# REPORTS

OF

# CASES DETERMINED

IN THE

# SUPREME JUDICIAL COURT,

OF THE

# STATE OF MAINE.

By JOHN SHEPLEY,
COUNSELLOR AT LAW.

VOLUME XI.

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# JUDGES

OF THE

# SUPREME JUDICIAL COURT,

DURING THE PERIOD OF THESE REPORTS.

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HON. EZEKIEL WHITMAN, LL. D. CHIEF JUSTICE.
HON. ETHER SHEPLEY, LL. D.
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## OF CASES REPORTED IN THIS VOLUME.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF LINCOLN.

ARGUED AT MAY TERM, 1844.

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## IRA HERSEY *& al. versus* SAMUEL VEAZIE.

No individual members of a body corporate have the right, by a bill in equity, without the consent of such corporation, legally obtained, to call the agents or officers thereof to account with the plaintiffs, or to make settlements and adjustments with them, for money of the corporation, alleged to be in the hands of such officers.

If the defendants in the bill in equity, as agents of the corporation, have acted fraudulently towards it, obtained fraudulent judgments against it, and on them have made a fraudulent sale of its franchise, these are wrongs primarily committed against the corporation. And until it has been shown to have been incapable of doing it, or to have been faulty, no corporator can assume the right of the corporation to obtain redress for such wrongs, and to settle for them with the persons committing them.

If after proper exertions made to procure the corporation to obtain redress, it had been found incapable of doing it, or had improperly or collusively refused to do it, the corporators might, perhaps, have obtained redress by making such corporation a party defendant; but unless it is made a party, it would be improper for the Court to proceed and compel the defendants to make a settlement, which could not be conclusive upon the rights of the corporation.

Where shares in a corporation have been transferred by a debtor to his creditor, the latter agreeing with the former "to account for the said shares, or reconvey them," the debtor has no such interest as would enable him to maintain a bill in equity against a third person by reason thereof.

BILL in equity. The facts appear in the opinion of the Court.

*Everett* and *Groton*, for the plaintiffs.

*Kent*, for the defendant.

The opinion of the Court was drawn up by

SHEPLEY J. — When this bill was filed by Ira Hersey, Samuel Veazie and Alfred J. Stone were made parties defendant. After they had filed their answers, the plaintiff discontinued as to Alfred J. Stone, and asked leave to amend his bill, and to make John Coburn, as the executor of Jonathan Baker, deceased, a party plaintiff. Leave was granted upon terms, and the executor of Baker became a party. Instead of amending the bill by inserting his name, with averments suited to present properly the claims of both the plaintiffs, a separate paper has been presented, containing a reference to the motion for leave to amend, as if that had some connexion with the bill, and a reference also to the answer of Veazie, as if that could be properly noticed in an amended bill, or regarded as an answer to it in its amended form. Since leave to amend was granted, the proceedings have been very informal and irregular. The defendant has filed a demurrer to the most material portions of the amended bill, which by consent has been argued without regard to the form, in which the allegations made by the present plaintiffs have been presented. Stripped of their formal parts the material allegations, contained in the papers presented as a bill, are in substance: that the proprietors of the booms in Androscoggin river were constituted a body corporate; that the property of the corporation was represented by thirty-six shares; that James Rogers formerly owned eight of those shares, and on March 21, 1823, conveyed the same to Jonathan Baker, who on June 25, 1828, executed an instrument in writing "agreeing to account for the said shares or reconvey them, when he should have realized therefrom the amount of a note for $930, due from the said Rogers to said Baker, and other demands in said instrument alluded to," as stated in the bill; that after Rogers had conveyed those shares to Baker, he conveyed or assigned all his right to them to the plaintiff, Hersey; that from the year 1825, to the year 1831, the defendant was the collector of tolls, treasurer, and sole

agent of the corporation, to prosecute and defend suits; that during all that time the booms were under his care and management, whereby he became possessed of a large amount of the funds of the corporation, for which he has rendered no account; that by the purchase of shares and by obtaining proxies from other shareholders, he obtained the control of a major part of the shares and of the corporation; that during the year 1829 he fraudulently caused certain actions at law to be commenced against the corporation in his own name and in the names of other persons, and collusive judgments to be obtained in them by his consent as agent of the corporation, and that with intent to defraud the other shareholders he thereby caused the franchise of the corporation to be sold and received the pay therefor; that he ought to render an account and pay over to the plaintiffs their proportions of the sums of money by him received for tolls and otherwise, and of the amount received for the sale of the franchise; and that he has obtained possession of the books and papers of the corporation and refuses to permit the plaintiffs to have access to them. The prayer is in substance, that an account may be taken; that the books and papers of the corporation may be produced; and that he may be decreed to pay to the plaintiffs their proportion of the funds of the corporation in his hands.

There is no allegation in the bill, that the corporation has been dissolved, or any facts stated, from which such an inference could be justly drawn; or that it has refused to call upon the defendant to account; or that it has acted collusively with him except as represented by him as agent. And although it is alleged, that he had obtained a control of the corporation by proxies and purchase, there is no allegation, that a corporate meeting could not be obtained. And by our law, the minority of the shareholders may cause a meeting of a corporation to be called; and those, who had given proxies to the defendant, could at any time have voted upon their own shares, or have revoked their proxies and caused their shares to be represented by the agency of other persons. It is not alleged, that he held a majority of the shares in his own right, and thereby prevent-

ed the corporation from passing any vote to call him to account with it. It does not therefore appear from the allegations, that the corporation had not the power and the disposition to settle with its collector and treasurer and agent, according to its own pleasure; unless it may be inferred from the delay to do it. This cannot be inferred from mere delay, especially when there does not appear to have been any effort made by the holders of these eight, or the holders of any other shares, to have a meeting of the corporation called for such a purpose; and when, from aught that appears in the bill, there may have been directors or trustees of the corporation, with power to have made an adjustment with the defendant. As this bill is presented, the plaintiffs assume the right, which no member or members of a body corporate have or can have without its consent legally obtained, to call its officers and agents to account with them, and to make settlements and adjustments with them. If the defendant should settle his accounts with the plaintiffs, the corporation would not be bound by it; nor would any payment made to them be good against the corporation. Nor can the plaintiffs by the interposition of a court of equity accomplish such an object; for the Court could not rightfully assume the control of the corporation, and exercise its rights in this respect, without its being a party to the suit, and having an opportunity to justify its own course of proceeding. If the defendant, as agent of the corporation, acted fraudulently toward it, obtained fraudulent judgments against it, and on them made a fraudulent sale of its franchise, these were wrongs primarily committed against the corporation. And until it has been shown to have been incapable of doing it, or to have been faulty, no corporator can assume its right to obtain redress for such wrongs, and to settle for them with the person, who has committed them. If the plaintiffs have been injured by these fraudulent acts, they should have taken measures to have the corporation obtain redress for them, and through its action have obtained their own redress. If after proper exertions made it had been found incapable of doing it, or had improperly or collusively refused to do it, they might perhaps have

obtained redress by making it a party defendant. Without the corporation being made a party, that an adjustment of all these alleged grievances might be made between those having competent authority, it would be improper for the Court to proceed and compel the defendant to make a settlement, which could not be conclusive upon its rights. *Robinson* v. *Smith*, 3 Paige, 222. Nor can the bill be sustained on the allegations respecting the books and papers, because it would be to no good purpose to compel their production, when they could not be used to produce any final result. Nor does it appear, that it can be useful to the plaintiffs to retain the bill and permit another amendment, to have the corporation made a party; as it would seem to be probable from the allegations made in the bill, that the proper measures had never been taken or the proper proceedings had to enable them to make the corporation properly a party. There is another difficulty to be encountered. The bill is now multifarious. The plaintiff, Hersey, can have, according to the bill, no right to call upon the defendant or upon the corporation, should it be made a party, for any dividend of profits or property. Baker was the sole owner of the eight shares, so far as the corporation and its officers and the other shareholders were concerned. He alone could receive any money, which might be payable to the owner of them. Hersey does not stand in the relation of assignee of a mortgagor to Baker or his executor. The contract from Baker to Rogers appears to have been made more than five years after the shares had been conveyed to him, and it is stated in the bill to have been an agreement "to account for the said shares or reconvey them." It was therefore at his option to account for them; and Hersey could not have claimed a reconveyance, or an account of the property or profits received for them, upon a tender of the amount due from Rogers to Baker. All that he could claim of him was to account to him for their value. His claims, if any he have, are only upon the estate of Baker, and not upon the corporation, or its funds.

*The demurrer is allowed, and bill dismissed with costs.*

NATHANIEL PLUMMER *versus* WILLIAM WALKER *& al.*

The distinguishing characteristics in a declaration in a writ of right are, that the demand is of the land as the demandant's right and inheritance in fee, averring a seizin of himself, or of an ancestor under whom he claims, taking the esplees, &c.: and that he ought to have possession of the same, but that the tenant deforceth him. The words, "*as by our writ of right*," are wholly immaterial in our mode of proceeding.

If the demandant, in his writ, alleges that *he was seized as of fee and right*, but concludes by alleging a disseizin done to himself by the tenant, it is but a writ of entry; and a judgment thereupon is no bar to a writ of right.

The Court may permit the demandant in a writ of entry, or a writ of right, to amend his declaration by diminishing the extent of his claim, even after a verdict is returned into Court and before it is affirmed.

THIS action was tried at the September Term in this county, 1843, before SHEPLEY J. The same action had been tried at the term at which it was entered, September, 1841, when the jury disagreed. At this first term, the defendants offered for a plea, that they "were not guilty of disseizing," &c. The Judge then presiding ruled that such was not the proper plea, and required the tenants to plead the general issue to a writ of right. The tenants then, protesting that the writ was not a writ of right, filed the plea required, and also filed a brief statement alleging a former judgment between the parties. This plea is sufficiently noticed in the opinion of the Court. They also filed a disclaimer of part of the premises.

The declaration originally was; "In a plea of land, wherein the said Plummer demands against the said William and George Walker one messuage with the appurtenances in Alna aforesaid, bounded," as particularly set forth; "which he, the said demandant, claims to be the right and inheritance of him, the said Nathaniel Plummer. Whereupon the said demandant says, that he, himself, was seized of the demanded premises in his demesne as of fee and of right, within twenty years now last past, by taking the esplees of the same to the value of five dollars by the year, and ought now to be in quiet possession thereof; whereof the demandant complains that the said William and George unjustly deforce him."

At the term at which the last trial took place, Sept. 1843, the demandant moved for leave to amend in two particulars; to insert the words, "as by our writ of right," immediately following the words, "inheritance of him, the said Nathaniel Plummer," and before the word "whereupon;" and by so altering the description of the demanded premises as to demand a less portion thereof. To each of these amendments the tenants objected, but they were permitted by the Judge, and made.

The jury brought in their verdict, that the demandant recover one eighth part of the premises described. Before the verdict was affirmed, the demandant moved for leave to amend his declaration by inserting the words, "undivided eighth part of a," immediately preceding the word "messuage." The tenants objected, but the amendment was allowed and made. The verdict was then affirmed.

The tenants filed exceptions to the rulings and decisions of the Court, stating in the exceptions the rulings at each trial.

*E. & M. H. Smith*, for the tenants, contended that the writ was originally a writ of entry. It wanted the words, "as by our writ of right," to make it a writ of right. These words are in the forms of writs of right, and constitute the only material difference between such writs and writs of entry. Stearns, 427, 497; Jackson on Real Actions, 25, 277.

The amendment changed a writ of entry to a writ of right, and was improperly allowed. *Haynes* v. *Morgan*, 3 Mass. R. 208. In England any amendment of a writ of right is not permitted. 4 Bos. & P. 64 and 234; 5 B. & P. 429. All writs of right had been abolished in this State by the legislature before this amendment was permitted, and it was too late for the Court to allow a party to bring a writ of right by making one out of a writ of entry. Rev. Stat. c. 145, § 1.

If the view already taken be the correct one, the Court at the first term erred in requiring the tenants to put in a plea to a writ of right, it being then a mere writ of entry.

The ruling, that the former judgment was not a bar to this action, was erroneous. In that case the allegation was, that

the demandants were "seized as of fee and right;" and that was a writ of right, if the present one was before the amendment.

The amendment, after the verdict was returned into Court, was improperly allowed. It changed the effect of the verdict. Having demanded the whole, he cannot recover a part.

*F. Allen*, for the demandant, contended, that the writ, as originally made, was a writ of right, and the amendment to the form of it, was wholly immaterial. It is not necessary to state in the writ, that it is a writ of right. The true distinction is, that a writ of entry alleges a disseizin, and a writ of right does not. The decision was right in requiring a plea to a writ of right before the amendment. Prec. Dec. 303, 304, 305; Stearns, 358; Booth, 92; 22 Pick. 122. The allegation that it is a writ of right in England, where the declaration is no part of the writ, is merely to give the Court jurisdiction. But the necessity for it does not exist here.

This disposes of the objection, that the ruling, with respect to the effect of the former judgment, was erroneous. The writ in that case alleged a disseizin by the then tenant, and it was but a writ of entry, and is no bar to a writ of right. *Arnold* v. *Arnold*, 17 Pick. 4.

An amendment lessening the close demanded may be allowed by the presiding Judge, in the exercise of his discretionary power, at any time before judgment; and such act is not the subject of exceptions. 2 Shepl. 213; 3 Shepl. 136; 13 Pick. 535; 21 Pick. 176.

A writ of right may be amended as other writs. Howe's Pr. 385; *Boston* v. *Otis*, 20 Pick. 38.

The opinion of the Court was drawn up by

WHITMAN C. J. — The distinctive characteristics of a declaration in a writ of right, are, that the demand by the plaintiff, is of the land as his right and inheritance in fee, averring a seizin of himself, or of an ancestor under whom he claims, taking the esplees, &c. and that he ought to have possession of the same, but that the defendant deforceth him. In the English

mode of proceeding the words "as by our writ of right," &c. may with propriety be added, because the writ there is issued separately from the declaration, and in a form wholly inapplicable to our mode of proceeding. Booth on Real Actions, c. 3. In our mode of proceeding, in which the count is inserted in the writ, those words become senseless. The plaintiff's writ in this case, as originally issued, was in due form, according to our practice, and was properly a writ of right. The amendment adding the above words was therefore immaterial.

