valuable consideration therefor. Parol evidence, for such purpose, was admissible. It neither varied, explained or contradicted the terms of the agreement; but showed merely that it was obligatory, like proof that the instrument was duly executed. To prove the consideration it became necessary to show the circumstances, which occasioned the making of it. To that extent his testimony was clearly unobjectionable. And it is not perceived, that, in the residue of it, there was any thing tending to vary or contradict the import of the mem-

orandum; and, therefore, may be deemed immaterial; and, the suffering it to be introduced, a mere misspence of time, which could furnish no ground for sustaining a bill of exceptions. To send causes back to incur the delay and expense of a new trial, when, though there may have been some irregularities of proceeding, there is no reason to apprehend, that any injustice has resulted therefrom, would be alike detrimental to the interest of the public, and to that of the parties concerned.

There is, however, another exception taken, which may seem to come within this category; yet, on the whole, we are unable to come to the conclusion that it should be so considered. It was to the refusal of the Judge to require the erasure or exclusion of a note, placed upon the plaintiff's bill of particulars, by Henry C. Babb, and over his signature; which was, that the defendant would pay it. This it was the right of the defendant to have had excluded; for Babb himself testifies, that he had no authority to bind the defendant by any writing whatever. Upon the introduction of such testimony, the note or memorandum may not have had the slightest influence upon the decision by the jury. We are unable to perceive, that, without it, the other evidence would not have been abundantly sufficient to charge the defendant; so much so, that the note, in the view of sensible men, might be deemed wholly unimportant. But this was matter of fact, and within the province of the jury; and the refusal of the Judge to reject the note may have given it importance in their minds; and as we have no means of ascertaining that it did not, we must consider the exception for this cause as well taken.

The other exceptions taken at the trial were not insisted upon at the argument; and it does not occur to us that they were of any validity.

Exceptions sustained.

David Hall & *al. versus* Samuel Thing & *al.*

The owners of a majority in interest of a vessel, may change her employment from the performance of foreign voyages to the coasting trade, and also to the fishing business, if the vessel be of a suitable character for such employment.

The outfit for a fishing voyage, although composed partly of salt, lines, hooks and nets, is but a suitable equipment and preparation of the vessel for profitable employment in that business; and the majority in interest may bind all the owners in the purchase thereof.

The managing owner of a vessel represents the interests of all, and has the same power, which the major part in interest have, with respect to the change of employment, and the preparation and outfit of the vessel, in a manner suited to the profitable employment in the business to which she is destined.

Assumpsit to recover the amount of a bill charged to "Owners of schooner Bethiah, Thing & Morse." The first item was under the date of April 15, 1841, and the last on the eighth of September following. Thing was defaulted, but the other defendant, Morse, denied his liability. The facts sufficiently appear in the opinion of the Court.

Barnes, for the defendants, said it was well settled, that one part owner of a vessel could not, as such merely, render the other owners liable for the cargo. Even the managing owner can render none but himself liable, without their assent. *Hewitt* v. *Buck*, 5 Shepl. 147. The general rule as to the liability of the owners of a vessel is stated in *Harding* v. *Foxcroft*, 6 Greenl. 78, in accordance with the English authorities. Holt's Intr. 33. Ship's stores do not include articles of this description. A policy on the vessel would not cover them.

There is another objection to the maintenance of this suit. The schooner had been employed during the preceding year in the coasting trade, in which business such articles are worse than useless. One owner, even if he be the managing owner, has no power to change the employment of the vessel without the assent of the others. This change of employment alone, created the necessity for these articles, if there is ground for

saying that any existed. It could not enable him to bind the other owner.

W. Goodenow, for the plaintiffs, said that there could be no doubt, but that one owner might bind the whole for supplies for the vessel. Abbott on Shipping, 112, § 8. The charges were properly made to the vessel and owners, and they are all liable for supplies furnished the vessel. 10 Mass. R. 47. The articles here furnished could not be considered as cargo, to be carried and sold, or delivered, but as stores or supplies for the use of the vessel. *Wilkins* v. *Reed*, 6 Greenl. 220.

The managing owner is under no obligation to employ the vessel in the precise mode in which it had been before. He should consult his judgment as to the course of proceeding most likely to bring profit to himself and the other owners. Here, however, there was no change of employment. Going along the coast for fish is employing the vessel in the coasting business.

The opinion of the Court was prepared by

SHEPLEY J. — This is a suit to recover the value of certain goods furnished to the schooner Bethiah for her outfit on a fishing voyage. James Lambert formerly owned one half of the schooner, and on January 14, 1839, conveyed the same to the defendant, Morse, who continued to be the owner thereof until the month of May, 1842. Samuel Thing was the owner of the other half, and had been the managing owner before Morse purchased. Coffin, who was master during the season of 1841, testified, that he never knew but one owner, after Lambert was said to have sold out. There can be no doubt, therefore, that Thing had been the managing owner for some years, and that he so continued during the season of 1841, when the goods were furnished. They were delivered to the master upon Thing's order in writing, directing the first portion delivered to be charged "to account of schooner Bethiah."

It is contended in defence, that the authority of a managing owner does not authorize him to fit out a vessel on a fishing voyage upon the credit of the owners. And his authority to

do so is especially denied in this case, because the schooner had been employed in the coasting trade during the preceding year. And it is contended, that the salt, lines, hooks, and nets, procured are rather to be regarded as cargo than as necessaries for the employment of the vessel.

The part owners, who employ a vessel, are presumed to do so for the benefit and at the expense of all the owners, who do not make known their dissent or disapprobation of the voyage. They may procure the necessary repairs, equipment, and outfits, for the vessel upon the credit of the owners. There must necessarily be a discretion entrusted for the benefit of all to the owners of a major part, to enable them to take advantage of the changing aspects of business, and to secure the benefit of adventures holding out the prospect of favorable results, to change the employment of the vessel from the performance of foreign voyages, to the coasting trade, and the fishing business, if the vessel be of a suitable character for such employment. The managing owner represents the interests of all, and has the same power, which the major part in interest would have, with respect to the change of employment and the preparation and outfit of the vessel, in a manner suited to her profitable employment in the business, to which she is destined. While acting within the scope of his authority, he does so at the expense and risk of all, who do not dissent. The outfit for a fishing voyage, although composed partly of salt, lines, hooks, and nets, is but a suitable equipment and preparation of the vessel for profitable employment in that business. The whole is intended to be consumed and used in that employment. No part of it is designed for sale. That, which is not designed for sale, but for consumption and use, cannot properly be regarded as cargo, when speaking of the distinction between the outfit and the cargo. It is the necessary and peculiar preparation and outfit of the vessel for that particular employment; and as such within the scope of the authority of the major part in interest or managing owner to provide. There are certain items in the bill of goods furnished

to the master and crew for their own use, for which the plaintiffs are not entitled to recover.

Judgment on the default.

ISAAC DYER *versus* ELIZA ANN GREENE, *Adm'x.*

Where a written instrument is introduced in evidence, clear in its terms, and giving no cause of action; and parol evidence is also introduced in relation thereto entirely of a negative character and which may all be true to its utmost extent without affecting the written instrument, it is competent for the presiding Judge to instruct the jury, that the action is not supported.

The expression of an opinion by the presiding Judge, at a trial, on the state of the facts of a case, is not a matter of legal exception, and furnishes no cause for setting aside the verdict, rendered in accordance with such opinion, when the jury are not restrained by any rule which could be regarded as binding, but were directed to exercise their judgment in making up their verdict.

The presiding Judge may authorize the jury to find specially on any point arising at a trial.

ASSUMPSIT against E. A. Greene, as administratrix, of the estate of Roscoe G. Greene, deceased, whose estate had been represented to be insolvent. The plaintiff had presented his claim to the commissioners; and being dissatisfied with their decision, brought this suit under the provisions of Rev. St. c. 109, § 20.

The first paper introduced by the plaintiff at the trial before WHITMAN C. J. was thus. "Portland, June 30, 1835. I agree to give Isaac Dyer five hundred dollars for his half of 11 lots in No. 6 in the 3d range, over and above the cost to him, in one year with interest. R. G. Greene." The next was in these terms. "Portland, April 3d, 1835. Received of Isaac Dyer two hundred dollars which I was to receive for my services in making sale of a township of land in the county of Washington, lately owned by R. P. Dunlap and R. T. Dunlap. R. G. Greene."

The plaintiff then introduced several witnesses; and the presiding Judge ruled, that this evidence was wholly insuffi-

cient to support the plaintiff's action upon the 200 dollar memorandum, and that the defendant need not go into any evidence to resist this branch of the plaintiff's case.

The defendant then introduced witnesses in reference to other portions of the plaintiff's claim, and also a receipt, signed by the plaintiff, of which the following is a copy.

"Received of R. G. Greene, three hundred and twenty-five dollars, which I agree to indorse on his note for five hundred dollars, given me in June last, payable in one year, and if said note is on interest, no interest is to be reckoned up to this date (on said note) and if not, I agree to pay interest on the said sum of $325,00, from the 25th of April last. Portland, Oct. 29, 1835. "Isaac Dyer.

"Witness, James Smith."

It was in evidence, that the witness, at the time of the trial, resided in the State of New York.

The testimony is given at length in the bill of exceptions, but is not inserted here, as the law of the case may be sufficiently understood without it.

The ruling of the Court and other proceedings, are stated in the following manner in the bill of exceptions.

The Court ruled that the receipt introduced by the defendants was conclusive to establish the payment by Greene, of so much of the $500 obligation, until the plaintiff should prove its application or relation to some other and different transaction, and that it was unnecessary for the defendant to introduce further testimony to that fact.

Upon the testimony the cause was submitted to the jury, upon argument of counsel, and the Court reiterated the opinion to the jury, that the facts proved, did not establish any fraud, or deception on the part of Greene, towards the plaintiff in selling the land to Rice, for his, Greene's, exclusive benefit, and in purchasing the plaintiff's interest for the sum mentioned in the obligation of June 30, 1835; that there was no evidence, that the sale of the property by Greene to Rice was previous to the purchase of plaintiff's interest therein, and that thereby an unjustifiable and deceptive suppression of the truth,

that the property had been already sold by Greene as a partner of the plaintiff, for a greater sum than Greene was to pay the plaintiff for his interest, had been practised by Greene upon the plaintiff; that if, however, the jury were satisfied upon this evidence that such a deception had been practised by Greene, the obligation of June 30, 1835, might be treated as a nullity, and the plaintiff would be entitled to recover a moiety of the proceeds of the sale to Rice, actually received by Greene.

The Court instructed the jury, that it was not obvious to the Court, that there were any facts in the evidence to establish such a deception, but that the jury must judge for themselves of the facts; that fraud was not to be presumed, though it might be proved by circumstances; and if not proved in this case, there was nothing but the contract in its terms for the plaintiff to stand upon; that the Court would leave the argument of the plaintiff's counsel on this point with the jury to establish the fact; and directed the attention of the jury to the opposing influence derivable from the evidence, that the bond from Greene to Dyer, and the deed from Dyer and Greene to Rice, bear date on the same day; that there was no force in the argument of the plaintiff's counsel, that the same person witnessed both instruments, yet had not been inquired of by the defendant, whether those instruments were or not executed at the same time, inasmuch as it was equally competent for the plaintiff to have gone into that inquiry; that the jury should consider whether some effort would not have been made by the plaintiff in Greene's lifetime, to rectify the transaction, if it had been wrong on the part of Greene; and that there was no evidence in the case, that such an effort was made; that the receipt should be considered as conclusive evidence of payment towards the 500 dollar obligation, in the absence of proof on the part of the plaintiff; that it relates to another transaction; and that there did not appear in the language of it, nor in the figures upon it, any evidence to the contrary; as to the 200 dollar memorandum, the Court repeated the instruction to the jury, that there was no evidence in the case, to support this part of the plaintiff's claim; and that

while, because Greene was deceased, it furnished no reason for the jury to entertain sympathies for the widow and children of Greene, beyond what the law and evidence of the case require, yet one consideration it was not improper for the jury to indulge, viz. that Greene has friends, whose feelings may be wounded by the assertion of a claim founded in any alleged fraud on his part; and that there would be no impropriety in the jury saying at the end of their verdict, that there was not the slightest fraud or deceit practised by Greene towards the plaintiff, if they were perfectly satisfied that there was not.

The Court instructed the jury not to consider themselves called on by the Court to do this, but they might properly judge, whether, under all the circumstances of the case, and to relieve the feelings of friends, they could or not, render such an opinion at the end of their verdict.

The jury upon the evidence and the foregoing instructions of the Court, returned a verdict for the plaintiff for the sum of $250,28, and also a verdict as follows: "And the jury further find, there is no evidence of fraud or deception on the part of R. G. Greene, in any part of the transaction between Greene and Dyer."

The plaintiff filed exceptions to the ruling of the presiding Judge; and also filed a motion for a new trial, and assigned several causes therefor, among which were one that the verdict was against the evidence, and another in the following terms.

"Because the Court improperly communicated to the jury and instructed the jury respecting the opinion of the Court upon the facts and upon the verdict, which in the opinion of the Court the jury should render upon the facts adduced in evidence in the case, as well as respecting the opinion of the Court upon the law applicable to the case as the adverse parties claimed to have presented their case respectively in evidence for the decision of the jury."

The arguments were in writing.

F. O. J. Smith, for the plaintiff, in suppport of his argu-

ment, cited 8 Mass. R. 214; 12 Mass. R. 24; 11 Pick. 141 and 369.

Fessenden & Deblois and *A. Haines*, in their argument for the defendant, cited *M'Donald* v. *Trafton*, 15 Maine R. 225; 1 Stark. Ev. 515, 517; *Emerson* v. *Coggswell*, 16 Maine R. 77; *Ellis* v. *Jameson*, 17 Maine R. 235; *Hathaway* v. *Crosby*, 17 Maine R. 448; *Burnham* v. *Toothaker*, 19 Maine R. 371; *Smith* v. *Putney*, 18 Maine R. 87; *Hix* v. *Drury*, 5 Pick. 296; *Pierce* v. *Woodward*, 6 Pick. 206; *Hatch* v. *Kimball*, 16 Maine R. 146.

The opinion of the Court was drawn up by

TENNEY J. — The receipt given by the defendant's intestate, dated April 3, 1835, for $200, introduced by the plaintiff, is evidence, that the latter had contracted with the former to pay him $500, for services in making sale of a township of land, which R. P. & R. T. Dunlap owned and had given bond to sell to the plaintiff and others on March 11, 1835. The terms of the receipt import, that such services had been rendered by Mr. Greene, and that part of the agreed price had become payable, and was paid in pursuance of the agreement. Nothing in the case indicates, that the sum paid was an advance for services not then rendered, or that it was done under the influence of any mistake or misapprehension of the real facts on the part of the plaintiff. The other evidence relied upon by the plaintiff in support of this part of the claim is entirely of a negative character; it may all be true to its utmost extent without affecting the receipt. There is the same evidence that Mr. Greene was entitled absolutely to the $200, that there is, that he received it. The instructions of the Judge to the jury on this point were not subject to objection.

The sum of $325, named in the receipt of Oct. 29, 1835, was agreed therein by the plaintiff to be indorsed upon Mr. Greene's note for $500, given in June next preceding, and payable in one year. The obligation for $500, given to the plaintiff and introduced in the case, corresponds in every particular with the note on which this sum was to be allowed, as

described in the receipt ; and there is no evidence in the case, that the plaintiff held another note of the same description. If the sum acknowledged to have been received is not to be applied to the payment of the note introduced, it is difficult to perceive in what manner a receipt can be evidence of payment.

It was contended at the trial by the plaintiff's counsel, that when the note of $500, was given in June, 1835, there was a fraudulent suppression of facts connected therewith, and deception practised by Greene, and in consequence the plaintiff was induced to take this note for the full amount of the sum supposed to be due, when in truth he was entitled to a much larger sum. The Judge expressed an opinion to the jury that the evidence was insufficient to establish fraud in Greene, and that parts of the evidence relied upon by the plaintiff had no tendency to make out that issue for the plaintiff, to which exceptions were taken. This case differs materially from those cited for the purpose of sustaining the exceptions. It is said in the opinion of the Court, in *Aylwin* v. *Ulmer*, 12 Mass. R. 24, "they [the jury] must have received the impression, that by law, they could not, on that evidence, find a verdict for the plaintiff." In *Tufts* v. *Seabury*, 11 Pick. 140, it is said, "the Judge is represented to have told the jury, that if they believed Chamberlain, they ought to find for the defendant; whereas the proper instruction would have been, that they should find for the defendant, if upon the whole evidence, they believed a credit had been given." The verdict was set aside in *Morton* v. *Fairbanks*, 11 Pick. 368, because the Judge decided that the articles brought into Court were not shingles, and ruled, that as the point was clear on inspection, it was to be decided by the Court. The opinion says, "as the jury would have the whole case before them, this may seem to be a speculative objection, but we think in strictness the point thus decided was a question of fact." In all the above cases, the instructions to the jury were such, that they were not at liberty to pass upon the facts, whereas in the case at bar, after expressing an opinion of the effect of the evidence, the

Judge instructed the jury in express and unequivocal terms, that if they were satisfied upon the evidence, that such a deception had been practiced by Greene, the obligation of June 30, 1835, might be treated as a nullity, and the plaintiff would be entitled to recover a moiety of the proceeds of the sale of the land to Rice, actually received by Greene; that it was not obvious to the Court that there were any facts in the evidence to establish such a deception, but that the jury must judge for themselves of the facts; that fraud was not to be presumed, though it might be proved by circumstances. The jury were restrained by no rule which could be regarded as binding, but were directed to exercise their own judgment in making up their verdict.

The expression of opinion by the presiding Judge on the state of the facts of the case, is not a matter of legal exception. *Phillips* v. *Kingfield*, 19 Maine R. 375.

The permission given to the jury to return specially their finding on the question of fraud, was authorized by practice and by law. *Gordon* v. *Wilkins*, 20 Maine R, 134.

Exceptions overruled.

WILLIAM R. COBB *versus* IVORY H. BILLINGS.

The sale of ardent spirits in less quantities than twenty-eight gallons by a person without license therefor, is illegal; and no action can be maintained for the price thereof.

The statute against retailing excepts from its prohibitions, the sale and carrying away, at one and the same time, of spirituous liquors in quantities equal to or exceeding twenty-eight gallons. And it comes within the exception, if the liquors making up the twenty-eight gallons in the whole are of several kinds.

ASSUMPSIT for goods sold and delivered as by a bill of particulars annexed to the writ.

The facts are given in the opinion of the Court.

Willis and *Fessenden*, for the plaintiff.

Longfellow, for the defendant.

The opinion of the Court was drawn up by

WHITMAN C. J. — The account declared upon is for articles of merchandize sold and delivered; a considerable portion of which consisted of ardent spirits. No question is made as to the sale and delivery of any part of them. But it is agreed, that the plaintiff was not licensed to retail ardent spirits; and the defendant objects to his recovering for that part of the account which is for ardent spirits. But, by the statement of facts agreed upon, it appears, that, in each instance of the sale of ardent spirits, with one exception, several kinds were purchased, and carried away at one and the same time, amounting in the aggregate to more than twenty-eight gallons; although there was not, in any instance, twenty-eight gallons of any single kind. We have no doubt that the defence is maintainable, as to the particular item forming the above exception, as it was for less than twenty-eight gallons. That sale was clearly a violation of law; and no promise can be held obligatory at law, which originates in a palpable violation of a positive statute. But statutes, which are highly penal, or work a forfeiture, are not to be extended in their construction beyond what the letter of their enactments manifestly requires.

The statute against retailing excepts from its prohibitions the sale and carrying away, at one and the same time, of spirituous liquors, in quantities equal to or exceeding twenty-eight gallons. It does not seem to be material, that the twenty-eight gallons so to be sold and carried away, should be in one compact mass. If it be taken in several kegs or vessels, and all purchased and carried away at the same time, it would come within the exemption; and we do not see that it should make any difference, if such kegs or vessels were filled with spirits of various kinds. They would be spirituous liquors, and all sold and carried away at the same time. If they were mixed together, and sold in quantities of twenty-eight gallons or over, no one would doubt that they came within the exemption, even although, for the purpose of transportation, they were divided and conveyed in vessels of sizes much smaller than

would contain twenty-eight gallons; and why should it make any difference, if the kinds, amounting in the aggregate to the exempted quantity, were kept separate, and conveyed away in a similar manner? We do not perceive that the mischief intended to be prevented, would thereby be aided or promoted. We think, therefore, that the plaintiff should recover the amount of his account, with the exception of the item sold in violation of law; and judgment may be entered accordingly as upon default, deducting the credits given.

The claim to have these credits set off against the illegal item we think inadmissible. They are payments *pro tanto*. Neither party has made any specific appropriation of them. In such case they must be deemed to have been made in discharge of the items in the account bearing the oldest date; and not being sufficient to balance those of a date prior to the one in question, this cannot be considered as cancelled thereby.

INHABITANTS OF FREEPORT *versus* INHABITANTS OF POWNAL.

The act incorporating the town of Pownal provided, "that the poor of said town of Freeport, with which it is now chargeable, together with such poor as have removed out of their town prior to this act of incorporation, but who may hereafter be lawfully returned to said town of Freeport for support, the expense thereof shall be divided between the two towns in proportion as they pay in the State valuation." *It was held*, that these provisions did not extend to such persons as were born after such incorporation and derived their settlement from those who had acquired one by residence in the part of Freeport which become Pownal and who had removed from Freeport before the incorporation of Pownal.

THE nature of the action and the main facts in the case appear in the opinion of the Court. The case came before the Court upon an agreed statement of facts.

Mitchell, for the plaintiffs, contended that the act incorporating the town of Pownal, March 3, 1808, made provision for the support of the paupers between that town and Freeport. All who had gained a settlement at that time in that part of Freeport, which became Pownal, and their descendants who

had acquired no settlement in their own right, were to have their settlement, and be supported in Pownal, if they became paupers. This must have been the intention of the legislature; and the intention of the law, is the governing principle in the construction of statutes. The object was, that Pownal should bear the burden of supporting those persons, who should become afterwards chargeable as paupers, whose settlement was acquired by living on the territory now Pownal, without regard to whether the settlement was gained by the pauper in his own right, or derivatively from an ancestor. It could not have been designed, that the provision should apply only to persons then in existence, and having a settlement in Freeport before the division.

Deblois, for the defendants, contended, that as the paupers were all born after the incorporation of the town of Pownal, that their settlement was not affected by either of the special provisions of the incorporating act. They were not chargeable at that time, for they were not then alive; nor had they removed out of the town of Freeport prior to the incorporation of Pownal; nor had they afterwards returned to Freeport for support. The act does not extend to the descendants of those who had removed from Freeport, and derived their settlement from ancestors who had acquired one there. The duty of a town to support paupers, depends entirely on positive statute enactments; and none is found requiring Pownal to support these paupers. Their grandfather, from whom their settlement is derived, had his settlement in Freeport; and on that town falls the burden of their support. He cited *Danvers* v. *Boston*, 10 Pick. 512; *Fayette* v. *Hebron*, 21 Maine R. 266; *East Sudbury* v. *Sudbury*, 12 Pick. 5; *Shrewsbury* v. *Boylston*, 1 Pick. 105; *Princeton* v. *West Boylston*, 15 Mass. R. 257; *Southbridge* v. *Charlton*, 15 Mass. R. 249; *Norton* v. *Mansfield*, 16 Mass. R. 48.

The opinion of the Court was drawn up by

Tenney J. — This is an action for the recovery of certain proportions of the expenses incurred by the plaintiffs for the

relief of Lydia Day and her two sons, James and Arthur, together with money paid to other towns, which had furnished supplies to the same persons, and the expenses of a suit instituted by the plaintiffs against the town of Sidney for the purpose of fixing the settlement of said paupers in the town of Sidney.

Benjamin Day, the father of said Lydia Day, resided in the town of Freeport in 1799, and had his legal settlement there; and although he removed the same year, and never resided in that town afterwards, there is no evidence, that he ever acquired any other settlement. He was born on the territory, which remained a part of Freeport after the incorporation of Pownal in 1808. The paupers never gained any settlement, excepting that derived from said Benjamin Day. It follows from these facts, that by the statute of 1794, c. 34, § 2, art. 10, Lydia Day derived a settlement from her father, in what remained Freeport after the incorporation of Pownal, and that her two children, who were born subsequent to 1808, derived a settlement from her in the same town, which they have since retained. This is not denied by the plaintiffs, but they insist that this action is maintainable by virtue of the 3d section of the act incorporating the town of Pownal, which is in the words following: — "That the poor of said town of Freeport, with which it is now chargeable, together with such poor as have removed out of their town prior to this act of incorporation, but who may hereafter be lawfully returned to said town of Freeport for support, the expense thereof shall be divided between the two towns in proportion as they pay in the State valuation." Those who were "poor" at the time of the act of incorporation were chargeable to the whole town of Freeport, as it had been; up to that period they belonged to one part equally with the other, and the previous expenses for their support had been borne by the inhabitants according to the respective valuation of each individual taxed. It was reasonable that the expenses incurred for the support of those who had a settlement in Freeport at the time of the division, and who should be chargeable thereafter as paupers, should be

borne, after the act, by both towns according to the ability of each. And the section refers to two classes of persons; one class were those, who were actually chargeable at the time of the passage of the act; and the other class included all those, who had their settlement in Freeport at that time and had removed into other places, but who might be lawfully returned to said town of Freeport for support. The language will not admit of a construction, which will embrace the descendants of the persons referred to in the latter clause; the provision would become inoperative after the decease of those persons having their settlement in Freeport, who had removed before the division took place.

By the facts agreed, the paupers, named in this suit, and for the expenses incurred in the support of whom it is brought, were not in being at the time that Pownal was incorporated.

The plaintiffs, according to the agreement, must become nonsuit.

CHARLES C. MITCHELL *& al. versus* SEWALL F. BELKNAP.

When the order from the defendant to deliver goods to a third person, is proved by evidence to which there is no objection, the delivery thereof may be proved by the books and suppletory oath of the plaintiff, whenever a delivery to the defendant himself, could be thus proved.

Where two men were doing business together in a store, their books and suppletory oaths were held by the Court, to have been admissible by the Judge presiding at the trial, to prove the delivery of a cask of spirits containing forty-five gallons.

ASSUMPSIT for goods sold and delivered, as by a bill of particulars annexed to the writ. The articles of the greatest bulk and weight were casks of liquor, no one containing a greater quantity than forty-five gallons, and barrels of sugar.

At the trial before SHEPLEY J. the plaintiffs introduced their books of original entries, on which the commencement of the account in suit was thus.

"Mr. S. F. Belknap to C. C. Mitchell & Son, Dr.
1842. To goods delivered United States Hotel,
Sep. 21. One bbl. St. C. Rum, 41 1-2 gallons,' $41,50."

To prove the delivery of the articles as charged, the plaintiffs offered their books, supported by their suppletory oaths. And being admitted, they testified to the delivery of all the goods charged to John S. Dunlap, or Dunlap and Kingsbury, or Kingsbury, or at the hotel for the use of the hotel of which Dunlap and Kingsbury were the keepers. The plaintiffs called a witness, who testified, that he was the truckman of the plaintiffs, and had at various times received goods from the plaintiffs, of which some were of a bulky character, to be delivered at the United States Hotel, and had there delivered them, and received payment for his services from Dunlap & Kingsbury. The defendant was not present at the delivery of any of the articles.

The defendant objected to the admission of all this testimony; first, because being delivered to Dunlap & Kingsbury the delivery should be proved by them or by some person other than the plaintiffs. And, second, because the goods were of such bulky and weighty nature, that other proof of their delivery than the plaintiffs' own oath should be required.

The presiding Judge overruled these objections, and permitted the plaintiffs to testify to the entries, and that the goods were delivered to Dunlap & Kingsbury.

The plaintiffs introduced evidence tending to show, that the articles were so delivered on the authority and guaranty of the defendant.

The verdict was for the plaintiffs for the full amount of their claim, and the defendant filed exceptions to the decision of the Judge.

Codman & Fox, for the defendant, contended, that it was not competent for the plaintiffs to prove by their books and own oaths the delivery of goods to third persons. Better evidence exists of the delivery. The persons to whom the delivery is alleged to have been made are competent witnesses, and might have been called. There is no distinction between the delivery of small sums of money and other articles to third persons. *Prince* v. *Smith*, 4 Mass. R. 455; *Faunce* v. *Gray*, 21 Pick. 243; *Winsor* v. *Dillaway*, 4 Metc. 221; *Dunn* v.

Whitney, 1 Fairf. 13; *Mifflin* v. *Bingham*, 1 Dall. 276; *Deas* v. *Darby*, 1 Nott & M'C. 436; 1 Greenl. Ev. 140, 141, and note.

Many of the articles charged were of the description denominated bulky, and on that account the delivery could not be proved by the books and oaths.

W. P. Fessenden, for the plaintiffs, remarked that the authority from the defendant to deliver the articles, was proved by testimony to which there was no objection. And he contended, that there was no difference in the kind of proof necessary to prove the delivery of goods to third persons by order of the defendant and to the defendant himself. The authorities do make a distinction between payments of money to order, and to the person giving the authority; but this is only an exception to the general rule. Nor is there any greater necessity for other proof, than there is where the delivery is to the purchaser himself, if the seller has a clerk, journeyman, or apprentice.

He commented upon the cases cited in behalf of the defendant, and cited 1 Binn. 237; *Chamberlain* v. *Carter*, 19 Pick. 188; 3 Dane, 322; 11 Conn. R. 207; 4 Conn. R. 228.

The presiding Judge is to exercise his discretion in determining whether the articles have so great weight or bulk as to require the assistance of others; and his decision is conclusive. *Leighton* v. *Manson*, 2 Shep. 208; *Clark* v. *Perry*, 5 Shep. 175.

The opinion of the Court was drawn up by

Tenney J. — This is an action of assumpsit for goods, wares and merchandize sold and delivered, and appearing from the bill annexed to the writ of various kinds, and sold at different times, during a period of almost two years. It was admitted by the plaintiffs, that the defendant did not personally receive any of the articles, nor was he present at the delivery thereof. The plaintiffs were permitted by the presiding Judge to introduce to the jury their books, supported by their oaths, against the objection of the other party; and they testified

that the goods were delivered at the United States Hotel, or to one or both the keepers of said Hotel; and other evidence was introduced for the purpose of showing that the goods, so delivered, were upon the defendant's authority or guaranty. Exceptions having been taken to the admission of the books and the oaths of the party, it is insisted, that they are sustainable on the ground, that the existence of other and better evidence is expressly disclosed, which should have been introtroduced, and the books and the testimony of the plaintiffs excluded; and that some of the articles being of a bulky and weighty nature, it is to be presumed, that the plaintiffs were aided in the delivery of those articles by those who were competent witnesses, and who should have been introduced.

In England the shop books of a tradesman, containing the entries made by a clerk, are admissible with the evidence from the clerk of the delivery of the goods charged; and when it has been shown that the clerk was dead, they have been allowed on proof that the entries were in his handwriting. 1 Phil. Ev. 211 & 212, and notes; *Pitman* v. *Maddox*, 2 Salk. 690. Further than this the books of a party are not there considered competent evidence.

In this country a more liberal practice has prevailed, but by no means uniform in all the States. In New York the books, containing the original entries of the party, have been held admissible, and his oath has been allowed in their support; but they are not evidence of money lent nor for a single charge of any other article. Their admission has been denied, unless a foundation has first been laid by proof, that the party had no clerk, that some of the articles had been delivered, that the books produced are the account books of the party, and that he has kept fair and honest accounts, and this by those, who have dealt and settled with him. *Carr* v. *Potter*, 8 Johns R. 212. In Connecticut, the statutes have regulated to some extent the practice in relation to this species of evidence. In Pennsylvania, the books and the oath of the party have been held admissible to prove the delivery of goods. *Poultney* v. *Ross*, 1 Dallas, 239.

In Massachusetts, from an early period to the present time, a party has been allowed to introduce his books, containing entries made by himself, and to testify relative to the delivery of the articles charged and the entries made; and the same practice has prevailed in this and other States. It has been restricted in some particulars, to secure the rights of the party attempted to be charged. Such evidence has not been admitted to sustain a charge for money exceeding forty shillings, or for cash paid to a third person on an order; the charges must appear to have been made at or about the time of the respective dates, and when the articles were delivered. If the entries are made by a clerk, his testimony is required; if dead the books have been held to be competent to go to the jury, if it be proved, that the entries are in his handwriting; and the books of a deceased party, the entries being in his handwriting, have been admitted as evidence.

The departure from the English practice has undoubtedly arisen from a supposed necessity. The rigid adoption of the English rule in a country like this, when first settled, when clerks were not generally employed, would have been a serious obstacle to the successful prosecution of business of tradesmen or mechanics. The practice which has prevailed here for so long a time, has become a rule, recognized by men of business and Courts of law; and although having its origin in necessity, it may be regarded as established, and not subject to vary according to the necessities and circumstances of each particular case. In this State, the books and the oath of the party have been allowed without first laying the foundation, by proving other facts, as has been required in New York. They have been admitted, on appearing to be regularly kept, to prove the delivery of goods, where the entries have been made by the party, notwithstanding he may have had a clerk in his shop, or others may have been present at the time of the delivery. It has been left to the Judge or the Court before whom the case is tried, on inspection, to determine whether the book was proper for that purpose, and on a determination in its favor it is admitted.

Authorities have been cited for the defendant, which it is insisted sustain the proposition, that this evidence is inadmissible, when the goods are delivered to a third person. In Greenleaf's Evidence, p. 140 and 141, in note, it is laid down that this evidence has been refused admission to prove the fact of goods delivered to a third person; — and the transaction, to be susceptible of this kind of proof, must have been directly between the original debtor and the creditor. In *Dunn* v. *Whitney*, 1 Fairf. 9, the learned Judge who delivered the opinion of the Court, lays down the general principle, "that whenever it does appear, from the nature of the transaction, or from disclosures in the case, that other evidence is obtainable, the law requires its production. If the articles were delivered by a clerk, by him must the fact be proved. If delivered to an agent or servant, he is the proper witness."

On the other hand, the case of *Coffin* v. *Cross*, decided by the Supreme Judicial Court of Massachusetts, in the county of Essex, in 1800, as reported in 3 Dane's Abr. page 322, is relied upon. Coffin was allowed to introduce this kind of proof to show services rendered to a third person: but other evidence was required to show, that those services were rendered on the credit of Cross; and in the case of *Poultney* v. *Ross* before cited, the plaintiffs introduced their books and their suppletory oaths to prove the delivery of goods to one Hawke, but it was not considered proof of authority to make the charges to Ross.

When the cases referred to by Mr. Greenleaf in his note, are examined, it is believed, that they will not be irreconcilable with those last cited; this species of evidence was refused admission rather on account of its insufficiency, than its incompetency. Where the articles are delivered to a third person, and that is established by the most plenary proof, it is certainly insufficient alone to sustain the action against the party attempted to be holden. And where the delivery to a third person can be shown by the book and the party's oath, such evidence would be entirely useless, unless other evidence of the authority is adduced, and ought not to be permitted to go

to the jury unaccompanied by other proof of that authority; parties have been restricted in their testimony to the *delivery* of the articles, even when made directly to the adverse party; no contract as to price, or statement of the value of the goods, has been allowed to be given in evidence by the one who offers his books in his own favor. To the decision of the case of *Dunn* v. *Whitney*, we think there can be no objection; it is in harmony with the doctrine deducible from most if not all the cases, where the question has been presented. It is not believed that any decision has gone so far to allow such evidence in support of a claim like the one finally presented in that case. But we do not find authority for the doctrine contained in that opinion, that, where the goods are delivered to an agent or servant, the delivery must be proved by him. If it appears that the goods were delivered by a servant or agent, who has made the charges in the books, we have seen that the evidence of such person has been required. We have not been able to find any case, where the evidence of the servant of the party receiving the goods has been held indispensible to the exclusion of the books and the suppletory oath of the other party. There are the most obvious reasons for the distinction. The clerk or agent of the vendor, who delivers the goods and makes the entries in the books, is supposed to know at the time of the delivery, the kind, the quality, the amount and the value of the articles sold; his situation presupposes that he has as full knowledge of all these as the party himself; and if this has faded from his recollection, there are before him in the books, that which will enable him to testify without the danger of error. On the other hand, the servant or agent of the purchaser, perhaps in a large majority of cases, receives the goods in casks, packages and bales, without being informed of the contents, much less of the precise amount, character and value; and if he did know all this, there is little which could call it up to his remembrance months or years afterwards. If such evidence should be necessary, in order to secure the mechanic or the shopkeeper, the evidence of his claims for articles and labor which are charged

upon his books, servants, porters and truckmen would be required to make memorandum of the articles, specifying particularly their amount and value, which passed through their hands, and the entries of the seller, in a litigated case, would be useless. Such agents have never been supposed to be subject to such a duty.

As to the second ground of objection, we are not satisfied that the Judge erred in allowing the books as evidence in relation to the articles, which were the most bulky or weighty of those charged. No precise line has been drawn, between those which can, and those which cannot be proved to have been delivered by the books and oath of the party, making the claim, but it has been deemed proper that the Judge should determine from the inspection of the items.

The heaviest article in the bill of particulars annexed to the writ, is a cask of spirit, containing forty-five gallons. This is not so difficult to deliver, that it could not be done by the two plaintiffs, and we think that the verdict should not be disturbed for that reason.

Exceptions overruled.

DAVID B. STROUT *versus* THE INHABITANTS OF DURHAM.

In an action against a town to recover damages, alleged to have been sustained by a defect in a public highway within the town, brought before a justice of the peace who was an inhabitant of the town, if the defendants enter an appeal, and proceed to try the merits of the case in the District Court, and fail in their defence, they cannot afterwards make objection, that the justice was an inhabitant of the town.

If the defendants appear in this Court by their selectmen, and not otherwise, as their agents, it is not competent for them, by the same agents, appearing by virtue of no additional powers, to question their agency.

If the defendants have availed themselves of the advantages of an appeal, entered by their selectmen, it is too late at the second term to deny the right of their officers to appear and answer to the suit in the name of the town.

If the parties go to trial on the merits, in an action before a justice of the peace, and an appeal is entered, without the addition of the *similiter* to the plea, the District Court, nevertheless, has jurisdiction of the case.

If a party tenders an immaterial issue, having had the full benefit of it as a material one, he cannot afterwards object to the proceedings on account of his own irregularities; nor have his own appeal dismissed on account of defects in his own pleadings, after he has had an opportunity to try his case upon its merits, and could again have a hearing upon the appeal.

Where the defendant has pleaded an immaterial plea, tendering an issue, in an action before a justice of the peace, and an appeal has been entered to the District Court, without any joinder of the issue, and the defendant has refused to amend his plea, it is competent for the latter Court to permit the plaintiff to demur to the plea.

In an action against a town to recover damages alleged to have been sustained by the plaintiff by reason of a defect in a highway within the town, commenced before a justice of the peace, and carried by appeal to the District Court, it is competent for that Court to order a repleader, or an amendment of the pleadings.

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

The facts in the case, and the questions raised in the District Court, as well as the rulings and decisions of the District Judge, appear in the opinion of this Court.

Fessenden, Deblois & Fessenden, argued for the defendants in support of their positions in the District Court; and cited *Wood* v. *Prescott*, 2 Mass. R. 174; *Spear* v. *Bicknell*, 5 Mass. R. 129; *Hodgdon* v. *Foster*, 9 Greenl. 113; *Low* v. *Ross*, 3 Greenl. 256; Com. Dig. Pleader, 2 B.; Co. Litt.

66 (b); 1 Chitty's Pl. 387; 1 Tidd's Pr. 62, 105; 1 Wend. 80; *Copeland* v. *Bean*, 9 Greenl. 19; *Magoun* v. *Lapham*, 19 Pick. 419; 5 Com. Dig. 4 Ed. 512; *Kelly* v. *Taylor*, 17 Pick. 218; *Strout* v. *Berry*, 7 Mass. R. 385.

S. Moody argued for the plaintiff, citing Rev. Stat. c. 116, § 9; 5 Mass. R. 193; 4 Pick. 169; 8 Pick. 405; 19 Maine R. 22; 18 Maine R. 349; 1 Greenl. 361; Rev. Stat. c. 104, § 34; 8 Greenl. 62; 7 Greenl. 302; 1 Greenl. 183; Rev. Stat. c. 115, § 20.

The opinion of the Court was drawn up by

TENNEY J. — This action was brought for an injury alleged to have been sustained by the plaintiff by reason of a defect in the highway, before a justice of the peace, who was an inhabitant of the town of Durham. The selectmen of the town appeared and pleaded, that the defendants *did not owe* the plaintiff, &c. and thereof put themselves *on the country;* whereupon the cause proceeded to trial, and a judgment was rendered for the plaintiff for damages and costs. An appeal was taken from this judgment, and a recognizance entered into to prosecute the same; the appeal was entered in the District Court, and the cause continued. When the action was called for trial at the second term, the counsel for the defendants moved that the proceedings be quashed for several reasons, which are set forth in the exceptions. The motion was overruled and the trial ordered to proceed. The reasons relied upon by the defendants at the argument, are, 1st. That the justice, being an inhabitant of Durham, had no jurisdiction. 2d. That the selectmen could not legally appear and plead to the action. 3d. That there was no material issue, and no issue joined before the magistrate. The plaintiff's counsel moved the District Court for leave to reply, or to demur to the plea put in before the justice. Upon this motion, the defendants' counsel consented that the plaintiff might reply by joining the issue tendered before the magistrate, but objected to a demurrer to that plea. The leave to file the demurrer was granted, and the demurrer was accordingly filed; the Court

directed the defendants to join the demurrer, or plead anew to the action, which they declined to do; whereupon the defendants' plea was adjudged bad, and a judgment was rendered for the plaintiff, against the objection of the defendants.

Rev. Stat. c. 116, § 1, gives to justices of the peace original and exclusive jurisdiction in all civil actions, wherein the debt or damage does not exceed the sum of twenty dollars, excepting in certain actions therein mentioned; and in prosecutions for penalties, a justice of the peace may have jurisdiction, if otherwise entitled, notwithstanding his town may be interested in the penalty. From the latter provision, it is implied, that in other cases where he has an interest in the damages sought to be recovered he has not jurisdiction. If there was any foundation for this objection, advantage should have been taken in some form at an earlier stage of the proceedings; the defendants cannot avail themselves of this point, after proceeding to try the merits of the case, and failing in their defence.

The second ground of exception relied upon cannot be sustained. The defendants now appear by their selectmen, and not otherwise, as their agents; and it is not competent for them, by the same agents, appearing by virtue of no additional powers, to question their agency. Again, the defendants have ratified the acts of their selectmen, by availing themselves of the advantage secured thereby. They have entered the appeal taken by the selectmen, and it was too late at the second term, to deny the right of these officers to appear and answer to the suit in the name of the town.

If the proceedings, before the magistrate, were such that no appeal could be made therefrom, and this appeared from the record, the District Court should have dismissed the the whole matter; the judgment in this case however shows, that a plea was filed, that issue was joined upon it, a trial had, judgment rendered for the plaintiff, an appeal taken, and a recognizance entered into to prosecute it. The plea was not in the proper form of the general issue, in such an action, but no objection was made thereto. Chap. 115, § 9, 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, where the person and case may be rightfully understood by the Court, nor for want of form only, and which by law might have been amended."

The defendants' counsel moved the District Court, that the proceedings be dismissed, because no material issue, and no issue was joined. When the case and the papers are all examined, it is apparent, that the plaintiff omitted to add to the defendants' plea, the *similiter*. The case finds that to the "plea, an issue was joined by the plaintiff as appears by the following copy of the original plea before the justice sent up by him." Then follows a copy of the plea, without the addition of the *similiter*. We do not think the *similiter* was necessary in order to have given the District Court jurisdiction. In *Earle* v. *Hall*, 22 Pick. 102, an appeal was taken from the Court of Common Pleas, where two defendants were sued in trespass, and they filed a *joint* plea, which was afterwards retracted, and *several* pleas filed by leave of Court, and the plaintiff refused to join issue; the cause was tried notwithstanding, in the Court of Common Pleas, and a verdict returned for the defendants, and appeal taken, which was entertained by the appellate Court. In *Sayer* v. *Pocock*, 1 Cowp. 407, the replication was amended by order of Court after verdict by inserting the *similiter*, on motion of the plaintiff, and one reason for the amendment was that the Court only make that right, which the defendants understood to be so by going to trial. In the case at bar, the proceedings before the justice were not regular, but it was the understanding of the parties, that a material issue was joined, because they went to trial. The justice entertained a similar opinion, because he says the plaintiff joined the issue. The defendants having failed in their defence, took and entered their appeal. Both parties appeared in the District Court. The plaintiff consented after imparlance, that all irregularities should be amended, so that an issue proper in substance and form for the foundation of a

judgment should be presented and tried. The defendants waived any objection, if they could have made it, to the want of the *similiter*, for they contended that the issue, as presented before the justice, should be joined. If they tendered an immaterial issue, after having the full benefit of it as a material one, they ought not to object to the proceedings on account of their own irregularities; nor could they with propriety ask to have their own appeal dismissed on account of defects in their own pleading, after they had had an opportunity of trying their case upon its merits, and could again have a hearing upon the appeal. If they had pleaded anew, as the counsel for the plaintiff consented that they might do, and the issue tendered had not been joined, it might have been a discontinuance by the plaintiff, and judgment for costs would have been awarded against him. In the case of *Eaton & al.* v. *Storer*, 7 Mass. R. 312, the Court say, "But it is at least doubtful whether in any case the party who tenders an immaterial issue, should it be found against him, can have the benefit of a repleader; and this upon the just principle that the party who commits the fault shall not avail himself of that fault to prejudice or delay the other party." In the case before us, the defendants declined to plead anew, when they could have done so, by consent of the other party, and certainly should not be allowed to take advantage of their own fault to the injury of the plaintiff.

Did the Court err in allowing the plaintiff to demur to the plea of the defendants after they had refused to amend their plea? It is insisted by them, that the plaintiff could have made the issue before the justice perfect by joining it in the District Court, but declining that, they had no right to file a demurrer to the plea. The Court will never require that to be done, which will be useless after it shall be done. If the plaintiff had joined the issue tendered by the defendants, it might not have been sufficient for the foundation of a valid judgment; and if the *similiter* had been added, the Court might have ordered a repleader, and upon refusal to replead, a judgment might have been entered as upon default. The

permitting the demurrer, adjudging the plea bad and entering judgment for the plaintiff was no more in effect, than to have entered judgment for want of a material plea. The demurrer set out in form the defects in the plea which the Court could have officially noticed without it. Judgment entered for want of a valid plea, would be the same as if entered after the plea should be adjudged bad on demurrer. The refusal of the defendants to join the demurrer, after direction of the Court, could not prevent them from doing that, which could have been done, if the defendants had refused to plead.

It is again contended that the Court could not authorize a repleader, but were bound to allow the pleadings to stand as they were left before the magistrate. The cases relied upon by the defendants in support of this proposition are those where soil and freehold was pleaded before the justice. Such a plea cannot be withdrawn after the entry of the appeal. The withdrawal and repleader would permit a party defendant, without any intention of putting in controversy title to real estate, to oust the justice of the peace before whom the action was pending, of his jurisdiction of the matter really in issue and ultimately to bring the action into this Court by appeal, when we should have had no jurisdiction upon the appeal, if the plea of soil and freehold had been omitted.

By c. 116, § 9, "when an appeal is taken from a justice of the peace, the case shall be entered, tried and determined in the District Court, in like manner, as if it had been commenced there;" and by c. 115, § 10, all imperfections and defects may, on motion, be amended by either party, on such terms as the Court may direct. And if the Court are at a loss how to give judgment a repleader will be awarded on motion of either party. *Gerrish* v. *Train*, 3 Pick. 124. Generally a repleader will be ordered before or after verdict, where the Court shall be satisfied, that the fact put in issue is irrelevant to the merits of the case. *Eaton & al.* v. *Storer*, 7 Mass. R. 312.

Exceptions overruled.

Daniel Burnham *versus* Nathan Howe & *al.*

When a case is opened to the jury, and taken from them without a verdict, and submitted to the opinion of the Court upon a report of the evidence, and there is no agreement of the parties inconsistent therewith, it is within the discretion of the Court to permit other evidence to be offered, if it is in itself pertinent to the issue, and has a tendency to throw light upon the questions presented.

Where justices duly selected and qualified have administered the poor debtor's oath, after an examination, to a debtor, who had been arrested on execution and had given bond, they may amend their certificate, conformably to the truth of the case, not only after the commencement of a suit upon the bond, but upon the trial thereof.

Under the poor debtor act of the Revised Statutes, if the debtor wishes to avail himself of the benefit of an examination and of the poor debtor's oath, it is for him to take such measures, that a legal tribunal for the purpose shall be constituted. He must select one justice, and procure his attendance at the time and place appointed in the notice; and if the creditor omits to appear and select the other, the debtor must cause the appointment to be made by an officer, and procure the attendance of the justice so selected.

The statute has pointed out no mode, document or precept, in reference to the selection of a justice, which an officer is bound to regard, or notice; and the debtor has but the same power to procure the appointment and attendance of the other justice, in such case, that he has in procuring the attendance of the justice selected by himself.

It is not necessary that the officer making the selection of a justice, should have absolute knowledge of the failure of the creditor to make his own selection. If the officer acted under erroneous information, and made an appointment, when the creditor had procured the attendance of a justice of his own selection, the appointment by the officer would be void.

The justices may amend their certificate by adding, in accordance with the truth, a more full statement of the mode in which their own selection was made.

Where it appears by the certificate of the justices to what debt the proceedings related, their omission to insert the date of the execution, on which the arrest was made, will not render the proceedings void.

When the certificate of the justices states that the debtor was examined prior to his taking the oath, it is conclusive in that respect; and parol evidence is inadmissible to show that there was in fact no examination.

That there was an examination is implied from the language of a certificate which says, "that in our opinion the debtor is clearly entitled to have the oath prescribed in the 28th section of said chapter administered by us, and that we have, after due caution to him, administered said oath."

Debt on a poor debtor's bond, dated October 3, 1842.

After all the evidence had been introduced, the case was taken from the jury by consent of the parties, and by them submitted thereon, or on so much thereof as should be considered legal and admissible, to the decision of the Court, with authority to order a nonsuit or default, and enter judgment in favor of the party entitled to prevail. The facts are stated in the opinion of the Court.

Howard & Shepley contended, that the justices assuming to act in this case were not legally selected, and had not jurisdiction of the matter, and that therefore their proceedings were *coram non judice* and void. This has been repeatedly decided by this Court. One of the justices was not selected by the plaintiff, or by any officer, but by the debtor, or the other justice.

The plaintiff should have been permitted to inquire of the justices respecting the examination, and to show, that there had been none. The justices could not administer the oath without an examination of the debtor. The certificate does not state that there had been any. The plaintiff is not precluded from showing, that there was none. Rev. St. c. 148, § 20, 22, 25, 27, 29; *Harding* v. *Butler*, 21 Maine R. 191. There is the same reason for permitting this inquiry, that there is in proving by parol, that there was no legal selection of the justices.

The amendments offered ought not to be allowed. They are not conformable to the truth, nor consistent with the statements of the parties, under oath, who wish to amend. The same objections apply to the second one offered, with the additional ones, that the justices did not know of the fact when the first certificate was made, and that the parties had agreed to submit the case on other facts. The justices are a Court only for a specific purpose and for a limited time, and after administering the oath and giving the certificate their authority to act ceases, and they cannot, years afterwards, amend their record.

Deblois and *O. G. Fessenden*, for the defendants, contended, that having shown the application to a justice of the peace

for a citation, and the certificate of two justices of the peace and of the quorum, that they had administered to him the poor debtor's oath, one alternative of the bond was complied with, and the defence made perfect. The plaintiff is not at liberty to contradict such certificate in any particular stated in it. *Cunningham* v. *Turner*, 20 Maine R. 435; *Cary* v. *Osgood*, 18 Maine R. 152; *Agry* v. *Betts*, 3 Fairf. 415; *Black* v. *Ballard*, 13 Maine R. 239; *Colby* v. *Moody*, 19 Maine R. 111.

It was incompetent for the plaintiff to introduce proof that Harding and Ilsley were not duly selected to take the oath of the debtor, they having in their certificate stated their own character, the parties to the process, the commitment of the debtor, his desire to take the oath, and that he had notified the creditor according to law. Officers *de facto*, undertaking to act officially, are to be presumed to be duly qualified to act, and their qualification cannot be controverted collaterally, in a suit in which they are not parties. *Bucknam* v. *Ruggles*, 15 Mass. R. 180; *Nason* v. *Dillingham*, 15 Mass. R. 170; 9 Mass. R. 231; 7 Johns. R. 549; 10 Mass. R. 290; *Charitable Association* v. *Baldwin*, 1 Metc. 359; *Granite Bank* v. *Treat*, 18 Maine R. 340.

But if not conclusive, the certificate is *prima facie* evidence, and if uncontradicted, is to be taken as true. This was decided in the case last cited. The testimony reported does not contradict this certificate.

The justices, however, had the right to amend their certificate, and as amended complete performance is shown. *Colby* v. *Moody*, 19 Maine R. 111.

No damages were sustained; and in such case, none can be recovered. *Colby* v. *Moody*, before cited; *Oriental Bank* v. *Freese*, 18 Maine R. 109; Rev. St. c. 115, § 78; *Clark* v. *Lamb*, 6 Pick. 512.

The opinion of the Court was by

TENNEY J. — This action is upon a poor debtor's bond given upon his arrest on an execution, in the usual form. The

defence set up is, that within six months from the execution of the bond, the debtor duly cited the creditor to appear before two justices of the peace and of the quorum, and submitted himself to examination, and took the oath prescribed by the Rev. Stat. c. 148, § 28, according to the first condition mentioned in said bond. The defendants introduced the certificate of the magistrates, who signed the same as justices of the peace and the quorum. In order to show a want of jurisdiction in them, the plaintiff called upon one of the justices as a witness; and the defendants afterwards introduced other evidence, in support of their authority to act in the matter. It appeared that at the time and place mentioned in the citation, the debtor made selection of Charles Harding, Esq. whose name is affixed to the certificate; he immediately after called upon the attorney of the creditor and requested him to go to the place appointed for the disclosure, and attend to the same, to which the attorney replied, that he did not *or* would not take notice; that the said Harding then requested him to appoint a justice, which he refused to do; that thereupon said Harding requested a deputy sheriff to appoint a justice, and the deputy sheriff did appoint Henry Ilsley, jr. for the creditor, out of several justices of the peace and of the quorum, which he requested Harding to mention as being commissioned and qualified; that Mr. Harding did not know, that he stated to Mr. Ilsley, that he was so appointed; that Mr. Harding asked Mr. Ilsley to call at the place appointed for the disclosure, before he saw the said attorney or the officer, who made the appointment; that he put into the hands of the officer no document, nor did the officer give to the justices any paper; and that neither the creditor, or his attorney appeared or was informed of the appointment of Mr. Ilsley.

After a portion of the above mentioned evidence was presented, and the case taken from the jury by consent of parties that the facts might be reported, the defendants were allowed to put into the case, the other portion of the evidence, against the objection of the plaintiff. An amended certificate was also offered by the defendants, showing how the justices were

appointed, which is to be considered a part of the evidence or not, as the Court shall determine. A further amendment was offered under a written motion of the defendants, at the argument before the whole Court, which is also for their consideration.

1. Was the evidence adduced at the trial, after the case was taken from the jury, and the amendment first offered, legally admissible?

At the term of the Court, when the action was tried, there being no agreement of the parties inconsistent therewith, it was within the discretion of the Court, to allow other evidence to be offered, if it was in itself pertinent to the issue, and had a tendency to throw light upon the questions presented. It was in furtherance of justice, and was in violation of no inflexible rule of law.

It is well settled, that whenever certificates first made are defective, and do not contain all the facts, they may be amended conformably to the truth of the case. The authorities relied upon in support of this principle are full. Such amendments have been repeatedly allowed, not only after the action was commenced, but at the trial of the cause. The amended certificate was not inconsistent with the facts, which were stated by the witnesses, and we are satisfied, that it should make a part of the case.

The propriety of the other amendment, after it was agreed that the decision of the cause should depend upon such parts of the evidence, introduced at the trial, as were legally admissible, and the questions of law were argued, may admit of more doubt; but it is a matter, which is immaterial in this case.

2. Had the justices, who gave the certificate, jurisdiction of the matter referred to therein?

Chap. 148, § 46, provides, that "one of the justices shall be selected by the debtor, and one by the creditor, his attorney, or agent, if the same can conveniently be done, otherwise by the sheriff or any deputy or coroner, who might legally serve the precept on which he was arrested; and such officer

may also select, in case the parties or either of them decline so to do."

The statute points out no mode in which the officer may be called upon to make an appointment, where the same becomes necessary. After the debtor has made a selection of one justice, that justice is clothed with no power to do any act connected with the examination of the debtor, until another is legally appointed. He cannot compel the attendance of a sheriff or deputy, and a notice, that his attendance becomes necessary, has no more validity than one from any other person. If an officer be present, the justice appointed by the debtor cannot issue any valid precept, or in any manner require, that he should make a selection and appointment for the creditor. The statute has pointed out no record, document or precept, which an officer is bound to regard or to notice. If the debtor wishes to avail himself of the benefit of an examination, and the poor debtor's oath, it is for him to take measures that a legal tribunal for the purpose shall be constituted. It is necessary that a justice be selected in his behalf, who shall attend at the time and place appointed. No precept, or written request to such a justice, has been required by the statute or practice. If the creditor omits to appear, and make selection of another, the debtor must cause the appointment to be made by an officer. He has the same means to cause the officer to act, and to procure the attendance of the magistrate after his appointment, that he has to obtain the services of the one of his own selection, and no greater. If he succeeds, in obtaining the magistrate, impartially selected by the officer, authorized in other respects, to proceed in the examination, and the two are present at the time and place, mentioned in the citation, we do not perceive any reason, why they have not authority to enter upon the consideration of the matter, for which they were selected. If they are two disinterested justices of the peace and of the quorum of the county, where the examination is contemplated to be made, and in fact selected by those, who have the power to make the selection, it would be a reproach upon the law, to

say they had no jurisdiction, because the officer had not absolute knowledge of the failure of the creditor to make his own selection. It cannot be said, that such appointment was not made in compliance with the statute. If the officer acted under erroneous information, the creditor himself having procured the attendance of a justice of his own selection, the appointment of the former would be void.

In the case at bar, the justices' certificate as it was first introduced, was in the form prescribed in the statute, c. 148, § 31, excepting that the date of the execution on which the arrest was made is not inserted. The amendment offered at the trial shows how the magistrates, who signed the certificate, were selected and appointed; and the evidence offered by the plaintiff does not contradict, but so far as it extends is in affirmance of its statements; the evidence of the defendants, which was properly allowed, after the attempt of the plaintiff to show that there was no power in the justices to act, discloses more fully the steps taken to obtain a legal appointment of the magistrate, in behalf of the creditor; no undue influence upon the mind of the officer is exhibited; and no attempt is made to prove a want of disinterestedness and impartiality, in the one appointed.

The omission to insert the date of the execution in the certificate cannot render void, the proceedings. It is not made a prerequisite to its admissibility as evidence, in a suit upon a bond. The jurisdiction of the justices fully appears upon the certificate, and it also shows what was done by them. No other doubt could arise from the omission, than that, whether the proceeding were in relation to the debt on which the arrest was made and the bond given, or not. The description of the debt in the certificate and the bond itself are identical, and is so full, that no doubt can reasonably exist in this respect. The certificate being properly in evidence, shows that the condition first mentioned in the bond has been fulfilled, it not being required therein, that there should be a certificate in any particular form.

The evidence offered, to prove that there was no examina-

tion of the debtor, previous to his taking the oath, was properly excluded. The 25th section of the statute referred to, requires "that the justices shall examine the notification, and return, and if they deem them correct, they shall examine the debtor on his oath concerning his estate and effects, and the disposal thereof, and his ability to pay the debt for which he was committed; and they shall also hear any other legal and pertinent evidence, that may be adduced by the debtor or by the creditor;" and § 27, "If upon such examination, and the hearing of such evidence the justices shall be satisfied, that the debtor's disclosure is true, and shall not discover any thing thereby inconsistent with his taking the oath, set forth in the next section, they may proceed to administer the same."

The jurisdiction of the justices being established, it was for them to judge of the sufficiency of the notification, and the return; and their judgment in that matter is conclusive in a suit upon the bond. They are also to examine the debtor, and to judge conclusively upon the propriety of administering the oath. The mode and extent of the examination, they are to determine. The examination is implied from the language used in the certificate, "that in our opinion he is clearly entitled to have the oath prescribed in the 28th section of said chapter administered by us, and that we have after due caution to him, administered said oath." Whether they administered the oath in the exercise of a sound discretion or not, is not an inquiry which could properly be instituted at the trial.

Judgment for the defendants.

ALFRED J. STONE *& al. versus* MARGARET NICHOLS *& al.*

If a note is signed by one person, witnessed, and delivered over to the payee, and afterwards, when the subscribing witness is not present, a third person in pursuance of an original agreement to that effect, signs his name upon the back thereof, so far as it respects the latter it is not within the provisons of the tenth section of the statute of limitations of 1821, c. 62, as a "note in writing, made and signed by any person or persons and attested by one or more witnesses."

ASSUMPSIT by Stone and Morse against Margaret Nichols and John M. Nichols on a note of which a copy follows.

"Brunswick, Feb. 13, 1836. Two months from date and grace, value received, I promise to pay Stone & Morse, or order, fifty dollars. "Margaret Nichols.

"Witness, C. Hosmer."

John M. Nichols signed his name upon the back of the note. They were alleged in the declaration to have promised jointly and severally. The action was not commenced within six years next after the note became payable. The statute of limitations was pleaded.

The District Judge instructed the jury, that if J. M. Nichols put his name upon the note in pursuance of an original agreement to that effect, after the signatures of Margaret and the witness, and not in their presence, and after the delivery thereof to the plaintiffs, yet they would be considered joint and several promisors, and the case would be within the exception in the statute, as to witnessed notes, not only as it related to Margaret, but to J. M. Nichols. The jury found for the plaintiffs, and the defendants filed exceptions.

A. Haines, for the defendants.

W. P. Fessenden and *J. W. Davis*, for the plaintiffs.

PER CURIAM. — The exceptions are sustained, and a new trial granted, because so far as it respects John M. Nichols, this is not a witnessed note, within the provisions of the tenth section of the statute of limitations of 1821, c. 62. The action, therefore, as to him is barred by the statute of limitations.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF YORK.

ARGUED AT APRIL TERM, 1844.

JOHN FAIRFIELD & *al. versus* JOHN T. PAINE.