The writ, a copy of which was introduced at the trial, wherein Plummer & als. were defendants, and Walker was plaintiff, was a writ of entry. Although the plaintiff therein alleges, that he was seized as of fee and right, yet he concludes by averring a disseizin done to himself by the defendants. The general issue, in such case, is *nul disseizin*; whereas, in a writ of right, there is no allegation of a disseizin, and of course no such general issue. The Court, therefore, were clearly right in refusing to admit such a plea in this case.

Thus in effect the plaintiff's exceptions, laying aside what took place at the coming in of the verdict, are wholly disposed of. The case of *Arnold* v. *Arnold*, 17 Pick. 4, affords a full elucidation of the doctrine relied upon by the plaintiff in this case, and contended against by the counsel for the defendant. It is said of a writ of right, that "it is of so forcible a nature that it overcomes all obstacles, and clears all objections that may have arisen to obscure and cloud the title." F. N. B. 6; 1 Inst. 158; and the case last cited, fully enforces this principle.

As to the disclaimer in the former action, attempted to be set up in bar of this, we find the parties were not the same in both; and from the argument of the defendant's counsel it is evident that there was some difficulty, to say the least of it, in making out the identity of the land disclaimed, as being the same with that recovered; and the counsel for the plaintiff utterly denies its identity; and we are not furnished with the means of enabling us to determine any thing concerning it.

The amendments of the plaintiff's declaration, including the one made at the coming in of the verdict, were clearly such as

are admissible by the Court in the exercise of a sound discretion, having regard to the furtherance of justice. To allow a plaintiff to diminish the extent of his claim is almost a matter of course. *Dewey* v. *Brown*, 2 Pick. 387. And the doing it at the coming in of the verdict, to accommodate the demand of the plaintiff to the finding of the jury, may be admissible, when it shall appear to be in accordance with what may be just and reasonable; and in either case it furnishes no cause for exceptions.

*Exceptions overruled.*

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NATHAN GILPATRICK *versus* WILSON P. HUNTER *& al.*

If the plaintiff, during the pendency of an action of trespass in his favor against several persons for a joint trespass, committed upon his person and property, receives of one of them a sum of money, and gives a receipt therefor "in full of said L's trespass, where he and Wilson P. Hunter, (another defendant) were in company, together with others;" this operates as a discharge of the other joint trespassers, and the action can no longer be maintained against either of them.

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

Trespass for breaking the plaintiff's wagon, tearing his clothes, and injuring his person. The suit was commenced against the present defendants and Seth Leonard. A brief statement alleged, that the demand was fully paid and satisfied, and the action discharged. At the trial the defendants offered in evidence a receipt signed by the defendant, in these words. "Lisbon, December 20, 1841. This day received of Seth Leonard five dollars in full for a trespass and damage done me on the road from Bath to Topsham, which damage of trespass is now in suit pending at the Middle District Court next to be holden at Wiscasset; the said five dollars in full of said Leonard's trespass where he and Wilson P. Hunter was in company, together with others. Nathan Gilpatrick.

"Attest, James M. Rogers."

The counsel for the defendants insisted, that the receipt operated as a discharge of all the defendants. The presiding Judge ruled, that the receipt operated as a discharge of Seth Leonard alone, and not of his co-trespassers; and would only diminish the damages by that sum. The plaintiff then discontinued his action against Leonard, and proceeded against the others. A verdict was returned for the plaintiff, and the defendant filed exceptions.

*E. B. Bowman*, for the defendants, submitted the action on his part, on the following citation of authorities. 5 Dane, c. 146, a. 7, § 21, 22; *Kiffin* v. *Willis*, 4 Mod. 379; *Briggs v. Greenfield*, 8 Mod. 217; Co. Lit. 232; 5 Bac. Abr. 204; Hammond's N. P. 72; Hobart, 66; Com. Dig. Trespass, A. 1; Story on Partnership, 260.

*S. Moody*, for the plaintiff, submitted the case, with the single remark, that the rulings of the Judge of the District Court, to which the defendants except, was in accordance with the principles of law and equity.

The opinion of the Court was by

SHEPLEY J. — The plaintiff commenced an action of trespass against the defendants and Seth Leonard, for a joint trespass committed upon his person and property. He afterward received of Leonard five dollars "in full of said Leonard's trespass, where he and Wilson P. Hunter were in company, together with others." The question presented is, whether this operated to discharge the other joint trespassers.

In a joint trespass, or tort, each is considered as sanctioning the acts of all the others, thereby making them his own. Each is therefore liable for the whole damage, as occasioned by himself, and it may be recovered by a suit against him alone. There can be no separate estimate of the injury committed by each and a recovery accordingly. *Brown* v. *Allen*, 4 Esp. R. 158; *Wynne* v. *Anderson*, 3 C. & P. 596.

The difficulty in maintaining the suit against the others is, that the law considers, that the one, who has paid for the injury occasioned by him, and has been discharged, committed

the whole trespass and occasioned the whole injury, and that he has therefore satisfied the plaintiff for the whole injury, which he received. Co. Litt. 232; Com. Dig. Pleader, 3 M. 12; Hobart, 66; *Kiffin* v. *Willis*, 4 Mod. 379.

The plaintiff by his own act appears to have precluded himself from a recovery against the defendants.

*Exceptions sustained,*
*and a new trial granted.*

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JOHN HUSSEY, *Adm'r & al. versus* ELIZABETH DOLE *& al. Ex'rs & al.*

It is a general rule, that all interested in the subject of a bill in equity should be made parties thereto, as plaintiffs or defendants, that a complete decree may be made between them.

The want of proper parties to a bill in equity may be taken advantage of at the hearing.

But when the objection for defect of parties is not taken until the hearing, it is competent for the Court, on such terms as they may deem proper, to order the case to stand, with leave to the plaintiff, if he shall move therefor, to amend by adding new parties.

Where a conveyance is made of certain lands in trust that the grantee will appropriate the proceeds of the sale thereof in a certain manner; and afterwards, another grantor, by deed of warranty, conveys the same and other lands to the same grantee, who at the same time gives back to the last grantor a bond, conditioned to account to him for the proceeds of all the sales in a manner different from that indicated in the first conveyance; the grantee will not be relieved from the duty undertaken by him in the bond, by reason of any claims on the part of those interested in the trust, upon which the first conveyance was made.

THIS was a bill in equity brought by John Hussey, administrator of the goods and estate which were of William Waters, deceased, and by Edwin Waters, Orrin Waters and Mary Jane Waters, as heirs at law of the intestate, against John Dole, deceased; and was heard on bill, answer and proof. During the pendency of the suit, John Dole died, and his executors and heirs at law took upon themselves the defence. It appeared in proof, that there were six heirs at law of William

Waters, and no reason was alleged or shown, why the other three should not have been made parties, if any of them were.

The case was argued in writing by

*Ruggles*, for the plaintiffs, and by

*M. H. Smith*, for the defendants.

But one of these arguments, which was very full, and mainly on the merits, has come into the hands of the reporter.

The facts bearing on the questions decided, are all stated in the opinion of the Court, as drawn up by

TENNEY J. — This bill was originally brought by the present complainants against John Dole, charging, that certain real estate was conveyed to him, Lucius Barnard and Joseph Glidden, in trust, by William Waters; that portions of the estate so conveyed have been sold, payment received, or security taken for the purchase money, and that other portions remain unsold; that Lucius Barnard has died insolvent, and that Joseph Glidden had conveyed to said Dole, before the decease of the latter, all his right and interest in the estate; that Dole has been called upon to account for the estate conveyed, and has refused so to do; and the complainants seek a discovery, and pray relief in the premises, by payment, assignment and conveyance.

Dole appeared and filed his answer, admitting that the real estate was conveyed to him and the other grantees named in the deed, in trust; that they have sold and conveyed portions thereof; have received a part of the purchase money; have certain notes for a part, secured by mortgage; that Joseph Glidden has released his interest in the premises, and that Lucius Barnard died insolvent; that he has accounted for the money received in the manner contemplated in the contract of trust. But he insisted in his answer, that a part of the estate was held in trust for persons other than the said Waters and his representatives.

Pending the suit, the original defendant died. His executors, and legatees, devisees and heirs appeared upon a bill of

revivor and filed their answers, relying substantially upon the grounds taken in the answer of the original defendant.

On May 4, 1825, William Waters conveyed to John Stuart the land described in the complainant's bill, and the same was conveyed by John Stuart to Ann Stuart by deed dated Sept. 2, 1826. On June 26, 1835, Ann Stuart gave to Dole, Barnard and Glidden, a deed of the parcel first described in the complainants' bill, in trust, for the use of Abigail Carleton, and the heirs of Polly Glidden, deceased, and the heirs of Jane Clark, deceased, the said Abigail, Polly and Jane, being the children and heirs of Samuel Waters, the father of said William Waters, and on July 10, 1835, conveyed the residue of the land described in the bill to William Waters. On July 5, 1835, Dole, Barnard and Glidden were put in possession of the parcel conveyed to them by Ann Stuart on a writ of possession, issued on a judgment obtained against William Waters in their favor; and on the same day he surrendered to them in writing the land, of which they took possession, and received from them a lease of the same for one year. On July 6, 1836, William Waters conveyed to them by deed with covenants of warranty, the whole of the land described in the bill, and Dole and Barnard at the same time executed and delivered to him a bond, agreeing therein, that whenever the whole or any part of the land described in his deed to them should be sold, they would faithfully and honestly account with him for the net proceeds of all sales by them made, by applying the same to the payment of certain notes and claims, which Moses Carleton and wife, and the heirs of Polly Glidden, and the heirs of Jane Clark, had against said Waters, and so far as any net proceeds should be received, the same were to go to extinguish the claim, which they had by virtue of the writ of possession against said Waters; that they would not at any time within one year, sell any of the real estate so conveyed to them, without consulting with said Waters; and that if any sums should come into their hands from sales of the land, or in any other manner, more than sufficient to pay the just balance due from said Waters and the abovenamed claims,

that they would refund to said Waters or his heirs or assigns, all such overplus so received. Dole, Barnard and Glidden conveyed to E. G. & D. G. Baker a portion of the land described in the bill by two deeds. On Feb. 14, 1839, Glidden released all his right and interest in the land, excepting so far as it had been previously conveyed to Dole; and Barnard died insolvent long before the complainants' bill was filed. William Waters died, leaving Hannah Tomlinson, Statira Fitzpatrick, Mary Jane Waters, Edwin Waters, Daniel Waters and Orrin Waters, his children and heirs. John Hussey was duly appointed administrator of the goods and estate of William Waters.

The contract in writing entered into between Dole and Barnard on the one part, and Waters on the other, which is a specialty, was given at the time a conveyance with covenants of warranty was made to them of the whole of the land described in the bill; they bound themselves to account for the whole of the net avails of the sale of the real estate therein described or referred to. By the terms of the instrument, they were bound to appropriate sufficient of the proceeds to the payment of certain notes held by Moses Carlton and his wife, and the heirs of Polly Glidden, and the heirs of Jane Clark, against William Waters, but after the payment of these notes, they were not entitled to hold the premises in trust for Moses Carleton and wife, and the heirs of Polly Glidden and Jane Clark. That contract, which made a part of the conveyance, has not been rescinded, forfeited, cancelled or discharged, and no facts are presented showing that it is not a valid and binding contract; the obligors make no exception of the land conveyed previously to them by Ann Stuart for the benefit of the *cestuis que trust*, therein named; but took a warranty deed from Waters of the whole land, to which also their obligation fully applies. The representatives of William Waters are entitled to the benefit of the contract which Dole and Barnard entered into with him; and it is not a sufficient answer for either of the obligors to make, that they are relieved from the duties assumed therein by any claims of the *cestuis que trust*,

named in Ann Stuart's deed to them, additional to those mentioned in the bond.

It is however a general rule, that all interested in the subject of a suit in equity, should be made parties thereto either as plaintiffs or defendants, that a complete decree may be made between them, it being the constant aim of a Court of equity to do complete justice, by embracing the whole subject, so that the performance of the order of Court may be perfectly safe for those who are compelled to obey it, and prevent further litigation. Cooper's Eq. Pl. c. 1, p. 33. This objection may be taken at the hearing. Story's Equity Pleading, p. 76; *Felch* v. *Hooper*, 20 Maine R. 159.

Three of the children of William Waters are omitted as parties to the bill. They have an interest similar to other heirs of William Waters, and are entitled to be heard with those who are complainants. There is nothing in the bill, answer or proof, showing that they have in any way released their rights as heirs of William Waters, and a decree in favor of the complainants could not do perfect justice.

The objection for defect of parties was not taken till the hearing, and on the authority of the case of *Felch* v. *Hooper*, it is competent for the Court, on such terms as they deem proper, to order the case to stand, with leave to the plaintiffs to amend by adding new parties. If such order is not moved for, the

*Bill is dismissed.*

MOSES R. LUDWIG *versus* HANNAH BLACKINTON, *Adm'x.*

It is only when the funds in the hands of the administrator are not "sufficient to extend beyond the payment of the expenses of the funeral and administrator, and the allowance to the widow and children," that it is not necessary to appoint commissioners of insolvency on an insolvent estate; and then only is the administrator "exonerated from the payment of any claim of a subsequent class;" and it is then only, that he has a defence against a suit on a legal demand, brought after the expiration of the year, without the appointment of commissioners of insolvency.

When the administrator was appointed before the Rev. Stat. were in force, and returned his inventory afterwards, he must account for the property contained in it according to existing laws.

Where the plaintiff is entitled to judgment against an administrator of the estate of an intestate, no commissioners of insolvency having been appointed, he will, by the provisions of Rev. Stat. c. 120, § 4, be entitled to one execution against the goods and estate of the intestate for the amount of the debt, and to another against the administrator personally for the amount of the costs.

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

Assumpsit to recover the amount of a bill for medical services performed for the intestate, but not in his last sickness. The defendant, in her brief statement, admitted that the demand sued was a legal demand against the estate, but alleged that she had fully administered upon the estate, (in manner mentioned in the opinion of the Court,) and settled her account of administration in the Probate Court.

The defendant offered parol evidence, the facts not appearing on the records, to prove an order of notice, and that the order had been published as directed, of the settling of the administration account of the defendant. To this evidence the plaintiff objected, but the objection was overruled, and the testimony admitted. The plaintiff then contended, that even if the account was duly settled, that the case was not brought within the provisions of the statute, which excused an administrator from representing the estate insolvent, and exempted him from liability, on the ground, that the defendant had not appropriated the assets as provided in that statute, and also on other grounds. This objection was overruled. A verdict was

returned for the plaintiff for his damages; and thereupon he moved the Court for judgment, and that execution should be awarded him for his debt against the estate of the intestate, and for his costs against the proper goods and estate of the defendant. The presiding Judge ordered judgment to be entered for both damages and costs against the goods and estate of the intestate, and that execution should not issue, till the further order of Court, "in consequence of the facts alleged and proved in the brief statement of the defendant." The plaintiff excepted to all the rulings of the presiding Judge, excepting so much thereof as had reference to the entering of judgment against the estate of the intestate for the amount of the damages. The defendant also filed exceptions as to so much of the ruling and decision of the Judge, as ordered judgment to be entered against the estate for the damages and costs.

*Ruggles*, for the plaintiff, contended in his argument, that after the expiration of the year an administrator is protected from a suit only when the estate has been represented insolvent, and *commissioners have been appointed*, as provided in Rev. St. c. 109, § 3; and this should appear of record; or when the estate is insufficient to pay more than the expenses of the funeral and administrator and allowance to the widow and children, as provided in the same statute, § 4. This too should appear by the records. 4 Mass. R. 620; 17 Mass. R. 386; 12 Mass. R. 570. In this case no commissioners of insolvency have been appointed, and there is a balance in the hands of the administratrix, after payment for the purposes mentioned in § 4. The administratrix settled her first and only account since the Revised Statutes were in force, and therefore those statutes are to govern.

In a case like this the statute is imperative, that judgment for costs shall be rendered against the administrator *de bonis propriis*. Rev. St. c. 120, § 4.

The Judge erred in ordering the execution to be stayed. The estate is not shown to be insolvent in the mode required by the statute.

*Lowell* and *Chandler*, in their arguments for the defendant, contended that the administratrix was entitled to verdict, judgment and execution for costs in her favor; and that therefore the decisions of the Judge were erroneous.

1. Because she has always admitted the existence of the plaintiff's demand; has pleaded to this action *plene administravit*, and shown a compliance with the provisions of the statute of March 15, 1838, c. 322, and of Rev. St. c. 109, § 4. This is a legal defence, as well as an equitable one. Story's Pleadings, 198, 200, 202, 203, and notes; *United States* v. *Hoar*, 2 Mason, 317; *Coleman* v. *Hall*, 12 Mass. R. 571; *Shillaber* v. *Wyman*, 15 Mass. R. 323; *Johnson* v. *Libby*, *ib.* 140; *Hunt* v. *Whitney*, 4 Mass. R. 620.

2. Because all the assets that had in fact come into the hands of the administratrix had already been absorbed in the payment of preferred debts, to which that of the plaintiff was of a subsequent class; and so the plaintiff had no just cause of complaint, and no legal or equitable ground of action.

3. Because all the legal rights of the plaintiff were as effectually secured to him by the admission of the administratrix, as they could have been by a verdict and judgment. *Hunt* v. *Whitney*, 4 Mass. R. 620; *Baxter* v. *Penniman*, 8 Mass. R. 133; *Emerson* v. *Thompson*, 16 Mass. R. 428; Rev. St. c. 109, § 29.

The opinion of the Court was drawn up by

Shepley J. — This case comes before the Court by bills of exception taken by each party.

It appears, that the defendant on May 14, 1840, was appointed administratrix on the estate of Nathan Blackinton, her deceased husband. She returned an inventory on November 4, 1841, and settled an account on May 12, 1842, in which she charged herself with the amount of the estate, as appraised, and obtained an allowance for items charged to balance the account. Those items of charge were for funeral expenses, Dr. Rose's bill in last sickness, taxes of deceased, a bill for legal advice and assistance and for attending Probate Courts;

and an allowance was made by the Judge of Probate to herself. The intestate was indebted to the plaintiff; and this suit was commenced to recover the amount admitted to be due.

The defence was, that the estate was insolvent, and that it was so represented; that she had fully administered the same; and had accounted for all the assets, which had come to her hands. She relied upon the provisions of the statute c. 109, § 4, as a perfect defence. No commissioners of insolvency had been appointed.

The third section of that statute provides, that the Judge of Probate shall appoint commissioners, when the estate will probably be insufficient for the payment of the debts, except as provided in the fourth section; which is in these words. "But if the funds shall not be sufficient to extend beyond the payment of the expenses of the funeral and administrator, and the allowance to the widow and children as aforesaid, it shall not be necessary to appoint commissioners; and the administrator shall be exonerated from the payment of any claim of any subsequent class."

It is only when the funds are not sufficient to extend beyond the payment of those designated claims, that it is not necessary to appoint commissioners; and then only is the administrator exonerated from the payment of any claim of a subsequent class. In this case it appears by the account settled, that the funds did extend further, and that the administratrix paid certain expenses of the last sickness and taxes due from the intestate.

As the defendant was appointed administratix before the Rev. Stat. were in force, it is contended, that she may be protected by the provisions of the act of March 15, 1838, c. 322. It is not perceived, that such could be the result, if that statute were applicable to the case, for it discharged the administrator only, when the amount of the estate should be absorbed in the payment of bills of the last sickness, the funeral expenses and the allowance to the widow; and the amount was not thus absorbed in this case by the sum paid for taxes. That statute however was repealed, and the Rev. Stat. were in force, before

the inventory in this case was returned; and the administratrix should account for the property contained in it according to existing laws.

What should be the construction or effect of those statutes, when a case is presented within their provisions, it is not now necessary to decide.

The plaintiff, being entitled to judgment, will, by the provisions of the statute, c. 120, § 4, be entitled to an execution against the goods and estate of the intestate for the amount of the debt and to another against the defendant for the amount of the costs. The exceptions taken by the defendant must be overruled, and those taken by the plaintiff sustained. And as the debt is admitted to be due, judgment is to be entered in this Court for the amount, and executions are to be issued accordingly.

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JOHN TILTON *versus* WILLIAM HUNTER *& al.*

Where a resolve of the Commonwealth of Massachusetts authorized the conveyance of a lot of land, and provided that such conveyance should not "affect the rights or claims of any actual settlers, claiming lands under any title, not derived from the Commonwealth, or by possession merely, against each other; but that all such claimants may pursue their legal remedies as if no such conveyance had been made;" *it was held*, that this provision extended not only to such as were actual settlers upon the land at the time, but to their grantees and assignees.

By the statute commonly called the betterment act, the common law in relation to disseizin is so far altered, that a wood lot, constituting part of a farm, may be subject to a disseizin by the occupant of the farm, if used for the purpose of cutting fuel and getting house-bote and fence-bote therefrom, openly and notoriously, and in a manner comporting with the management of a farm. But the possession must still be open and notorious.

If one, without the knowledge of the owner of the land, causes it to be run out, and a plan made thereof, at the same time claiming it as his own, this does not constitute a disseizin.

The recording of deeds is constructive notice only to those, who would claim under the same grantor.

TRESPASS *quare clausum.* The plaintiff, as part of his evidence, introduced the deed of Thomas M'Clure. On the

argument of the case, it was contended as matter of fact, that this deed did not include the land whereon the trespass was committed, and that therefore the instructions of the Judge at the trial respecting the effect of that deed were erroneous. A plan was referred to, but was not among the papers of the case. The facts are stated in the opinion of the Court. The *lop and top fence* appeared to have been made by felling trees in such manner, that the top of one should be upon the lower end of another.

The trial was before SHEPLEY J. who instructed the jury, that such a fence across the westerly end of the Tilton lot, without a fence on the northern or southern side of the Hunter lot and so continued and maintained by the defendant, Hunter, as to inclose a tract of land not on any line or bound of his deed but without them, would not constitute a seizin in Hunter and disseizin of the grantors of Tilton, so as to defeat the operation of their deeds; and that this fence, as so built across the Tilton lot, would not operate a disseizin before the erection of the permanent fence from nine to thirteen years prior to that time; and that as Thomas M'Clure, the grantor of Tilton in 1832, was an heir and tenant in common, his deed would convey a seizin to the plaintiff, unless defeated by an adverse possession.

The verdict being for the plaintiff, the defendants filed exceptions to the instructions of the Judge.

*Bulfinch* argued for the defendants, and cited the following authorities. 9 Mass. R. 196; 2 Greenl. 367; 9 Mass. R. 185; 18 Maine R. 436 and 428; 2 Greenl. 287; 1 Greenl. 238; 11 Pick. 140.

*E. Smith* argued for the plaintiff, citing 4 Pick. 159; 5 Pick. 131; 5 Mass. R. 344; 8 Cranch, 249; 4 Mass. R. 416; 14 Pick. 383.

The opinion of the Court was drawn up by

WHITMAN C. J. — This is an action *quare clausum*. The acts set forth as constituting the trespass are not denied. Each

party claims to be the owner in fee of the *locus in quo.* The plaintiff deduces his title thereto through sundry mesne conveyances, the first of which was made in 1811; and these conveyances embrace the premises, without question; and make out a perfect title in the plaintiff, unless controlled by that set up on the part of the defendants.

The defendants claim, first, under a deed of quitclaim, made to their father, whose heirs they are, in 1766, which they contend includes, within the boundaries therein given, the *locus in quo;* secondly, that the same is included in a deed made to them in 1815, by Messrs. Orr & Bailey, as agents of Massachusetts, of which Maine was then a part, in pursuance of certain resolves passed for quieting settlers, &c.; and thirdly, that they have acquired a title by disseizin; or were, at any rate, so seized as to defeat the operation of the deed upon which the plaintiff must depend for the establishment of his title.

The deed of quitclaim, relied upon by the defendants, was of a tract of land extending from Damariscotta river, south-easterly, the south-easterly boundary being a straight line, extending one hundred and thirty rods. How far south-easterly such a line must be placed is not shown by any actual admeasurement laid down on the plan taken by order of Court. It cannot be known, therefore, there being no monuments recognized as showing the south-eastern boundary, that the *locus in quo* is included in that conveyance; and the defendants do not now claim by a straight line for their south-eastern boundary. This point in the defence therefore fails.

The deed of Messrs. Orr and Bailey is next to be considered. The description in that deed is, of "two lots, numbered 138 and 139, in the western division of said town of Bristol, conformably to the plan taken by William M'Clintock, June 12th, 1815." These lots are not laid down on the plan taken by order of Court, or on any plan to which we are referred in the bill of exceptions. Whether they covered the *locus in quo* we have not the means of ascertaining. The defence, therefore, upon this ground was not made out.

Moreover, if the description in the deed of Messrs. Orr and Bailey included the *locus in quo*, it was made under resolves, which provided, that such conveyance should not "affect the rights or claims of any actual settlers, claiming lands under any title, not derived from the Commonwealth, or by possession merely, against each other; but [that] all such claimants may pursue their legal remedies as if no such conveyance had been made." It is contended, however, by the defendants, that this extends only to the claims of actual settlers, at the time of the conveyance, under the resolve, and not to their assignees; but this would, evidently, be a construction altogether too narrow. An actual settler, at that time, and who afterwards conveyed the land, on which he was settled, to another person, without any knowledge of an adverse claim, would surely convey all the rights appertaining to himself; and the grantee would become seized thereof as fully and effectually, to every intent and purpose, as the settler held the same. This position of the defendants, therefore, is clearly untenable.

We come now to the question of title by disseizin. The *locus in quo*, although it is not so expressly represented in the bill of exceptions, was obviously a forest; and in an uncultivated state. The lop and top fence, and the log fence, indicate this; and, if it had ever been under improvement, it would have been so represented. To constitute a disseizin, under such circumstances, decisive acts, tending to a dispossession of him in whom the title might be, must be proved. The common law definitions of a disseizin are collected by Mr. Justice Wilde, in delivering the opinion of the Court in *Bates* v. *Norcross*, 14 Pick. 224. The one quoted from Lord Holt is, that "a bare entry on another, without an expulsion, makes such a seizin only, that the law will adjudge him in possession, that has the right; but it will not work a disseizin or abatement without expulsion;" and the one from C. J. Parsons is, that "to constitute an ouster of him who was seized, the disseizor must have the actual and exclusive occupation of the land, claiming to hold it against him who was seized; or he must actually turn him out of possession." Mr. Justice Wilde,

again, in delivering the opinion of the Court, in *Coburn & al.* v. *Hollis*, 3 Metc. 125, lays down the law to be, that, in order "to make out an adverse possession in ejectment, the tenant must show a substantial inclosure, an actual occupancy, definite, positive and notorious. It is not enough to make what is called a possession fence, merely by felling trees, and lopping them one upon the other round the land." Mr. C. J. Kent, in *Jackson* v. *Schoonmaker*, 2 Johns. R. 230, to constitute a disseizin, says, "there must be a real and substantial inclosure, an actual occupancy, a *possessio pedis*, which is definite, positive and notorious, to constitute an adverse possession, when that is the only defence, and is to countervail a legal title." This was said in a case, where the disseizin set up was by running a lop and top fence round the land, which was held to be insufficient for the purpose; and it has been often so held in this State and Massachusetts.

By the statute of this State, however, commonly called the betterment law, it is provided, that, to constitute disseizin, "it shall not be necessary that such lands shall be surrounded with fences, or rendered inaccessible by water, but it shall be sufficient, if the possession and improvement are open and notorious, and comporting with the ordinary management of a farm, although that part of the same, which composes the woodland, belonging to such farm, and used therewith as a wood lot, shall not be inclosed." By this enactment the conmmon law may be considered so far altered as that a wood lot, constituting a part of a farm, may be subject to a disseizin by the occupant of the farm, if used for the purpose of cutting fuel, and getting housebote and fencebote therefrom, openly and notoriously, and in a manner comporting with the management of a farm. That the possession must still be open and notorious is not abrogated, but expressly retained.

Now what are the facts in the case at bar to bring it within those principles? The first is, that, in 1775, the ancestor of the defendants, being in possession of a tract of land, supposing the *locus in quo* to be a part of it, felled a lop and top fence across the land, afterwards claimed by a person, under

whom the plaintiff claims to have derived his title. It was intended probably to mark out the southeasterly boundary of the land, as purchased by the defendant's ancestor. This fence did not inclose any land; and could not have been made with a view to an occupation and improvement of the land. In 1802 it had decayed, and a new one was made, of a similar nature, but about forty rods distant from the former. This inclosed nothing, and only ran across the land now claimed by the plaintiff; and, from 9 to 13 years ago, a log fence was built, nearly on the same line. The case does not find that this completed an inclosure of any land. These, then, according to the common law authorities, could not amount to a disseizin; and did not amount, in the language of the statute, to an open, notorious possession and improvement, such as comports with the ordinary management of a farm. Running a lop and top fence through a region of forest, without any connexion with any other fence, so as to make an inclosure, cannot be believed to comport with the ordinary management of a farm; and, as to notoriety, it does not appear, that any adverse claimant had any knowledge of the existence of either of the fences; or, if he had, that he had any knowledge of who erected them, or with what design they were placed there. No acts of cutting of wood or timber on the *locus in quo* are proved, anterior to the trespass complained of.