The return of an officer that he made an attachment of property at twelve o'clock at noon on a certain day, is to be considered prior in point of time to the return of an attachment as made on the same day, indefinitely, without specifying any particular time of the day.

When judgment has been rendered in the suit, the officer making service of the writ ought not to be permitted to amend his return, unless the record discloses something from which the addition can be made.

No amendment of an officer's return should be permitted, or allowed to have effect, when such amendment would destroy or lessen the rights of third persons previously acquired, *bona fide*, and without notice by the record, or otherwise.

If during the pendency of an action in the District Court, where the parties claimed under others who had respectively made levies upon the same land on executions issued on judgments of the same Court, the District Judge should direct the clerk to insert under his entry of the pending action a permission to an officer, who had years before made service of one of the writs in one of the former suits, to alter his return, and the alteration is made, this Court will, nevertheless, on an appeal determine the effect of such proceedings upon the rights of the parties.

WRIT of entry wherein certain lands in Shapleigh were demanded. The parties agreed upon a statement of facts, and that the Court might render such judgment as they would, if the same had appeared on the report of a Judge on trial of said action, and might order a nonsuit or default.

The title under which the demandants claim is thus derived. John Trafton recovered judgment against Ansel Gerrish, at the October Term of the Common Pleas for said County of York, 1838, for $2131,53, damage, and $40,28, costs, and an execution, issued on said judgment, was levied on the demanded premises and other property on Nov. 21, 1838, within thirty days after judgment, and recorded Jan. 28, 1839. The demand on which said judgment was rendered had been assigned by Trafton to the demandants on Aug. 7, 1838, and on Feb. 25, 1839, a deed of release was given by him to them. The officer's return of an attachment on the original writ, as it remained until Aug. 23, 1842, was as follows. "York, ss. May 17, 1836. I attached a quantity of mill refuse, refuse, clear boards and timber, being by estimation fifty thousand feet, of the value of two hundred dollars, and put them in the care of the within named Trafton, and also all said Gerrish's right, title and interest in and to any real estate in the county of York, and gave him a summons for his appearance at Court. Caleb Emery, D. Sheriff." In Aug. 1842, at an adjournment of the preceding May Term of the District Court, the demandants made a written motion, that Caleb Emery should have leave to amend his return by inserting the time of day when the attachment was made. By direction of Goodenow J. the following entry was made upon the clerk's docket, under the present action, then pending in the District Court. "Leave to amend the officer's return as per motion of plaintiffs on file, in vacation as well as in term time." Emery had ceased to be a deputy sheriff in 1838, and on Aug. 23, 1842, and for four or five years prior to that time, resided in the State of New Hampshire, and then and there altered the return on the writ, which had been taken from the files of the clerk and carried there, by inserting between the words *also* and *all* these words; "on said 17th day of May, 1836, at the earliest possible moment after the 16th day of May I attached."

At the September Term of the Supreme Judicial Court for said county, 1838, John Gowen recovered judgment against

the same Ansel Gerrish for $6167,00, damages, and $61,35, costs, took out his execution, duly levied the same upon the demanded premises, on Oct. 26, 1838, within thirty days after judgment, and the levy was recorded on Nov. 21, 1838. On Nov. 26, 1838, John Gowen conveyed the same premises to the tenant by deed of warranty, and the deed was recorded the same day. On May 17, 1836, Moses Goodwin, jr. a deputy sheriff, by virtue of the original writ in that action, made an attachment thereon of the demanded premises, his return commencing thus. "York, ss. May 17th, 1836. One second past twelve o'clock, by virtue of this writ I have attached all the right, title and interest the within named Ansel Gerrish has in and to the farm on which he now lives," describing it, and other real estate, and including the premises demanded.

Fairfield & Haines, pro se, argued: —

1. That if no amendment had been allowed or made, but taking the return as it at first stood, Trafton's attachment should have the precedence.

One second past twelve o'clock, on May 17, must be held to be immediately past meridian of that day. Trafton's attachment covers the whole day of the 17th, no hour being stated. Without the amendment, it might be unreasonable to consider the attachment as made at the earliest moment of that day; but it would be as much so, to consider it as made at the last moment. A fair, liberal and reasonable construction of the return would seem to require, that neither the most favorable nor the most unfavorable time should be adopted, but the point between them, 12 o'clock, meridian. This would make our attachment the earliest. But if they are to be considered as made at the same time, the parties would take in moieties. *Shove* v. *Dow*, 13 Mass. R. 529.

2. But the return as amended clearly gives Trafton's attachment precedence of Gowen's.

3. The District Court was fully competent to allow this amendment. It was matter of discretion merely, and not of law, and therefore not subject to exceptions, or liable to be overruled by this Court, in whatever form the question may

be presented. That the allowing of amendments is merely a matter of discretion is settled by a long series of decisions. *Freeman* v. *Paul*, 3 Greenl. 260; *Clapp* v. *Balch*, 3 Greenl. 216; *Wyman* v. *Dorr*, 3 Greenl. 183; *Spear* v. *Sturdivant*, 2 Shepl. 266; *Carter* v. *Thompson*, 3 Shepl. 464: *Ordway* v. *Wilbur*, 4 Shepl. 265; *Raynard* v. *Bicknell*, 4 Pick. 302; *Whitney* v. *Thayer*, 5 Pick. 528; *Thacher* v. *Miller*, 4 Mass. R. 413; Same case, 13 Mass. R. 270; *Mandeville* v. *Wilson*, 5 Cranch, 15; *Baily* v. *Musgrave*, 2 Sergt. & R. 29; *Johnson* v. *Day*, 17 Pick. 106; *Newhall* v. *Hussey*, 6 Shepl. 249. Any arguments against the impropriety or injustice of the amendment are out of place here. They should be addressed to the Court below. It would be but mockery to say to the Court below, that it had power to allow such amendments, as might be deemed just and proper, without exception or re-examination, and then adopt a course which would render such amendments entirely nugatory.

4. But if the question of amendment was now an open one, and the application was made to this Court, it would be reasonable and proper to grant it. *Gilman* v. *Stetson*, 4 Shepl. 125; *Eveleth* v. *Little*, 4 Shepl. 374; *Buck* v. *Hardy*, 6 Greenl. 162; and most of the authorities before cited. Paine stands no better in respect to this question, then Gowen would, as our levy was made prior to Gowen's conveyance to him.

5. But if Paine is to be regarded as a third party, still the propriety of the amendment is not thereby affected. *Haven* v. *Snow*, 14 Pick. 28; *Johnson* v. *Day*, 7 Pick. 106; *Whittier* v. *Varney*, in New Hampshire not yet published, (10 N. H. R. 291.)

6. The fact that the deputy was not in office at the time of the amendment, cannot affect its validity. *Adams* v. *Robinson*, 1 Pick. 461; 4 Hammond's R. 45; *Welch* v. *Joy*, 13 Pick. 481.

7. Nor is it affected by the circumstance, that it was done out of term time, especially as it was so done by order of Court. *Limerick, Pet'r.* 18 Maine R. 183.

J. Shepley argued for the tenant, contending: —

1. That as the returns of the officers were made, and as they remained until years after the present parties had acquired the rights they now have, the attachment on Gowen's writ was prior in point of time to that on Trafton's.

Goodwin's attachment on Gowen's writ was but one second after twelve o'clock at noon; and the inquiry is, merely, whether that is not before one made at some indefinite time during the same day. Had Gowen brought a suit against Emery for falsely returning an attachment of the estate prior to that in his suit, and had shown that Emery in fact had the writ delivered to him at nine o'clock in the evening, could such action be maintained? Where the time of day is left indefinite, it must be taken as of the last moment of the day, because the return would be true, if made at any time before the day was ended.

2. No title to the demanded premises was acquired by the alteration of the return, because the permission of the Judge did not extend to an alteration unless before the Judge or the clerk; and because a District Judge has no power to authorize a stranger in another State to alter the records of the County of York. And indeed no such alteration can at any time be made unless in open Court. The permission of the Judge, too, was a mere order regulating the trial of this suit, and was vacated by the appeal. 3 Metc. 372.

3. The alteration of the return in 1842 could not take the title to the premises from the tenant, and transfer it to the demandants, because that Mr. Paine had, years before, acquired a perfect title, as shown by the records. The return of the officer and the levy were matter of record. A deed from the debtor to Trafton, made on the 17th of May, before our attachment, and remaining unrecorded, could not have had such power. After the levy is once recorded, there is the same necessity for recording any change of title, as if the creditor had acquired it by deed. Much better would it be, that the title to real estate should pass by parol, when the parties could be heard before a jury, than that some Judge and some person who had once been a deputy sheriff, should

have the power, without reason and without a hearing, to take lands which by the records had for years been the property of the tenant, and transfer them to the demandants. If this can be done, the registry of conveyances is useless. If an alteration of the officer's return of the levy of an execution, not recorded, cannot affect the rights of others, who have looked to the record title, it is not perceived why the alteration of his return upon the writ should. And if this alteration, made after the lapse of six years, is to give the title of the demandants precedence, it is hoped some way will be pointed out, whereby the tenant can have a remedy on the sheriff, by his showing this amended return to be a false one.

4. If this had been a question between Gowen and Trafton, the creditors of Gerrish, the alteration of the return would not have been a valid amendment, because there was nothing on the original return from which an amendment could have been made; but on the contrary, the original return shows, that the alteration was not in accordance with the truth, but against it. The original return shows, that on that day the officer first attached a large quantity of different descriptions of boards and timber, and put the same into the hands of a receiptor or keeper before there was an attachment of real estate. Even the clerk of the Court cannot amend his record, unless there is something to amend by. *Limerick, Pet.* 6 Shepl. 187.

5. The alteration of the return could not destroy or injuriously affect the title of the tenant, who had become a *bona fide* purchaser of the estate from Gowen, and without notice by the record, or otherwise, of any title in Trafton or in the demandants, several years before this alteration of the return was made.

This principle, it is believed, is well settled. But few of the numerous cases on the subject will be cited. The leading case in Massachusetts is *Emerson* v. *Upton*, 9 Pick. 167. It is reaffirmed in *Hovey* v. *Wait*, 17 Pick. 19. In Maine, *Means* v. *Osgood*, 7 Greenl. 146; *Berry* v. *Spear*, 1 Shepl. 154; *Banister* v. *Higginson*, 3 Shepl. 73; *Gilman* v. *Stetson*, 4 Shepl. 124; *Russ* v. *Gilman*, *ib.* 209; *Eveleth* v.

Little, *ib.* 374; and in New Hampshire, *Bowman* v. *Stark*, 6 N. H. R. 459, are in accordance with the decisions in Massachusetts. The cases of *Haven* v. *Snow*, 14 Pick. 28; *Johnson* v. *Day*, 17 Pick. 106; *Whittier* v. *Varney*, 10 N. H. R. 291, and *Colby* v. *Moody*, 1 Appl. 111, it was contended, did not controvert this principle.

6. The effect of any amendment upon the rights of any persons other than the parties to the record which is amended, is to be determined by the tribunal before which those rights are litigated, and not by the Judge permitting the amendment.

The Court in permitting such amendment commonly acts *ex parte;* and it would frequently be difficult, if not impossible, to know at the time, whose rights would be affected by it. But no amendment ought to be allowed without a careful inquiry, whether the effect would be injurious to others.

That the effect of the amendment is to be decided by the tribunal where the rights of the parties affected by it are litigated, was decided, directly, in *Emerson* v. *Upton*, and in *Means* v. *Osgood*, before cited, and in *Spear* v. *Sturdivant*, 2 Shepl. 263. And in cases of amendments analogous in principle, such as increasing the *ad damnum* in a writ, altering the time of holding the Court, putting a seal upon a writ, introducing a new cause of action by amendment, the effect of the alteration is to be determined by the proper tribunal to decide upon the rights of parties, when and where they are brought to trial. 3 Pick. 445; 14 Pick. 191; 13 Pick. 90; 17 Mass. R. 591; 1 Pick. 205; 4 Greenl. 277; 2 Fairf. 177; Howe's Practice, 391.

So far as it respects the propriety or impropriety of the act of the District Judge in granting, or refusing to grant, an amendment of any description, it may be matter of discretion, and as a mere act of discretion not subject to revision in this Court. It is however equally clear, that if the Judge has no power to grant the amendment, that his decision is subject to revision by exceptions, and will be reversed. This case is of the latter class. The Judge had no power to permit the amendment, and the act was merely void.

The opinion of the Court was drawn up by

TENNEY J. — By the return on the writ against Gerrish in favor of Gowen, the attachment of the land in controversy was made one second after twelve o'clock on the 17th day of May, A. D. 1836. The original return of the attachment of the same land, upon the writ in favor of Trafton against Gerrish, showed that it was made upon the same day as the other, without designating the precise time in the day. As the returns were, before the amendment of the latter, what was the interest of each party in the land by virtue of the levies under which they respectively claim?

When the evidence of the official doings of those authorized to make service of writs, is required to be in their returns, the parties to the precept or process, and those holding under them, are conclusively bound thereby. Every thing which the officer is required to do in making such services must appear affirmatively, by this species of evidence. There can be no presumptions short of necessary inferences, which can supply omissions. Hence, in the return of an extent upon real estate by virtue of an execution, if the officer omits to state, by whom the appraisers were chosen, the return would be so defective that the creditor could acquire no rights thereby; notwithstanding he might be able to show conclusively by other evidence, that there had been a perfect compliance with the requirements of the statute. In the return of service upon mesne process, if the officer should omit the date, unless this defect should be cured by an amendment, or by some act of the defendant therein, a judgment rendered in that action would be erroneous, as the return would furnish no evidence, that there had been legal notice to him.

The demandants contend, that a fair and liberal construction of the return upon Trafton's writ, as it was when first made, would be, not that the land was attached at the earliest or the latest possible moment of the day, but at a moment equally removed from their extremes, which would be at noon. To admit the correctness of this proposition would establish

the principle, that all attachments which in the return thereof have no date of the hour or minute when made, must be presumed to be made at noon, which no one will contend is generally the fact. A consequence arising from this would be, that an attachment made and so returned at the earliest time, after noon, would be postponed to one made at the latest moment of the same day, if the precise time was omitted in the return of the latter. And this presumption, which it is contended will arise, is equal to the most conclusive positive proof, as no evidence to affect a return of an officer of his doings in such a case can be adduced.

An officer making an attachment may know the precise moment, when it is made; it is the privilege of a creditor to have this appear upon the return. If it be omitted to his prejudice, when required to be made, the officer is liable. But if all attachments without a more particular date than that of the day, are to be considered as made at noon, the rights of the vigilant creditor, who causes one to be made after that time, however early, and the return shows the precise moment, are to be surrendered to the one coming after him, who takes no measures to have the hour designated; and the former is remediless, for the officer, who made his attachment, has done his whole duty, and the other has made no false return.

In returns of officers, nothing is to be presumed in reference to dates, more than any other fact. A creditor has the advantage of no time earlier than that which is so expressed, as to exclude one which is later. In order to hold the property returned on another writ, it is not enough that he should show by the return, that it may have been, but that it certainly was earlier than the attachment upon the former.

The attachment was made on Gowen's writ at a fixed and certain time. That upon Trafton's, according to the return when first made, is not affirmatively shown to be at a time so early. The former must take precedence of the latter.

Assuming, that the amendment of the return upon Trafton's writ was made in pursuance of an order of the District Court, where the record was, which is denied, can that amendment

affect and change the rights of the parties now before us? The party to be prejudiced thereby is not the debtor in Trafton's execution, but the grantee of another creditor, who we have seen derived a perfect title as against the demandants, by his attachment upon the writ followed by a seasonable levy upon the execution.

It is insisted by the demandants, that the amendment was allowed in the exercise of a discretion, and therefore is not subject to revision by any other Court. It is true, that many amendments may be allowed by a Judge of the District Court, or by a Judge of this Court while sitting alone, which on consideration may appear of doubtful expediency, but if they were permitted in the legal exercise of a discretion, their propriety cannot be questioned on exceptions. But if the amendment is one, which the *law* does not authorize, it is otherwise; and the demandants are not understood as controverting this proposition. An amendment in a return of an officer, beyond the legitimate power of a Court to permit, in the exercise of a discretion, cannot take away the rights of third persons, which were perfected before any alteration took place in the return as first made. If in the trial of an action in the District Court, such an amendment should be allowed, the party sought to be injuriously affected thereby objecting, and the case should be carried up by exceptions or appeal, the legal propriety of such an amendment, and the effect thereof could certainly be considered and determined by the appellate tribunal. A contrary doctrine might leave to the aggrieved party a right of appeal, but would allow the Court appealed from, to change entirely the evidence first presented, so that the character of that evidence, and the right to change it to the prejudice of either party could not be revised. *In Emerson* v. *Upton*, 9 Pick. 167, the Court say, "We do not interfere with the rights of the Court of Common Pleas to allow the officer to alter his return; from the evidence on which that Court acted, we presume they had sufficient ground to be satisfied that the attachment was made on the 6th of March. But they did not decide on the effect of the amendment, nor could they, so

as to bind this Court upon any question arising out of the proceedings, which might affect the rights of third persons."

Cases bearing upon this question, decided in this State, Massachusetts and New Hampshire, have been cited. And the rule, which may be extracted from them, on the subject of allowing officers to amend their returns upon writs and executions so as to affect the interest of third persons, whose rights had been previously acquired, seems to be well established; if there is any difficulty it is in its application. "Such amendments can be allowed only where there is something upon the record, by which the correction can be made, and in such cases there can be no difficulty." *Thatcher & al.* v. *Miller*, 13 Mass. R. 270. "When the subsequent purchaser or creditor, being chargeable with constructive notice, of what is on the record, if he has sufficient to show him, that all the requirements of the law have probably been complied with, and he will, notwithstanding, attempt to procure a title under the debtor, he should stand chargeable with notice of all the facts, the existence of which is indicated and rendered probable by what is stated in the record, and the existence of which can be satisfactorily shown to the Court." *Whittier* v. *Varney*, 10 N. H. R. 291. In the cases cited in the argument, unless the party, moving that an amendment may be made, or seeking a right by virtue of such, has brought himself within these principles, the amendment has been refused, or if made, it has not been permitted to prejudice the rights of third persons, previously obtained.

Was there any thing upon the record in Trafton's case from which the amendment could be made? or was there any thing therein, which could be a notice to Gowen before his levy, or to the tenant, Paine, before his purchase, that it was probable, that the attachment upon Trafton's writ was made at an earlier time than one second after twelve o'clock on the 17th day of May, A. D. 1836? The date of the return was as specific as appears in a very large majority of cases; it was perfect in itself, there being nothing indicative of any positive error or accidental omission. The fact that the service was

made on the first day of service for the next succeeding Court, does not impress us as having a tendency to render it probable, that the attachment was made before noon of that day, or that the date was not as particular as was intended. The omission of the precise time of making the attachment, in the return, is nothing from which an amendment can be made. If it were so in this case, it would be the same in all, where the year, the month and the day make the only date. Could one be aided in the least, in ascertaining the time of day, when the numerous writs on the files of this Court were served, by an examination of the returns, where the precise time is not expressed? It is difficult to perceive how the omission to state that, which is not usually stated, and which is not required to constitute evidence of a legal service, and which implies no mistake can enable the officer, who made the service, to state the exact moment, when it was made. Many circumstances, independent of the record, may call to his mind the time of day when he made his attachment, but unless the record discloses something, from which the addition can be made, the rule forbids the amendment.

If there was nothing upon the record, which could aid the officer in making the amendment, it follows that there was nothing therein rendering it probable to the mind of another attaching creditor or purchaser, that there was an omission of that, which if supplied, would entitle the creditor in that suit to hold by the attachment. But there is that upon the return itself, which renders it very remarkable that the exact time should have been omitted, if the attachment was made at the earliest time after the commencement of the 17th day of May, A. D. 1836. It was not a case where an officer had nothing to do but to sit down at his table in his own room, and make a return or a memorandum of an attachment of real estate, which may be done without going upon the land; but the officer in this case must have actually gone to the spot, where lay fifty thousand of boards, which he states in his amended return he attached and delivered to the creditor, at the earliest possible moment after the 16th of May. If it was then

thought so important, that the service should be made about the hour of midnight, and the minute and the hour were entirely omitted in the return, it implies such a degree of forgetfulness or want of care in the officer as to render it somewhat hazardous, to permit the rights of third persons to be taken away by an amendment made from his memory three or four years afterwards. No case has been referred to, in which an amendment has been allowed to prejudice the rights of third persons where the record did not give stronger indications of omission or mistake than the one in question.

It has always been the policy of the law, that the title to real estate should rest upon that evidence which cannot mislead, and which should remain unchanged by time; that it should not depend upon the frail recollection of honest men, or the false testimony of dishonest men. The statute of frauds and our laws of registration of titles to real estate are universally approved. In consequence of them, the right which has been fairly acquired, is not liable to be defeated. If a register of deeds could be allowed to make an alteration in, or an addition to the date, showing when a conveyance was recorded, years afterwards, from his memory, which he might honestly suppose did not mislead him, and thereby change essentially the titles, which were evidenced by the records, the registry would be but an imperfect security. And it is certainly no more important that such records should be exempt from the mutilation which would essentially change rights, than those which are made by other officers who are intrusted with the responsibility of fixing titles, by their returns upon judicial precepts.

It is presumed, that the amendment in the case in question was made in perfect good faith, by all who had an interest therein; but to allow it to have the effect which is claimed by the demandants, would take away the rights of the tenant fairly acquired, and overthrow the doctrine which has here for a long time been entirely settled.

The demandants must become nonsuit.

INHABITANTS OF PARSONSFIELD *versus* SAMUEL LORD *& al.*

By the st. 1832, c. 42, (Rev. St. c. 25, § 3,) the doings of the County Commissioners in locating a road must be made to, and recorded at, a term of their Court held next after such proceedings shall have been had and finished; and not at an adjournment of a term commencing previously.

And although, if an applicant for a writ of *certiorari* has sustained no injury from the proceedings in locating the road complained of, and cannot sustain any, the petition may well be dismissed; yet if such proceedings are returned to a wrong Court, and there accepted, the error will not be considered of that character, and the writ will be granted.

SAMUEL LORD and others presented their petition at the regular term of the Court of the County Commissioners for the county of York, in May, 1840, wherein they prayed that a new road might be located from a certain point in the middle road village in Parsonsfield, to another point at Limerick corner in Limerick. After giving due notice the Commissioners met and heard the parties on the last Tuesday of September and concluded their report of their doings on the twenty-second day of December, in the same year. There were but two regular terms of the County Commissioners' Court in that county, the one commencing in May, and the other in October. The October term of that Court in 1840, was adjourned until the same twenty-second day of December, 1840; and on the same day the report was dated, it was accepted by the Court, and an adjudication made that a road should be established and made in conformity thereto. The road thus laid out was wholly within the limits of the town of Parsonsfield.

The inhabitants of Parsonsfield presented their petition to the Supreme Judicial Court, praying that a writ of *certiorari* might issue to the County Commissioners, to the end that the proceedings might be reversed. The reasons assigned were in substance: —

1. That the acceptance of the report and adjudication thereon were not at the next regular session of said Court after their proceedings had been finished, but at an adjournment of the preceding October session.

2. That the road located was entirely within the limits of

the town of Parsonsfield, and did not connect that town with any other town or plantation.

3. That the location of said road was not within the jurisdiction of the County Commissioners, the law having expressly prohibited them from acting in such case.

Bradley, for the petitioners, contended that an adjourned term or session of the Court, could not be considered as the next regular session after the proceedings were finished, as required by the St. 1832, c. 42, § 1. 1 Mass. R. 411; 5 Mass. R. 436; 6 Mass. R. 492.

The County Commissioners had no power to act, where the road was wholly within any one town and did not connect that town with any other town or plantation. This is expressly forbidden by the St. 1839, c. 367. Merely putting another piece of road with it in the petition, where nothing was done, cannot give jurisdiction to the Court, or enable them to evade the provisions of the statute. 1 Fairf. 24; 8 Greenl. 271; 21 Maine R. 377.

Mc'Intire, for the respondents, contended that the session of the Court, at which the adjudication was made, was a regular one, and was holden after the proceedings were finished and the report made. It was a session at which the general business was transacted, in contradistinction to one holden only for a particular and specific purpose. That it was a session by adjournment, does not affect its regularity. The object of the statute was to prevent the calling up and acceptance of reports long after they were made; it was for the purpose of hastening and not of delaying the action of the Court. The granting of this writ is an exercise of the discretionary powers of this Court, and the Court will not give its aid to reverse the proceedings upon a mere technicality, where no one is injured, as this must be considered, even if the construction of the other party is right.

The Commissioners had jurisdiction of the subject matter, and power to act as they did. The object of the statute, c. 367, which seems to have been passed for some temporary

purpose, as it was soon repealed, merely prohibits the Commissioners from having original jurisdiction in laying out town and private ways. But here the petition was for a public road leading from a village in one town to the principal village of another town, and thereby connecting with the roads principally travelled. The connexion between the towns was none the less necessary, because the portion of land connecting two public roads from town to town, was wholly within the limits of one town. Their construction would prevent the location of the road by any authority; for it could not be laid out as a town road, being for the public generally, and not for the benefit of Parsonsfield alone. The mere fact, that the part of the road actually located is wholly within one town, furnishes no evidence that it does not "connect said town or plantation with some other town or plantation."

The opinion of the Court was by

WHITMAN C. J. — This is a petition for a *certiorari*. The complaint is, that the County Commissioners have located a road, wholly within the limits of Parsonsfield, in violation of the statute of 1839, c. 367; and that their report of their doings therein was returned to, and accepted and recorded at, a Court of the County Commissoners, which commenced its regular session anterior to the completion of their doings in the location of said road, contrary to the provision contained in the statute of 1832, c. 42, § 1. It appears, that the road was laid out in the year 1840; and the doings of the Commissioners, in reference thereto, were completed on the twenty-second of December of that year; and returned and recorded at an adjournment of the Court, held on that day; the regular session of which had commenced in the month of October previous.

The Commissioners were bound of course to have been guided by the law, as in force at that time. The statute of 1839 forbade their laying out any public highway wholly within the limits of any particular town; and the highway in question seems to have been so located. But, the application

for the laying out, was for a road extending from the interior of one town, into the interior of another, and so did not contemplate the laying out of a road, wholly in one of them; and the Commissioners would seem to have been of opinion that the object of the petitioners, and the interest of the public, would be best subserved by laying out a part of the road prayed for, which part was within the limits of Parsonsfield, and which would connect with two other roads, thereby conveniently extending the communication between the termini, named in the petition, without laying out a road for the whole extent prayed for.

Whether this act, on the part of the commissioners, can be justly considered, under the circumstances, as in violation of the statute of 1839, when viewed with reference to its true scope and design, may at least admit of doubt. It must be admitted, that there is much force in the argument of the counsel for the defendants, that, as there was, in this case, an application for the laying out of a road intended, in the express language of the statute, to "connect said town or plantation with some other town or plantation;" and for a road actually extending from the interior of one town into the interior of another, and as the road actually located, to every intent and purpose, accomplished that object, the doings of the Commissioners were within a sensible construction to be put upon that act. At any rate the petitioners have sustained no greater injury by this laying out, than they would by the laying out of a road the whole distance prayed for, so far as appears.

Besides, the act of 1839 was repealed in 1841, so that now, and before the act of 1839, the Commissioners would have had authority to do precisely what they have done; even if the original application were for the laying out of the road wholly in Parsonsfield. If their doings were, therefore, to be reversed for this cause, they would have power to re-locate the same piece of road; and it may be presumed that they would do so, as they have once adjudged it to be of common necessity and convenience. If we have, as it must be conceded we have, a

right to exercise a sound discretion in granting a *certiorari*, it may well deserve consideration, whether it should not be refused, if this were the only cause assigned for granting it.

We will now proceed to an examination of the other cause assigned by the petitioners for granting the writ. The statute of 1832, ch. 42, § 1, explicitly requires the doings of the County Commissioners, in such cases, to be returned "to the regular session of said County Commissioners' Court, held next after such proceedings shall have been had and finished." The question is, were the proceedings so returned, in reference to the road in question? What was the regular session of the court, held next after the completion of the doings of the commissioners? It is contended, that a session held by adjournment, satisfies the requirement of the statute. If it had been required, that the return should be made at the next regular term of said court, we presume no one would have doubted, that the return must have been made to a term of the court commencing next after the completion of the doings of the Commissioners. Now, were not the words, next regular session, in the act, used as synonymous with the words, next regular term? Suppose the doings in laying out and locating the road had been completed on the day next succeeding that of a commencement of a regular term, and the court should be continued by adjournment from day to day till the third day of the term, would those doings be returnable to the court, so holden by adjournment on such third day of the term? This adjournment would be as much the next regular session of the court as it would be, if the court were adjourned over a number of days, or weeks, or months. The session of a court includes all its adjournments, which are but parts of its session. If an appeal were granted from one court, to the regular session of another court, to be held next after the granting of the appeal, could an appeal so granted be entered at an adjournment of a session of such other court, which commenced its session anterior to the granting of the appeal? Manifestly not: and yet it is not discernable that such a case would in principle, be dissimilar to the one under consideration. We

cannot, therefore, entertain any doubt, that the return of the doings of the Commissioners should have been made to, and recorded at, a term of their court, held next after the completion of their doings; and not at the adjournment of a term commencing previously.

A question still remains. Was this such an error as should induce us to yield to the desire of the petitioners? Mere informalities, not productive, or likely to be productive of injury to any one, would not be good ground for granting a *certiorari*. If an applicant for such a writ has sustained no injury from the proceedings complained of, and cannot sustain any, we might well dismiss his petition. But the petitioners in this case had an interest in having the doings of the Commissioners returned to the proper Court. They could not be bound to take notice, that they would be otherwise presented. They had an interest in fixing the time within which they should be required to make the road; and would be bound forever afterwards to keep it in repair. They had a right to be apprised of every important step to be taken with regard to it. They could not be required to look for the presentation of the doings of the Commissioners at any other than the next regular session or term of their Court. Besides, the error can hardly be deemed one of mere form. On the whole we conclude that a *certiorari* must be granted.

Israel Boody *versus* Joseph H. McKenney *& al.*

When an infant has made a conveyance of real estate, and would affirm or disaffirm it after he becomes of age, there must be some positive and clear act performed for that purpose. The mere acquiescence for years affords no proof of a ratification.

When an infant has purchased real estate, or has taken a lease of it subject to the payment of rent, he must make his election, within a reasonable time; for he cannot enjoy the estate after he becomes of age for years, and then disaffirm the purchase, and refuse to pay for it, or claim the consideration paid.

When an infant has sold and delivered personal property, and has received actual payment therefor, acquiescence alone does not confirm the contract; but if it remains unexecuted, and he holds a bill or note, taken in payment for the property, if he should collect or receive the money due upon it, or any part thereof, after he becomes of age, that would affirm the contract. And should he disaffirm the contract, which he cannot do until he becomes of age, and reclaim the property, the bill or note would become invalid.

If an infant has purchased and received personal property, and retains the same or any part thereof in his possession after he becomes of age, it becomes his duty to make his election, whether to affirm or disaffirm, within a reasonable time. And when, after a reasonable time has elapsed, he continues to have the use of the property, and then sells it, or any part of it and receives the money therefor, he must be considered as having elected to affirm the contract, and he cannot afterwards avoid payment of the consideration.

It is not competent to prove by parol testimony, that a note, absolute in its terms, "was not to be paid unless called for during the lifetime of the payee."

A bill of parcels, or receipt, showing the purchase of an article by one of two defendants of the other, and payment therefor, is not admissible, when offered by the purchaser, unless there be proof, that the paper had been in the hands or in some way connected with the opposing party; and it is then received as exhibiting his assent, or showing his connexion with the transaction.