But it is said that in 1814 the defendants caused the land to be run out, as claimed by them, corresponding nearly with the log fence, and a plan to be made, &c. This however was an *ex parte* proceeding, of which the plaintiff had no knowledge, and therefore could not be concluded by it. This neither came within the common law or statute as constituting a disseizin.

Again, it is said, that the two deeds under which the defendants claim, were on record, and were constructive notice, that the defendants claimed the *locus in quo.* To this two answers may be given. The first is, that it does not appear, that, upon an accurate running out of the land, the *locus* would be embraced within its limits; the second is, that the

recording of deeds is constructive notice only to those, who would claim under the same grantor. *Little* v. *Megquier*, 2 Greenl. 178; *Bates* v. *Norcross*, before cited.

The seizin in this case might have been sufficient, on the part of the defendants, to enable them to maintain an action of trespass against one, who had no pretence of claim to the land, or to have authorized the plaintiff to have declared against them in a plea of land, as disseizors, if he had elected so to do; but by no means amounts to such an adverse possession as would, in law, ever have ripened into a title by disseizin; and therefore did not preclude the deed of Murdock, as guardian, from passing the fee to the plaintiff. The deed of Thomas M'Clure, therefore, was of no importance, and may be laid out of the case; and what was said by the Judge in his instructions to the jury, in reference to it, may be considered as immaterial, and as forming no ground of exceptions.

The argument of the counsel for the defendants, concerning a claim for betterments, was wholly irrelevant. The exceptions do not show that any such claim was ever made. The Judge, in his charge and ruling, does not appear to have noticed any thing of the kind.

*Exceptions overruled.*

PRES'T., &c. MEDOMAK BANK *versus* ELIZA A. CURTIS, *Adm'x.*

Where the plaintiff received post notes, payable at a future day and in another State, and agreed to account for the same to the defendant on his note to the plaintiff if collected; or to return them, if payment thereof should be refused; it was the duty of the plaintiff to cause the post notes to be seasonably presented for payment, when the day of payment should come, and if they were not then paid to return them to the defendant.

Where a person has deceased, and his estate has been rendered insolvent and commissioners have been appointed, all claims and demands between such estate and a creditor are subject to be set off, and the balance only should be allowed, or recovered, although there could have been no set-off if both parties had lived.

If the cashier of a bank enters into a contract in behalf of the corporation, without authority for the purpose, and the bank claims the benefit of the contract, it is thereby ratified by the corporation.

Although contracts in writing cannot be varied in their terms by parol evidence, yet it is competent for one party to show by parol, that the performance of such contract has been prevented or waived by the other party.

ASSUMPSIT upon a note given by the intestate, C. S. Curtis, to the plaintiffs, dated June 24, 1839, for $444,13, payable in seven months with interest. The estate of the intestate was rendered insolvent, and the note was laid before the commissioners by the plaintiffs, as their property. The defendant set up a claim in set-off before the commissioners arising out of an instrument signed by James R. Groton, cashier of the Bank, of which the following is a copy.

"Medomak Bank, Waldoboro', June 24, 1839. Received of C. S. Curtis six post notes, issued by the Mississippi Shipping Company at Natchez, Mi. payable at the Bank United States, Philadelphia, on Jan. 28, 1840, for four hundred and fifty dollars, which sum is to be accounted for to said Curtis on his note to the Bank at that time, if collected, or returned to him, if payment is refused. J. R. Groton, Cashier."

The Commissioners allowed a balance to the plaintiffs of $12,33, and they gave notice, &c. according to the provisions of the statute, and brought this suit.

The evidence is reported, but no ruling or decision, or instruction of the Judge at the trial, whatever, appears in the

case. The verdict was for the defendant, and the plaintiffs filed a motion, "that the verdict be set aside for the following reasons, viz.

"1. Because said verdict is against the evidence.

"2. Because said verdict is against the weight of evidence.

"3. Because the verdict is against the law.

"4. Because the said verdict is against the instructions of the Judge."

*Ruggles* and *Bulfinch*, for the plaintiffs.

*E. & M. H. Smith*, for the defendant.

The opinion of the Court was drawn up by

WHITMAN C. J.—The motion is for a new trial, averring that the verdict returned for the defendant was against evidence, and against law, and the instruction of the Court in matter of law.

The defendant's intestate, in his lifetime, on the 20th of June, 1839, gave to the plaintiffs a note of hand for $444,13, payable in seven months then next; and, as collateral security therefor, put into the hands of the plaintiffs' cashier, J. R. Groton, certain post notes, issued by the Mississippi Shipping Company, at Natchez, payable at the Bank of the United States at Philadelphia, in January, 1840, for $450,00, and took an agreement in writing, signed by Groton as cashier, that the same amount should be accounted for at that time in payment of said intestate's note, if collected, or be returned to him, if payment should be refused.

The two agreements appear to have been separate, and independent of each other, though made at the same time. The intestate, by his note, agreed to pay the plaintiffs the sum named therein in seven months. The plaintiffs on their part, in effect, agreed that the post notes should be presented for payment, when due, and if not then paid, to return them to the intestate. Both agreements were broken. The intestate's note has never been paid; and the plaintiffs never presented the post notes for payment, as was impliedly agreed, and have

never received the amount due on them, or returned them to the intestate.

Ordinarily these breaches of contract could not at law be set off against each other. But Curtis having deceased, and his estate being represented insolvent, the plaintiffs were compelled to lay their claim before the commissioners appointed to examine and allow claims against his estate; and thereupon it became the right of the defendant to file her claim, for the breach of the plaintiffs' agreement, in set-off against their claim. *Boardman* v. *Smith*, 4 Pick. 212. And, of course, on an appeal from the decision of the commissioners to this Court, the same right in set-off continued; and whatever the damage for the breach of the plaintiffs' agreement may be, should be allowed in set-off against the demand of the plaintiffs.

The question first to be settled is, had the defendant, as administratrix, any well grounded claim to damages for breach of the plaintiffs' contract. And if any, to what amount? The plaintiffs contend, that the performance of their contract was waived by the intestate; and that the breach of it was therefore excusable; and that they are not liable for any damages for the non-performance of it. This depends upon the testimony of the cashier, Groton. His competency to testify is in the first place questioned by the defendant. It is alleged, and the fact is undoubtedly so, that he was under bonds to be faithful in the performance of his duties as cashier; and it is further alleged, that he took the note in question without the knowledge and approbation, previously obtained, of the president and directors of the bank, or any one of them; and gave the writing relied on by the defendant, without being previously authorized so to do; and that if any detriment should accrue to the bank therefrom, he will be responsible for it. This objection would seem to be overcome by the adoption of the negotiation by the plaintiffs, who prosecuted this claim before the commissioners, and still are prosecuting it in this Court; and it does not appear, that they have questioned their liability on the writing signed by their cashier, under pretence that his signing the same was not duly authorized. This subsequent

adoption of his acts, even if there was an original want of express authority for the purpose, must be regarded as a ratification of them. The defendant has, moreover, elected to examine him upon the *voir dire;* and he has unequivocally denied having any interest in the event of the suit. We think therefore that he was a competent witness for the plaintiffs.

It is next objected, that his testimony was inadmissible, inasmuch as he came to testify to facts inconsistent with the terms of the written contract. The rule that a written contract cannot be varied, contradicted, or even explained by oral testimony, is well established. But it is urged, that the writing, to which the testimony relates, is but a mere receipt, and that receipts are not within the rule. But we think the writing must be deemed something more than a mere receipt, acknowledging merely the reception of money or of chattels. After acknowledging the reception of the notes, it goes on to stipulate what shall be done in reference to them. Besides; it is not the reception of the post notes that is denied. It is the liability consequent upon their reception, which is in question. We think, therefore, that there was a contract, contained in the writing, between the parties; and that such contract is not liable to be varied by oral testimony.

But it has often been held, that it is competent to parties, who have entered into stipulations, to show, that the performance of them has been prevented or waived by the opposite parties. The case here may be considered as coming within this principle. If the intestate, by his acts, statements or entreaties, induced the plaintiffs not to present the post notes for payment, it would be quite inequitable to allow his administrator now to recover the value of them of the plaintiffs; or what would be the same thing, to have them now allowed in set-off. The case of *Boyd & al.* v. *Cleveland*, 4 Pick. 525, is very much in point for the plaintiffs here. A note in that case was indorsed to the plaintiff by the defendant. The indorsement contained an agreement, by implication, that the defendant was to be liable only upon a failure of the makers, upon due demand and notice of non-payment. The plaintiff notified

the defendant, at the time he received it, that he had no confidence in the other parties to the note; and that he should look wholly to him for payment. The defendant replied, that he should be in New York, when the note would become due, and would then take it up, if it were not paid by any other party to it. The court held this to be a waiver of the obligation to make demand on the maker, and to give notice of non-payment. The case of *Fuller* v. *M'Donald*, administrator, 8 Greenl. 213, is to the same effect.

The testimony of Groton, if believed, and no reason appears why it should not have been, proved such a waiver, on the part of the intestate, of the obligation, on the part of the plaintiffs, to demand payment of the post notes, at the time and place appointed therefor; and the testimony of Groton is strongly corroborated by that of Moses Call; who says, among other things, tending to show that the intestate did not contemplate having a demand made of payment at Philadelphia, that "he said he did not care about the post notes being sent to Philadelphia, if he could help it, as they were the company's funds." It is difficult to perceive how a jury, in such case, could be authorized to doubt the fact of there having been a waiver, by the intestate, of the implied undertaking of the plaintiffs, to make demand of payment of the post notes at Philadelphia. Such fact being established, we can see no reason why the plaintiffs should be charged with the amount of them, or indeed of any part of them.

But, if chargeable at all, they could not have been chargeable for any amount above the actual injury sustained by the intestate by the breach of the contract. And what was the amount of that injury? It can scarcely be doubted, from Call's testimony, that the notes were never intended to be presented for payment at Philadelphia. If they were actually payable there, why should the intestate have hesitated in that way to avail himself of funds to pay the plaintiffs, and Call also? Yet if Call had been able to have obtained them from the bank, he was not to present them for payment, but was to return them to the intestate, at Natchez, where they were not worth more,

according to the testimony of the defendant's witness, Holmes, than from seventy-five to eighty per centum of their nominal amount. Again, Call says the reason assigned by the intestate why he did not want them sent to Philadelphia, was, that they were the company's funds. Surely then there can be very little reason, if any, why the defendant, if he can avail himself of any amount in set-off, should avail himself of more than they would have been worth to the intestate at Natchez.

Another stipulation in the plaintiffs' contract may be deserving of notice. It is, that, if the post notes were not paid, they should be returned to the intestate. But when? They were in the hands of the plaintiffs as collateral security. Were they to return them to the intestate without being paid the amount due on their note against him? This could not have been the understanding of the parties. The plaintiffs would, by so doing, be left without any security, other than that of an individual, whose estate has been represented insolvent. Besides; he had deceased before either his note to the plaintiffs, or the post notes, had become payable. And moreover, if it be assumed as a fact, that the post notes were not to be presented for payment, and we cannot see why it may not be, it would become still more absurd to suppose, that the plaintiffs were to return them without first receiving the amount due to them.

Finally, upon a careful examination and consideration of the case, we are satisfied, that the verdict was returned against evidence, and against law, and that a new trial must therefore be granted.

## Samuel Bubier *versus* John Bubier.

This Court has power under the revised statutes (c. 96, § 10) to hear and determine, as a court of equity, "all suits to compel the specific performance of contracts in writing," "when the parties have not a plain and adequate remedy at law." But under this provision the court must see not only that the contract is in writing, but that it is in force as such. If merged in a judgment, it would no longer be a contract in writing within the purview of the statute.

It should appear, also, that the plaintiff had not a plain and adequate remedy at law. If he has a judgment in his favor upon the contract in a court of law, he must be regarded as having there a plain and adequate remedy upon it.

And if the contract be in reference to the personalty, and not to the realty, it is, with a few exceptions of a peculiar character, considered that a party has his appropriate remedy at law; and will not be entitled to the aid of a court of equity to enforce the performance of it.

As a court of equity, with its limited equity powers, this court cannot aid a court of law to carry into effect a proceeding pending before it, or a judgment which it may have rendered.

Where the parties to an action on a mortgage of real estate, pending in the District Court, made an agreement in writing to refer that action and also all other demands between them, including claims by each against the other for the payment of money, by rule of court, to the determination of three persons named, agreeing to perform their award; and the arbitrators, acting under the rule, made their award, that one party should convey to the other the mortgaged premises, on the performance of certain conditions, and that the other party should pay certain sums of money at certain times, and give certain security therefor, and that certain personal property should be divided between them; and this report, or award, was returned into court and there accepted; and the party to whom the conveyance was to be made brought his bill in equity, claiming a specific performance of the award; *it was held*, that the bill could not be sustained.

This was a bill in equity, and came before the Court on bill, answer and proof.

An action on a mortgage was pending in the Middle District Court for the County of Lincoln, in favor of Samuel Bubier against John Bubier, the parties to the present bill, and at the August Term, 1842, they entered into a written agreement of reference, signed by the parties, in these terms.

"Whereas Samuel Bubier, on the 17th day of April, 1838, conveyed a farm to said John, and received back from him a mortgage deed to secure the performance of certain conditions

therein specified; and it has now become desirable to both parties that said conveyance and mortgage should be rescinded, and said Samuel restored to the title he before had, if it can be done upon fair and equitable terms and compensations.

"And whereas said John claims that upon giving back a release of the farm, there ought in fairness and equity to be paid to him a compensation for labor and services done and improvements and buildings made upon said farm, and for moneys, articles and supplies furnished by him to said Samuel. And on the other hand the said Samuel claims that said John should make him compensation for delinquencies of said John in not performing the conditions of said mortgage, and for stock, farming tools, and other articles belonging to him, which he says said John has wrongfully disposed of.

"Now therefore it is agreed, that the action aforesaid, brought upon said mortgage, be referred to E. E., S. P. and J. M. F, who, or a major part of whom, after due hearing had, shall arbitrate and award finally upon said claims, and decide what sum or sums shall be paid, and by whom paid, in full satisfaction for said claims and reconveyance, and in what manner the sum or sums, so awarded, shall be received. And said parties agree with each other, that they will perform said award, and make the payments, and give the securities, as said award may require.