Assumpsit against Joseph H. McKenney and Leander Staples, on a note dated March 12, 1835, given by them to Lydia Boody, then the wife of the plaintiff. Staples was defaulted, but Mc'Kenney defended, pleading the general issue and infancy.

The facts are stated in the opinion of the Court. The Court were authorized to draw such inferences from the facts as a jury might properly do.

McDonald, for the defendant, said that he did not contend,

that it was competent to introduce parol evidence to change the terms of the note, but that the evidence offered was admissible to prove that the note was to be delivered up on the happening of a certain contingency, which had happened.

The declarations of Staples ought to have been admitted, as part of the *res gesta*. The possession of that part of the property was changing at times and the cause of it was stated, and this was the evidence offered. It is a common mode of poving a sale, by showing that the owner has declared that he sold it. And it is the best evidence the nature of the case would admit, as the plaintiff had chosen to prevent Staples from being a witness, by joining him as a defendant. The receipt was admissible on the same principle, but if either is admissible it is sufficient.

But if the evidence be not admissible, how then does the case stand? As McKenney was an infant at the time of the signing, it must be shown, that he has said something, or done something, after he became of age, to make him liable, or judgment must be in his favor. He has said nothing, and the only pretence is, that he had a very small portion of the property received by Staples of H. McKenney, in his hands, after he became twenty-one years of age.

If the note had been given to Henry McKenney, then Joseph could not have avoided the contract. It was valid between the other parties, and Joseph had no power to take property from Staples and return it to Henry, and could not avoid the contract. Staples was liable, and it was wholly a matter between him and Joseph, what was done with the property. Joseph had no power to rescind or disaffirm the contract.

The property sold by Henry McKenney to Staples and Joseph, was not the same sold by Mrs. Boody to Henry. She had no better claim, than if she had never owned any portion of it. There was no privity whatever between Mrs. Boody and the present defendants. She took the note of Staples, whom she knew was of age, and of Joseph, known to her not to have been of age, instead of the note of Henry. The security was as good as before without Joseph. The note

would have been good against Staples without consideration, and against Joseph also, but for his infancy. She, therefore, had nothing to do with the consideration as between Henry and the defendants. Whether Joseph had none, or all, of the property purchased of Henry, so far as the plaintiff was concerned, was wholly immaterial, and could not affect the liability of Joseph. If he could have returned the property she could not have held it a moment. If the sale was rescinded, the property would not have belonged to her. If the defendants could not have set up want of consideration as a defence against the plaintiff, had the property turned out not to belong to Henry, it would seem to follow, that the liability of the defendants could not be affected by the use made of the property.

As the contract between the parties of age was valid, no act of disaffirmation on the part of Joseph could give the plaintiff, or Henry a right to take the property. How then could the manner in which the property was disposed of between Staples and Joseph vary the rights of any of the parties to this transaction?

No prior rescinding of a contract is necessary, in order that the plea of infancy may be availing, nor is it necessary to return the property. *Tucker* v. *Moreland*, 10 Peters. 75; *Benham* v. *Bishop*, 9 Conn. R. 330. The infant must do some positive act to confirm the contract, after he arrives at full age, or he cannot be bound. And a mere acknowledgment of indebtedness is not enough, but there must be an express promise to pay. *Ford* v. *Phillips*, 1 Pick. 203; *Thompson* v. *Lay*, 4 Pick. 48; *Hale* v. *Gerrish*, 8 N. H. R. 374. And must be made to the party in interest. 3 Wend. 479; 11 Mass. R. 147. A partial payment, after the minor has arrived at full age, is not a ratification of the contract on which the payment was made. *Putnam* v. *Dutch*, 14 Mass. R. 460; *Barnaby* v. *Barnaby*, 1 Pick. 221. And the promise must be made deliberately and with a knowledge that he is not bound by law. 9 Mass. R, 62 and 100. The mere possession

of part of the personal property after of full age, and sale thereof, does not amount to a ratification. *Thing* v. *Libby*, 4 Shepl. 55.

The ground on which the possession and sale of the property by the infant, after he becomes of full age, is considered as equivalent to a new promise, is a matter between seller and buyer, and is believed to be, that he shall not be suffered to avail himself of the consideration, and pay nothing for it. The facts do not show this, but the reverse. Staples was at all events liable, and took possession of the whole of the property, and retained it for more than a year saving the portion he had previously sold. The only part of this property, which ever came into the possession of Joseph, was but a very small one and was received directly from Staples, who disposed of all the rest. Joseph did not receive this property from the plaintiff, nor from Henry. Nor did he ever receive the half of the property, or any equivalent for it from Staples. There is, therefore no foundation for any conclusion that he received the colt in any other mode, than as a purchase of it from Staples. He should not be held liable, as it was not received under any contract with the plaintiff or Henry, and could be no affirmance of it.

Caverly, for the plaintiff, contended, that the contract was for the benefit of the infant, and was therefore valid and binding upon him *ab initio*. *U. States* v. *Bainbridge*, 1 Mason, 82; *Keane* v. *Boycott*, 2 H. Black. 514; *Stone* v. *Dennison*, 13 Pick. 6.

Infants are liable for necessaries. Certain articles of property are in themselves necessaries. Other articles become necessaries, whenever they accord with the infant's proper business or station in life. 8 T. R. 578; 2 Strange 1101; Chitty on Con. 31. These articles were necessaries for him as a farmer.

The infant has no defence, for he has tacitly acquiesced for five years, and has not disaffirmed the contract, or given notice that he did not intend to be bound. 8 Taunt. 39; 8 Greenl. 405; 6 Conn. R. 494.

If he had given proper notice of his disaffirmance on arriving at majority, yet in order to avail himself of a defence to the note, he was bound to return the property, or at least so far as he was able, to have restored to the plaintiff his just rights. 15 Mass. R. 363; 1 Greenl. 13; 7 Cowen, 179; 2 Kent, 241.

If the contract was originally voidable, the infant has affirmed it by his holding and making sale of the colt, and converting the proceeds to his own use. *Lawson* v. *Lovejoy*, 8 Greenl. 405; *Dana* v. *Coombs*, 6 Greenl. 91. It was incumbent on him, if he would disaffirm the contract with Mrs. Boody, to have taken his part of the property from Staples, and to have restored it to the legal holder of the note.

J. Shepley, for the defendant, replied.

The opinion of the Court was drawn up by

Shepley J. — This suit is upon a promissory note for one hundred dollars made by the defendants on March 12, 1835, and payable to Lydia Boody, the wife of the plaintiff or her order, on demand. The defendants are a son and the husband of a daughter of Mrs. Boody by a former husband. Mrs. Boody has since deceased. The defendant, McKenney, was an infant, when the note was made, nearly twenty years of age. Mrs. Boody being the owner of a colt and certain cattle, sold them during the year 1834 to her son Henry McKenney, and received his notes in payment. When the present note was made, the defendants had purchased that and some other property of Henry McKenney, and to pay him therefor gave the note in suit and another note for about one hundred and twelve dollars to Mrs. Boody, who at that time cancelled the notes made the year before by Henry McKenney. The property purchased was afterward in the possession of the defendant Staples on a certain farm. The defendant McKenney resided in Portland during the year after the purchase. Simeon Strout testified, that "he did not see the colt in the possession of Joseph until after he returned from Portland; and that one Chick wintered the said colt for the said Joseph

the winter after he returned from Portland." Henry McKenney testified, that he did not know that any of the property, which he sold to them, came into the possession of Joseph after the sale "excepting the colt, which he had the year after he delivered him to the defendants." It is admitted that Joseph kept the colt after that time till the year 1839, and then sold it for one hundred dollars. The case presented, without the testimony offered and excluded, is that of a minor purchasing property with a person of age, without proof, that he had exercised any acts of ownership over, or had received any benefit from it, excepting a smaller portion of the property in value, which came to his possession a short time before he was of age; and this he retained for nearly three years after he became of age, and then sold it, and received pay for it. The case shows, that the defendants offered to prove an agreement when the note was made, that it "was not to be paid, unless called for during the lifetime of Mrs. Boody." Parol evidence cannot be received to vary the meaning of a written contract by adding to its terms, or by extending or limiting them, or by introducing an exception or qualification, or by proving a different contemporaneous agreement. Or by proving that a note payable on demand was to be paid on a contingency only, or not till after the death of the maker. *Rawson* v. *Walker*, 1 Stark. R. 361; *Woodbridge* v. *Spooner*, 3 B. & A. 233. This testimony was properly excluded. The defendants offered also to prove the declarations of the defendant, Staples, made to Henry McKenney, while the colt was at Chick's, that Joseph had bought the colt of him, and had given him forty-five dollars for it. And also offered a receipt of Staples to Joseph for forty-five dollars received for the colt. The declarations of Staples cannot be admitted as part of the *res gesta* of any sale or other transaction. If any sale were made to Joseph, it does not appear to have been made, or any other business to have been transacted, at that time. They cannot be connected with the receipt, for they do not appear to have been made at the time, when that was made. They were therefore, but the declarations of a party made to a third

person and offered in favor of his co-defendant. Receipts, bills of parcels, and other papers, signed by one party to a suit, and offered by an opposing party, are received, like other contracts, as showing the engagements or declarations in writing of the opposing party. But they cannot be received, when offered by the maker of them, unless there be proof, that they have been in the hands or in some way connected with the opposing party; and they are then received as exhibiting his assent, or showing his connexion with the transaction. The receipt, as offered in this case, was but the written declaration or statement of one defendant to his co-defendant. It was not testimony under the sanction of an oath of any transaction between those persons. The case must therefore be decided upon the testimony introduced and already stated.

There have been differences of opinion, whether a negotiable promissory note, made by an infant, was void, or voidable. The better opinion is, that such a note is voidable only at the election of the infant. *Goodsell* v. *Myers*, 3 Wend. 479. Many of the apparent differences in the judicial decisions respecting the duties and liabilities of persons, after they become of age, when they would affirm or disaffirm contracts made during their infancy, may be shown to have been appropriate and not in conflict by adverting to the state of facts, on which the remarks were made. Those remarks may have been well suited to the state of facts and to the point then under consideration, and yet when applied as exhibiting abstract truths, applicable to all such cases, they may appear to be in conflict with other remarks equally appropriate to the cases, in which they were made. To explain some of these apparent differences, alluded to in the arguments, it becomes necessary to state briefly certain conditions, in which a person may be placed, after he becomes of age, in relation to contracts made during his infancy; and his appropriate conduct and duty, when he would affirm, or disaffirm them.

1. When he has made a conveyance of real estate during infancy, and would affirm or disaffirm it, after he becomes of age. In such case the mere acquiescence for years to dis-

affirm it affords no proof of a ratification. There must be some positive and clear act performed for that purpose. The reason is, that by his silent acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself. There is nothing to urge him as a duty, towards others to act speedily. Language, appropriate in other cases, requiring him to act within a reasonable time, would become inappropriate here. He may therefore, after years of acquiescence, by an entry or by a conveyance of the estate to another person, disaffirm and avoid the conveyance made during his infancy. *Jackson* v. *Carpenter*, 11 Johns. R. 539; *Austin* v. *Patton*, 11 S. & R. 311; *Tucker* v. *Moreland*, 10 Peters, 58.

2. When during infancy he has purchased real estate or has taken a lease of it subject to the payment of a rent, or has granted a lease of it upon payment of a rent. In such cases it is obvious, when he becomes of age, that he is under a necessity, or that common justice imposes it upon him as a duty, to make his election within a reasonable time. He cannot enjoy the estate after he becomes of age for years, and then disaffirm the purchase and refuse to pay for it, or claim the consideration paid. Or thus enjoy the leased estate, and then avoid payment of the stipulated rent. Or receive rent on the lease granted, and then disaffirm the lease. When he will receive a benefit by silent acquiescence, he must make his election within a reasonable time, after he arrives at full age, or the benefits so received will be satisfactory proof of a ratification. *Ketsey's case*, Cro. Jac. 320; *Evelyn* v. *Chichester*, 3 Burr. 1765; *Hubbard* v. *Cummings*, 1 Greenl. 11; *Dana* v. *Coombs*, 6 Greenl. 89; *Barnaby* v. *Barnaby*, 1 Pick. 221; *Kline* v. *Beebe*, 6 Conn. R. 494. In the case of *Benham* v. *Bishop*, 9 Conn. R. 330, it appeared, that the defendant and his mother and sisters were in possession and owned land in common, and that defendant, while an infant, made his note to another sister for a conveyance to him of her undivided share of the same estate, and that they continued to occupy the land in the same manner several years after he

became of age; and it was decided not to amount to a ratification of the note. This case can only be regarded as correctly decided by considering the defendant as having occupied only by virtue of his own previous title as a tenant in common.

3. When he has during his infancy sold and delivered personal property. When the contract was executed by his receiving payment, it is obvious, that he can receive no benefit by acquiescence; and it alone does not confirm the contract. When the contract remains unexecuted, and he holds a bill or note taken in payment for the property, if he should collect or receive the money due upon it, or any part of it, that would affirm the contract. Should he disaffirm the contract and reclaim the property, the bill or note would become invalid. He cannot disaffirm it until after he becomes of age. And if he then does it, there are cases, which assert, when the contract has become executed, that he must restore the consideration received. *Badger* v. *Phinney*, 15 Mass R. 363; *Roof* v. *Stafford*, 7 Cowen, 179.

4. When he has purchased and received personal property during infancy. When the contract has been executed by a payment of the price, if he would disaffirm it, he should restore the property received. When the contract remains unexecuted, the purchase having been made upon credit, he may avoid the contract by plea during infancy, or after he becomes of age, before he has affirmed it. It has been asserted in such case, that he should be held to refund the consideration received for the contract avoided. Reeve's Dom. Rel. 243. He admits, however, that the current of English authorities is otherwise. If he had received property during infancy, and had spent, consumed, wasted, or destroyed it; to require him to restore it, or the value of it, upon avoiding the contract, would be to deprive him of the very protection, which it is the policy of the law to afford him. There might be more ground to contend for the right to reclaim specific articles remaining in his hands unchanged at the time of the avoidance of the contract. When he continues to retain the specific property, or any part of it, after he becomes of full age, it becomes his

duty, within a reasonable time, to make his election. If such were not the rule, he might continue to use for years a valuable machine until nearly worn out, and thus derive benefit from it, and yet avoid the contract and refuse to pay for it. And when after a reasonable time he continues to enjoy the use of the property, and then sells it, or any part of it, and receives the money for it, he must be considered as having elected to affirm the contract; and he cannot afterwards avoid payment of the consideration. This, as before shown, is the well settled rule in relation to real estate purchased or leased; and the principles applied in those decisions appear to be equally applicable here. Such was the decision in *Lawson* v. *Lovejoy*, 8 Greenl. 405; *Chesire* v. *Barrett*, 4 McCord, 241; *Dennison* v. *Boyd*, 1 Dana, 45; *Delano* v. *Blake*, 11 Wend. 85.

It is contended, that the colt did not constitute a part of the consideration of the note in this case, because the purchase was made of Henry McKenney, and the note was made payable to Mrs. Boody for the cancellation of the notes of Henry. The testimony proves, that the cattle and colt were the consideration received by the defendants for making the note, although not the consideration, upon which Mrs. Boody became entitled to receive it. It cannot be material, so far as it respects a ratification of the contract by Joseph McKenney, to whom the note was made payable.

Defendants to be defaulted.

JAMES OSBORN *versus* NATHANIEL K. SARGENT.

By the Rev. Stat. a justice of the peace has the same power to examine persons brought before him on complaint and warrant, and bind them over to appear at a higher Court, where the offence charged may be prosecuted *by indictment or by action of debt*, as where it can be prosecuted by indictment only.

A justice of the peace has authority, under the Rev. Stat. to examine a person brought before him, on complaint and warrant, accused of being a common seller of wine, brandy, rum and other strong liquors, without license therefor; and, on sufficient cause shown to believe him to be guilty of the offence charged, to require him to enter into recognizance for his appearance at the next District Court within the county; and, on his refusal so to do, to cause him to be committed to jail until he shall comply with such order.

TRESPASS for an alleged illegal arrest and false imprisonment.

On March 1, 1842, a complaint was made against the plaintiff and his partner in business as traders, alleging that they, "on the first day of August, eighteen hundred and forty-one, and from that day to the first day of March, eighteen hundred and forty-two, at said Kennebunk, did presume to be, and were, and have been common sellers of wine, brandy, rum and other strong liquors by retail and in less quantities than twenty-eight gallons, and that delivered and carried away all at one time, not being authorized therefor, and not having given bond therefor, against the peace of said State of Maine, and contrary to the form of the statute in such cases made and provided;" and praying that they might be arrested to answer to the complaint, &c. The complaint was made under oath, and a warrant was issued, and the plaintiff was arrested thereon, and the warrant returned before the defendant, a justice of the peace. The plaintiff there pleaded to the jurisdiction of the justice, alleging that he had no jurisdiction of the offence charged, and declined to make any other plea. The justice overruled the plea, and proceeded to the examination of witnesses, and found the plaintiff and his partner "guilty as in said complaint alleged, and they were severally ordered to recognize to said State in the sum of one hundred dollars each, with one surety in the sum of one hun-

dred dollars, to appear" at the then next term of the District Court, "and to stand committed till sentence be performed." The plaintiff refused to enter into recognizance, and thereupon the defendant made out a mittimus, and the plaintiff was arrested thereon, committed to the common jail at Alfred, and on the same day released therefrom, on entering into recognizance.

On the trial of this action the defendant justified the imprisonment as a justice of the peace, and produced copies of the proceedings in due form. It appeared that the question of jurisdiction was argued fully before the justice by counsel, and that he examined the authorities cited, and finally decided that he had jurisdiction.

At the trial of this action the counsel for the defendant objected that it could not be maintained; but WHITMAN C. J. presiding, instructed the jury, that the plaintiff was entitled to recover, and they returned a verdict in his favor. The defendant filed exceptions to this instruction.

Bourne, for the defendant, contended, that as this was a suit against a justice of the peace for misconduct in office, it could not be maintained without proof that notice had been given thirty days before the commencement of the action. It is necessary that this should be done, that the justice might have an opportunity to make tender of amends. St. 24 Geo. 2, c. 44, § 1; Burns' Justice, 238.

Justices of the peace have power at common law to bind over, to answer at a higher Court, all such as appear to be guilty of an indictable offence. *Boynton* v. *Rees*, 9 Pick. 532; *Commonwealth* v. *Churchill*, 2 Metc. 118; *Com.* v. *Leach*, 1 Mass. R. 58; *Sackett* v. *Sackett*, 8 Pick. 309; *Pierce* v. *Atwood*, 13 Mass. R. 324; 1 Dall. 74; *Colby* v. *Merrill*, 3 Greenl. 55; *Commonwealth* v. *Knowlton*, 2 Mass. R. 534; Story's Pl. 536; 17 Mass. R. 92; 2 Fairf. 288.

By the old statutes of Massachusetts a justice of the peace, in a case like this, had power to bind over to answer at a higher Court such as were shown to be guilty on the examination. *U. S.* v. *Wiltberger*, 5 Wheat. 95; 1 Kent, 466, 468,

and notes; *Fayette* v. *Hebron*, 21 Maine R. 271; *Lord* v. *Lancey*, *ib.* 469; *Doane* v. *Phillips*, 12 Pick. 226; *Jones* v. *Jones*, 18 Maine R. 313; *Foster* v. *Medfield*, 3 Metc. 1; *State* v. *Bailey*, 21 Maine R. 68. Opposed to this position stands alone the case of *Commonwealth* v. *Cheney*, 6 Mass. R. 347. He examined this case, and insisted that it stood opposed to all other authorities, and contrary to the well established principles of law on this subject. He cited 10 Pick. 506; 11 Pick. 490; 2 Sumn. 164; 5 Dane, 245; 2 Bac. Abr. 14; 5 Mass. R. 259; 2 Kent, 11 and note; 9 N. H. R. 468; 2 Mass. St. 792; Mass. St. 1783, 1 Mass. Laws, 374; Maine St. 1821, c. 171, § 1; and various other statutes relating to incendiaries, robberies, larcenies, &c. and contended that there was no difference between them and this in principle, and yet the practice had always been for a justice to bind over persons charged with such offences to appear at a higher court. 1 Gallison, 1; 2 Conn. R. 38; *State* v. *Bailey*, 21 Maine R. 67; *Commonwealth* v. *Phillips*, 16 Pick. 214. The case last cited is wholly inconsistent with *Commonwealth* v. *Cheney*. 8 Serg. & R. 91; 5 Cowen, 253; 6 Dane, 601, 682. After an eulogy on the late Chief Justice Parsons, he remarked, that however great may be the reverence, and though all the sympathies of the bar in New England may cluster around his memory, no such reverence is due to him, or to any other Judge, as that the profession should not at all times freely express their opinion, that their decisions are not law, whenever such is the fact; and trusted that this Court, notwithstanding the scurrilous and contemptible aspersions of anonymous writers in another State, will not hesitate to overrule any decision of any Court which is not sustained by authority, legal principles, or practice.

He also contended, that if the case, *Commonwealth* v. *Cheney*, was to be received as good law at the present day, still that our Rev. Stat. varied from the old Massachusetts statutes, and gave power to justices of the peace, which protected the defendant. Rev. Stat. c. 170, § 3, 4, 5, 6; c. 171, § 16, 17,

Bradley and *Leland*, for the plaintiff, contended that the defendant had not, as a justice of the peace, jurisdiction in the case; and that his acts were illegal and void.

He had no jurisdiction at common law. *Commonwealth* v. *Foster*, 1 Mass. R. 490; *Commonwealth* v. *Knowlton*, 2 Mass. R. 535; *Bridge* v. *Ford*, 4 Mass. R. 644; *Commonwealth* v. *Otis*, 16 Mass. R. 199; *Martin* v. *Fales*, 6 Shepl. 28.

Nor had he jurisdiction by the general statute, (Rev. Stat. c. 170,) entitled "of the power and proceedings of justices of the peace in criminal cases." Sections 1, 2, 4, 5, 6, are a transcript of Stat. of 1821, c. 76, § 1, entitled "An act describing the power of justices of the peace in civil and criminal cases," which is referred to in the margin of the Rev. Stat. Section 3 of the Rev. Stat. is a transcript of part of § 1 of Stat. 1823, c. 235, entitled "An act to prevent unnecessary costs in criminal prosecutions." It is not, therefore, intended to enlarge the power of justices, but to restrain it. The Stat. 1821, c. 76, is a transcript of the Stat. 1783, c. 51. This latter statute has received a judicial construction in *Commonwealth* v. *Cheney*, 6 Mass. R. 347. By the re-enactment of this latter statute, the judicial construction, before given to it, was adopted with it.

Nor had the defendant any authority, to justify his acts, under the license act of Rev. Stat. c. 36; or by that in connexion with Rev. Stat. c. 170. The sixth section of the latter statute, as has been said, is a transcript of the Stat. 1821, c. 76, which was a transcript of Stat. 1783, c. 51. The case *Commonwealth* v. *Cheney*, 6 Mass. R. 347, decided long before the enactment of the Stat. 1821, is directly in point in our favor. And in *Commonwealth* v. *Churchill*, 5 Mass. R. 176, Parsons C. J. says, "Hawkins lays down the law generally, that whenever any suit on a penal statute may be said to be actually pending, it may be pleaded in abatement of a subsequent prosecution, being expressly averred to be for the same offence." Now an indictment is a prosecution, and an expensive one, for on it, the accused can be arrested and

imprisoned or held to bail; and if acquitted, he cannot recover costs. The suit and the indictment are but different modes of recovering the same penalty, and no power is given by either of the statutes to anticipate the right to bring a suit for the penalty by a complaint before a justice. The statute remedy for the recovery is by suit or indictment only, and not by suit or complaint before a justice. Where a statute creates a new offence, by prohibiting and making unlawful any thing which was lawful before, and provides a remedy against such new offence by a particular method of proceeding, such method of proceeding must be pursued, and none other. 1 Russel on Crimes, 49; Hawk. B. 2, c. 26, § 17; Jacob's Law Dic. title, Information; *Wiscassett* v. *Trundy*, 3 Fairf. 204.

The opinion of the Court was drawn up by

TENNEY J. — The plaintiff contends that the warrant to apprehend him for the offence charged in the complaint on which it was issued, was unauthorized; and that consequently the commitment of him to prision, which was ordered by the defendant, was a trespass, for which he is entitled to damages. In support of this position, he relies upon the case of the *Commonwealth* v. *Cheney*, 6 Mass. R. 347, and insists, that the decision is a construction of a statute, which has been re-enacted in the Revised Statutes of this State, and therefore has been legislatively adopted; but if otherwise, that it is applicable to and decisive of the case now before us.

It is a well settled rule, that "if a provision of one statute receives a judicial construction, and is inserted in another, the same construction will be given to it; but when the clause varies, it shows a different intention in the legislature. *Rutland* v. *Mendon*, 1 Pick. 154. It will be proper to examine the statutes under which the case of *Commonwealth* v. *Cheney* was decided, and those of the Revised Statutes upon the same subject, in order to ascertain, whether they are so substantially the same, that the legislature are presumed to have adopted in the latter the construction given to the former in that case.

The statute of 1783, c. 51, empowered justices of the peace to hold to bail all persons guilty, or suspected to be guilty, of the offences of which they had not cognizance, certain high crimes excepted; and to take cognizance of, or examine into all other crimes, matters and offences which by particular laws are put under their jurisdiction. The statute of this State, c. 76, passed in 1821, contains similar language. By the Revised Statutes, c. 170, entitled "of the power and proceedings of justices of the peace in criminal cases," § 3, it is provided, that "when complaint shall be made in due form to any justice of the peace, alleging any offence to have been committed, and praying for a warrant to be issued against the person charged, the justice shall carefully inquire of the complainant on oath into the circumstances of the case, and if he shall be satisfied, that the person charged committed the offence alleged, he shall issue his warrant." Sect. 5, provides, that when the offence is of a high and aggravated nature, the person arrested (in the manner before provided) and in custody, may be committed or bound over for trial to the Court having jurisdiction of the case. Chapter 171 of the Revised Statutes, entitled, "of the commencement of proceedings in criminal cases," § 1, empowers justices of the peace to issue process, to carry into effect the provisions of this chapter. And § 2, provides, that when complaint shall be made to him, that a criminal offence has been committed, he shall examine the complainant on oath and any witnesses he may produce, and if it shall appear, that any such offence has been committed, and there is reason to believe that the person charged is guilty, he shall issue his warrant, stating the substance of the charge, and requesting the officer to whom it is directed, forthwith to arrest the person accused and bring him before such justice, or some other magistrate of the county, to be dealt with according to law; and in the same warrant may require the officer to summon such witnesses as shall be therein named, to appear and give evidence on the examination. By § 17, "If it shall appear that an offence has been committed, and that there is probable cause to believe the prisoner guilty, and

if the offence be bailable by such magistrate, and sufficient bail be offered, it shall be taken and the prisoner discharged, but if the offence is not bailable by the magistrate, or no sufficient bail be offered, the prisoner shall be committed to prison to await his trial."

The statute of 1787, c. 68, entitled "an act for the due regulation of licensed houses," makes criminal certain acts, which are made so likewise by the Revised Statutes of this State, c. 36, and in each, two modes are provided for recovering the forfeiture incurred; the former by information or indictment; the latter, by an action of debt in the name of the person prosecuting, or of the town or plantation, where the offence may have been committed, or by indictment. But in the act of 1787, a moiety of the penalty is appropriated to the use of the prosecutor, and the other moiety to the county in which the offence may have been committed, excepting when the prosecution is by a grand jury before the Supreme Judicial Court, or Court of general sessions of the peace, in which case, the whole forfeiture is to the use of the county. In the Revised Statutes the penalty enures wholly to the town, in which the offence may be committed, whether it be obtained in one mode or the other.

It will be seen that the *duties* of justices of the peace are more specifically pointed out and defined in the Revised Statutes, than they were by the act of 1783, and their *powers* are also materially different in one from the other. In that of 1783, they were empowered to hold to bail, when they *suspected* the person accused to be guilty. In the Revised Statutes, it is made their duty to issue a warrant on being satisfied of the truth of the charge, and only in such case; and to bind over and commit the person on having *probable cause*, to believe him guilty.

Judge Parsons in the opinion, in the case referred to by the plaintiff, says, "the reasoning of the counsel for the Commonwealth would be conclusive, if the statute enacting the offence, had not so appropriated the forfeiture, and provided the mode of recovering it, as by necessary implication, to ex-

clude the offence." The reason given for the exception of this offence from the operation of the statute of 1787, cannot fully apply under the statute now in force, as the forfeiture, in no mode of prosecution, and in no event, can enure to the benefit of any other, than the town or plantation in which the offence may be committed. It is quite certain that the rule of construction invoked by the plaintiff's counsel does not apply; the statutes under which that decision was made are not only in terms very different from those in the Revised Statutes, but the provisions of the two are substantially unlike.

2. Was the defendant as a justice of the peace authorized to order the plaintiff to be committed, on his failure to recognize with surety to appear at the District Court?

The statutes which we are now considering, like all others, are to be so construed, that they may have a reasonable effect, agreeably to the intent of the legislature. Courts may give a sensible and reasonable interpretation to legislative expressions, which are obscure, but they have no right to distort those, which are intelligible; neither is the language of a statute to be enlarged or limited by construction, unless its object and plain meaning require it.

It will be noticed that in the Rev. Stat. justices of the peace have, by the language used, the same power, and are bound by the same duties in those cases where the prosecution is by indictment only, as in those, where the prosecution may be by action of debt, or by indictment. The language used is clear, unambiguous, and comprehends all offences, not cognizable by a justice of the peace. Such being the case, some manifest inconvenience, or palpable injustice, must be shown to result from the adoption of the literal meaning, before we can be authorized to say that a different intention was entertained by the legislature. It would have been easy to have incorporated the exception, which it is contended is implied, if such exception was in fact intended; but if their meaning was otherwise, to have provided, that the power of justices to hold to bail, should extend to all cases where two modes of recov-

ery of the forfeitures were prescribed, would be but a senseless repetition of the same provision in different terms.

There are many statutes of the United States, creating offences, which are punished by pecuniary forfeitures, a part of which in each case, are to the use of the person informing and prosecuting therefor, and the other part to the use of the United States; and such penalties may be recovered by suit, or by prosecutions in a criminal form. As an example, may be mentioned, "An act to reduce into one, the several acts, establishing and regulating the postoffice department," passed March 3, 1825. It is believed to be almost an uniform practice in prosecutions for the recovery of such forfeitures, to enter a complaint before a justice of the peace, that the accused may be arrested on a warrant, and held to answer at a tribunal having cognizance of the offence; and yet on the principle contended for by the plaintiff's counsel, all such prosecutions are unauthorized, and if followed by a commitment of the accused to prison, subject the magistrate to an action for damages.

This practice, which has so long prevailed, was unauthorized, if the case of *Commonwealth* v. *Cheney*, was a proper construction of the statutes under which it arose. No decided case was referred to by the Court, and we are not aware that its doctrines have been reaffirmed. By that interpretation of the statutes, persons might persist in the most palpable violations of the license laws for a considerable time, and by absconding before a grand jury could act upon the subject, escape all punishment in a criminal form. Whether such an exemption was intended by the authors of those statutes, or would result from the language used therein, we may be permitted to doubt, without directly impugning the authority of that case; for it may still remain as the construction of statutes no longer in force, and which have been replaced by those, which are essentially different.

The law of 1787 held out to individuals inducements to commence prosecutions by information, for a violation of its provisions, by giving a moiety of the penalty to the informer;

he entitled himself thereto on filing the information, before giving notice to the accused; and his right thus acquired ought not to be taken away by the interposition of a prosecution for the same offence in the other mode; and it was therefore held, that an exception was so clearly implied, that the legislature intended it. But by the present law, the town, where the offence is committed, is alone entitled to the forfeiture, and the only loss to which one, who may commence a civil suit, can be subjected in any event, will be the costs, which may arise, before it becomes known, that the different modes of prosecution have been both resorted to; this is what would seldom happen, and we think the legislature are not to be presumed, against the express language of the statute, to have intended the exception for such a remote contingency. The same inconvenience might arise on the ground, that the criminal form of prosecution, is limited to an indictment; a civil suit may be commenced, so short a time before the finding of a bill, that neither the grand jury, the attorney for the State, or the complainant, may have knowledge of it, and no service of the writ be made upon the person charged therein.

A further reason for supposing, that the authors of the law, intended what the language imports without the exception, which it is insisted is implied, is found in Revised Statutes, c. 36, § 22, which provides that no prosecuting officer shall discontinue any legal process, commenced or to be commenced, under the provisions of this chapter, except by the direction of the Court, before whom the same may be pending. By prosecuting officers we understand those officers whose duty it is to take charge of criminal proceedings in behalf of the State; and the prohibition in the section referred to is not limited to indictments, but will extend to warrants issued by magistrates, implying that other forms of criminal prosecution, than indictments may have been intended. Besides, is it to be presumed, that when the legislature denied to the prosecuting officers of the State, the exercise of a discretion in this particular, which they possess over criminal matters generally, they intended to allow an individual, friendly to those who per-

sist in a violation of the law, by a private suit, in his own name, to defeat every indictment, which a grand jury might present; and such private suit, to discontinue at pleasure, or suffer to remain pending for the protection of the accused. Bills of indictment can be found only after long intervals; and before the sitting of the Court having jurisdiction, attended by a grand jury, civil suits over which prosecuting officers, and those interested to have the law enforced in the criminal form prescribed, may be commenced, and thereby annul in effect, the statute, so far as it provides for a recovery of the penalty by indictment. The legislature supposed it important, that penalties should be recovered in both modes pointed out. We think injustice and oppression would not be produced by the adoption of a literal construction of the statute; but by attributing to the legislature an intention to forbid justices of the peace to exercise the power, with which they are vested over other criminal matters, might lead in some measure at least to defeat the object evidently sought by the authors of the statute. The conclusion to which we come is, that the acts of the justice complained of in the action, were fully authorized by virtue of the complaint and the warrant which were legally made and duly returned to him, on the arrest of the plaintiff.

Exceptions are sustained.

EDWARD TUCKER *versus* THOMAS K. LANE.

A barrel of flour purchased by the debtor, and manufactured from grain of which he had never been the owner, is not exempted from attachment by Rev. Stat. c. 114, § 38.

TRESPASS for taking and carrying away a barrel of flour. On May 23, 1843, the plaintiff purchased of A. Chase, and paid therefor, a barrel of Baltimore flour, manufactured from grain which had never belonged to the plaintiff. At this time the plaintiff was indebted to Chase for a barrel of flour, previously purchased and carried away, and not paid for. Chase procured a writ against Tucker on this demand, and gave it to

the defendant, a deputy sheriff, who attached thereon the barrel of flour last purchased. At the time of the attachment the plaintiff had a family, and no breadstuff in his house.

It was agreed, that the Court might render such judgment as the law required, and order a nonsuit or default.

M. Emery, for the plaintiff.

Fairfield & Haines, for the defendant.

By the Court. — The flour was purchased by the plaintiff in its manufactured state, and he was never the owner of the grain from which it was made, prior to its being changed from grain into flour. The flour in question was not exempted from attachment either by the letter or by the spirit of the Rev. Stat. c. 114, § 38.

The plaintiff must become nonsuit.

John Merrill *versus* Caleb Burbank & *al.*

Where a deed is made by one seized in fee of the premises, and having a perfect right to convey the same, other persons cannot question its efficacy in giving title to the grantee, unless it be upon the ground, that they are creditors of, or *bona fide* purchasers from the grantor; or are holders under such creditors or *bona fide* purchasers, or have authority from them.

Where the debtor is sole seized of the whole of a parcel of land, and a levy is made upon an undivided portion thereof, and no reason is given in the return of the appraisers or of the officer for not setting it off by metes and bounds, such levy cannot be upheld.

If a levy be made by virtue of an execution in favor of "H. M. treasurer of the town of P." J. B. his successor in the office of treasurer, without any special authority from H. M. or from the town, cannot, by his deed, transfer the title to the land levied upon.

In an action of trespass *quare clausum*, the defendant cannot avail himself of the title of a third person, without showing both the title and the command or permission of that person.

Trespass *quare clausum.*

The plaintiff claimed under a deed from Samuel Chase, dated Nov. 13, 1838, and forthwith recorded.

The defendant admitted the committing of the acts alleged

to have been trespasses, and justified the same under a title originating in a levy upon the same premises of an execution against said Chase in favor of "Hardy Merrill, as he is treasurer of said town of Parsonsfield." The attachment was made on Nov. 23, 1838; and the levy was made on Nov. 9, 1839, on "one hundred and thirty-seven two hundred and sixtieths of said land and buildings in common and undivided," the debtor then and at the time of the attachment owning the whole or no part of the premises. No reason was given for levying upon an undivided share. That suit was founded upon a note given to Hardy Merrill, treasurer of Parsonsfield, by said Chase as principal, and by David Chase and Tristram Redman, as his sureties, dated April 15, 1837. On March 8, 1840, John Brackett, treasurer of Parsonsfield, by deed of that date, but without any special authority from the town, or from Merrill, conveyed the premises to Redman, who on the next day conveyed the same to Isaac Moore. The case states that the entry was made, and the acts alleged to be trespasses were done "by the defendants, under the claim of authority to do so, as and for the executor of the last will of Isaac Moore, who had deceased."

As the plaintiff's deed from Chase was prior to the title set up by the defendants, the latter contended that the deed from Chase to the defendant was fraudulent as to creditors, and introduced testimony, from which it appeared that the farm of Chase, part of which was covered by the levy, was of the value of about one thousand dollars; that Chase was indebted to the plaintiff, at the time the deed was made, in the sum of $274,00; that at this time there were attachments upon the farm to the amount of $428,00; that Merrill agreed verbally either to pay Chase the balance above these two sums, or to give an agreement in writing to reconvey on being paid the amount and interest, but that it was not done at that time because the exact amount of the attachments could not be then ascertained, and nothing further was done at that time; and that on Feb. 8, 1839, the plaintiff paid Chase $100,00, and refused to do any thing further. The suits, wherein attach-

ments were made prior to the plaintiff's deed, went to judgments which were satisfied by levies upon the farm.

SHEPLEY J. presiding at the trial, was of opinion that the deed of the plaintiff was fraudulent as to prior creditors of Chase, if the levy was legally made. It was agreed for that trial, that it should be so considered, and the plaintiff consented to become nonsuit, subject to the opinion of the Court. "If the Court should be of opinion that the plaintiff might recover, or that the levy was not legally made so as to give a title under it, the nonsuit was to be set aside, and a new trial granted, or the action disposed of according to the legal rights of the parties."

Howard, for the plaintiff, contended that the action could be supported, although the plaintiff's deed of the premises was to be considered void as to the prior creditors of the grantor. Even if fraudulent, it is good between the parties, and good against all who can show no title as, or under, prior creditors, or *bona fide* purchasers of Chase. There being no adverse possession, the deed gave seizin and possession, and enabled the plaintiff to maintain the action against all who cannot show such title.

The town of Parsonsfield were the creditors of Chase, but Hardy Merrill was not his creditor. The levy gave no title to the town. The agreement at the trial was merely not to take advantage of the mode of making the levy, but left all other objections open to us. If then the defendants made title under Merrill, they acquired no rights as prior creditors, Hardy Merrill not being such.

The case shows, that Brackett had no authority to make the conveyance to Redman, either from Hardy Merrill, or from the town of Parsonsfield. Nothing, therefore, passed by his deed to Redman, and Redman, having neither seizin nor possession, could pass nothing by his deed to Moore. Moore had no right whatever to the premises, and could not question our title.

But even if the levy was good, and Moore had derived title under it, the defendants have not shown any rights under him.

They do not claim under his heirs or devisees, but merely under his executor, who had no right whatever to intermeddle with the real estate. *Henshaw* v. *Blood*, 1 Mass. R. 35; *Drinkwater* v. *Drinkwater*, 4 Mass. R. 354; *Gibson* v. *Farley*, 16 Mass. R. 280; *Holmes* v. *Moore*, 5 Pick. 257.

Caverly, for the defendants, contended, that the plaintiff could not support his action.

The deed from Chase to Merrill was fraudulent as to the prior creditors of Chase, and in fact, as to all creditors. There was no consideration paid at the time. The delivery up of the notes, afterwards, for a small portion of the value, and the payment of the one hundred dollars, could not alter the true character of the transaction. The plaintiff intended throughout to defraud the creditors of Chase. Cowper, 432; 1 Burr. 396; 4 T. R. 432; 8 Greenl. 373; 2 Metc. 104; 7 Cowen, 301; 10 Wend. 240; 21 Maine R. 414.

The defendants show a title in those persons by whose license they entered. By the levy, Hardy Merrill, as treasurer of Parsonsfield, took the land as an incident to the debt, which was due to him in his capacity of treasurer, and it was held as the note had before been, and as such it passed by the deed of the succeeding treasurer, Brackett, on being paid the amount due on the note; and Redman conveyed the same to Moore. But if these deeds did not pass the legal estate, the defendants may justify under the equitable title, which is in those under whom they claim to hold. *Reed* v. *Woodman*, 4 Greenl. 406.

The levy was not defective, although made of an undivided share, the whole being described by metes and bounds. 13 Mass. R. 57; 14 Mass. R. 404; 3 Greenl. 238.

The plaintiff is but a fraudulent grantee of Chase, and cannot impeach the title under which the defendants justify. 6 Greenl. 162; 21 Maine R. 417; 13 Pick. 298.

The plaintiff cannot maintain this action of trespass. The levy of the execution on the land, and delivery of seizin, gave the seizin to the creditor. This action is not brought for the original act done, on entering upon the land, but for a subse-

quent act, while in possession. When a man is once seized, he is presumed to continue so, until the contrary is proved. The plaintiff has shown no entry upon the land since, and cannot maintain this action, if we fail of showing title in ourselves. 17 Mass. R. 302; 1 Shepl. 90; 4 Mass. R. 416.

The opinion of the Court was drawn up by

WHITMAN C. J. — The deed, under which the plaintiff claims title to the *locus in quo*, was made to him by one Chase, who was, at the time, seized in fee, and had a perfect right to make the conveyance. Other persons can have no right to question its efficacy, unless it be upon the ground, that they are creditors of, or *bona fide* purchasers for a valuable consideration from Chase; or the holders under such creditors or *bona fide* purchasers. The defendants are not in either of these predicaments. They claim to have entered, and to have done the acts complained of, "as and for the executors of the last will of Isaac Moore, who had deceased." It does not appear that the executors of Moore had any authority by his will to enter upon the real estate of which he may have died seized; and of course could not have imparted any such authority to any one else, unless duly licensed, as by law provided, to make sale thereof; and no such license appears in this case.

There are other serious difficulties to be overcome by the defendants, before they can hope to succeed in their defence. The levy set up was of an undivided portion of a certain parcel of real estate; and it does not appear, that the debtor was not sole seized of the whole; nor is there any reason assigned, by the officer making the levy, for not setting it off by metes and bounds. The certificate of the appraisers affords clear indications, that the debtor was sole seized of the whole of the parcel, and the return of the officer does the same. Such a levy cannot be upheld. But a still graver objection, as it appears to me, exists to the ground of defence. The levy was made by virtue of an execution in favor of "Hardy Merrill as he is treasurer of the town of Parsons-

field." The fee in the premises must have vested, if at all, in trust for the inhabitants of that town; whereupon they, by virtue of the statute of Henry the 8th, for transferring uses into possession, would have become seized thereof, so that Merrill as treasurer, or otherwise, could not have transferred it without special authority from the *cestuis que use* for the purpose; and surely a subsequent treasurer, as is attempted to be set up in this case, without any such special authority, could not have conveyed the same.

If it could be urged, that the inhabitants of Parsonsfield were seized by virtue of the levy, still the defendants could not set up title in them, and claim to have entered by their command; for it would be necessary to show the command as well as the title. *Chambers* v. *Donaldson & al.* 11 East, 65. And it could not be shown that they had any such authority to enter.

The nonsuit, therefore, must be taken off; and, in pursuance of the agreement of the parties, a default must be entered.

School District No. 3, in Sanford *versus* Thaddeus Brooks.

A school district cannot maintain an action to recover the school money assigned by the town for the support of schools in that district against their school agent, although he has received it of the town.

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

Assumpsit for money had and received by the defendant, to the use of the plaintiffs.

The plaintiffs offered to prove that the town of Sanford raised a sum of money for the support of schools, and that a certain portion thereof was assigned to the plaintiffs, as their proportion of the school money; that the town neither chose a school agent that year, nor authorized the district to choose

one, but that the defendant was chosen by the district as school agent, and as such received from the town sixty-five dollars and fifty cents, as school money belonging to the district. There were certain questions raised in relation to the respective rights of the district and of the agent to appropriate the money, but the decision was on other grounds.

The presiding Judge ruled, that the action could not be maintained on such proof, and none other being offered, a nonsuit was entered; and the plaintiffs filed exceptions.

Appleton, for the plaintiffs, contended that the action could be maintained. So far as it respects this action, Rev. St. c. 17, is the same as the statute of 1834, on this subject. The school agent is the agent for the district, however chosen, and the school district, and not the town, had the exclusive right to appropriate the money. When the proportion belonging to the district is assigned, it belongs to the school district, and not to the town. 23 Pick. 62; 15 Pick. 35; 21 Pick. 75; 10 N. H. R. 72 & 96; 3 Fairf. 254.

The defendant received the money as the agent of the district, and for it, and cannot now deny the right of the district to call the money out of his hands.

W. A. Hayes, for the defendant, said that by law the right, duty and obligation of maintaining schools was on the town. The district, as such, has no right to set up or maintain a school, and cannot raise and collect money for such purpose. Neither the school district, nor the school agent, have any right to receive the money. If instructors are legally employed, the town is liable to them for their services, and not the district; and if the district receives the money of the town, it does not exempt the latter from their liability to the instructors. The school district has no right to the custody of the money, and it is not the practice in other places to pay it over to the district, or to the school agent, but directly to the persons employed. He commented upon the various provisions of the statute to show, that his views were correct; and cited 11 Pick. 260, and 23 Pick. 225.

By the Court. — School districts are under no legal obligations to support schools, and have no power to raise money for that object. The law imposes this duty on towns. They are to raise and collect the money, and pay the instructors. Nor have the school districts any right to the custody of the money. This action cannot be maintained.

Exceptions overruled.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF OXFORD.

ARGUED AT MAY TERM, 1844.

THE PRES'T. &C. OF THE FRANKLIN BANK *versus* ALDEN BLOSSOM.

Where land situated within the limits of two adjoining towns is included in the same mortgage, an officer may lawfully advertise, sell and convey the right of the mortgagor to redeem the land lying within one of the towns only; and the purchaser will thereby acquire the right to redeem the mortgage by an entire performance of the condition thereof.

In giving a construction to the language used by an officer in his return of the sale of an equity of redemption, and in his deed thereof, the whole description of the land should be taken together; and effect should be given to every clause and word, if possible, in order to ascertain the intended meaning.

Where the officer's description of the land was — "all the right in equity which the within named Jacob D. Brown, the debtor, had on the fourteenth day of December, 1835, of redeeming the following described real estate lying in Oxford, in the County of Oxford, mortgaged by said Brown to S. H. K. and J. F. a certain tract of land lying in Oxford aforesaid, containing about six thousand acres, (be the same more or less) to wit, all the lands lying in said town of Oxford, known by the name of the Craigie lands, being the same that were purchased of the heirs of the late Andrew Craigie, Esq. by said Brown and Samuel H. King, and afterwards deeded by said Brown to W. B. A. in two deeds, and recorded in the Oxford Registry of deeds, vol. 46, p. 426, 427, 428, 429, 430, to which record reference is to be had for a more particular description;" — and where the lands described in the deeds referred to were situated partly in Oxford and partly in Hebron; *it was held*, that the description by the officer of the equity of redemption sold, embraced only the lands within the town of Oxford.

CASE against the defendant, late sheriff of the County of Oxford, for an alleged default of J. J. Perry, then one of his

deputies. The writ, in the action wherein judgment was recovered and the execution issued, whereon the equity was sold, was not served by Perry. All the material facts appear in the opinion of the Court. It was agreed that the proper judgment should be entered by direction of the Court, and a nonsuit or default ordered.

Codman & Fox, for the plaintiffs, contended, that as the deputy did not advertise in Hebron, the town in which a portion of the mortgaged lands was situated, nothing passed by the sale or deed. *Grosvenor* v. *Little*, 7 Greenl. 376. The attachment on the writ was of all the right, title and interest of Brown, the debtor, within the County of Oxford; and as the interest was but that of an equity of redemption of a tract of land lying within two towns, it was the duty of the officer to advertise in both towns. When an officer undertakes to act, he should comply with the law. *Start* v. *Sherwin*, 1 Pick. 521; *Bond* v. *Ward*, 7 Mass. R. 126; 2 Kent, 466. And in the sale of an equity of redemption, the officer is liable to the creditor, or purchaser, if he does not perform all the acts required by law, and make return thereof. *Whitaker* v. *Sumner*, 7 Pick. 554; *Seaton* v. *Nevers*, 20 Pick. 454; *Harrington* v. *Fuller*, 18 Maine R. 279; *Kimball* v. *Davis*, 19 Maine R. 310.

The conveyance by the plaintiffs to Welch can make no difference. By an assignment of all rights under a deed, all incidents pass with the assignment. *Brown* v. *Maine Bank*, 11 Mass. R. 153; *Coverdale* v. *Wilder*, 17 Pick. 178; *Clark* v. *Clough*, 3 Greenl. 357; *Harriman* v. *Hill*, 14 Maine R. 127; *Smith* v. *Dutton*, 16 Maine R. 308; *Gibson* v. *Crehore*, 3 Pick. 482: *Carll* v. *Butman*, 7 Greenl. 104.

Deblois and *Howard* argued for the defendant in support of these positions.

1. Perry, the deputy of the defendant, has been guilty of no neglect, and committed no default in reference to the execution of the plaintiffs against Brown, and the sale of the equity thereon.

The deputy did not serve the writ, and thereby know what property was intended to be attached, and the return gave no information. It was not his duty to search the records and examine the title of the debtor to real estate. *Start* v. *Sherwin*, 1 Pick. 521; *Bacon* v. *Leonard*, 4 Pick. 282; *Littlefield* v. *Kimball*, 17 Maine R. 313. The officer legally advertised and sold all the land of the debtor in the town of Oxford, and gave a deed of the same property he sold, and the plaintiffs thereby satisfied their execution. Where a mortgage covers land in two towns, the right of redeeming the land in one town may be sold, and the purchaser will have the same rights as if he had purchased of the mortgagor one of two tracts of land included in the same mortgage. *Pomeroy* v. *Winship*, 12 Mass. R. 514. And so may redeem the mortgage.

2. The plaintiffs, by means of the sale of the equity, have received entire satisfaction of their judgment against Brown; and have in no respect been injured by any error or defect in the proceedings of the officer, who made the sale, if there be any; and cannot, therefore, maintain an action by reason of errors or defects, which have occasioned them no damage.

3. The attorney of the plaintiffs had full authority to direct the proceedings of the officer, and having done so, and the officer having complied with his directions, is not to be prejudiced. *Jenney* v. *Delesdernier*, 20 Maine R. 183.

The opinion of the Court was drawn up by

Tenney J. — This action is for the recovery of damages for the alleged default of John J. Perry, the defendant's deputy. The writ contains four counts; the first, second and fourth are for losses, which the plaintiffs insist that they have sustained as creditors in the execution put into the deputy's hands against one Jacob D. Brown, by his neglect to cause the execution to be satisfied, and for a false return made thereon. The third sets out specially, the suing out of a writ in the name of the plaintiffs against Brown, the delivery of the same to an officer, the attachment of Brown's real estate in the county of Oxford, the entry of the action, and the obtaining

judgment and execution thereon; it then proceeds to allege, that the execution was seasonably delivered to Perry, that he seized the right in the real estate attached on mesne process, that he advertised the same for sale, that it was purchased by the plaintiffs, that he made return of his doings, and made, executed and delivered to them a deed of the right so sold; they then aver that the right in the land upon which the levy was made was advertised in such a manner, that they obtained no title by the sale and the deed, that the interest secured by the original attachment has been lost, and that they have derived no benefit from the judgment and execution.

The deeds introduced at the trial and referred to in the case, show that at the time of the attachment on the original writ, there was in the debtor, the equity of redemption of a parcel of real estate situated partly in the town of Oxford, and partly in the town of Hebron, in the county of Oxford, and that afterwards, and before the seisure of the same upon execution, the same had been conveyed by him. The execution being in Perry's hands within thirty days of the rendition of judgment, he undertook, from the right thus secured, to obtain satisfaction of the debt. The return states his doings, and shows, that for the right in equity of redeeming the lands therein described, the plaintiffs gave the full amount of the execution and all fees, were the purchasers of the interest sold, and that he executed and delivered to them a deed of the same. The case shows that they afterwards gave a quitclaim deed to one John H. Welch of all interest, which they derived from the sale and the deed of the officer, with no covenants, excepting against the claims of those, who might hold under them. Subsequently to this deed, they gave another confirming the first grant, and transferred, assigned and conveyed to said Welch, his heirs and assigns, all the covenants contained in the deed from Perry to them, with all the use, benefit and advantage of the same, to be recovered for his sole use and benefit; the consideration given by Welch to the plaintiffs was the full amount of the judgment, cost and interest; they are nominal plaintiffs only in the present suit, it being institut-

ed and prosecuted for the benefit of their grantee, who had constructive notice at least of all the facts upon which he now relies in support of his claim. Assuming that it is competent for him to prosecute in their name, and is entitled to all the rights which they held before the release, do the return upon the execution, and the officer's deed, fail to confer a title to the interest, which was supposed to be passed from the debtor to the creditors? The counsel for the plaintiffs contend for the negative, and rely upon the case of *Grosvenor* v. *Little*, 7 Greenl. 376, as decisive of the question. In that case, the Court hold, that in a sale of a mortgagor's right to land lying in two towns, notices must be posted up in both towns in order to constitute a valid transfer; but the land *described* in the return of the officer was in two towns; but in the case at bar, the defendant insists, that the land described in the return was situated in the town of Oxford only, and therefore that the authority is not applicable.

It is competent for a mortgagor to convey to different persons separate parcels of the mortgaged premises, and such conveyances will pass the interest of the mortgagor to each grantee, in the land therein described. *Crehore* v. *Gibson*, 5 Pick. 146. The same principle will apply to statute conveyances; as where several parcels of land are mortgaged in the same deed, a creditor of the mortgagor may cause the right in equity of redeeming one parcel only to be sold; and a part of a parcel of land incumbered with a mortgage may be set off on an execution against the mortgagor in possession without regard to the incumbrance, provided no deduction is made therefor, and in both cases the mortgagor's interest will pass to the creditor. *White* v. *Bond*, 16 Mass. R. 400. The mortgagee is entitled to receive on redemption the entire sum secured by the mortgage, and cannot be compelled to release to one holding a part only of the equity of redemption, that part, by a tender of that proportion of the debt, which upon a fair adjustment might be the sum due to free the part so held from the incumbrance.

If the return of the officer upon the execution shows that

the right in the land described therein was duly advertised and sold, a title thereto vested in the plaintiffs, and the execution and judgment are entirely discharged; they have in such case received in money their whole debt and all costs. On the other hand, if the proceedings of the officer were not in conformity with the statute, no benefit was obtained by the plaintiffs from the purchase. If the land described in the return, and in the deed, which is identical, is upon a fair construction, situated entirely in the town of Oxford, the officer proceeded as he was bound to do, and the title was transferred; but if the land lay partly in the town of Oxford and partly in the town of Hebron, he omitted to advertise the sale in a manner which the law required to make it valid. The land is described as being "all the right in equity, which the within named Jacob D. Brown, the debtor, had on the 14th day of December, 1835, of redeeming the following described real estate lying in Oxford, in the county of Oxford, mortgaged by said Jacob D. Brown to Samuel H. King of Oxford, in said county, gentleman, and John Foster of Cambridge, in the Commonwealth of Massachusetts, a certain tract of land lying in Oxford aforesaid, containing about six thousand acres (be the same more or less) to wit, all the lands lying in said town of Oxford, known by the name of the Cragie lands, being the same that were purchased of the heirs of the late Andrew Cragie, Esq. by said Brown and Samuel H. King, and afterwards deeded by said Brown to Wm. B. Abbott, in two deeds, and recorded in the Oxford Registry of Deeds, vol. 46, pages 426, 427, 428, 429, 430, to which record reference is had for a more particular description."

In giving a construction to the language used in the description of the land referred to in the return, the whole must be taken together; effect must be given to every clause and word, if possible, in order to ascertain the intended meaning; the idea imported by the terms in one part, when standing alone, may be materially affected by the language of another part. If the lands had been only described as those, "mortgaged by said Jacob D. Brown to Samuel H. King and John Foster,"

and, "being the same, that were purchased of the heirs of the late Andrew Cragie, Esq. by said Brown and Samuel H. King, and afterwards deeded by said Brown to Wm. B. Abbott, in two deeds, and recorded in the Oxford Registry of deeds, vol. 46, pages 426, 427, 428, 429, 430, to which record reference is had for a more particular description," no doubt could exist as to the lands intended; there being no words to limit the meaning, no quantity short of the whole amount mortgaged by Brown, and described in the record referred to, could satisfy the language used; the description would be clear and perfect, and any thing farther would be entirely unnecessary, if the whole of the lands mortgaged was intended. When, however, the return and deed proceed farther, and represent the land sold as lying in the town of Oxford, and twice repeat the same, we are not at liberty to reject this limitation as destitute of meaning; on the contrary, it clearly manifests an intention in the officer, to confine the lands levied upon to that town; and this restriction by no means destroys the effect of other parts of the description, but materially qualifies them. The part lying in Oxford was "mortgaged" equally with the whole tract; it was the same land, so far as it was in the town of Oxford, which was described in the record to which reference was made, though it was not all the land embraced in that record. After the language, "to wit, all the land lying in said town of Oxford, known by the name of the Craigie lands," it was proper, if not necessary, to refer to the conveyance of the heirs of Andrew Craigie to Brown and King and the record of the deeds from Brown to Abbott, that no question should afterwards arise as to what was intended in the return by the lands known as the Craigie lands, situated in the town of Oxford; without reference to documents or records, the lapse of time might cause doubts and uncertainty, respecting the extent and boundaries of that land in the town of Oxford, known by the name of the Cragie lands. The quantity of land sold was six thousand acres *more or less*, which would apply to a part as well as to the whole of the lands "mortgaged," and "conveyed" as mentioned in the description.

The different particulars contained in the description do not conflict with each other, but seem appropriate to point out the lands intended with certainty. By the construction adopted, every part will have an important meaning, and the real object of all interested in the same will be effected. And the sale itself, which the officer, the plaintiffs and their grantee treated as a legal one, will be effectual.

Plaintiff nonsuit.

DAVID N. FALES & *al. versus* PELEG WADSWORTH.

The Rev. Stat. c. 44, § 12, making the protest of an inland promissory note evidence of the facts therein stated, applies as well to protests made before as after the act went into operation; and is not in that respect unconstitutional.

ASSUMPSIT upon a promissory note, dated Jan. 1, 1841, for $414,13, signed by Butterfield & Barker, and payable to the defendant, by whom it was indorsed, in ninety days and grace, at either of the banks in Portland.

To sustain his action the plaintiff offered in evidence the protest by Henry Ilsley, jr. a notary public for the County of Cumberland in this State, dated April 3, 1841, before the Rev. Stat. went into effect as laws. The counsel for the defendant objected to the introduction of this paper, and contended, that it was not legal evidence to prove demand or notice. It was admitted.

In defence, testimony from the makers of the note, Butterfield & Barker, was offered for the purpose of disproving the statements contained in the protest.

The parties to the suit admitted, that the makers and indorser of the note, at the time it was made, and when it became due, resided in Hiram, in this State; and they submitted to the decision of the Court, as matter of fact, whether that testimony was sufficient to disprove the statements in the protest.

If the protest was rightly admitted in evidence, and the

facts did not constitute a good defence, the defendant was to be defaulted; otherwise the action was to stand for trial.

A. R. Bradley, for the plaintiffs.

Codman & Fox, for the defendant.

The opinion of the Court was by

WHITMAN C. J. — The note of hand, declared upon in this case, was made payable at either of the banks in Portland. When at maturity, on the last day of grace, it is stated in the protest of Henry Ilsley, jr. notary public, that he demanded payment of the same at the Canal Bank, which is a bank established in Portland, and was answered by the cashier, that there were no funds there for the purpose. The notary further states, that, afterwards, on the same day, he sent a written notice of the dishonor, by mail, to the defendant at Hiram, Me. By the Revised statutes, c. 44, § 12, it is enacted, that "the protest of any foreign or inland bill of exchange, or promissory note, or order, duly certified by any notary public, under his hand, and official seal, shall be legal evidence of the facts stated in such protest, as to the same, and, also, as to the notice given to the drawer or indorser, in any Court of law." The defendant is the indorser who was notified as stated in the protest.

The defence is, that the above enactment was passed after the making of the above protest, and therefore does not apply to the case; and that the notarial certificate is disproved by other evidence, referred to in the statement of facts; and that there is no evidence that the plaintiffs were ever the holders of the note. The two latter objections may be disposed of at once. There is not a particle of testimony, actually in conflict with the notarial certificate, that a demand was made at the bank, and that notice was despatched to the defendant as therein stated. The evidence referred to is, that a written notice or demand, was handed to one of the makers, two days after the dishonor; and that a similar demand or notice was handed, by mistake, to the witness, about the first of April, and was returned, after the note fell due, to the notary. As

before observed, this could have no tendency to prove, that demand of payment was not made at the bank, where the note was payable, or that notice was not duly forwarded to the defendant. And as to the ownership of the note by the plaintiffs, it is sufficient, so far as the defendant is concerned, that they have commenced a suit upon it, and have the control of it, for aught that appears to the contrary.

As to the first ground of defence, it depends on whether the statute affects the rights of the defendant, or only the mode of proceeding. In whatever the defendant might have a vested right, it would not be competent for the legislature to violate it. But no one can have a vested right in a mere mode of redress provided by statute. The legislature may at any time repeal or modify such laws. They may prescribe the number of witnesses, which shall be necessary to establish a fact in Court, and may again, at pleasure, modify or repeal such law. And so they may prescribe what shall, and what shall not be evidence of a fact, whether it be in writing or oral; and it makes no difference whether it be in reference to contracts existing at the time or prospectively. When the statute against usury was enacted, it was provided, that a defendant might be a witness for himself, in a certain contingency, to prove that ground of defence. It was never questioned that it did not apply to demands existing before, as well as subsequent to the passage of the act. And the cases are numerous in which such a principle has been recognized. The case of *Wright* v. *Oakley & al.* 5 Met. 400, is lucid and full upon the subject. We therefore think that the plaintiffs have made out a *prima facie* case; and that nothing has been shown on the part of the defendant to affect it.