"And it is agreed, that when the payments and securities so required shall be made, the said John shall make, execute and deliver to said Samuel a quitclaim deed in fee of said farm, with the usual covenants contained in quitclaim deeds, and peaceably surrender up the possession thereof, at such time as the said referees shall in their award direct."

On Dec. 16, 1842, the parties agreed, that the submission should be so extended as to embrace all demands between the parties, and that the referees should determine and report thereon as justice and equity should require. Schedules of these demands were annexed to the submission.

This agreement was filed in Court, and a rule of Court issued, whereon the referees made and signed their award and determination, as follows.

"Lewiston, December 17, 1842. Pursuant to the foregoing submission, we the arbitrators therein named, after due notice to both parties, have met them and their counsel, and have heard their several statements, pleas and evidence concerning the premises, and maturely considered the same, and more particularly the several items described in the annexed schedule A, exhibited to us on the part of the said Samuel Bubier, the plaintiff, and in the annexed schedule B, exhibited on the part of the said defendant, John Bubier; and have determined and awarded, and do determine and award, that the said John Bubier within thirty days after the acceptance of this report by the Court, do make and execute and deliver to said Samuel a quitclaim deed in fee of the farm with the buildings, improvements and all appurtenances referred to in the said rule with the usual covenants contained in quitclaim deeds, and that, provided the security hereinafter required shall previously be given on the part of the said Samuel, he shall peaceably surrender up the possession of the same on or before the fifteenth day of April next to the said Samuel.

"And on the other part we determine and award that the said Samuel Bubier shall pay on demand the following sums, or at his election give security to pay the same sums as follows, viz.

"Seventy-five dollars in one year from April 15, 1843, and one hundred and eighteen dollars and eight cents in two years from the same date, each with interest from the said date; and that for such of the said payments as are to be paid at a future day or days, that the said Samuel shall give his promissory notes to the said John for the same payable with interest from and after the fifteenth day of April, A. D. 1843, and that as collateral to the said notes, he be required to give a good and sufficient mortgage in fee of the premises above referred to for the payments aforesaid, with an agreement contained therein, that the said Samuel shall retain possession of the premises till breach of the condition of the said mortgage; said mortgage to be dated and executed at the same time or times as the deed above required on the other part. If the quitclaim deed

above required from the said John to the said Samuel should not be executed by the wife of the said John, as relinquishing her contingent right of dower, we further award that the sum of one hundred dollars be deducted from the last payment to be made as aforesaid, if the said wife shall be living at the time fixed for payment; and that the last mentioned note shall be so expressed as to provide for the same condition.

If it should so happen, that this report should not be accepted by the Court until after the said fifteenth day of April, we further determine that the delivery of possession of the premises and the execution of the conveyances and notes above referred to shall be made and performed within thirty days after such acceptance by the Court.

And we further determine that the farm referred to shall remain in the respective occupation of both parties, as it has been held or occupied since the commencement of this suit; and that the stock, farming tools and other articles remain upon the premises for the use of the parties until the said fifteenth day of April next, and that the hay be reserved for the maintenance of the stock thereon under the care of the said John, and that on the surrender of the premises, pursuant to the foregoing provisions, that whatever hay may then remain shall be equally divided, and that the following articles of property shall then absolutely remain the property of the said John, viz., A wagon, recently bought by the said John, one axe, one hoe and one shovel, carried to the said place by the said John in 1838, two three year old steers, two cows, two yearlings and one swine with the horse and sheep; and the following shall become absolutely the property of the said Samuel, viz., the cow and heifer, commonly called the said Samuel's cow and heifer, and the calf and one swine together with the cart and wheels, plough, harrow, chains, yokes and irons and all other farming utensils. The larger of the two swine to be assigned to the said Samuel, as his. The balance due on the note to Nathan Reynolds for $65,19, ($38 already paid,) is to be paid by the said John Bubier. The foregoing

to be in full of the several claims submitted to us under the said rule.

"We finally award that the said Samuel recover against the said John, twenty-three dollars and ninety-five cents, being one half of the costs of this reference; and that no costs of Court be taxed for either party except such costs as the Court in their discretion may assess upon either party as having accrued after the approaching December Term of this Court, and that the said costs of reference be included in whatever execution or process the Court may order for enforcing this award, unless previously paid."

This report was returned into Court, and there accepted.

The facts sufficiently appear in the opinion of the Court.

The case was fully argued by

*J. O. L. Foster*, for the plaintiff; and by

*S. Moody*, for the defendant.

The counsel for the plaintiff made the following points: —

The plaintiff has a good award in his favor, unimpeached, and unimpeachable. 3 Taunt. 486; 12 Mass. R. 47; 18 Ves. 447.

This Court has power under its equity jurisdiction to compel its specific performance. The plaintiff has no adequate remedy at law. The parties mutually agreed that they would perform the award, and this Court has power to compel them to perform their written agreement so to do. Rev. St. c. 96, § 10; *Jones* v. *Boston Mill Corp.* 4 Pick 507; *Clark* v. *Flint*, 22 Pick. 231; *McNear* v. *Bailey*, 18 Maine R. 251.

The plaintiff has done, and offered to do, all that was required on his part, to entitle him to the relief this Court has power to afford him. He therefore expects that this Court will decree a specific performance of the award in his favor.

The counsel for the defendant took these among other grounds of objection to the maintenance of the bill.

As the Court has not general jurisdiction in equity, the plaintiff must make it appear affirmatively, on the face of his bill, that his case is within the jurisdiction of the Court. This has

not been done. 12 Pick. 34; 18 Maine R. 204. If the plaintiff has any cause of action, it is at law.

Applications for relief in equity in this Court are in all cases applications to the discretion of the Court. 4 Pick. 507. The Court cannot decree a specific performance in this case in the just exercise of that power, for several reasons. Among them are: — that the referees exceeded their authority in several particulars. These were pointed out, and commented upon.

Nor has the plaintiff performed the award on his own part, and on that account cannot call upon the defendant for a specific performance of what he was directed to do.

The opinion of the Court was drawn up by

WHITMAN C. J. — This Court has power, under the Rev. Stat. (c. 96, § 10) to hear and determine, as a court of equity, "all suits to compel the specific performance of contracts in writing," "when the parties have not a plain and adequate remedy at law." In cases presented to us under this provision we must see, that the contract is in writing, and in force as such. If merged in a judgment it would no longer be a contract in writing, within the purview of the statute. It should appear, also, that the plaintiff had not a plain and adequate remedy at law. If he has a judgment in his favor, upon the contract in a court of law, he must be regarded as having a plain and adequate remedy upon it. And if the contract be in reference to the personalty, and not to the realty, it is with a few exceptions of a peculiar character, considered that a party has his appropriate remedy at law; and will not be entitled to the aid of a court of equity to enforce the performance of it.

The case here presented has a complication of difficulties. The contract relied upon has reference to both real and personal estate. It originated under, and in connection with, proceedings in a court of law; in a writ of entry upon a title by mortgage; and an agreement to refer that action, by rule of Court, and sundry other matters in controversy between the parties, to arbitrators, who made their award or report to the

Court, from which the rule had issued. The Court accepted it; but it is alleged declined to enter up judgment upon it. If the report was such that it could be accepted it is not easy to perceive why judgment should not have been entered up according to it. If it was such that judgment could not have been entered upon it, it is equally incomprehensible, that it should have been accepted. It is this award that the plaintiff seeks to have enforced, upon the ground that it is the result of an agreement in writing, or the terms of an agreement in writing ascertained by an award.

Some doubt has been entertained, whether a court of equity could be resorted to for the purpose of having an award of arbitrators carried into effect; but latterly this doubt seems to have been overcome, so far as it respects awards for the conveyance of real estate. *Jones* v. *Boston Mill Corporation*, 4 Pick. 507. It is believed that no decision has gone further than this. The award in the case before us goes further and embraces various other matters, all connected with the conveyance of real estate, so that we could not decree that it should be conveyed, without, at the same time, decreeing the performance of other extraneous matters. Under such circumstances, if there were no other difficulties in the way, we might well be expected to hesitate to proceed in the case.

But the plaintiff has sought his remedy at law; and has there proceeded till he had become apparently entitled to judgment in his favor. The report of the referees, under the rule of Court, having been accepted at his instigation, has placed him in this predicament. If he has been unfortunate in this particular it was of his own seeking. A court of equity cannot be required to step in and relieve him. In *Bateman* v. *Willoe*, 1 Schoales & Lefroy, 201, it was remarked by the chancellor, that "the inattention of parties, in a court of law, can scarcely be made a subject for a court of equity." And it has often been decided, that courts of equity cannot revise the doings of a court of law, unless they were procured by fraudulent practices. If new matter before unknown to a party has arisen, essentially varying the case as it stood at the

time of the decision at law, equity might afford relief, if its jurisdiction were general, or if it were specially conferred by statute, which is not the case in this State. And courts of general equity jurisdiction may afford relief in some cases in which a court of law is incompetent to do it. But this also is a power not conferred by our statutes, where a court of common law has already taken cognizance of the case. For a court of equity to be called upon to aid a court of law to carry into effect a proceeding pending before it, is believed to be unprecedented; and equally so to carry into effect a judgment which it may have rendered. And for this Court, with its limited equity powers, to do either would be clearly unwarranted.

If the agreement and award under a rule of Court have gone into judgment, as we should presume had been, or would be the case in this instance, there having been an acceptance of the report, there would be no longer an agreement in writing to be enforced; for both the agreement and award would be merged in the judgment. No action thereafter at law would lie, either upon the agreement or the award. The judgment would have become the security to be relied upon, and our equity powers, as we have seen, would not authorize us to carry it into effect.

Other difficulties, in the way of the right of the plaintiff to recover, still remain to be considered. If we were authorized to consider the case as exhibiting a simple arbitration and award, and could become satisfied of our power to enforce it, we could not proceed to do so until we had ascertained, that the award was at all points exactly in pursuance of the agreement. The first and principal item in the agreement to refer was the action then pending. Nothing is said about that in the award. Whether it was considered that the plaintiff had or had not a right to recover in that action, does not appear. Again; on looking into the agreement between the parties, it appears that they entered into certain obligations expressly to be performed in a certain event. The referees were to ascer-

tain any balance due, upon an adjustment of all demands between them, from the one party to the other; and prescribe the security to be given therefor. It was not agreed that they should award, that either party should make a conveyance of the real estate to the other, nor that they should determine when, or on what terms, any such conveyance should be made. As to both of these particulars the parties had expressly agreed between themselves; and to this effect, that "when the payments and securities so required shall be made, the said John shall make and execute a quitclaim deed in fee of said farm." The payments, or securities therefor, were to be first made; and then it was, and not till then, that the defendant was to make his deed. The arbitrators have proceeded to award "that the said John Bubier, within thirty days after the acceptance of this report by the Court, do make a quitclaim deed of the farm," &c. and then they proceed to award, that, "provided the security hereinafter required shall be given on the part of the said Samuel, he (the said John) shall peaceably surrender up the possession of the same (farm,) on or before the fifteenth day of April next, to the said Samuel." In the agreement the defendant had agreed to convey, the securities having been first made, without other specification of time. In the award the referees undertake to prescribe, that the deed shall be made at a specified time, without any reference to whether the securities had been made or not; thus varying the terms expressly agreed upon by the parties; and without power delegated to them so to do. No payment has ever been made, or securities given by the said Samuel, or any tender made of either. He has not, therefore, placed himself in a condition to demand a conveyance of the farm. The postscript to the agreement to refer, in which it is said, that all demands were referred, had reference doubtless to the conflicting claims set forth in the recital to the agreement, and cannot be construed to control the express stipulations between the parties, contained in the same agreement, as to what should be done in a certain event.

Viewing this case in every aspect in which it has been presented to us, we are unable to come to the conclusion, that it would be in conformity to the rules incident to equity jurisprudence, that we should afford the relief sought for.

*Bill dismissed.*

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF KENNEBEC.

ARGUED AT JUNE TERM, 1844.

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## Franklin Bank *versus* Otis Small.

The general rule is, that where personal property attached upon the writ, has been lost through the negligence of the attaching officer, or has been misappropriated by him, he is liable to the attaching creditor for the fair value of the property at the time it would have been taken on the execution, had it remained to be taken thereon.

There are exceptions, however, to this general rule; such as where the officer, immediately upon having attached the property, converts it to his own use; or where he should realize a greater value by a sale thereof; or should obtain it of a receiptor, or of some one who had tortiously taken it from him.

This was an action on the case against the late sheriff of the County of Penobscot, for the neglect of Aaron Haynes, one of his deputies, in not keeping safely property attached on a writ in favor of the plaintiffs against Luther Dwinal and others. The plaintiffs introduced a copy of the original writ upon which the attachment was made, by which it appeared that Haynes had attached "pine mill logs sufficient to make four hundred thousand of boards, being the same that are in" certain booms named. Judgment was obtained and execution duly issued thereon, and delivered to the then sheriff of the county, not the defendant, but his successor in office. There was no proof of any demand of the defendant or his deputy, who made the attachment, for the property attached, except the return of the sheriff to whom the execution was delivered, to which, as evidence of demand, the defendant objected.

SHEPLEY J. presiding at the trial, admitted it as *prima facie* evidence of demand. The defendant then offered evidence to prove that the logs, which were attached upon the writ, were not the property of the original debtor, as whose they were attached, but that at the time of the attachment, the owner of the land, where they had been cut, had a lien upon them for over $2000, and that there was also a lien for boomage; and introduced testimony to prove that one Rufus Dwinal, to whom the defendant committed the custody of the logs after attachment, caused them to be sawed at his expense. There was evidence tending to show, that the boards delivered to the proprietor of the land, where the logs were cut, were made out of the logs attached, and that the sawing, running and boomage, with the lien claims were equal to the value of all the logs, and also that the expenses of sawing, running and booming were incurred by the debtors; and there was evidence to show the contrary, and that about one half the boards made from them were delivered to the owner of the land in extinguishment of his lien, and that the expense of sawing, running to market, boomage, &c. amounted to the full value of the other half of said boards.