A default must be entered,
and judgment accordingly.

GILMAN TUELL *versus* INHABITANTS OF PARIS.

A question of law cannot properly be presented for decision by a motion to set aside a verdict on the ground of error or misconduct of the jury.

If individual inhabitants of a town have knowledge of a defect in a road, this is sufficient notice to the town in its corporate capacity, of such defect.

ON the trial of this action a verdict was returned in favor of the plaintiffs, and the defendants moved that it should be set aside; —

1. Because the verdict is against evidence and the weight of the evidence at the trial.

2. Because the verdict was against the instructions of the presiding Judge to the jury.

3. Because the jury in assessing damages for the plaintiff, in order to find the amount of such damages, agreed to mark severally the amount of damages, and then add up the whole and divide the sum total by twelve, and thus find the damages; and found that sum, so ascertained, as damages.

4. Because the damages are excessive.

There was no bill of exceptions, or report of the presiding Judge, presenting any questions of law. Each party prepared a report of the evidence, and the presiding Judge decided wherein they disagreed. The facts sufficiently appear in the opinion of the Court.

Howard, for the defendants, in his argument, as matter of law, contended that in an action against a town for damages occasioned by a defect in a highway, the burthen of proof is on the plaintiff to show affirmatively, that he was driving with ordinary care and diligence. 11 East, 61; 6 Cowen, 189; 2 Pick. 621; 12 Pick. 177; 21 Pick. 146; 18 Maine R. 380; 21 Maine R. 31.

The plaintiff cannot recover, because the accident happened on the Lord's day, when the plaintiff was travelling in open violation of the law. Rev. St. c. 160, § 26.

The town had not reasonable notice of the defect in the highway, if any defect there was.

Andrews argued for the plaintiff; and to the point, that the

town had the notice required by the statute, cited 7 Greenl. 442; 3 Pick. 269; 13 Pick. 94.

This was a question of fact, and it was the peculiar province of the jury to make the decision. And in such case the Court will not set aside a verdict, even if they would have decided differently. 5 Cowen, 519; 2 Wend. 352; 5 Wend. 48; 8 Conn. R. 223; 6 Cowen, 519; 7 Mass. R. 261; 16 Maine R. 187; 2 Fairf. 335; 14 Maine R. 198; 19 Wend. 186.

The opinion of the Court, TENNEY J. taking no part in the decision, was drawn up by

SHEPLEY J. — This case is presented on a motion to set aside the verdict and grant a new trial. Several points have been presented in a written argument for the defendants.

1. It is contended, that the bridge from which the plaintiff was precipitated was not defective. It appears from the testimony, that there was a hill in the road a rod or two northerly of the bridge, described by a witness as "a pretty steep short hill," which one travelling from the north over the bridge must descend; and that the bridge was so constructed across the stream, that if one continued to travel straight after descending the hill, he would pass off from the westerly side of the bridge a little past the centre of it. The horse of the plaintiff was travelling in that direction and passed off from that side of the bridge at about that place. The length of the bridge was thirty feet. There was on the westerly side, for a railing, a spruce pole, at the northerly end fastened to the top of a post prepared for that purpose. At the southerly end there had formerly been a post, which a witness states, that he had not seen there for a year or more; and the southerly end of the pole was placed upon a log lying upon the bank of the stream and in no way fastened to it. There appear to have been formerly braces to sustain the posts, which had ceased to exist there. It does not appear, that supporters for the railing for the intermediate space of thirty feet, between the two ends, were at any time placed there. According to the testimony it

was about twelve feet from the plank of the bridge to the bed of the stream, which was covered with stones. After the accident the post, to which the rail had been fastened, remained in its place. The rail was thrown off into the stream, one end of it resting on the bank. The selectmen of the town soon after changed the position of the bridge. Whatever opinions the witnesses may have expressed upon such a state of facts, the Court would not be authorized to set aside a verdict founded upon the conclusion, that the bridge was not at that time safe and convenient.

2. It is contended, that if the bridge was defective, there was not sufficient proof, that the town had notice of it.

Simeon Buck, an inhabitant of the town, residing within about one hundred rods of the bridge, is the witness who stated, that he had never seen a post at the southerly end of the railing for a year or more before the accident, and that he put that end of the rail on to the log twice or more. America Thayer, one of the selectmen, stated, that he had been over the bridge a few weeks before the accident. The jury would be authorized from such testimony to conclude, that the inhabitants had full notice of its actual condition.

3. It is contended, that the accident did not happen by reason of any defect in the bridge, but was occasioned by the horse being vicious, dangerous, unsafe and uncontrolable.

There was much testimony to prove, that the horse had been ill broken, obstinate, restive, and so hard upon the bitt as to render it difficult to control him. And that the sight of the left eye had been impaired or destroyed, but whether before or after the accident, it did not clearly appear. The testimony also proved that the plaintiff's eyesight was defective; the eye being what is called nearsighted.

It is undoubtedly true, that the accident might have been occasioned by these causes or some of them. It can also be perceived, that if the horse bore so hard upon the bitt, that it was difficult or impossible for the plaintiff to diminish his speed, while passing down the hill and over the bridge, or to change the direction of his course, that if the bridge had been

built more nearly on the course of the road, or if the railing on the westerly side of it had been sufficiently strong, he might have passed over safely.

However vicious the horse might have been, there were two witnesses, who saw the plaintiff while passing on and near the bridge, and one who was in the wagon with him, and they all testify, that the horse travelled steadily and well up to the time of the accident. It was therefore necessary, that the jury should determine, whether the horse bore so hard upon the bitt as to occasion the accident, or whether it was more immediately occasioned by the peculiar construction of the bridge and its defective railing. From the testimony the jury might conclude, that it was occasioned by the latter without being under the influence of any bias or prejudice. The Court would not therefore be authorized on this ground to set their verdict aside.

4. It is contended, that the plaintiff was not entitled to recover, because he was unlawfully travelling on the Lord's day when the accident happened.

It does not appear from the case, that any such legal point was made at the trial. If there had been, it is possible, that the plaintiff could have exhibited a sufficient excuse. It is however a sufficient answer now, that such a question of law cannot be properly presented for consideration or decision, by a motion to set aside the verdict, on the ground of error or misconduct of the jury. There is no bill of exceptions presented, or question of law in any other manner reserved.

Although stated in the motion, it is not now insisted upon, that the damages assessed were so unreasonable as to authorize the Court to set aside the verdict because they were excessive.

The motion is overruled,
and judgment on the verdict.

PHILO CLARK, *Adm'r. versus* TIMOTHY HOWE.

Where the debt was originally due to two partners, and one has deceased, and the defendant has done nothing to change his original liability, the action must be brought in the name of the surviving partner, although by an agreement between the partners, the beneficial interest was in the deceased.

If a settlement be made wherein a claim is paid to one party, which the other alleged had already been settled by giving up a certain note; and the party to whom the payment was made, promised that he would repay the amount, if the other party ascertained, that he ever held such note; the cause of action, if any, accrues immediately upon the making of this promise, and the six years limitation commences running from that time.

THE action was assumpsit by Philo Clark, as administrator of the estate of Cyrus Clark, deceased. By the defendant the general issue and statute of limitations were pleaded. The action was commenced Oct. 24, 1842.

Cyrus Clark and Philo Clark had been partners in business in the name of Cyrus Clark & Son, until 1827, when the partnership was dissolved, "and the said Cyrus settled up the business of the firm." Cyrus Clark died in 1835, and Philo Clark is administrator on his estate. In the spring of 1834 the defendant called on Cyrus Clark to settle a note held against him by the firm, and brought in a claim for 20 M. shingles. Cyrus and Philo Clark both thought the defendant had been paid for the shingles by giving up to him a note for the same quantity of shingles, which the firm had received of some one whose name was not then recollected. The defendant insisted, that it was not so, and that the company never had at any time a note against him payable in shingles. After sometime, the defendant agreed, "that if they ever found, or ascertained, that they ever had such a note from any one payable in shingles, he would pay back to said Cyrus the amount of said twenty thousand of shingles," and the defendant was paid for the shingles at $2,00 per M. by allowing the same in part payment of his note to Clark & Son. Evidence was introduced tending to show, that the defendant had given a note for 20 M. shingles to one Turner and that Turner had transferred it to Clark & Son before the claim of the defendant

was allowed to him, and that neither of the Clarks was informed of this fact until 1840. A letter from the defendant to the administrator, dated April 15, 1842, was read in evidence, wherein he says — "At the close of that year we closed up, and I took the mill into my own management. I made my contracts to pay in shingles. In that way I hired Turner, and he assigned the note for his pay to your father, and I have no doubt that it was amicably and equitably settled at the time. The next year I sold you shingles at your store, which was finally settled justly, I believe. But if you can show that any mistake or error has been made, it will be promptly corrected." Also another letter, dated May 28, 1843, in which the defendant says — "I understand you wish to refer your lawsuit," and that if the plaintiff will give him a particular statement of his demand, "I will then decide upon the proposition."

After the evidence was all out, the parties agreed to take the case from the jury, and "that the Court may decide upon the foregoing facts, and draw such inferences as a jury might draw," and that the Court might enter a nonsuit or default.

Howard & Ludden argued for the plaintiff, citing 1 W. Black. 353; 1 Ld. Raym. 316; W. Jones, 329; 9 N. H. R. 359; 1 Evans' Pothier, Part 3, c. 8, Art. 2. § 2.

T. O. Howe argued for the defendant, and cited 5 Sergt. & R. 86; 7 Mass. R. 257; 2 Mass. R. 401; 6 Mass. R. 460; 1 Chitty's Pl. 8; 3 Greenl. 97; 2 Pick. 368; 4 Greenl. 41 & 413; 12 Maine R. 472; 14 Maine R. 300; 17 Maine R. 184; 11 Mass. R. 452.

The opinion of the Court was by

Whitman C. J. — There is no doubt that this action should have been commenced by the plaintiff as the surviving partner of the firm of Cyrus Clark & Co. It was a debt due to that firm; and the liability has never been changed by any agreement of the defendant with the plaintiff's intestate.

But the cause of action, if any exists, accrued in 1834;

and the statute of limitations is set up in defence; and more than six years had elapsed thereafter before this action was commenced. The cause of action did not depend, for its origin, on the discovery, by the members of the firm of Cyrus Clark and Company, that they had ever had a note, of the kind supposed, against the defendant, but on the fact, that on settlement, in 1834, they allowed and admitted, erroneously, an item for 20 M. of shingles, which had been before paid for. The defendant's promise to pay upon a contingency added nothing to his liability. If he had been before paid for the shingles, and was then again paid for them, by reason of his false allegations, a right of action instantly accrued against him. If he had not before been paid for them, his promise to refund the amount in any contingency, was without consideration, and therefore void.

The defendant's letters, relied upon, as taking the case out of the statute of limitations, contain no acknowledgment of indebtedness, or promise to pay any thing in any event.

Plaintiff nonsuit.

MARY WADSWORTH, *Adm'x. versus* GREENLEAF SMITH *& al.*

A partial failure of the consideration of a negotiable promissory note, given for goods sold and delivered, is a good defence, *pro tanto*, in a suit between the parties to the note.

ASSUMPSIT upon a promissory note, dated Feb. 7, 1837, given by the defendants to the intestate, John Wadsworth, or to his order. The defendants, at the trial before WHITMAN C. J. offered to prove, that owing to some mistake or misrepresentation, made by the payee at the time of the making of the note, they ought not to be held beyond the amount paid and indorsed on the note. The plaintiff objected to the admissibility of such proof. The objection was overruled and the evidence was admitted. The note was given for a quantity of pine timber. On the return of a verdict for the defendants, the plaintiff filed exceptions.

Codman, for the plaintiff, said that the only question here was, whether the partial failure of the consideration of a note can be given in evidence at the trial in reduction of damages. This is not an action for the price of an article sold, where it seems such testimony would be admissible, as is contended in the note to *Stevens* v. *McIntire*, 2 Shepl. 18. There is a distinction between that case and this which is on a negotiable promissory note. He admitted that there was some conflict in the authorities, but contended that the balance was on his side. 1 Campb. 40, and note; 2 Campb. 346; 2 B. & P. 155; 1 M. & M. 483; 9 Moore, 159; 1 Stark. R. 51; 12 Wheat. 183; 12 Conn. R. 234; 3 Ohio R. 285; 2 Bibb, 379; 14 Pick. 210; 21 Maine R. 155. The admission of such evidence would operate as a surprise upon the plaintiff, and on principle should not be admitted.

Howard, for the defendant, said that the authorities on the point, how far and under what circumstances, the partial failure of consideration of a note is a good defence to it, are very numerous, and in some measure conflicting. The tendency in England and in this country of late has been to admit the defence. From the authorities certain conclusions may be deduced.

1. The partial failure of the consideration of a bill or note, will constitute a defence, *pro tanto*, if the amount to be deducted on that account be a matter of definite computation.

2. Inadequacy of consideration even, where there is a warranty or fraud, is a defence.

3. There must be fraud, mistake, or illegality in order to impeach the consideration, totally or partially; and where either exists, it is competent to prove it in bar.

He cited 2 Campb. 347; 2 Stark. R. 270 & 145; Bayley on Bills, 531; 2 Kent, 473; 9 B. & C. 758; 8 Greenl. 404; 14 Maine R. 14; 3 Pick. 457; 14 Pick. 209 & 293; 22 Pick. 260; 4 Metc. 573; 8 Johns. R. 96; 13 Johns. R. 238; 15 Johns. R. 230; 8 Cowen, 34; 4 Wend. 492; 11 Wend. 9; 13 Wend. 605; 2 Hill, 606.

The opinion of the Court, TENNEY J. not hearing the argument, and taking no part in the decision, was drawn up by

SHEPLEY J. — The only question presented for the consideration of the Court in this case is, whether a partial failure of the consideration of a negotiable promissory note, given for goods sold and delivered, will be a good defence, *pro tanto*, in a suit between the parties to the note. It is well known, that there is á conflict of authority and that the law is differently administered in different States. In the case of *Obbard* v. *Betham*, 1 M. & M. 483, Lord Tenterden stated, that the distinction between an action for the price of the goods, and an action on the security given for them was completely established. That in an action for the price, the value only could be recovered. That in an action on bills given for them the plaintiff could recover, "unless there has been a total failure of consideration." No good reason for such a distinction has been presented. Why should the payee recover the full amount of the bill, when it is perceived, that he will be obliged to return a part of that amount upon a recovery against him by the defendant in another suit, and that suit arising out of no covenant of a higher nature, and expressly affording a remedy, as it would in the case of a suit upon a note given for the price of real estate conveyed? It is no sufficient reason to allege, that he might be surprised by the defence of a partial failure of the consideration; for it is admitted, that he must expect to be prepared for the defence of a total failure; and one can rarely occasion greater surprise than the other. Courts are to be presumed so to administer the law as to prevent injustice by the surprise of a defence, which could not have been anticipated. It is not perceived, that there can be more difficulty or inconvenience in receiving and acting upon the testimony to prove a partial failure of consideration, when the suit is upon the bill or note, than when it is for the price of goods sold and delivered. In both cases, by admitting the defence, circuity of action may be avoided. There may not unfrequently be absolute injustice in the exclusion of such a defence. The promisee or payee may be destitute of all other property

than the bill or note, or be otherwise so situated, that to refuse to admit such a defence is for all beneficial purposes to refuse all means of redress to the party aggrieved. The decided cases in this State have authorized such a defence. *Folsom* v. *Mussey*, 8 Greenl. 400; *Stevens* v. *McIntire*, 2 Shepl. 14. By allowing it, injustice may be prevented and circuity of action avoided. There is little reason to expect, that the administration of justice would be improved by the adoption of a different rule.

Exceptions overruled.

WILLIAM GAMAGE *versus* MOSES HUTCHINS, JR.

Where at the time when a note, payable on demand, was indorsed and guarantied, the maker was solvent, and so continued for two years thereafter, during which time and until the maker had failed, the holder made no attempt to collect it, and gave no notice to the guarantor, the latter is discharged.

If the guarantor of a note is discharged by the negligence of the holder, in order to render the guarantor liable notwithstanding, an acknowledgment of liability, or promise of payment, must be made with a full knowledge of the want of due diligence on the part of the holder; and such fact must be proved by the plaintiff, if he would avoid the effect of his laches.

ASSUMPSIT against Hutchins as guarantor of a note of which a copy follows.—"Portland, June 2, 1836. Value received I promise to pay Moses Hutchins, Jr. or order one hundred and fifteen dollars on demand and interest. Wm. Rice."

On the back of the note were these words, subscribed by Hutchins, without date. "For value received I guarantee the payment of the within note to W. Gamage.

"Moses Hutchins, Jr."

The action was commenced Dec. 30, 1841.

The action was opened for trial, when the defendant contended, that the plaintiff was not entitled to prevail without first showing a seasonable demand of Rice and notice to the defendant of non-payment. The Judge ruled, that no demand or notice was necessary.

Witnesses were examined and depositions read, when the parties agreed to take the case from the jury, and turn it into a statement of facts; and thereupon that the Court should render such judgment as should be proper and legal. The view of the evidence taken by the Court appears in the opinion.

Hammons, for the plaintiff.

The note, when sold by the defendant, was due, being on demand, and in order to charge the party it was not necessary to take any measures whatever; the liability was fixed, and the guaranty was absolute, and unconditional in its terms. *Cobb* v. *Little*, 2 Greenl. 261; 2 Johns. Cas. 409; 7 Conn. R. 523; *Read* v. *Cutts*, 7 Greenl. 186; 8 Wend. 403; 12 East. 227; 8 Pick. 423; 20 Maine R. 28; 4 Greenl. 521.

But if demand and notice were necessary, the proof is, that these were done.

It is a well settled principle, that where demand and notice are necessary, and have been omitted, and the indorser or guarantor with a knowledge of the facts promise to pay the debt, he is bound by such promise. 7 East, 231; 12 Mass. R. 52; 7 Conn. R. 523; 2 Campb. 188; 3 Johns. R. 68.

Mere delay in proceeding against the principal will not discharge a surety or guarantor. 2 Pick. 581; 1 Holt's R. 87; 5 Greenl. 130; 3 Mason, 446; 5 Wend. 501; 10 Pick. 129; 11 Pick. 156.

G. F. Shepley, for the defendant.

The engagement of a guarantor is but a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of some other person first liable. Fell on Guaranty, 1; 3 Kent, 121.

The holder of the note, as a general rule, should take the usual legal steps to secure the debt from the principal, before he can call on the guarantor. The holder should make use of reasonable diligence to obtain payment of the principal, and if he fails, give notice to the guarantor of the failure. 8 East, 242; 2 Taunt. 206; *Oxford Bank* v. *Haynes*, 8 Pick. 423; 9 Sergt. & R. 202; Chitty on Bills, (8th Am. Ed.) 474; 2

Gill & John. 302; 6 Conn. R. 81; *Loveland* v. *Shepard*, 2 Hill, 139. The exception to this rule is, where the debt was due and payable before the guaranty was entered into, as stated in *Read* v. *Cutts*, 7 Greenl. 186; and is in fact an absolute, and not a collateral guaranty. The plaintiff must show, that the guaranty was made after the parties were all previously fixed.

The facts show no waiver of any rights, and certainly none when the defendant had knowledge of the true state of the case. It is answer enough that the plaintiff admitted after all this, that the defendant was not liable. The principal remained able to pay for more than two years, and afterwards failed, and then, and not before, was the defendant called upon. If the defendant is liable, the condition of a guarantor is quite as onerous, as that of a surety.

The opinion of the Court was drawn up by

WHITMAN C. J. — The note in suit was made by one Rice, and indorsed to the plaintiff, with a guaranty, that the note should be paid to the plaintiff. The note was payable on demand. At the time of the indorsement and guaranty Rice was solvent; and so continued for about two years thereafter, during which time it does not appear that the plaintiff made any effort to collect the note. Such negligence, should ordinarily exonerate the guarantor from liability. *Oxford Bank* v. *Haynes*, 8 Pick. 423; *Talbot* v. *Gay* 18 *ib.* 534; Story on Bills of EXC. 344 and note.

But it is insisted, on the part of the plaintiff, that the defendant has waived this ground of defence, by acknowledging his liability, and promising to pay the amount due, if Rice did not. And he contends that this case is similar in principle to the case of a simple indorser of a promissory note of hand, when demand of payment and notice of default, has not been given and still the indorser acknowledges himself holden to pay it. In this case it does seem to have been proved, that the guarantor, the defendant, at two different times recognized his liability to pay the amount due in case Rice should

not; and we are not disposed to question the similitude in this respect, between that of a guarantor, and that of an indorser simply. But it should distinctly appear, that the recognition was made, after laches of the holder had taken place, in the case of a simple indorsement; and, in the case of a guarantor, after the holder had unreasonably delayed to enforce payment, until the promisor had become insolvent. In the present instance, however, we are unable to ascertain, from the case as presented in the copies furnished, whether the acknowledgments relied upon were made before or after Rice had failed. By one witness it is stated, that what he heard, was in June or July, four years ago; and by the other, that the conversation he heard was about three years ago; and it does not appear in the copies furnished, whether these acknowledgments took place before or after Rice failed; the times of taking the testimony not being stated.

We however, do not deem it material to ascertain when they were made. It must be considered as undeniable, that, to render an indorser or guarantor liable in either of such cases, any acknowledgment of liability, or promise of payment, must, in order to be effectual, be made with a full knowledge of the want of due diligence on the part of the holder; and such fact must be proved by the plaintiff, if he would avoid the effect of his laches. In the case here it does not appear, that the defendant, when he made the admissions relied upon, had any knowledge that Rice had remained solvent for two years after the giving of the guaranty, and had then failed, if such fact had then taken place; and if it had not then taken place, the acknowledgments proved were nothing more than a recognition of the liability, originally created, as still existing, without any such concession.

Under such circumstances, we can have no doubt, that the plaintiff should become nonsuit.

JAMES LORD *versus* AMOS POOR.

A writ of *replevin*, returnable before a justice of the peace, like other justice writs, is to be "duly served not less than seven, nor more than sixty days, before the day therein appointed for trial."

The right of the father to the earnings of a minor child arises out of his obligation to support and educate the child. And if the father emancipate the son, and allow him to provide for his own support and education by his own labor, the father does not thereby withdraw from his creditors any property or fund, to which they are legally or justly entitled for the payment of his debts.

REPLEVIN for two heifers. The writ was dated Oct. 28, 1842, was served upon the defendant the next day, and was made returnable before a justice of the peace on Nov. 5, 1842. On the return day the defendant appeared, and pleaded in abatement, that by the return upon the writ it did not appear to have been served fourteen days before the day of the Court to which it was made returnable, and that therefore the service was insufficient. This plea was overruled by the justice. The defendant then pleaded the general issue, and filed a brief statement, alleging that he was a constable of the town of Denmark, and that he attached the heifers, as the property of L. J. Grover, the owner thereof, on a writ against him in favor of Swan. Judgment was rendered against the defendant by the justice, and he appealed to the District Court, and there insisted upon his plea in abatement, which was again overruled by GOODENOW, District Judge. Evidence was then introduced tending to show that the property in the heifers was in J. N. Grover, a minor son of L. J. Grover; that the son had been emancipated by the father after the debt of Swan had accrued, but before the time of the attachment; and that the purchase of the heifers, whether made by the father or the son, or by them jointly, was made in August, 1841. These are all the facts appearing in the bill of exceptions.

The defendant's counsel requested the presiding Judge to instruct the jury, that the father cannot give the minor son his time, so as to deprive existing creditors of the right to the avails of the son's labor. The Judge refused to give this

instruction, and instructed them that the law was otherwise. The verdict was for the plaintiff in replevin, and the defendant claimed the right to appeal, which was denied by the Court. The defendant filed exceptions.

S. H. Chase, for the defendant, contended, that a replevin writ before a justice of the peace should be served fourteen days before the return day. The general grounds taken appear in the opinion of the Court.

The instruction requested by the counsel for the defendant should have been given. On this point, the decided cases neither directly controvert nor sustain the instruction requested; and the principle is to be settled for the first time in this State. And it is contended, that justice and public policy require, that a different principle should be established from that indicated in the instruction of the District Judge.

Here the counsel made an elaborate argument in support of his position.

A. R. Bradley, for the plaintiff, examined the several statutes on the subject of service of replevin and justice writs, and contended that no longer time was required to be given in the service of writs of replevin, returnable before a justice, than of any other justice writs.

On the second point, he cited *Whiting* v. *Earle*, 3 Pick. 201; and insisted that the instruction of the Judge was in accordance with law, justice and sound policy.

The opinion of the Court, TENNEY J. taking no part in the decision, was drawn up by

SHEPLEY J. — It is contended, that the service of a writ of replevin, issued by a justice of the peace, must be made fourteen days before the return day. The statute, c. 116, § 6, provides, that "the writ in civil actions, commenced before a justice of the peace, shall be by a summons, or a capias and attachment; and of the form prescribed in the one hundred and fourteenth chapter, and signed by the justice; and such writ shall be duly served not less than seven nor more than sixty

days before the day therein appointed for trial." It is also provided by statute, c. 130, § 2, that the writ for the replevin of beasts distrained or impounded, issued by a justice of the peace, may be served and returned "in like manner, as is provided in the case of other civil actions before a justice of the peace, except as otherwise prescribed." And by the ninth section of the same chapter, that the writs for the replevin of goods "may be sued out, served and returned, like other writs in civil actions in all particulars, in which a different course is not prescribed." It is said that two kinds of writs only are provided for by the words "a summons or capias and attachment;" and that these are "a summons and attachment, or a capias and attachment." The writs named in that section are to be such, as are prescribed in c. 114. The first section of that statute declares, that the forms of writs shall remain as established by c. 63 of the statutes of 1821. The latter statute provided for two kinds of writs only, to be issued by justices of the peace, to be used in civil actions. One was denominated "summons for appearance," and it was in form of a common writ of summons, containing no command for the attachment of property. The other was denominated "capias or attachment," containing a command for an attachment of the goods or estate, and for want thereof to take the body. There is no such form of a writ prescribed by statute in *haec verba* as a writ of summons and attachment, as the argument supposes. Such a writ is in use, arising out of a modification of the form of the writ of capias or attachment, to make it conform to the requirements of certain statutes exempting the body from arrest. It is yet the same writ without any statute change of name. It therefore becomes certain, that the writ of summons, containing no command for the attachment of property, was intended to be described by the words, "the writ shall be a summons," contained in c. 116, § 6. And that the provision for the service of process by original summons, in c. 114, § 26, cannot apply, so far as it respects the time of the service of such a process, when issued by a justice of the peace; while it is applicable so far as it regulates the mode of

service. And the clause in c. 130, § 9, that replevin writs when issued by a justice of the peace and by the Courts, "in both cases may be sued out, served, and returned, like other writs in civil actions," becomes a plain direction, that such writs, issued by a justice of the peace, may be served as other writs issued by him in civil actions are served. The words "in all particulars in which a different course is not prescribed," have reference undoubtedly to the duty of the officer to take and return a bond, and to take and deliver the property, when he makes service of a writ of replevin. In these respects the service would not be like that of a writ in other civil actions. The plea in abatement was properly overruled.

It is further contended, that the District Judge ought to have complied with a request to instruct the jury, "that the father cannot give the minor son his time, so as to deprive existing creditors of the right to the avails of the son's labor." This request assumes, that a father has a present valuable property in the labor of a minor son, which his creditors have a legal right to have applied to the payment of their debts. The right of the father to the earnings of a minor child arises out of his obligation to support and educate the child. There cannot be necessarily any present valuable property in the future labor of a minor son. It is contingent, depending upon the health, life, and ability of the son to perform the labor. And if the labor be performed, it is justly subject in the first instance to a charge for the maintenance and education of that son. And no creditor of the father can have a right to have the proceeds of that labor applied to the payment of his debt to the exclusion of a proper education and maintenance for the son. If therefore the father emancipate the son, and allow him to provide for his own support and education by his own labor, he does not withdraw from his creditors any property or fund, to which they are legally or justly entitled for the payment of his debts.

Exceptions overruled.

Ann Burgess *versus* Leonard Bosworth.

The mother of a bastard child is a competent witness on the trial of her complaint against the alleged father, if she has complied with the other provisions of the statute, (Rev. Stat. c. 131) and been constant in her accusation of the respondent from and after the time she first made it, before the magistrate on her examination, or in the time of her travail; and any other accusation of another person as the father, even if in the form of an examination under oath, made anterior to her accusation of the respondent, goes only to affect her credibility, not her competency.

Complaint under the bastardy act.

The examination of the plaintiff before a magistrate, wherein she alleged that the child was begotten by the respondent "on or about the 20th of October, 1842, just before bedtime in the evening, in the kitchen of said Bosworth," was taken April 7, 1843. After proving that she accused Bosworth in the time of her travail, she was offered as a witness. The respondent objected to her admission on the ground, that she had been inconstant in her accusation. And to show it, he introduced in evidence her examination, on March 7, 1843, before another magistrate, wherein she accused another person as being the father of her expected child. He also urged the fact, that the proof introduced in her behalf shew, that her accusation before the magistrate charged the act to have been at a different time and place from that stated by her in the time of her travail, to wit: "at the respondent's house about twelve o'clock at night." Goodenow, District Judge, overruled the objection, and she testified. The verdict was in her favor, and the respondent filed exceptions.

Howard & Shepley, for the respondent, contended, that the complainant should not have been admitted as a witness, she having been inconstant in her accusation, after having made her voluntary examination before a justice of the peace. *Maxwell* v. *Hardy*, 8 Pick. 562; *Bradford* v. *Paul*, 18 Maine R. 30.

The constancy required by the statute is not after she has accused a particular person, but after she has done a particular act, making the declaration before the magistrate in the first

instance. The cases before cited go on this ground. If she can accuse two persons on oath of being the father of her child, and still be a witness, she may two hundred.

Andrews, for the complainant, contended that any variation in her statements in relation to time or place, not relating to the person accused, was no evidence of inconstancy.

As to her accusation, a month before, of another person, it would be wholly subversive of justice, if being compelled by threats from the father of her child, in whose house she lived, to accuse another person, that this should furnish him with the means of escape. She has been constant in the person since her accusation of the respondent, and that is all the statute requires. The objection goes only to her credit, not to her competency. 1 Phil. Ev. 17, 423; 2 Stark. Ev. 716; 8 Greenl. 42; 8 Pick. 560.

The opinion of the Court was drawn up by

WHITMAN C. J. — The complainant, before accusing the defendant, had, under oath, before a magistrate, accused another man of being the father of the child of which she was pregnant. The statute requires, in order to her being admitted as a competent witness on the trial of the one accused, that she should have accused him, under oath before a magistrate, and also in the time of her travail, of being the father of the child, the filiation of which is sought to be established, and that she should have remained constant in her accusation. In *Maxwell* v. *Hardy*, 8 Pick. 560, it was decided, that the constancy, required by the statute, was to take place from and after either of those accusations; and that any statements, which she might have made before, as having charged the parentage of the child upon another person, &c. would not avail against her competency. If this be a correct exposition of the statute, and the statutes of Maine and Massachusetts, on this point, are precisely similar; it becomes a question whether the having previously charged the parentage upon another person, under oath, and in the same form in which she had accused the defendant, should be sufficient to exclude her from testifying.

If the statute only contemplates that she should have remained constant after she had accused the defendant, then, in whatever form, and under whatever solemnities, she may have previously accused another, should make no difference. The language of Mr. C. J. Parker, in delivering the opinion, in the case cited, would apply with equal force, seemingly, to this case as to the one the Court were about deciding. He says that such previous statements may have been "the result of terror or shame for her condition, or to have been produced by the threats or blandishments of her seducer." Such terror, or threats, or blandishments might induce an accusation, under oath, and before a magistrate, in legal form, as well as without such a solemn proceeding. The only difference would be that the degree of influence in the one case must necessarily be greater, to produce the result, than in the other: and her credit would be more seriously affected in the one case than in the other; of which it would be the province of a jury to judge, in view of all the circumstances of the case.

On the whole we are of opinion, that, whatever may have been the form or manner of the accusation of any one else, by the complainant, anterior to the accusation of the defendant, it should be allowed only to affect her credibility, and not her competency.

Exceptions overruled.

A TABLE

OF THE

PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

ACTION.

1841;" and the referees heard the parties and before Sept. 1, made their award, under seal, fixing the amount due; and the plaintiff, on Sept. 10, 1841, made a demand of the neat stock, but payment was refused by the defendant; *it was held*, that the demand was not made too early; that the amount became payable in money, on demand and refusal of payment; and that an action of debt could be maintained therefor.

Barrett v. *Twombly*, 333.

8. The owner of goods stolen cannot maintain a civil action for the injury, till after the conviction or acquittal of the party charged with the taking.

Belknap v. *Milliken*, 381.

9. The demandant in a writ of entry can recover only on the strength of his own title, and not by the failure of title in the tenant.

Thayer v. *McLellan*, 417.

ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS.

AGENT.

See BILLS, &c. 14.

AMENDMENT.

1. Where one of two demandants in a writ of entry, pending at the time the Revised Statutes went into operation, afterwards dies, the Court has power to permit an amendment by striking out the name of the deceased, and otherwise amending, so that the action may stand as if commenced by the survivor alone. *Treat* v. *Strickland*, 234.
2. When judgment has been rendered in the suit, the officer making service of the writ ought not to be permitted to amend his return, unless the record discloses something from which the addition can be made.

Fairfield v. *Paine*, 498.

3. No amendment of an officer's return should be permitted, or allowed to have effect, when such amendment would destroy or lessen the rights of third persons previously acquired, *bona fide*, and without notice by the record, or otherwise. *Ib.*
4. If during the pendency of an action in the District Court, where the parties claimed under others who had respectively made levies upon the same land on executions issued on judgments of the same Court, the District Judge should direct the clerk to insert under his entry of the pending action a permission to an officer, who had years before made service of one of the writs in one of the former suits, to alter his return, and the alteration is made, this Court will, nevertheless, on an appeal determine the effect of such proceedings upon the rights of the parties. *Ib.*

ARBITRAMENT AND AWARD.

1. Where, in a rule of reference, entered into before a justice of the peace, the whole matter in controversy is submitted to the referees, "*to be decided according to the principles of law*," the law and the fact are equally submitted to their decision; and that clause does not prevent their being the final judges of both, or require them to report the facts and their conclusions upon them to the Court for its revision. *Latham* v. *Wilton*, 125.
2. An award to do some act, other than the payment of money, to be good, should be so certain, that a specific performance could be decreed.

Banks v. *Adams*, 259.

3. An award, that B should pay to A a certain sum "in property as good as he had received," and that A should pay to B "the amount which B had paid to R in as good property as he had paid to R," is void for uncertainty.

Ib.

4. An award may be good for part and bad for part; and the part which is good will be sustained, if it be not so connected with the part which is bad, that injustice will thereby be done. *Ib.*
5. As referees are judges agreed upon by the parties, mere errors in judgment afford, ordinarily, no ground for a recommitment of their doings.

Harris v. *Seal*, 435.

found to such an amount; but he is not bound to attach any, but such as does belong to him. *Bradford* v. *M'Lellan*, 302.

9. Personal property found in the possession of the debtor, may be presumed to be his, if nothing appears to the contrary; and the burthen of proof is on the officer, if he omits to attach it, to show that in fact it was not the property of the debtor. *Ib.*

10. If there be external *indicia* of ownership in the debtor, the officer cannot be excused from making an attachment, when necessary to the security of the creditor, by any thing but eventual proof that the property did not belong to the debtor; or in case of reasonable grounds of suspicion, by a refusal of the creditor to furnish security for an indemnity. *Ib.*

11. Where hay was attached that grew on land which had been in the occupation of the debtor for about six years under a sealed agreement, that when the debtor should have paid to the owner the price agreed upon for the farm, that it should be conveyed to him, and that the produce should be the owner's until such payment was made, but that the debtor should have the management thereof, and that whatever the same might net and be realized therefrom by the owner, should be credited towards payment for the farm; and the hay was during that time, cut by the tenant and put into the barn, and there attached as his property; *it was held*, that the hay was subject to attachment as the property of the tenant. *Garland* v. *Hilborn*, 442.

12. The return of an officer, that he made an attachment of property at twelve o'clock at noon on a certain day, is to be considered prior in point of time to the return of an attachment as made on the same day, indefinitely, without specifying any particular time of the day. *Fairfield* v. *Paine*, 498.

13. A barrel of flour purchased by the debtor, and manufactured from grain of which he had never been the owner, is not exempted from attachment by Rev. St. c. 114, § 38. *Tucker* v. *Lane*, 537.

See CONVEYANCE, 3, 4, 5.

ATTORNEY.

1. To authorize a conveyance of land by attorney, it is not necessary that a power to *convey land* should be *expressly* delegated; it may be imparted by implication. *Marr* v. *Given*, 55.

2. In the construction to be given to a power of attorney, the intentions of the parties are to be regarded. *Ib.*

3. The attorney was duly authorized, "to bargain, sell, grant, release and convey to such person or persons, and for such sum or sums of money, as to my said attorney shall seem most for my advantage, and upon such sale or sales, convenient and proper deeds, with such covenant or covenants, general or special, of warranty, quitclaim, or otherwise, as to my said attorney shall seem expedient, in due form of law, as my deed or deeds, to make, seal, and deliver and acknowledge," but the power was silent as to what was to be sold or conveyed; and the attorney conveyed land, and the grantee entered into possession thereof, and continued to occupy for nearly twenty years, during which time the grantor never asserted any title to the land. In an action demanding the land against one who had no title under the grantor, *it was held*, that it was the intention of the parties to authorize a sale and conveyance of all the rights of the grantor in any real estate. *Ib.*

4. When a service has been made thereon, the attorney who made the writ has no authority to alter it without leave of Court. *Childs* v. *Ham*, 74.

See CORPORATION, 9.

BANKS.

1. The statute of 1836, c. 233, entitled "Further to regulate Banks and Banking," does not render stockholders in a bank, who had become proprietors of their stock before the passage of that act, personally liable for the debts of the bank. *Wheeler* v. *Frontier Bank*, 308.

2. The mere service of a copy of the writ, in a suit then pending, upon the receivers of the effects of an insolvent bank, is not a compliance with the

provisions of the act of April 16, 1841, that creditors must bring in and prove their claims, if they would receive their share of the effects.
Read v. *Frankfort Bank* 318.

3. No action can be maintained against the sureties on an official bond of the cashier of a bank, where the breaches assigned are all for unfaithfulness in office after a reappointment, and after the giving and acceptance of a new bond. *Frankfort Bank* v. *Johnson*, 322.
4. The statute of 1831, "to regulate banks and banking," c. 519, § 28, gives a remedy only to creditors of a bank, as holders of its bills or otherwise, and not to the stockholders, against the directors thereof for losses arising "from the official mismanagement of the directors." *Rich* v. *Shaw*, 343.

BANKRUPTCY.

1. A bankrupt can, after his bankruptcy, maintain in his own name, a suit for a wrong done, brought before he was declared a bankrupt, unless his assignee should interpose an objection. *Sawtelle* v. *Rollins*, 196.
2. And if there has been an equitable assignment of the cause of action before the bankruptcy, the suit may be prosecuted afterwards in the name of the bankrupt, for the benefit of the party in interest. *Ib.*

See Trustee Process, 1. Poor Debtors, 4, 5.

BARON AND FEME.

See Husband and Wife.

BASTARDY.

The mother of a bastard child is a competent witness on the trial of her complaint against the alleged father, if she has complied with the other provisions of the statute, (Rev. St. c. 131,) and been constant in her accusation of the respondent from and after the time she first made it, before the magistrate on her examination, or in the time of her travail; and any other accusation of another person as the father, even if in the form of an examination under oath, made anterior to her accusation of the respondent, goes only to affect her credibility, not her competency.
Burgess v. *Bosworth*, 573.

BETTERMENTS.

1. A tenant claiming by virtue of a possession and improvement may not only offer to purchase in the title, but may in writing contract to do so, without altering the character of his occupancy, if the terms of the contract show, that the intention was to purchase and sell, not a full and perfect title, but one encumbered by such claim. *Kelley* v. *Kelley*, 192.
2. But all claim for *betterments* will be considered as abandoned, if the contract expressly admits, that the demandant was the owner of the land, and that the tenant was living upon it, and agreed to purchase an unqualified title thereto by deed of warranty. *Ib.*
3. To entitle the tenant to *betterments*, the "actual possession for the term of six years or more before the commencement of such action," required by the statute, should be immediately preceding the commencement of the suit, and not at some remote period. *Ib.*
4. The acts authorizing tenants in real actions to claim for the value of the improvements on lands, "holden by such person by virtue of a possession and improvement," require that such holding should be adverse to the legal title; and therefore a tenant holding under a bond for a deed from the owner, is not entitled to claim the value of such improvements.
Treat v. *Strickland*, 234.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Where a note payable to a person named, or bearer, was transferred by the payee to his creditor as collateral security for a debt due from the payee to him, and a suit is brought by the creditor in his own name against the maker, it furnishes no defence, if the latter can show, that the payee had paid his own debt to the plaintiff, and so was entitled to have had the note returned to him, before the commencement of the suit.
Sibley v. *Robinson*, 70.

2. Where it appears upon the face of a promissory note, that one of the makers is principal and that the others are sureties, and one of the latter, having paid the note, claims contribution of the other, the character in which the parties signed will be presumed to be correctly exhibited by it; but the contrary may be proved by the other party. *Crosby* v. *Wyatt*, 156.
3. Where it was the custom of a New Hampshire Bank to receive payments of interest from time to time on notes in advance, and suffer them to remain, and still hold the sureties, and this custom was fully known to both principal and sureties, and they come into this State to enforce a contract, made in that State, arising out of a note of such bank whereon they are sureties, and interest on the note in advance has been taken of the principal, the sureties will not be considered as discharged by the taking of such interest in advance. *Ib.*
4. If an incorporated manufacturing company, by their agent, draw a bill upon their treasurer and indorse the same, a demand upon him, and his refusal to make payment, have the effect against the company, in order to charge them as indorsers, of both demand and notice.
Com. Bank v. *St. Croix Man'g Co.* 280.
5. If the agent of an incorporated manufacturing company be clearly authorized to issue negotiable business paper, indorsees, not privy to its origin, would not be bound to look into the particular transaction giving rise to the existence of a note or draft; but would have a right to presume that it had been drawn in pursuance of the authority delegated. *Ib.*
6. The protest of a notary public of another State, wherein he states, that he sent a notice of the dishonor of a bill to the drawer on the next day after the demand and refusal, "and by the first practicable mail thereafter," is competent evidence to prove the facts thus stated.
Beckwith v. *St. Croix Man'g Co.* 284.
7. The holder of a bill or note has a right to adopt a private conveyance, instead of the mail, for the receipt and transmission of notice to a drawer or indorser of the dishonor thereof; but in such case, it is incumbent on the holder to show, that due diligence was used.
Jarvis v. *St. Croix Man'g Co.* 287.
8. If there be a writing on a note, under the signature, put on at the time of the making thereof, varying its terms, and this has been taken from the note by an indorsee and not produced, it will be presumed to have been a material and valid part of the contract, which could not be taken from the note without rendering it void, unless the holder shows clearly and satisfactorily that the removal of the writing from the note made no material alteration. *Johnson* v. *Heagan*, 329.
9. Where there was written at the bottom of a note, at the time it was made, a memorandum that it was not to be collected until a person named "should take it up himself," as the maker "had paid (such third person) for the same," such memorandum constitutes a part of the contract, neither repugnant nor immaterial, and cannot be taken from the note by the payee or indorsee without rendering the note void. *Ib.*
10. It is sufficient for the holder of a bill or note to notify his immediate indorser, without any limitation as to the place of his residence, and he is under no obligation to do more, unless he desires to charge other parties; and such indorser, on receiving the intelligence, should in due season notify the next indorser, and those whom he would charge. And this course may be followed by all the parties however numerous.
Crocker v. *Getchell*, 392.
11. And if the holder of a note or bill leaves it with a bank or an individual, residing in a different city or town, as an agent for the collection thereof, such agent is for that purpose to be considered as a party, and is bound only to notify his principal in due season. *Ib.*
12. But if the holder of the note should employ agents whose residences, or places of business, are so distant from those of the parties to the paper, that the transmission of notices through them would necessarily occasion great and unnecessary delay, it might be evidence of a want of due diligence, or even of a fraudulent or vexatious attempt to injure a party, under the pretence of using due diligence. *Ib.*

2. The act of 1842, c. 32, "in relation to institutions for savings" is not unconstitutional. *Savings Institution* v. *Makin*, 360.

CONSTRUCTION.

See CONVEYANCE, 7, 8, 9, 10, 11.

CONTRACT.

See BILLS, &c. 8, 9.

CONVEYANCE.

1. When a creditor calls in question a conveyance made by his debtor upon the ground of fraud, in an action between him and the grantee, the demand of the creditor must be subject to examination, in order to see whether he has a right, as such, to question the validity of the conveyance. And if a judgment has been obtained by him, still, as between him and the grantee, who is no party to it, it will not be regarded as precluding the latter from an examination of the grounds of it. The grantee may be allowed to show that it was obtained by fraud, or that the cause of action accrued under circumstances, which would not give the creditor a right to impeach the conveyance. *Miller* v. *Miller*, 22.
2. Where one party claimed under the extent of an execution, and the other under a deed of the same premises from the judgment debtor, and one item in the account which formed part of the foundation of the judgment of the execution creditor was subsequent to the deed, and a credit of larger amount was also subsequent, and neither party had made an appropriation of the payment, the Court held, that it cannot adopt its own notion of what may be equitable in each particular case, even to enable a creditor to contest a conveyance alleged to be fraudulent as to prior creditors, but must apply the payment according to the general rules of law, in extinguishment of the oldest item, instead of the most recent. *Ib.*
3. If the debtor, who had taken a deed of the premises, made prior to the attachment, but not recorded until afterwards, has conveyed the same premises to another, and the last deed was recorded before the attachment, this cannot be regarded as giving notice of such unrecorded deed. *Roberts* v. *Bourne*, 165
4. Where the tenant, who received a deed from the debtor prior to the attachment, but did not record it until afterwards, gave back a mortgage to his grantor at the same time, and this mortgage was recorded before the attachment, the record of the mortgage cannot be considered as notice of the unrecorded deed. *Veazie* v. *Parker*, 170.
5. When the person in possession is other than the grantee, it is necessary that there should be a visible change which should indicate to others that there had been a sale, to have the effect of giving notice to a subsequent purchaser or attaching creditor. Therefore where one, who had been a tenant of the grantor before the giving of the unrecorded deed, attorned to the grantee at the time it was given, and remained in possession afterwards until after the attachment, such possession cannot furnish notice of the conveyance. *Ib.*
6. The tenant will not be permitted to set up in defence, that nothing passed by a deed from the lawful proprietor to the demandant, by reason of a disseizin by the tenant, if the latter, three years afterwards, while continuing in possession, in writing, admits the title of the demandant, and contracts to pay him for the land, and has since occupied it as his tenant at will. *Kelley* v. *Kelley*, 192.
7. Every call in the description of the premises, in a deed, must be answered if it can be done; and the intention of the parties is to be sought by looking at the whole, and none is to be rejected, if all the parts can stand consistently together. *Herrick* v. *Hopkins*, 217.
8. If there be a precise and perfect description, showing that the parties actually located the land upon the earth, and another, general in its terms, and they cannot be reconciled with each other, the latter should yield to the former. *Ib.*
9. But where there is inaccuracy or deficiency in the particular description, the one which is general often becomes important, and renders that clear, which, without it, would be obscure and uncertain. *Ib.*

10. Where land adjoining on tide waters is conveyed "with the flats adjoining the land and appertaining thereto, meaning to convey only the flats of right belonging to said parcel of land," such flats only would pass as the law would determine to belong to that parcel of land, unless there be sufficient evidence to show, that the language was used by the parties in a different sense. If there be such evidence, the language must receive such a construction, as will accord with their intentions.

Treat v. *Strickland*, 234.

11. To explain the language used in conveying an estate, its actual condition and occupation at the time of that conveyance may be considered. *Ib.*

12. And the purchaser of land with flats appertaining thereto, must be presumed to have known the manner in which the flats had before been conveyed in deeds spread upon the records, and the manner in which they were occupied at the time of the conveyance. *Ib.*

13. The record of a conveyance of land in mortgage, which on the records appeared to be the land of the mortgagee, is not notice of a prior conveyance thereof by the mortgagee to the mortgagor. *Pierce* v. *Taylor*, 246.

14. Grants, not now to be found, may be presumed to have existed from mere lapse of time, as well against the State as against individuals.

Crooker v. *Pendleton*, 339.

15. It would seem, however, that a presumption of a grant might not avail against a State so readily as against an individual. Against the State, no precise number of years appears to have been fixed, as a rule in all cases; but a much shorter period, accompanied with circumstances tending to fortify the presumption of an ancient grant, will suffice to establish it, than would otherwise be requisite. *Ib.*

16. Where a deed is made by one seized in fee of the premises, and having a perfect right to convey the same, other persons cannot question its efficacy in giving title to the grantee, unless it be upon the ground, that they are creditors of, or *bona fide* purchasers from the grantor; or are holders under such creditors or *bona fide* purchasers, or have authority from them.

Merrill v. *Burbank*, 538.

See ATTORNEY, 1, 2, 3. TOWNS, 5.

CORPORATION.

1 Where a corporation organized on the 29th of March, and again on the 4th of June following, and one who became a creditor of such corporation in the intervening time, consented as a stockholder to the new organization and to have the stock divided anew, and took shares in the new stock; it was held, that such creditor did not thereby forfeit his right to recover his debt against the corporation, if the jury came to the conclusion, that the plaintiff did not thereby intend to surrender, discharge or affect his claim against the corporation by consenting to a new organization of it.

Longley v. *Longley Stage Co.* 39.

2. If the charter of a corporation be legally repealed by the legislature, as it respects that corporation, in accordance with a provision in the charter reserving that right on a certain contingency, a creditor of the corporation can interpose no valid objection to the constitutional power of the legislature, on the ground that such act would prevent the prosecution of the remedy of the creditor to collect his demand by a suit against the corporation, then pending, where property had been attached.

Read v. *Frankfort Bank*, 318.

3. An action at law can be maintained by a depositor of money therein against an incorporated savings institution, after due demand of payment and refusal, to recover the amount of his deposit, where such institution by its laws and regulations, assented to by all the depositors, provided that twice every year a payment of two per cent. interest should be made; "that although four per cent. is promised, yet every fifth year, all the extra income, which has not before been paid out and divided, will then be divided in just proportion to the length of time the money has been in, according to the by-laws;" and that as "people may become sick, or otherwise want their money, after they have put it in; it is provided, that they may take it out, when they please; but the days of taking it out are the third Wednesdays of January, April, July and October;"—although there has

DOWER.

EQUITY.

upon it, without making known his own title, will not be permitted to disturb him in the enjoyment of the estate — cannot be applied to cases of parol contracts for the purchase of land, where all the parties to the contract fully understood the true state of the title, and one of them seeks relief from another. *Ib.*

10. The powers of the Supreme Judicial Court, as a court of equity, are specific, and limited by statute; and in regard to mortgages, are expressly confined to "suits for the redemption or foreclosure" thereof. What is to be understood, in this instance, by *foreclosure*, it may be difficult to ascertain; but the Court, it is believed, are not vested with the power to decree a foreclosure in any case. The acts which are to foreclose a mortgage are, in every case, to be those of the mortgagee, or of those standing in the place of the mortgagee. *Shaw* v. *Gray*, 174.

11. An individual conveys two tracts of land in mortgage, and afterwards conveys, by deeds of warranty, one tract to the plaintiff and the other to W. who stipulates with his grantor to pay the amount due to redeem the whole mortgage; W. does not redeem it, and conveys the land by quitclaim deed, subject to the mortgage, to G. who verbally agrees with his grantor to pay the debt secured by the mortgage; G. procures an assignment of the mortgage to be made to himself, possession having been previously taken to foreclose the same, and the three years expire, when he sells the land he purchased of W. to one man, and another tract, originally sold to the plaintiff, and included in the mortgage, to H. who is ignorant of the former transactions; the plaintiff brings his bill in equity against G. and H. praying to have a decree made, directing that this land should be conveyed to him; *it was held*, that the bill could not be maintained against either G. or H. *Ib.*

12. To maintain a bill in equity, it is not sufficient to allege merely, that a conveyance of land by an absolute deed from a third person to the defendant, was made in trust for the plaintiffs; it should appear, that the conveyance was made in trust expressly, or by implication; and if by implication, such facts should be stated, as would clearly show it to be so made. *Rowell* v. *Freese*, 182.

13. If a bill in equity be brought by one of several partners founded on partnership transactions, all the members of the copartnership must be made parties, or it cannot be maintained. *Fuller* v. *Benjamin*, 255.

14. If some of the partners are insolvent, yet they must be made parties; and if bankrupts, their assignees should be made parties in their place. *Ib.*

15. If a legacy be a charge upon land, it is a trust, within the equity jurisdiction of this Court; and where an estate is devised on condition of, or subject to, the payment of a sum of money, or where the intention of the testator to make an estate specifically devised the fund for payment of a legacy, is clearly exhibited, such legacy is a charge upon the estate; and a Court of Equity may follow the legal estate, and decree that the person in whom it is vested, shall execute the trust. *Bugbee* v. *Sargent*, 269.

16. The misjoinder of parties defendant in a bill in equity, is no sufficient cause for a dismissal of the bill as it respects other parties than those improperly joined. *Ib.*

17. When the object of a bill in equity is single, to establish and to obtain relief for one claim in which all the defendants may be interested, it is not multifarious, although the defendants may have different and separate interests. *Ib.*

18. Equity is not the Chancellor's or the Judge's sense of moral right, or his sense of what is just and equal, but is a complex system of established law. The maxim, that equality is equity, can only be applied according to established rules. *Savings Institution* v. *Makin*, 360.

19. The general rule in equity is, that the answer of one defendant cannot be used as evidence against another. *Robinson* v. *Sampson*, 388.

20. But an order of court may be obtained to examine one of several defendants as a witness in the case, subject to cross examination by the other defendants. *Ib.*

21. In equity the cancellation of a mortgage on the records is only *prima facie* evidence of its discharge, and leaves it open to the party making such objection, to prove that it was made by accident, mistake, or fraud. On such

proof being made, the mortgage will be established, even against subsequent mortgagees without notice, if they became such anterior to the cancellation. *Ib.*

22. This Court has equity jurisdiction in all suits to compel a specific performance of contracts in writing, made since February 10, 1818, when the parties have not a plain and adequate remedy at law. But where the agreement has been carried fully into effect, and no further act is to be done under it, there can be no decree, under the equity powers of the Court to compel a specific performance of contracts, that other acts for the convenience or security of the parties should be done.

Haskell v. *Allen*, 448.

23. Where the parties agreed in writing under their hands, that a person designated by them should ascertain and mark the lines between their respective estates; and where the service was performed and the lines marked and the parties occupied according to those lines for several years, when one of them entered beyond the line, thus marked as his boundary, and took timber and wood therefrom, *it was held*, that the party injured thereby could not maintain a bill in equity, either to compel releases of the land beyond the line thus marked, to be given, or to obtain compensation in damages for the injury sustained. *Ib.*

See CORPORATION, 4, 7.

EQUITY OF REDEMPTION.

1. Where land situated within the limits of two adjoining towns is included in the same mortgage, an officer may lawfully advertise, sell and convey the right of the mortgagor to redeem the land lying within one of the towns only; and the purchaser will thereby acquire the right to redeem the mortgage by an entire performance of the condition thereof.

Franklin Bank v. *Blossom*, 546.

2. In giving a construction to the language used by an officer in his return of the sale of an equity of redemption, and in his deed thereof, the whole description of the land should be taken together; and effect should be given to every clause and word, if possible, in order to ascertain the intended meaning. *Ib.*

3. Where the officer's description of the land was — "all the right in equity which the within named Jacob D. Brown, the debtor, had on the fourteenth day of December, 1835, of redeeming the following described real estate lying in Oxford, in the County of Oxford, mortgaged by said Brown to S. H. K. and J. F. a certain tract of land lying in Oxford aforesaid, containing about six thousand acres, (be the same more or less) to wit, all the lands lying in said town of Oxford, known by the name of the Craigie lands, being the same that were purchased of the heirs of the late Andrew Craigie, Esq. by said Brown and Samuel H. King, and afterwards deeded by said Brown to W. B. A. in two deeds, and recorded in the Oxford Registry of deeds, vol. 46, p. 426, 427, 428, 429, 430, to which record reference is to be had for a more particular description;" — and where the lands described in the deeds referred to were situated partly in Oxford and partly in Hebron; *it was held*, that the description by the officer of the equity of redemption sold, embraced only the lands within the town of Oxford. *Ib.*

ERROR.

1. Where an objection to the form of a writ might have been taken by plea in abatement, it cannot be assigned as error to reverse the judgment.

Piper v. *Goodwin*, 251.

2. If the declaration be sufficient in substance, and the judgment be formal, there may be an informal writ without subjecting the party to the loss of his judgment. Error will not lie for defects in matter of form. *Ib.*

3. All objections to the *form* of the writ and declaration are cured by a verdict, or judgment by default. *Ib.*

4. Where the clerk of the Courts, in an action by an administrator, erroneously enters up judgment against the administrator instead of against the goods and estate of the intestate, or makes a mistake in the name of the administrator, the judgment should not be reversed, but corrected. *Ib.*

EVIDENCE.

1. Where there is a joint liability of the two defendants, the confessions of one made under oath as a witness when called by the other defendant in another suit, are admissible against both; although as between each other, it might be that the liability ought to be discharged solely by him who made the admission. *Davis* v. *Keene*, 69.
2. In an action of trespass against a sheriff for goods attached by his deputy on a writ and removed, in favor of a third person claiming to be the owner, the deputy, on being released by the sheriff, is a competent witness for him. *Welcome* v. *Batchelder*, 85.
3. And if a person had promised to indemnify the deputy for attaching and taking the goods, the release of the deputy discharges all claim against such promisor, and he becomes a competent witness for the sheriff. *Ib.*
4. Public policy authorizes a Judge of a Court to excuse himself from testifying as to what witnesses have testified on trials before him; but it furnishes no ground of exception, should he not insist upon his right to be excused. *Ib.*
5. A witness may refresh his recollection from his minutes, made at the time of the transaction. *Ib.*
6. Where the plaintiff makes and signs a written agreement to transfer his interest in a parcel of land to the defendant for a specified consideration, parol evidence is inadmissible to show, that the defendant, before or at the time of making such contract, had promised to pay therefor an additional consideration. *Hilton* v. *Homans*, 136.
7. Where a witness, in testifying to an admission, has stated the words used, it is not competent for the party calling him, to ask the witness, what he supposed was intended by those words. *Whitman* v. *Freese*, 185.
8. The declarations of a former owner of land, made while he was proprietor of the estate, respecting the extent and boundaries thereof, are competent, though not conclusive evidence against those claiming title under him. *Treat* v. *Strickland*, 234.
9. The lessor of the plaintiff, in an action of trespass *quare clausum*, wherein soil and freehold in the premises are pleaded by the defendant in himself, on being released from all claims under the covenants of the lease, is a competent witness for the plaintiff to disprove the title set up by the defendant. *Jordan* v. *Symonds*, 407.
10. Parol evidence is admissible to prove the consideration of a written contract, where none is expressed therein. *Warren* v. *Walker*, 453.
11. When the order from the defendant to deliver goods to a third person, is proved by evidence to which there is no objection, the delivery thereof may be proved by the books and suppletory oath of the plaintiff, whenever a delivery to the defendant himself, could be thus proved. *Mitchell* v. *Belknap*, 475.
12. Where two men were doing business together in a store, their books and suppletory oaths were held by the Court, to have been admissible by the Judge presiding at the trial, to prove the delivery of a cask of spirits containing forty-five gallons. *Ib.*
13. It is not competent to prove by parol testimony, that a note, absolute in its terms, "was not to be paid unless called for during the lifetime of the payee." *Boody* v. *M'Kenney*, 517.
14. A bill of parcels, or receipt, showing the purchase of an article by one of two defendants of the other, and payment therefor, is not admissible, when offered by the purchaser, unless there be proof, that the paper had been in the hands or in some way connected with the opposing party; and it is then received as exhibiting his assent, or showing his connexion with the transaction. *Ib.*

See USAGE, 3. POOR DEBTORS, 6. RETAILERS, 1. LUMBER, 2. WAYS, 9. CONVEYANCE, 11. BILLS, &c. 15, 16. BASTARDY, 1.

EXCEPTIONS.

See PRACTICE.

EXECUTION.

See EXTENT.

EXECUTORS AND ADMINISTRATORS.

1. A promise by an administrator to pay a debt of the intestate need not be in writing, nor upon any other consideration than the debt due from the intestate, to be sufficient to authorize a judgment against the goods and estate of the intestate in the hands of the administrator.

Piper v. *Goodwin*, 251.

2. And when the action is founded upon such promise by the administrator, it is not necessary to declare upon a promise made by the intestate, or to allege that he was requested and refused to pay. And indeed a request to pay need not be alleged in any other than those cases, in which it is necessary to allege and prove one, to entitle the plaintiff to maintain his action.

Ib.

See PARTNERSHIP, 1.

EXTENT.

1. Under the Rev. Stat. c. 94, the return of the officer of a levy upon land, that the debtor's agent, named in the return, selected an appraiser, is regarded as *prima facie* evidence of the authority of the agent to select an appraiser, and that the debtor was virtually notified for the purpose; especially where it does not appear, that there was any privity between the execution debtor and the demandant. *Roop* v. *Johnson*, 335.
2. If the justice certifies, that certain persons named, personally appeared and made oath, in proper form, as appraisers of real estate, the certificate furnishes sufficient evidence, that the appraisers were sworn by him, although he may omit the words, usual in such cases, preceding his signature, "Before me." *Ib.*
3. Nor will the levy be void, if the appraisers, in the certificate of the magistrate and in the return of the officer, are denominated "persons," and not "men," in the language of the statute, the names of the persons indicating that they were males, and not females. *Ib.*
4. It is a sufficient proceeding with the officer to view and examine the land, by the appraisers, under Rev. Stat. c. 94, § 6, if they proceed under the direction and supervision of the officer. *Ib.*
5. The true construction of the seventh section of the same statute is, that whatever the nature of the estate may be, it shall be described by metes and bounds, or in such other mode, as that the same may be distinctly known and identified. *Ib.*
6. Where the debtor is sole seized of the whole of a parcel of land, and a levy is made upon an undivided portion thereof, and no reason is given in the return of the appraisers or of the officer for not setting it off by metes and bounds, such levy cannot be upheld. *Merrill* v. *Burbank*, 538.