It was agreed, that the value of boards of all descriptions, made from said logs, was ten dollars per M. and that no farther evidence of the value of the logs should be produced on either side, and none was produced. The defendant contended, that in addition to the lien of the owner of the land, all the expenses of sawing, &c. actually incurred and paid by Dwinal should be deducted from the value of the boards, and that the defendant would be liable for no more than any balance which should then exist. The Judge instructed the jury, that the defendant was responsible for the full value of the logs, at the time of attachment; that if any lien existed in favor of the proprietors of the land, the amount of it should be deducted from that value; that if one half of said logs, when sawed into boards, extinguished said lien, the defendant would be responsible for the other half; that they were to look to the logs at the time of the attachment, ascertain their value

then, and from that value deduct the lien, if any existed, unless it was otherwise paid; and that to ascertain the value of the logs, they would take the agreement of the parties, that the boards cut from them, were worth ten dollars per M. and by allowing a reasonable price for manufacturing them, instead of the amount actually paid, the value of the logs might be ascertained. The jury returned a verdict for the plaintiffs for $1740,61.

If the instructions of the Judge were erroneous, the verdict was to be set aside, and a new trial granted; otherwise judgment was to be rendered thereon.

There was a motion for a new trial, on the part of the defendant, because the verdict was against the evidence; and a motion by the plaintiffs, that the verdict should be amended.

The case was argued at June Term, 1843, by

*Evans*, for the defendant; and by

*Wells*, for the plaintiffs.

The opinion of the Court was delivered at June Term, 1845, by

WHITMAN C. J. — Various exceptions have been taken to the rulings and instructions of the Judge, who presided at the trial; and upon one of the grounds relied upon, we think a new trial must be granted.

The Judge instructed the jury, that damages were to be assessed according to the value of the logs attached at the time of the attachment. The general rule in such cases is, as emphatically laid down in *Weld* v. *Green*, 1 Fairf. 20. Mr. C. J. Mellen, in that case, says, in reference to property attached on mesne process, and not seized by the attaching officer, Lambert, on execution, "Had it remained in Lambert's possession until execution, and been seized and sold thereon, the defendant would have been accountable only for the amount produced by the sale; and with this Weld (the creditor) must have been content; and why should the defendant be answerable in damages for a greater sum than the fair value of it, when not seized and sold on execution, but lost or misappro-

priated? See *Tyler* v. *Ulmer*, 12 Mass. R. 163. Such a sum would be the amount of injury sustained by the plaintiff; and that is the correct rule in the assessment of damages in such cases." The learned Chief Justice would not seem to have recognized any exception to this general rule. Cases, however, may be supposed, in which it would become reasonable to depart from it. If the officer, immediately upon having attached property, converts it to his own use, or if he should then realize the full value of it by a sale, or recover the same of receiptors, or of one who had tortiously taken it from him, a good reason would exist why he should be answerable to the creditor for such value. But the case before us is not within any such exception.

The officer must of necessity intrust some one with the care and custody of articles like those attached in this instance; and usually receipts are taken of such person, containing a stipulation to have the articles forthcoming on the issuing of an execution on the judgment to be recovered. The person receipting is, usually, some friend of the debtor's, procured by him for the purpose, who, it is understood, will allow the property to go back into the hands of the debtor. And this practice is sanctioned, to some extent at least, by usage, as tending at the same time, to the security of the creditor, and producing as little injury to the debtor as may be practicable. In this case it does not appear that a receipt was taken of the person intrusted by the officer with the custody of the property. Nevertheless the person so intrusted, may be believed to have been a friend of the debtor; for nothing is heard of any dissatisfaction from that quarter.

The case finds that the person so intrusted converted the lumber into boards; and disposed of them, partly to pay the amount due to the original owner of the lumber, who had agreed to part with it only upon the condition, that he should continue to be the owner of it until the agreed value of it, when standing, should have been paid for; and partly to pay the expense of manufacturing it into boards. The officer himself was guilty of no conversion of it; and it does not appear

that he has ever received any of the avails of it; and so would seem to be precisely within the principle, as to the damages to be assessed against him, laid down in the case cited. In that case the officer had delivered the property attached into the custody of a person deemed by him trustworthy and responsible; and in the case at bar, we have no reason to doubt, that the officer did the same; and in both cases the persons intrusted had so far converted the property to their own use, that they were unable to restore it to be taken on execution.

*New trial granted.*

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BENJAMIN L. LOMBARD *versus* EZRA FISKE *& al.*

Where the defendants, by a contract in writing, undertook "to clear him (the plaintiff) from all liabilities, tax, or assessment, that have or may arise, from his one share in the Scythe Factory," the name used by a company of unincorporated individuals who had associated to carry on the manufacture of scythes, of whom the plaintiff was a member, *it was held*, that the meaning was, that the defendants would indemnify the plaintiff for whatever of damage he might unavoidably sustain from his liabilities, that were strictly legal; and that if the plaintiff should be compelled to pay company debts, he should first seek his remedy over against his associates for all, except his share, and for the whole, if there was company property sufficient for the purpose.

And where a creditor of the company had obtained judgment against the individuals composing it, including the plaintiff and principal defendant, and had taken out execution, and the judgment debtors had been arrested thereon, and had severally given bonds; and afterwards one of the number agreed with the creditor to pay him the amount, and take an assignment of the judgment and bonds for his own benefit, to a third person, and the money was paid and the assignment was executed; and then a suit was brought, in the name of the creditor, against the plaintiff on his bond, and judgment was rendered by default for debt and costs, including the extra interest, given against the principal in such bonds by the statute, without notice given by him to the defendants, and the same was paid by the plaintiff; *it was held*, that even if the payment by one of the judgment debtors on the assignment to a third person, was not a payment and discharge of the judgment and bonds, the plaintiff was not entitled to recover of the defendants the extra interest so paid.

THIS is an action upon the following obligation. "Know all men by these presents, that I, Allen Fiske of Wayne, County

of Kennebec, State of Maine, as principal, and Ezra Fiske and Moses Hubbard, do covenant and bind ourselves in the sum of three hundred dollars to B. L. Lombard of said Wayne, to clear him from all liabilities, tax or assessment, that have or may arise from said Lombard's one share in the Scythe Factory in said Wayne. Given under our hands this 20th day of July, A. D. 1839." Signed by the above named E. and A. Fiske and Hubbard. The plaintiff proved, that at the time of the execution of said obligation he assigned, as the consideration therefor, his share in said factory as aforesaid, to Allen Fiske. It appeared in evidence that there was a voluntary association by articles of agreement, called the Wayne Scythe Manufacturing Company, with a capital stock of $4,000, divided into 40 shares of $100, each; that the said company, prior to the said assignment of the plaintiff's share, became indebted to Jonathan Hyde & Son, for articles procured of them for the use of the company; that the said Hydes caused their said demands to be sued against ten persons, as members of said company, among whom were Allen Fiske, Francis N. Fiske, Moses Hubbard, Asa Gile, and the plaintiff, and recovered judgment against them at the Middle District Court, in said county, Dec. Term, 1840, for the sum of $351,06, debt, and $19,98, costs; that execution on said judgment was duly issued and committed to an officer for service; that said officer arrested the plaintiff and all the other judgment debtors, save one, on said execution, and they severally gave a bond to the creditors, conditioned within six months to pay the debt, &c. agreeably to law in such cases; that prior to Nov. 23, 1841, $220, had been paid on said judgment and execution; and at that time a balance of $191,85 only was due thereon. The bonds aforesaid had all been forfeited before the 23d of Nov. aforesaid; that an action in the name of said Hydes was brought Feb. 25, 1842, against the said plaintiff and sureties, and four others and sureties, on the bonds by them respectively given upon their arrest, and judgment rendered in the action against the plaintiff and sureties upon defaults at said District Court, April Term, 1842, for the sum of $413,73, debt, and $9,32,

costs; that two executions were issued upon said judgment, one for the sum of $413,73, debt, and $9,32, costs, and the other for the sum of $60,23, extra interest upon said bond; that May 24, 1842, the plaintiff paid $165; Aug. 31st, 1842, $57,47, and on the same day, $54,20, on the execution for extra interest. The writ in this case bears date May 5, 1842.

The defendants introduced S. P. Benson, Esq. who testified that he was attorney for the said Hydes to collect their aforesaid demand against said Company; that the said Fiskes and Asa Gile had been at his office to obtain respectively an assignment of the judgment and execution aforesaid in favor of said Hydes against said Fiskes, Gile and others, and he declined acting in the matter without direction from the judgment creditors; that said Asa Gile, on the 29th of Nov. 1841, brought to him a line from the Messrs. Hydes, authorizing him upon the payment of the balance of said judgment and execution against said Gile and others, to assign said judgment and execution to said Gile, or some person for Gile's benefit; that on the said 23d day of Nov. the said Gile paid said Benson $110 in cash, and gave his note for $81,86, to be paid in a few days, which was paid first week of the Dec. District Court, being balance of said judgment and execution, and the full amount of the said Hydes' debt and costs; and that he, said Benson, in pursuance of authority brought by said Gile from the said Hydes, and upon the payment of said execution by said Gile, made an assignment of said judgment and execution to one E. E. Tuttle for the benefit of said Gile, leaving the execution undischarged for the balance aforesaid. The said Benson further testified, that in consequence of the following communication from the Messrs. Hydes, viz. "Bath, Jan. 19, 1842. S. P. Benson, Esq. Dear Sir, The bearer, Mr. Gile, has called on us to get our consent for you to assign to him, or some of his friends, certain bonds created by a suit of ours against the Wayne Scythe Company. In yours to us of Dec. 11, you say you have assigned to E. E. Tuttle the execution for the benefit of Asa Gile, and if you think proper you may

assign the bonds to the same person, provided it can be done in a way that we shall have no further trouble in the affair. Please understand we have no particular wish in the affair, and leave it entirely with you. Jonathan Hyde & Son;" and that he, on the 8th day of Feb. 1842, assigned the aforesaid bonds to said E. E. Tuttle.

Upon the foregoing proof, the counsel for the defendants contended, that the action could not be maintained; that the payment of the balance of the execution to Benson by Asa Gile, one of the judgment debtors, was a satisfaction and discharge of said judgment and execution; that the assignment of the judgment and execution to E. E. Tuttle for the benefit of Gile was inoperative and void, and also the assignment of the plaintiff's bond was void; that no action could be sustained on that bond against the plaintiff and his sureties; that the payment made by the plaintiff on the execution which arose from the bond, was made in his own wrong; that he was not bound to make it; that it was not one of the liabilities referred to in the obligation declared on; that nothing was paid by the plaintiff till after this suit; and that if this action could be maintained, that the plaintiff would not be entitled to recover for the extra interest, nor any thing more than one fortieth of the debt and cost recovered by the said Hydes in the original action against the company, or at most, one tenth of the original claim, being debt and costs of the said Hydes against the defendants in the original action.

Shepley J. the presiding Judge, instructed the jury, that the money paid by Gile to Mr. Benson was to be regarded as payment of the execution, and that the plaintiff would not be entitled to recover, unless they should be satisfied that it was paid in pursuance of an agreement before made to have the execution assigned to Edwin E. Tuttle, and to accomplish that object; and that it was so assigned; and that in such case, it would not operate as a payment, although the execution was assigned to Tuttle for the benefit of Gile, and the plaintiff might recover; and that he would in such case be entitled to

recover the amount which he had been compelled to pay by virtue of the judgment recovered against him on his bond.

The verdict was for the plaintiff, and the defendants excepted to the instruction of the presiding Judge.

*Emmons*, in his argument for the defendants, in support of his proposition, that the payment by Gile, one of the judgment debtors, to the attorney of the creditors, was a full discharge and satisfaction of the judgment and execution, and that of course, the bond given by Gile and others to discharge them from arrest on the same execution thereby became void, cited *Hammatt* v. *Wyman*, 9 Mass. R. 138; *Brackett* v. *Winslow*, 17 Mass. R. 153; *Stevens* v. *Morse*, 7 Greenl. 36.

That the legal effect of the assignment of the claim of Hyde & Son against Gile and others to a friend of his for his benefit, was the same as if assigned directly to him. 2 Story's Eq. § 1201; Law Lib. of March, 1843, 148. The prior agreement to have the assignment made to a friend, could not prevent the legal effect of the payment by Gile, who made the agreement, furnished the money, and was to have the benefit of the assignment.

In the construction of the obligation, the words are to be taken in a constricted sense. *Sumner* v. *Williams*, 8 Mass. R. 162.

*H. W. Paine* and *L. M. Morrill*, for the plaintiff, contended, that as the payment to the attorney of Hyde & Son was not to be, nor to be considered, as a payment of the debt, but merely as the consideration for the assignment, neither that, nor the assignment, was a discharge of the debt. *Allen* v. *Holden*, 9 Mass. R. 133; *Norton* v. *Soule*, 2 Greenl. 341; *Stevens* v. *Morse*, 7 Greenl. 36; *Herrick* v. *Bean*, 20 Maine R. 51.

If then the assignment was valid, the rule for assessing damages was right. The only fair construction to be put on the contract, whether we look at the letter or the spirit of it, is, that the defendants were fully and entirely to indemnify the plaintiff from all claims against him, as a member of the Scythe

Factory Company. Fiske purchased the plaintiff's interest in that company, and was in all respects to have his rights, and incur his liabilities. Fiske agreed to take the place of the plaintiff, and free him from all liabilities as member of that company. 20 Pick. 474.

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

WHITMAN C. J. — This action is founded upon a written contract between the parties in which the defendants undertake "to clear him (the plaintiff) from all liabilities, tax or assessment, that have or may arise from said Lombard's one share in the Scythe Factory." This was the name used by a company of unincorporated individuals, who had associated to carry on the manufacture of scythes, of whom the plaintiff was one. A correct interpretation of this contract becomes essential in order to understand the ground of the exceptions taken at the trial to the instruction of the Court to the jury.

The meaning would seem to be that the defendants would indemnify him for whatever of damage he might unavoidably sustain from his liabilites. Good faith was to be expected on his part; and that he would not wantonly allow himself to be subjected to greater damage therefrom, than might be unavoidable. The parties must have had in view liabilities that were strictly legal. If compelled to pay company debts, when he could have ample remedy over against his associates for all, except his share of them, or for the whole, in case of there being company property sufficient for the purpose, it would have been reasonable, and could hardly be deemed otherwise than that the understanding of the parties, was that he should seek his remedy from such source. It should be observed, that it is at least doubtful, if the defendants, by virtue of their contract with the plaintiff, could have had recourse to the company for any thing they might pay for the plaintiff. No privity of contract as to such payment would have existed between them. Any such payment by the defendants would have been, as it respected the company, a mere voluntary act. It would not

have been made as a member of the company. It surely could not be admissible for the plaintiff to pay all the company debts, and then turn round, by virtue of his contract with the defendants, and call upon them for the amount so paid, without an effort first made to recover the same of his associates. If the defendants were to reimburse him for such losses as were inevitable, it would seem that the terms of their contract, according to their true import, and according to what must have been the understanding of the parties, would be fulfilled.

How was the case here? The company were liable to Messrs. Hyde & Co. for a debt of something short of $400, for which judgment had been recovered; on which execution issued, and, before the 23d of Nov. 1841, had been satisfied in part, leaving due on it only $191,85. Gile, one of the debtors in the execution, afterwards paid the balance due on it; and procured an assignment of it, as if unsatisfied in any part, to a confidential friend of his, and also of the bonds, which had been given by each of his associates, that of the plaintiff's being one of them, which had been given upon the arrest of each on the execution; and subsequently, in the name of Hyde & Co. caused suits to be instituted against several of them; and against the plaintiff among the rest, who suffered judgment thereon to be entered against himself, upon default, for the full amount due on the execution, as if no payments had been made on it; together with $54,20, for extra interest, as provided by law against the principals in such bonds, and actually paid for the benefit of his associate, Gile, this extra interest; and two hundred and twenty-two dollars of the principal; and all this, so far as appears, without notifying the defendants of the existence of any such claim; and now calls upon the defendants, under the contract with them, for reimbursement of the whole amount so by him paid; and a verdict has been returned therefor in his favor.

It was objected at the trial, that, when Gile, he being one of the debtors, paid the balance due on the execution, it was satisfied; and that an assignment thereof to his friend, by the name of Tuttle, was nugatory; and that no action could there-

after be legally maintained upon the plaintiff's bond, given on arrest, on the execution, of himself, and the other associates. And at any rate, that nothing could be recovered for the extra interest paid by him in that case. The Court, however, ruled at the trial, and so instructed the jury, that if Gile paid the balance due on the execution, in pursuance of an agreement before made, to have the execution assigned to Tuttle; and to accomplish that object, it was so assigned, although for the benefit of Gile, that the plaintiff might recover the amount, which he had been compelled to pay by virtue of the judgment recovered against him on his bond. The jury found for the plaintiff, it may be presumed, as exceptions are filed by the defendant; and to the full amount claimed.

The question is, was the instruction such as ought to have been given? Was the assignment by Hyde & Co. of the execution and bonds, under the circumstances attending it, to Tuttle, for the benefit of Gile, of any validity? or, in other words; did not the payment by Gile, of the amount due, he being one of the debtors, render both *functus officio?* How does it vary the case that it was made nominally to his confidential friend, at his request, and solely for his benefit? The law should not regard mere shadowy forms in the transaction of business; it should look to the substance of things. Gile, the debtor, paid the full amount due; and was liable for that amount. The creditors were completely satisfied. Could the execution and bonds afterwards be deemed in force in the hands of any one?

It would seem difficult to believe, that this recovery against the present plaintiff, could have been had without collusion between him and Gile. Gile in his own name, could have recovered of him not exceeding one tenth part of the amount due and paid by him, there having been ten debtors, against whom the execution issued; yet he seems voluntarily to have paid the whole; for he made not the slightest resistance to prevent the recovery of it of himself.

But clearly the exceptions must be sustained, and a new trial be granted in reference to the extra interest, a liability for

which, was voluntarily incurred by the plaintiff. The plaintiff had been sued by Hyde & Co.; had suffered judgment to go against him by default, and execution to issue; and had given a bond in the usual form; and incurred a breach of its condition, without, so far as appears, calling upon or notifying the defendants of any such accruing liability. Surely they ought to have been apprised of these proceedings, if they were to be rendered responsible for the whole amount ultimately to be recovered. They should at least have been allowed an opportunity to take all needful measures in defence.

*Exceptions sustained;*
*new trial granted.*

The following dissenting opinion was delivered by

SHEPLEY J. — Certain persons associated under the name of the Wayne Scythe Manufacturing Company, became indebted to Messrs. Jonathan Hyde & Son, who brought a suit against them, and recovered judgment against the plaintiff, the defendants, Asa Gile, and several others. Upon an execution issued thereon, the judgment debtors, with the exception of one, were arrested and gave bonds according to the provisions of the statute. These bonds were forfeited; and the judgment had been partly paid, when Gile, one of the judgment debtors, applied to the judgment creditors to obtain an assignment of the judgment and execution to him or to some person for his benefit. To this they assented, and in writing gave their attorney authority to make such an assignment upon payment of the amount due to them. Gile, in accordance with this arrangement, paid and secured to their attorney that amount, and took an assignment in writing of the judgment and execution to Edwin E. Tuttle for his own benefit. There can be no doubt, that it was the intention of all parties to make a sale and purchase of the judgment, and an assignment and not a payment of it; and that intention should be carried into effect, if it be competent for a judgment debtor to make a purchase of a judgment against himself and others. May not one of several makers of a negotiable promissory note, or bill of ex-

change, before it becomes due, lawfully purchase and make sale of it? What legal principle is violated by it? It is not perceived, that there could be any legal objection to one of several makers becoming the equitable owner by purchase of a promissory note not negotiable. There might be some difficulty in the complex transactions of business in determining, whether the note was paid or purchased; but it would have reference to the fact and not to the law of the case. Such a purchase would not deprive the other parties to the paper of any legal right. Their rights upon a payment of the whole, or more than their proportion, would remain unaltered. And the original holder might, as well as the purchaser, compel any one of the makers to pay the whole. The form in which the debt may exist would not seem to make any difference respecting the right of purchase and sale. The collection of a judgment assigned must be enforced in the name of the creditor, who might, without an assignment or sale, agree with one of the judgment debtors to collect it partly or wholly of one or more of the debtors, according to the pleasure of that one. By making an assignment to him he would but enable him to accomplish the same purpose. The jury have found under instructions sufficiently favorable, on this point at least, to the defendants and upon testimony fully authorizing them, that the money was paid in pursuance of an agreement for an assignment of the judgment, and not in payment of it, and that it was assigned accordingly. The decision in the case of *Dunn* v. *Snell*, 15 Mass. R. 481, sanctioned an assignment by a verbal agreement to an officer, who, having neglected his duty, paid the debt to the creditor to obtain the benefit of the execution. The cases of *Hammatt* v. *Wyman*, 9 Mass. R. 138; and *Brackett* v. *Winslow*, 17 Mass. R. 153, were cases of payment by one of the judgment debtors without any sale or assignment by the judgment creditor as the consideration for the payment. That of *Stevens* v. *Morse*, 7 Greenl. 36, was of a like character, except that the payment was made by a third person, out of what was regarded as the property of one of the debtors. And there is a strong implication in the

reasoning of the opinion, that an assignment by the creditor would have been considered as good. If an assignment to a judgment debtor could not have been good, it would seem to have been unnecessary in all these cases to have labored to prove the transactions, constituted a payment, and not an assignment. In the case of *Nickerson* v. *Whittier*, 20 Maine R. 223, a surety was permitted by an agreement to acquire the beneficial interest in a judgment against himself and the principal.

The *transfusio unius creditoris in alium* of the civil law is usually denominated subrogation. When the relation of debtor and creditor subsists between two persons only, and the debtor pays with his own money, the claim is extinguished. When a third person pays the debt, he is entitled to be subrogated to the rights of the creditor. Inst. Just. c. 3, tit. 29; Dig. c. 36, 39. When the debt was due from several persons, their rights in this respect were regulated by the civil code of France, which declared, that a joint debt due from several debtors would not be necessarily extinguished by a payment made by one of them from his own funds, but that he would be entitled to a subrogation of the rights of the creditor. Code civil, liv. 3, tit. 3, § 11, art. 1250, 1251. When one of several joint debtors stipulates before payment for a cession of the rights of the creditor to a third person for his benefit, he does but effect by agreement, what by the French law he would obtain without it in a more direct form to himself. The other debtors are not injured by such an arrangement; and there can be no technical difficulties in the common law to prevent its being effectual; for in such case the rights of the creditor and debtor do not become united in the same person.

The other point presented by the exceptions arises out of the instructions respecting the amount, which the plaintiff might be entitled to recover. He owned only one out of forty shares, into which the capital of the associates was divided, when the debt due to the Messrs. Hydes was contracted; and there were then ten associates. It is contended, that the plaintiff is entitled to recover of the defendants only one

fortieth, or at most, one tenth part of what he was obliged to pay on account of the neglect to pay the debt. And that he must look to his associates for the remainder. After the debt was contracted the plaintiff sold his share to one of the defendants, or rather appears to have transferred it to him for the purpose of obtaining an indemnity against all liabilities on account of it; and received therefor an obligation in the following words: — "Know all men by these presents, that I, Allen Fiske of Wayne, County of Kennebec, State of Maine, as principal, and Ezra Fiske and Moses Hubbard, do covenant and bind ourselves in the sum of three hundred dollars to B. L. Lombard of said Wayne, to clear him from all liabilities, tax, or assessment, that have or may arise from said Lombard's one share in the scythe factory in said Wayne. Given under our hands this 20th July, A. D. 1839." If it should be considered to be the intention of the parties to relieve the plaintiff only from the payment of any tax or assessment, which must be made equally upon all the shares, the word "liabilities" would have no effect or influence upon the contract, which also contemplated a relief from past as well as future liabilities by the use of the words, "that have or may arise." The language of the contract is not only sufficiently comprehensive to include all liabilities, to which the plaintiff might in any legal manner be subjected by reason of his having been the owner of that one share, but effect cannot be given to the whole of it by a more restricted construction. The intention appears to have been, that Fiske should assume the position and rights of the plaintiff, and be subjected to all his liabilities, as one of the associates; and that the plaintiff should be free from them. As one of the associates, the plaintiff might be compelled to pay all their debts, and to look to them for repayment. And this would seem to furnish sufficient cause to induce him to surrender the share to be relieved from that responsibility. If he obtained an indemnity for only one fortieth part of the risk, the object would be greatly defeated; and the purchaser would pay nothing for it but its equal share of all assessments. There does not appear to be any ground,

on which the position can be sustained, that the design was to indemnify the plaintiff against one tenth only of any payments, to which he might be subjected.

Ten persons appear to have become associates in business under a company name. The capital or stock was divided into shares, and was held by them in unequal proportions. By the terms of their association any one might sell his share and retire from the association, and the purchaser, if not already a member, might be admitted with all the rights and subject equitably, as between the associates, to all the liabilites of the retiring member. Without any stipulation therefore between the seller and the purchaser it would be the duty of the purchaser and his associates to apply the capital to the payment of all preexisting debts. This contract, therefore, does no more than to compel the performance of that duty, if there was sufficient capital, and to save the seller from harm by reason of his liability to the creditors of the company. If there was not sufficient capital to pay the debts, it would require the purchaser to become responsible for them, and to relieve the seller from being injured by his liability to pay them. With what justice or propriety then can the purchaser in this case, who was already a member of the association and liable as such, insist, that the seller should pay the whole debt, and then only call upon him to pay simply the amount, which the holder of one share ought to pay? And do this, when his own contract with the plaintiff declares, that he shall clear him from liabilities, that have or may arise from that share? And with what justice does he complain of the amount recovered against him, when by his neglect and by a violation of his contract he allows a suit to be brought against the plaintiff, and his body to be arrested on an execution issued on the judgment recovered in that suit, and leaves him to relieve himself from actual imprisonment by procuring a statute bond, and then on its forfeiture to pay the money due, to discharge the debt and costs, to save his own property and that of his sureties from being sold on execution? The plaintiff claims to recover only the amount, which he was legally obliged to pay without any

compensation for the trouble and vexation occasioned by an arrest. And the purchaser now insists, that the plaintiff should collect of each other member of the association, his just proportion of that debt, before he can resort to him on his contract of indemnity. But this association is but a partnership, and if the plaintiff is to be considered as yet a partner as between themselves, so far as respects transactions occurring before his sale, he can maintain no suit against each copartner for his proportion of a debt due from the partnership; nor any suit against the partnership, until the partnership concerns have been adjusted. If on a sale of his stock or share, he ceased to be a partner by the consent of his former associates, then, by a payment of a partnership debt for the benefit of the association, he could maintain a suit against all the members of the association to recover from them the money so paid for their use. And could recover the amount now claimed of those defendants, who were members of the association, if he had not taken a contract of indemnity. But to turn the plaintiff over to such remedy is to deprive him of all substantial benefit from his contract. It is said, that the defendants, if the plaintiff should collect the amount of them, could not obtain their indemnity from the association. Two of them are sureties for the other, and like other sureties their claim will be upon their principal; who was a member of the company, and as such will have all the same rights and remedies, which he would have had, if he had, as a member of the company, paid the debt to Hyde & Son, without entering into this contract with the plaintiff; that is, the full rights of a partner, who has paid the debt of the firm. Complaint has been made, that the plaintiff suffered a default to be entered in the suit upon his bond and a judgment to be entered up for interest on the debt at the rate of twenty-four per cent. without notice to the defendants. It appears, that the principal defendant was a debtor in the same execution, on which the plaintiff was arrested, and that he also was arrested and gave a poor debtor's bond. The return of the officer on that execution was open to inspection. If that defendant had paid the debt, the plain-

tiff would have been relieved from the performance of the condition of his bond. It will therefore be perceived, that the principal defendant must have been discharged by taking the poor debtor's oath, or must have forfeited his own bond. These proceedings cannot be supposed to have taken place without his becoming fully informed, what proceedings had taken place in respect to his joint debtor, whom he had engaged "to clear from all liabilities." It is not perceived, that there can be any other foundation for the suggestion of collusion between the plaintiff and Gile, than the suffering a default and judgment to be entered as before stated; and it does not appear, that the plaintiff could have made any legal defence in that suit. And he might reasonably expect that judgment would be legally made up by the Court, or its officers, for the amount due, as that amount was disclosed by the papers in the case. And the payment on the execution appears to have been made on it after he had been arrested and not by himself; and he being no longer interested in the company could not be expected to be informed of payments made by it. Under such circumstances the rights of the plaintiff cannot be justly affected by such a suggestion without some direct proof of it. The interest at the rate of twenty-four per cent. was a penalty imposed by law, from which the plaintiff could not escape without a performance of his bond. From that and all other trouble arising from the company debts, it was the duty of the principal defendant to have relieved him; and it ill becomes him to blame the plaintiff for consequences resulting from his own neglect and breach of contract.

## The State *versus* Solomon Bruce.

Where there are two counts in an indictment, properly joined, and the respondent is found guilty on both, the attorney for the State may afterwards, before judgment, enter a *nolle prosequi* as to one of the counts.