FRAUD.

1. If the owner of land gives a bond to another, obliging himself to convey the same at a certain price within a given time, and takes back a written agreement stipulating that if the obligee, on a sale thereof, should realize profits beyond a certain sum, that he would pay to the owner one half of such excess, and a sale is made by the obligee above the fixed sum, and the land is conveyed, and half of the profits paid over; this does not make the owner of the land liable for the fraudulent acts of the obligor in effecting the sale, either as partner or agent. *Wingate* v. *King*, 35.
2. If a party would rescind a contract on the ground of fraud, the rule is, that it should be done within a reasonable time thereafter. *Ib.*
3. If a debtor, unable to pay his debts, in contemplation of approaching death, makes provision for his wife by a sale of a portion of his property for that purpose, such sale is illegal and void as to creditors.

Welcome v. *Batchelder*, 85.

4. And if the purchaser, having knowledge of the facts, agrees to pay *bona fide* debts with a part of the property, this will not alter the character of the transaction. *Ib.*
5. In an action by an indorsee of a promissory note, indorsed before it fell due "without recourse," where the defence set up was, that the note was obtained by the fraudulent representations of the plaintiff, or that it was given

in consequence of a mutual mistake in the value and character of the land for which the note was given, *it was held*, that a verdict for the plaintiff should not be set aside for error in the instructions to the jury, when they were instructed to find for the defendants, if there was fraud between the plaintiff and the defendants, inducing the latter to make the purchase and give the note in question; or if there was fraud between the vendors and the defendants in obtaining the note declared on of which the plaintiff was conusant; or if there was a mistake which went to the essence of the contract, and the plaintiff procured such contract to be made, or was instrumental in making it. *Herrick* v. *Johnson*, 188.

6. A conveyance of personal property, made without consideration, and for the purpose of defrauding creditors, is void as well against *subsequent* as *prior* creditors of the vendor. *Clark* v. *French*, 221.

See CONVEYANCE, 1. ACTION, 1.

GAMING.

1. Where the defendant was indicted for "keeping a bowling alley, which was then and there resorted to for the purpose of gaming," under Rev. St. c. 35, § 7, an instruction from the Judge to the jury, "that if they should find, that the defendant owned and had control of a place resorted to for the purpose of gaming, their verdict should be for the government," the testimony to which the instructions were applied not appearing, is incorrect, and cannot be supported. *State* v. *Currier*, 43.

GRANT.

See CONVEYANCE, 14, 15.

GUARANTOR.

See BILLS, &c. 18, 19.

HAY.

See ATTACHMENT, 11.

HIGHWAY.

See WAYS.

HUSBAND AND WIFE.

If the wife survive the husband, she cannot maintain an action for her personal labor, performed for another during the coverture, and for which the husband had not received payment, where there is no express promise of payment to herself. *Prescott* v. *Brown*, 305.

See FRAUD, 3.

INDICTMENT.

The Court is under no legal obligation to quash a defective indictment on motion before the trial is concluded, as the party indicted has his remedy by a demurrer, or by a motion in arrest of judgment. *State* v. *Stuart*, 111.

See GAMING.

INFANCY.

1. When an infant has made a conveyance of real estate, and would affirm or disaffirm it after he becomes of age, there must be some positive and clear act performed for that purpose. The mere acquiescence for years affords no proof of a ratification. *Boody* v. *McKenney*, 517,
2. When an infant has purchased real estate, or has taken a lease of it subject to the payment of rent, he must make his election, within a reasonable time; for he cannot enjoy the estate after he becomes of age for years, and then disaffirm the purchase, and refuse to pay for it, or claim the consideration paid. *Ib.*
3. When an infant has sold and delivered personal property, and has received actual payment therefor, acquiescence alone does not confirm the contract; but if it remains unexecuted, and he holds a bill or note, taken in payment

for the property, if he should collect or receive the money due upon it, or any part thereof, after he becomes of age, that would affirm the contract. And should he disaffirm the contract, which he cannot do until he becomes of age, and reclaim the property, the bill or note would become invalid. *Ib.*

4 If an infant has purchased and received personal property, and retains the same or any part thereof in his possession after he becomes of age, it becomes his duty to make his election, whether to affirm or disaffirm, within a reasonable time. And when, after a reasonable time has elapsed, he continues to have the use of the property, and then sells it, or any part of it, and receives the money therefor, he must be considered as having elected to affirm the contract, and he cannot afterwards avoid payment of the consideration. *Ib.*

See ACTION, 2.

INNHOLDERS.

See RETAILERS.

JUDGMENT.

See CONVEYANCE, 1, 2. PRACTICE, 5.

JUSTICE OF THE PEACE.

By the Rev. Stat. a justice of the peace has the same power to examine persons brought before him on complaint and warrant, and bind them over to appear at a higher Court, where the offence charged may be prosecuted *by indictment or by action of debt*, as where it can be prosecuted by indictment only. *Osborn* v. *Sargent*, 527.

See PRACTICE, 5. MILITIA, 5.

LAND AGENT.

The resolve of Jan. 24, 1839, authorizing and requiring the Land Agent to prevent "all persons found trespassing on the territory of this State, as bounded and established by the treaty of 1783," and with force, if necessary, from committing such trespasses, is equally applicable to such as may commit them on the lands of private persons and to such as trespass upon the public lands of the State. *Plummer* v. *Jarvis*, 297.

LANDLORD AND TENANT,

1. If the defendant goes into the occupation of a house by the permission of the plaintiff and another, and promises the plaintiff, by parol, to pay him one half of the rent therefor, this may be regarded as a consent on the part of the defendant to hold and occupy one half of the house under the plaintiff, for which he may be entitled to a reasonable amount of rent, for the time the defendant so occupied. *Sargent* v. *Ashe*, 201.
2. A parol agreement concerning the amount of the rent to be paid, made at the commencement of the occupation, is competent evidence, in determining what would be a reasonable amount of rent. *Ib.*

See ATTACHMENT, 11.

LEGACY.

See DEVISE, 3.

LEVY ON LAND.

See EXTENT.

LIEN.

See VENDORS, &c. 1

LIMITATIONS

1. If a suit be brought by the payee against one of two sureties on a note before the statute of limitations could be successfully interposed as a defence by either party, and judgment is obtained therein after the time when the statute would have furnished a defence in a suit then commenced by the

maker, and this judgment is satisfied, the same statute would not prevent the maintenance of an action against the co-surety for contribution, brought within six years from the time of payment. *Crosby* v. *Wyatt*, 156.

2. Where the debtor, at the time the cause of action accrued, was residing out of the State, proof that since that time, he had often been a few miles within the limits of this State on business, with attachable personal property, which was removed on his return to his own dwelling in another State, without any proof that the plaintiff had knowledge of it, is not sufficient to take the case out of the operation of the exception contained in the ninth section of the statute of limitations of 1821, c. 62. *Ib.*
3. When a note is made payable in several annual payments, the cause of action for the first payment accrues so soon as it becomes payable, and the statute of limitations begins to run against it from that time, and not from the time when the latest sum should be paid. *Burnham* v. *Brown*, 400.
4. The statute of limitations of 1821, c. 62, was repealed by the first section of the act to repeal the statutes which were revised.
Crehore v. *Mason*, 413.
5. The fourth section of the latter act, however, provided, that all the provisions of the laws revised, so far as they might apply to any limitation of any contract already affected by such previous laws, should be deemed to remain in force, notwithstanding such repeal. *Ib.*
6. If a person whose home is permanently established within this State, during the time, goes without the State, and there makes a contract, and a cause of action thereon accrues against him before his return home, such contract does not come within the provisions of the twenty-eighth section of the statute of limitations of the Rev. Stat. c. 146, that "the time of his absence shall not be taken as any part of the time limited for the commencement of the action." *Ib.*
7. A written agreement to waive all defence which a party might otherwise make under the statute of limitations, is not sufficient as an acknowledgment of indebtedness, or as an express promise, to take the case out of the operation of the statute. *Warren* v. *Walker*, 453.
8. But a party is bound by his written agreement, made for a sufficient consideration before the statute could operate as a bar, not to set up the statute of limitations as defence to a claim against him. *Ib.*
9. If a note is signed by one person, witnessed, and delivered over to the payee, and afterwards, when the subscribing witness is not present, a third person in pursuance of an original agreement to that effect, signs his name upon the back thereof, so far as it respects the latter it is not within the provisons of the tenth section of the statute of limitations of 1821, c. 62, as a "note in writing, made and signed by any person or persons and attested by one or more witnesses." *Stone* v. *Nichols*, 497.
10. If a settlement be made wherein a claim is paid to one party, which the other alleged had already been settled by giving up a certain note; and the party to whom the payment was made, promised that he would repay the amount, if the other party ascertained, that he ever held such note; the cause of action, if any, accrues immediately upon the making of this promise, and the six years limitation commences running from that time.
Clark v. *Howe*, 560.

LUMBER.

1. To avoid a note, given for a quantity of boards within the County of Penobscot, because the contract was in contravention of the provisions of the act regulating the survey of lumber within that county, the defendant must not only show, that the boards were sold within the county without survey, but also that they were not purchased for the defendants' "own use, or for home consumption," and that the parties did not agree to have the lumber "shipped without survey." *Whitman* v. *Freese*, 185.
2. It is not competent for a surveyor of lumber in the county of Penobscot, whose survey has been returned and recorded as provided in the statute regulating the survey of lumber in that county, to show by his testimony, that the lumber surveyed by him was of a different quality from that stated in his survey. *Whitman* v. *Freese*, 212.

MILITIA.

MISTAKE.

See FRAUD, 5.

MONEY HAD AND RECEIVED.

See ACTION, 3, 5, 6.

MORTGAGE.

them on the payment of certain sums at certain times, the instruments do not constitute a mortgage of the estate. *Treat* v. *Strickland*, 234.

8. *A delivery of personal property for security* is not a transfer on condition, and does not constitute a mortgage thereof. *Eastman* v. *Avery*, 248.
9. There can be no *legal* assignment of a mortgage by parol.
Prescott v. *Ellingwood*, 345.
10. After performance of the condition of a mortgage by the mortgagor, before entry for condition broken, the mortgagee cannot maintain a writ of entry upon the mortgage against a third person, although there was a parol agreement between the mortgagee and mortgagor, that the name of the former might be used for the benefit of the latter. *Ib.*

See CONVEYANCE, 13. EQUITY, 21. EQUITY OF REDEMPTION, 1.

OFFICER.

1. The officer serving a writ is not a party to the judgment rendered in the suit, and where there is no fraud, he cannot impeach it collaterally.
Childs v. *Ham*, 74.
2. If an officer, having a writ in his hands, goes to the debtor, and finding him in the actual possession of goods, informs him that he is directed to make an attachment thereof, and shall do so, but does not in fact interfere with the goods or take them into his custody, and the debtor informs the officer that the goods belong to a third person and not to him, but still procures one, other than the owner, to give a receipt therefor to the officer; this does not amount to such conversion of the goods by the officer as will enable the owner to maintain an action of trover therefor against him.
Rand v. *Sargent*, 326.

See ATTACHMENT, 1, 2, 4, 5, 6, 7, 8, 9. REPLEVIN, 2.
AMENDMENT, 2, 3, 4.

PARENT AND CHILD.

The right of the father to the earnings of a minor child arises out of his obligation to support and educate the child. And if the father emancipate the son, and allow him to provide for his own support and education by his own labor, the father does not thereby withdraw from his creditors any property or fund, to which they are legally or justly entitled for the payment of his debts. *Lord* v. *Poor*, 569.

PARTNERSHIP.

Where the debt was originally due to two partners, and one has deceased, and the defendant has done nothing to change his original liability, the action must be brought in the name of the surviving partner, although by an agreement between the partners, the beneficial interest was in the deceased.
Clark v. *Howe*, 560.

See EVIDENCE, 1. EQUITY, 13, 14.

PAYMENT.

The acceptance of a negotiable security for an existing indebtedness by simple contract, is to be deemed payment; but it is competent for the parties to agree, that it shall be received as collateral security merely; and proof by parol may be admitted to show, that it was so taken.
Comstock v. *Smith*, 202.

See CONVEYANCE, 2.

PLEADING.

1. In a declaration upon a statute to recover a penalty of an officer for neglect of official duty, where there is no distinct allegation, that it is a plea of *debt* or of any other form of action, but there is an averment, that the defendant owes and unjustly detains the amount demanded, the declaration is sufficient, in that respect, on general demurrer. *Berry* v. *Stinson*, 140.
2. In a declaration to recover a penalty for neglect of official duty, it is sufficient in substance, if the language of the declaration, in stating the neglect, is as full and decisive as that of the statute. *Ib.*

PLEDGE.

POOR.

provisions did not extend to such persons as were born after such incorporation and derived their settlement from those who had acquired one by residence in Freeport, and who had removed from the town before the incorporation of Pownal. *Freeport* v. *Pownal*, 472.

POOR DEBTORS.

1. If the justices who administered the oath to the debtor, are not selected in the manner pointed out in Rev. St. c. 148, § 46, they have no authority to administer the oath and make the certificate prescribed in that act; their proceedings have no validity; and in an action on a debtor's bond where such proceedings alone are relied upon to show performance, the plaintiff is entitled to recover as is provided in the same chapter, § 39. *Bunker* v. *Hall*, 26.
2. By the provisions of the Rev. St. c. 148, a bond taken of a debtor, under arrest or imprisonment, by the officer, is valid as a statute bond, although the penalty, from mistake, accident or misapprehension, shall exceed or fall short of double the sum for which such debtor was arrested or imprisoned; and the rights of the parties are to be regulated by the statute. *Horn* v. *Nason*, 101.
3. Where no attempt has been made to perform the condition of a poor debtor's bond, valid under the statute, the measure of damages is prescribed by the thirty-ninth section of Rev. St. c. 148. *Ib.*
4. When the principal has not attempted to perform any of the conditions of a poor debtor's bond within the prescribed time, and it has become forfeited, if he afterwards files his petition and obtains his discharge as a bankrupt, this cannot discharge his surety. *Ib.*
5. If neither of the alternatives of the condition of a poor debtor's bond be performed within the six months, the surety is not discharged from his liability by the principal debtor's filing his petition in bankruptcy before the expiration of the six months, and, after that time, obtaining his certificate of discharge as a bankrupt, under the bankrupt law of the United States. *Craggin* v. *Bailey*, 104.
6. In an action on a poor debtor bond, where the certificate, or record, of persons acting as justices of the peace and of the quorum, stating that they had administered the poor debtor's oath to the debtor, is introduced in evidence by the defendants, it is competent for the plaintiff to prove by parol testimony that such persons had no jurisdiction of the subject. *Williams* v. *Burrill*, 144.
7. Two justices of the peace and of the quorum must appear at the time and place fixed in the notice from the debtor to the creditor, for the purpose of acting in the matter, before any legal act can be done. If therefore but one appear, he has no power under the statute to adjourn until a subsequent time. *Ib.*
8. And if the attorney of the creditor should consent to such adjournment by one justice, not being conformable to the statute provisions, it would still be invalid. *Ib.*
9. The poor debtor's oath should be administered by two justices of the peace, each of the quorum; but if one only be of the quorum, the act of 1839, c. 366, gives relief. *Rider* v. *Thompson*, 244.
10. A poor debtor's bond is forfeited by an omission to take the *legal* oath; and the act of 1839, c. 366, does not give relief, when an oath found in a repealed act, is administered, instead of that required by the statutes in force at the time. *Ib.*
11. Where justices duly selected and qualified have administered the poor debtor's oath, after an examination, to a debtor, who had been arrested on execution and had given bond, they may amend their certificate, conformably to the truth of the case, not only after the commencement of a suit upon the bond, but upon the trial thereof. *Barnham* v. *Howe*, 489.
12. Under the poor debtor act of the Revised Statutes, if the debtor wishes to avail himself of the benefit of an examination and of the poor debtor's oath, it is for him to take such measures, that a legal tribunal for the purpose shall be constituted. He must select one justice, and procure his attendance at the time and place appointed in the notice; and if the credi-

PRACTICE.

3. A writ of *replevin*, returnable before a justice of the peace, like other justice writs, is to be "duly served not less than seven, nor more than sixty days, before the day therein appointed for trial." *Lord* v. *Poor*, 569.

RETAILERS.

1. The inhabitants of the town wherein the offence is alleged to have been committed are competent witnesses to sustain the prosecution, on the trial of an indictment against an inhabitant of the same town for being a common seller of wine, brandy, rum, and other strong liquors without license, contrary to the provisions of Rev. St. c. 36, § 17; although the town would be entitled to the penalty incurred. *State* v. *Stuart*, 111.
2. When one man is indicted for being a common seller of spirituous liquors, without license, another who was to participate in the profits of the business, cannot claim for that reason to be exempted from testifying to the commission of the offence. *State* v. *Davis*, 403.
3. All who take it upon them to be common sellers of spirituous liquors, without being licensed therefor, in less quantities than twenty-eight gallons at a time, are liable to the penalty provi led by the statute, whether they take it upon themselves to be common victualers or not. *Ib.*
4. The sale of ardent spirits in less quantities than twenty-eight gallons by a person without license therefor, is illegal; and no action can be maintained for the price thereof. *Cobb* v. *Billings*, 470.
5. The statute against retailing excepts from its prohibitions, the sale and carrying away, at one and the same time, of spirituous liquors in quantities equal to or exceeding twenty-eight gallons. And it comes within the exception, if the liquors making up the twenty-eight gallons in the whole are of several kinds. *Ib.*
6. A justice of the peace has authority under the Rev. Stat. to examine a person brought before him, on complaint and warrant, accused of being a common seller of wine, brandy, rum and other strong liquors, without license therefor; and, on sufficient cause shown to believe him to be guilty of the offence charged, to require him to enter into recognizance for his appearance at the next District Court within the county; and, on his refusal so to do, to cause him to be committed to jail until he shall comply with such order. *Osborn* v. *Sargent*, 527.

SALE.

See VENDORS, &c.

SAVINGS INSTITUTIONS.

See COPORATION, 3, 4, 5, 6, 7,

SCHOOL DISTRICT.

A school district cannot maintain an action to recover the school money assigned by the town for the support of schools in that district against their school agent, although he has received it of the town. *School District No.* 3, v. *Brooks*, 543.

SEIZIN.

See DISSEIZIN.

SETTLEMENT.

See POOR.

SHIPPING.

1. Where the master takes a vessel on shares, "to account to the owner for one half the earnings," he is, as to all persons but the actual owner, in all contracts, regarded as the owner, and entitled to all the rights and liable to all the duties of an owner; but as between him and the real owner, the "earnings," when collected, are equally the money of the owner and the master, and the latter becomes a trustee of the owner's share, when received, and holds it for his use. *Williams* v. *Williams*, 17.

2. And if a third person, knowing all the facts, is authorized by the master to receive the freight already earned, and promises to pay the owner his share, and afterwards receives the money, he holds it for the use of the owner, who may maintain a suit against him therefor. *Ib.*
3. To render a person liable as owner of a vessel, it is not necessary to show that he was such by the register, or by bill of sale, or other instrument in writing; but for that purpose, the ownership may be proved by parol evidence. *Lyman* v. *Redman*, 289.
4. The taking of the vessel by the master, his victualing and manning her, paying a portion of the port charges, and having a share of the profits, do not of themselves constitute him the owner *pro hac vice*. It is the entire control and direction of the vessel, which he has the power to assert, and the surrender by the owners of all power over her for the time being, which will exonerate them from their liability for the contracts of the master relating to the usual employment of the vessel in the carriage of goods. *Ib.*
5. It is not competent for the master of a vessel, by virtue of his power as such, to bind the owners in the purchase of a cargo; and before they can be holden for the payment therefor, there must be satisfactory proof of prior authority to purchase, or subsequent ratification of his acts. *Ib.*
6. If the owners of a vessel receive her from the master, with a cargo on board, knowing it to have been purchased on credit for the benefit of the vessel and owners, and send the same to another port under charge of another master for the purpose of making sale of the cargo, and on this voyage a part of the cargo is thrown overboard for the security of the remainder and of the vessel, and the residue is sold at the port of destination, and the proceeds thereof are applied to the repair of the vessel, the owners are liable to those who furnished the cargo for the price thereof. *Ib.*
7. The owners of a majority in interest of a vessel, may change her employment from the performance of foreign voyages to the coasting trade, and also to the fishing business, if the vessel be of a suitable character for such employment. *Hall* v. *Thing*, 461.
8. The outfit for a fishing voyage, although composed partly of salt, lines hooks and nets, is but a suitable equipment and preparation of the vessel for profitable employment in that business; and the majority in interest may bind all the owners in the purchase thereof. *Ib.*
9. The managing owner of a vessel represents the interests of all, and has the same power, which the major part in interest have, with respect to the change of employment, and the preparation and outfit of the vessel, in a manner suited to the profitable employment in the business to which she is destined. *Ib.*

STATUTES.

1. The second section of the repealing act in the Revised Statutes preserves not only actions, which technically and properly speaking had accrued by virtue of, or been founded on, the repealed statutes, but those also which were preserved and secured to a party by those acts. *Treat* v. *Strickland*, 234.
2. The statute of 1842, c. 32, "in relation to institutions for savings," is not unconstitutional. *Savings Institution* v. *Makin*, 360.
3. A saving clause in a statute, in the form of a proviso, restricting in certain cases the operation of the general language of the enacting clause, is not void because such proviso may be repugnant to the enacting clause of the same statute. *Ib.*

STATUTES CITED.

1821, c. 62, Limitations,	15, 413	Rev. St. c. 44, Protest,	553
" c. 118, Towns,	125	" c. 94, Levy on Land,	335
1831, c. 519, Banks,	343	" c. 95, Dower,	276
1832, c. 42, Ways,	9, 511	" c. 97, Exceptions,	420
1834, c. 121, Militia,	440	" c. 114, Attachment,	537
" c. 233, Banks,	308	" c. 138, Exceptions,	435
1836, c. 240, Assignments,	261	" c. 146, Limitations,	413
1839, c. 366, Poor Debtors,	244	" c. 148, Poor Debtors,	26, 101
Rev. St. c. 32, Paupers,	420	1840, Repealing Act,	234
" c. 35, Gaming,	43	1842, c. 32, Savings Institutions,	360
" c. 36, Retailers,	111		

SPECIAL ACTS.

STATUTE OF LIMITATIONS.

See LIMITATIONS.

TAXES.

1. By the tax act of 1842 an inhabitant of this State was liable to be taxed in the city or town of his residence for shares held by him in a cotton manufactory in another State, to the extent of his proportion of the value of the machinery owned at the time by such company.
Holton v. *Bangor*, 264.
2. If such shares were over valued in the tax, the remedy is by an appeal to the county commissioners, and not by an action against the city or town.
Ib.

TIMBER, PERMITS TO CUT.

See VENDORS, &c. 1.

TOWNS.

1. The inhabitants of a town cannot avoid being bound by their vote, at a meeting legally called, with authority in the warrant to act upon the subject, by proof that the vote was passed near the close of the meeting and after a portion of the voters had retired. *Bean* v. *Jay*, 117.
2. Where the plaintiff, in an action against a town for the support of one of its paupers, being obliged to support this pauper by the terms of a special contract to support the paupers of the town for one year, and having received payment of the amount due by the terms of this contract, made a claim upon the town for the support this pauper and openly stated in the town meeting the amount which he claimed therefor, and the town, within the year from the time the contract went into operation, *passed a vote to pay the plaintiff for supporting this pauper the last year; it was held*, that the vote was sufficiently certain to have reference to the year of the special contract; and that the town had no valid defence, either on the ground of a want of consideration for the promise, or because that the plaintiff was estopped by his special contract from availing himself of it. *Ib.*
3. In an action against a town to recover damages, alleged to have been sustained by a defect in a public highway within the town, brought before a justice of the peace who was an inhabitant of the town, if the defendants enter an appeal, and proceed to try the merits of the case in the District Court, and fail in their defence, they cannot afterwards make objection, that the justice was an inhabitant of the town. *Strout* v. *Durham*, 483.
4. If the defendants appear in this Court by their selectmen, and not otherwise, as their agents, it is not competent for them, by the same agents, appearing by virtue of no additional powers, to question their agency. *Ib.*
5. If the defendants have availed themselves of the advantages of an appeal, entered by their selectmen, it is too late at the second term to deny the right of their officers to appear and answer to the suit in the name of the town. *Ib.*
6. If a levy be made by virtue of an execution in favor of "H. M. treasurer of the town of P." J. B. his successor in the office of treasurer, without any special authority from H. M. or from the town, cannot, by his deed, transfer the title to the land levied upon. *Merrill* v. *Burbank*, 538.
7. If individual inhabitants of a town have knowledge of a defect in a road, this is sufficient notice to the town in its corporate capacity, of such defect.
Tuell v. *Paris*, 556.

TRESPASS QUARE CLAUSUM.

In an action of trespass *quare clausum*, the defendant cannot avail himsel of the title of a third person, without showing both the title and the command or permission of that person. *Merrill* v. *Burbank*, 538.

See EVIDENCE, 9.

TRESPASS.

See LAND AGENT.

TROVER.

See Officer, 2.

TRUSTEE PROCESS.

If the creditor has recovered judgment in a trustee process against his debtor, and against the trustee for the goods, effects and credits of the principal in his hands, and has taken out execution, and a demand has been made thereof of the trustee by the proper officer in due season, and he has refused to deliver up the same; and afterwards the original debtor files his petition in bankruptcy and obtains his discharge as a bankrupt under the late law of the United States on that subject; such discharge furnishes no valid defence to a *scire facias* to recover of the trustee the value of the goods, effects and credits of the principal in his hands. *Franklin Bank* v. *Bachelder*, 60.

USAGE.

1. There are general and particular customs, and those relating to a particular trade or business. General customs are such, as prevail throughout a country, and become the law of that country; and their existence is to be determined by the Court. Particular customs are such, as prevail in some county, city, town, parish, or place; their existence is to be determined by a jury upon proof; the Court may overrule such customs, if they be against natural reason; and when proved and allowed, they are binding upon all over whom they operate. *Bodfish* v. *Fox*, 90.
2. There are usages also showing a particular mode, or amount of compensation in a particular business or employment; but these do not necessarily bind all, and can never be allowed to operate against an express contract. *Ib.*
3. It is competent to admit testimony to prove the usual compensation claimed and paid, for the purpose of enabling a jury to determine what is a reasonable compensation, in the absence of a special contract, in cases of the like kind, such as the usual charge for wharfage, for freight or carriage of goods, for the services of commission merchants, auctioneers, of the various classes of mechanics, of physicians and of attorneys. *Ib.*
4. But there must be some proof, that the contract of employment had reference to the usage, or proof arising out of the position of the parties, their knowledge of the course of business, their knowledge of the usage, or other circumstances, from which it can be inferred or presumed, that they had reference to it, or it will not necessarily be binding upon them. *Ib.*
5. When a usage, regulating the compensation to be paid for a particular description of personal services, has been proved, whether the usage be, or be not reasonable, is for the decision of the Court and not of the jury. The true question for the consideration of the jury, in such case, is, whether the usage was so generally known and acted upon that the parties, from that and the other facts and circumstances proved, must be presumed to have had reference to it for the compensation to be paid; as in such case it would become, as it were, a part of their agreement, and binding upon them. *Ib.*

VENDORS AND PURCHASERS.

1. Where a sale of the right to cut and take off standing timber is on condition, that "all the timber cut on said land shall be and remain the property and subject to the control of the proprietor of the land" until payment of the consideration therefor shall have been made, the person receiving such permission cannot grant to a third person any right to such timber against the proprietor of the land, which will vest the property in him, without performance of the condition. His possession of the timber, therefore, although with the knowledge of the owner of the land, will not impair the rights of the latter. *Comstock* v. *Smith*, 202.
2. A mere description in a bill of sale of the articles sold as "certain lots of boards and dimension stuff now at and about the mills at P." does not amount to a warranty that the articles were merchantable. *Whitman* v. *Freese*, 212.
3. Where it was agreed between the parties, that one should take certain furniture in a house in payment of a pre-existing debt, the price to be determined by the appraisement of certain men, who ascertained the value in the presence of the parties, and the vendor left the premises and the evndee immediately entered into the occupation thereof and took actual

possession of the furniture, this is a sufficient sale and delivery, although no receipt is given for the furniture, or charge or credit on the books, and no formal delivery is made. *Clark* v. *French*, 221.

VERDICT.

If a verdict has been returned the reverse of what was intended, through a misconception by the jury of the meaning of legal terms, it may be corrected by them, before they have separated, under instructions from the Court. *Ward* v. *Bailey*, 316.

See PRACTICE, 4, 5, 11.

WAYS.

1. In laying out the road, the Commissioners must necessarily be more precise in designating the *termini* of the road laid out, than is required in a petition to have it laid out; and therefore, where they may not appear identical on the record, they may be presumed to be the same, in the absence of proof to the contrary. *Cushing* v. *Gay*, 9.
2. The Stat. of 1832, c. 42, (Rev. Stat. c. 25, § 3,) requires that the County Commissioners should make a return with their doings, "with an accurate plan or description of said highway," to "the regular session of said County Commissioners' Court, to be held next after such proceedings shall have been had and finished;" but does not require that the plan should be made and their proceedings finished and returned to the regular term next following their viewing and laying out the road. *Ib.*
3. Where commissioners to make partition assigned certain land to one, and made the following provision for the benefit of another, who had land adjoining, whereon was a gristmill, assigned to him: "excepting the privilege of the county road crossing said land, and a privilege of a passway over the floom on the south side of the millpond, twenty feet wide, leading from the county road at the south end of the bridge to the gristmill, where said road is now traversed;" *it was held:* *Chandler* v. *Goodridge*, 78.
4. That this gave but the right of passing and repassing along the way described in a safe and convenient manner: — *Ib.*
5. That the owner of the land had the right to use the passway for any purposes whatever, provided he did not interfere with such right of passage: — *Ib.*
6. That if a railing was necessary to make the passway safe and convenient, the party entitled thereto had the right to erect one, but in such manner, if it could be done, as not to prevent the owner of the land from rolling logs across the same into the millpond, or it would be subject to be removed for that purpose: — *Ib.*
7. That the passway was to be located on the south shore of the millpond as it was at the time of the partition: — *Ib.*
8. And in an action of trespass *quare clausum* against the owner of the land for entering upon the passway of the plaintiff, tearing down his railing, and "encumbering and impeding his rights of passage," in general terms, that the plaintiff could not recover damages for the defendant's suffering the passway to be encumbered by lumber and logs. *Ib.*
9. Where it appears by the town records, that the location of a town road by the selectmen was subsequent to the issuing of the warrant to call the meeting of the town for its acceptance, it is not competent to show by parol evidence, that the location by the selectmen in fact preceded the issuing of the warrant. *Blaisdell* v. *Briggs*, 123.
10. By the Stat. of 1821, c. 118, § 9, the inhabitants of a town, at a legal meeting called for that purpose, had power to alter or discontinue a town way without any previous action of the selectmen thereon. *Latham* v. *Wilton*, 125.
11. By the st. 1832, c. 42, (Rev. St. c. 25, § 3,) the doings of the County Commissioners in locating a road must be made to, and recorded at a term of their Court held next after such proceedings shall have been had and finished; and not at an adjournment of a term commencing previously. *Parsonsfield* v. *Lord*, 511.

See CERTIORARI, 4.

WRIT.

When a service has been made thereon, the attorney who made the writ has no authority to alter it without leave of Court. *Childs* v. *Ham*, 74.