It is not competent for the respondent to prove on the trial of an indictment, that a witness, introduced by the attorney for the State, "bore a notoriously infamous character."

On the trial of an indictment wherein the accused is charged with having obtained property of a witness by means of threats, testimony to prove that the same property was afterwards found, "in a concealed state in the dwellinghouse of" the accused, is admissible, as it might have a tendency to corroborate the testimony of the witness by satisfying the jury, that the respondent was conscious of having improperly obtained it.

An instruction to the jury, on such trial, that if the threats were maliciously made, with intent thereby to extort the property from the owner, it was immaterial whether they did or did not produce any effect upon the mind of such owner, is correct; as the offence consists in maliciously threatening to accuse one of an offence, or to injure his person or property, with intent to extort money or pecuniary advantage, or with intent to compel him to do an act against his will.

A person whose property has been stolen, has himself no power to punish the thief without process of law, and cannot claim the right to obtain compensation for the loss of his property by maliciously threatening to accuse him of the offence, or to do an injury to his person or property, with intent to extort property from him.

This was an indictment, it would seem, under the twenty-sixth section of Rev. Stat. c. 154. The indictment is referred to in the bill of exceptions, but no copy is found in the papers, and the bill does not show the offence charged, further than may be implied from the requests for instruction, and the instructions given. The opinion of the Court gives all the material portions of the exceptions.

*D. C. Weston & Pike*, for Bruce.

*Paine*, County Attorney, for the State.

The opinion of the Court was by

Shepley J. — It appears from the bill of exceptions, that on the trial of the defendant upon an indictment, containing two counts, he was found guilty upon the first and not guilty

upon the second count. It states, that, "at the same term, on motion of the defendant and by consent of the county attorney, the Court ordered, that the verdict be set aside and a new trial granted."

The defendant having been put upon his trial again at a subsequent term, contended that he could not be tried again upon the second count. The Court decided otherwise; and he was upon the last trial found guilty upon both counts. The attorney for the State, at the argument, entered a *nolle prosequi* as to the second count. This he might do; and the defendant cannot be injured by those proceedings unless they had an unfavorable influence upon his trial on the first count. *State* v. *Whittier*, 8 Shepl. 341. It does not appear from the bill of exceptions, that they could have had any such influence; for all the instructions complained of are stated to have had reference to the first count only. It is not therefore necessary to inquire, whether the defendant was or not properly put upon his trial upon both counts, after the first verdict had been set aside without limitation and by consent.

The testimony offered to prove, that a witness introduced by the government, "bore a notoriously infamous character," was properly excluded. *Phillips* v. *Kingfield*, 1 Appl. 375.

The testimony to prove, "that some of the property, which the defendant was charged with having obtained by means of threats from Lyon, was afterwards found in a concealed state in the dwellinghouse of said Bruce," was properly admitted. It might have a tendency to corroborate the testimony of the witness by satisfying the jury, that the defendant was conscious of having improperly obtained it.

The instructions, "that if the threats were maliciously made with intent thereby to extort the property from Lyon, it was immaterial, whether they did or did not produce any effect upon the mind of Lyon," were correct. The offence is not made by the statute, c. 154, § 26, to consist in the effect, which the threats may have had upon the person, or in the fact, that property was thereby obtained; but in maliciously threatening to accuse him of an offence, or to injure his person

or property, with intent to extort money or pecuniary advantage, or with intent to compel him to do an act against his will.

The instructions, "that if the defendant made the threat maliciously and with intent thereby to extort property from Lyon, it was not essential in the case, whether the said Lyon had been caught by the said Bruce in the act of stealing the property of the said Bruce or not," were also correct. A person whose property has been stolen cannot claim the right to punish the thief himself without process of law, and to make him compensate him for the loss of his property by maliciously threatening to accuse him of the offence, or to do an injury to his person or property, with intent to extort property from him. A threat made by one, whose goods had been stolen, that he would prosecute the supposed thief for the offence, if there were grounds to suspect him to be guilty, could not be considered as made maliciously and with intent to extort property, unless there were other proofs of malice and intended extortion. Nor do the instructions so state. The testimony to prove the malice and intended extortion is not presented; and it must be presumed to have been sufficient and satisfactory, especially after the defendant has been found guilty by two juries.

*Exceptions overruled.*

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JAMES N. COOPER *versus* RUFUS K. PAGE.

Where there is a guaranty by a third person to pay the amount due on a note, then payable, at a stipulated time, no demand on the maker of the note, or notice to the guarantor, is required to make the latter liable on his guaranty.

If one, in consideration of fifteen dollars, guaranties the payment of the note of a third person for three hundred dollars, and the contract of guaranty is broken, the note remaining unpaid, the damages to be recovered, are — not the consideration paid — but the amount due on the note guarantied.

THIS was an action on a written guaranty of a promissory note signed by Charles D. Lemont, and payable to the plaintiff and A. Cooper, deceased, and dated Nov. 1841, for $358,20.

A copy of the guaranty follows.

"I hereby guaranty the payment of a balance due on the note to J. N. & A. Cooper, dated Nov. 1, 1841, signed C. D. Lemont, within sixty days from the second day of May, 1843, balance due this day, $290,22. Rufus K. Page."

"Rec'd fourteen dollars and $\frac{64}{100}$ for the guaranty. R. K. P."

The counsel for the defendant contended, 1st, that the paper called a guaranty, did not on the face of it present a legal contract on which the plaintiff could recover. And 2d, that if he was legally entitled to recover, he was entitled to recover only the amount paid for the guaranty, being $14,64.

These objections were overruled, and the jury were otherwise instructed.

The defendant also contended that the guaranty was obtained by fraud. The testimony, on that point, was submitted to the jury, and a verdict was found for the plaintiff. In the consideration of the last point, the counsel for the defendant contended that there was no consideration for the note. It appeared to have been given on a settlement of account, and for a balance arising from freight of goods larger than the note, that balance being found against the said Lemont, who was master of a vessel partly owned by the plaintiff, and had signed a bill of lading for the goods, which he did not deliver to the consignee according to the bill of lading; the charge being for the freight of the whole goods, which was not paid on account of the short delivery.

The said Lemont was introduced as a witness and testified that the mate attended to the reception of the goods on board the vessel, and that he did not; that he signed the bill of lading according to the account of the mate; and that the goods were never in fact on board, or were removed by the mate without his knowledge before he sailed.

The jury were instructed by SHEPLEY J. presiding at the trial, that if the guaranty was not obtained by fraud, but fairly and without deception, the plaintiff would be entitled to recover.

To which rulings and instructions the defendant excepted.

*Wells* argued for the defendant, citing 2 Hill, 139; *Oxford Bank* v. *Haynes*, 8 Pick. 429; Bayley on Bills, 577; 7 Wend. 569; 7 Louis. R. 377; *Hill* v. *Buckminster*, 5 Pick. 391; *Cobb* v. *Little*, 2 Greenl. 261.

*F. Allen*, for the plaintiff, was stopped by the Court.

The opinion of the Court was by

TENNEY J. — On Nov. 1, 1841, one Lemont gave to the plaintiff and his partner, who has since deceased, a promissory note of hand on demand and interest, for a balance of accounts arising from the freight of a vessel, of which the payees were part owners, and the maker was master. The settlement was based partly upon a bill of lading of certain merchandise signed by the master, but which he thought embraced some articles, that were not in fact received, or were taken out by the mate, before the vessel sailed. On May 2, 1843, Lemont paid one hundred dollars upon the note and the defendant for the consideration of $14,64, signed the following memorandum on the back of the note: — "I hereby guaranty the payment of balance due on note to J. N. and A. Cooper, dated Nov. 1, 1841, signed C. D. Lemont, within sixty days from the second day of May, 1843, balance due this day, $292,22." There was no evidence in the case, that Lemont was insolvent or unable to pay the note.

The jury were instructed, that if the guaranty was not obtained by fraud, but fairly and without deception, the plaintiff would be entitled to recover the full amount of the balance due upon the note, to which instructions the defendant filed exceptions.

It is insisted for the defendant, that to entitle the plaintiff to recover of him, it was necessary, that he should have attempted to collect the debt of the maker by suit; or that he should at least make demand of payment of the maker, and on his refusal to pay, give notice thereof to the defendant. It has repeatedly been held in this State and Massachusetts that when the promise of the guarantor is absolute, that the note shall be paid at the time stipulated, which time is after it be-

comes payable by the maker, no demand or notice is required. *Cobb* v. *Little*, 2 Greenl. 261; *Norton* v. *Eastman*, 4 Greenl. 421; *Read* v. *Cutts*, 7 Greenl. 186, and cases cited; *Tenney* v. *Prince*, 4 Pick. 385. The case of the *Oxford Bank* v. *Haynes*, 8 Pick. 423, cited for the defendant, was where Haynes signed the memorandum, "I guaranty the within note," before it was discounted at the bank. It was payable in sixty days, and was suffered to remain for a balance, for a long time after its maturity, between which and the commencement of the action against Haynes, the makers had become insolvent; the Court held that Haynes was not liable, "because both promissors of the note were solvent, when it became due, and that they had abundant property liable to attachment. But the plaintiffs, with a knowledge of their delinquency, lay by nine months, during which time their property was sacrificed and all hopes of obtaining payment were by that means lost."

The objection, that the note was without consideration, cannot avail. It was given for that which was due by reason of the maker's written acknowledgment in the bill of lading. With a knowledge of all the facts, he gave the note, which he afterwards recognized as a valid contract by a payment thereon.

There is nothing in the contract of guaranty, which shows it usurious. If the ground had been taken at the trial, that it was a device of the parties, got up to avoid the statute of usury, the question might have been submitted to the jury upon proper evidence; that was not done and the defendant is concluded upon that point.

Again it is contended, that the plaintiff can recover only the sum paid to the defendant and interest thereon. The contract was upon a consideration, which was legal; the understanding of the parties cannot be doubted, and must be carried into effect. The cases relied upon for the defendant in support of his proposition were actions of indorsees against indorsers of negotiable securites, which were good and available in the hands of the latter, at a greater discount than legal interest, and the damages were confined to the amount paid and interest thereon. The damages in this case, as in those ordinarily

brought for non-performance of a contract, must be the sum promised and the interest from the time it was payable.

Whether the plaintiff will be entitled to the note on paying the amount, is a question not raised at the trial, and we do not perceive that its decision is at all connected with the points presented.

*Exceptions overruled.*

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THE STATE *versus* JOHN DUNLAP.

On the trial of an indictment, under the statute, for cheating by false pretences, the offence is complete, if there be one pretence, and that proved to be false, and made with a fraudulent design to obtain credit for goods, and credit is induced to be given thereby, although the indictment charges that the goods were obtained by more than one false pretence.

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

This was an indictment against Dunlap for obtaining goods of one Carroll by false pretences.

The facts appearing in the exceptions are found in the opinion of the Court, and also the instruction of the presiding Judge. The verdict was, that the respondent was guilty.

*Rice*, for the respondent, contended that the instruction to the jury was erroneous; and cited 1 Wheeler's Criminal Cases, 448; 2 Wheeler's Cr. Cas. 161; 13 Wend. 87; *Comm.* v. *Drew*, 19 Pick. 185; 4 City Hall Rec. 156; 1 C. & P. 661.

*H. W. Paine*, County Attorney, for the State, cited 11 Wend. 557; *Comm.* v. *Drew*, 19 Pick. 179; and *State* v. *Mills*, 17 Maine R. 211.

The opinion of the Court was drawn up by

WHITMAN C. J.—This is an indictment under the statute, for cheating by false pretences: and the case comes before us upon exceptions taken to the instructions of the Judge to the jury, on the trial in the Court below. These were, as stated in the exceptions, that, "if said representations constituted any

part of the inducement of Carroll to part with the goods, the offence was made out: That, if any one of the false pretences had the effect, though the others were inoperative, the offence was made out." The exceptions commenced with stating, that Carroll testified that the defendant made the representations as charged, and that they were proved to have been false. What the representations charged were, the exceptions do not show. We must presume that they were such as would support the indictment, if proved to be false, and were intended to defraud Carroll of his property, and had that effect. The charge of the Judge would seem to have been in substance that if any one of them were so designed, and had that effect, the offence was made out. And we think the cases of the *Commonwealth* v. *Drew*, 19 Pick. 179; and *The State* v. *Mills*, 17 Maine R. 211, fully sustain the charge. The discussions in those two cases were elaborate; reviewing all the cases cited by the counsel for the defendant in this case, and overruling the dictum cited from Wheeler's criminal cases. Indeed the decisions in the Supreme Court of New York, (*People* v. *Stone*; 9 Wend. 182; and *People* v. *Haynes*, 11 *ib.* 557,) have done the same. There can be no rational doubt, if there be one pretence, and that proved to be false, and made with a fraudulent design to obtain credit for goods, and credit is induced to be given thereby, that the offence is complete.

*Exceptions overruled.*

## Isaac Cowan *versus* David Wheeler.

No point, or question, is open on the hearing and determination of the law of the case, brought before the Court by bill of exceptions, which does not appear thereby to have been made on the trial of the issue.

A request that a particular instruction should be given to the jury, may be legally withheld, whenever it requires the Judge to assume a fact, which, if existing, was not established conclusively between the parties; and the existence of which was denied by the opposing party.

Where a claim for rent of certain real estate was filed in set-off; and the plaintiff objected, that the same estate was holden by the defendant in trust for the use of the plaintiff, the most that could with propriety have been requested of the presiding Judge, with reference to the allowance of the item, no question being there made as to the legal right to file such item in set-off, was, that the jury should be instructed to consider whether the rent claimed accrued from an estate held in trust by the defendant for the use of the plaintiff; and if they found that it did, to disallow it, otherwise to allow it.

Assumpsit upon an account annexed to the plaintiff's writ. An account was duly filed in set-off. The accounts were submitted to an auditor, and the only information, as to the words in which the controverted claim was stated, appearing in the papers, was in the following extract from the auditor's report. "Wheeler charges Cowan rent for the Barrows farm. The legal title is in Wheeler; but Cowan claims, that Wheeler holds it, or a part of it, merely in trust for Cowan."

The bill of exceptions refers to several papers, as read to the jury, copies of a portion of which are not among the papers; and sets forth the testimony of several witnesses; and concludes thus. "Upon this evidence the counsel for the plaintiff contended, that the trust thus set up, not being of common law jurisdiction, and not properly cognizable by the jury, the rent claimed by the defendant, growing out of the land alleged to be by him held in trust, was incident to it and inseparably connected with it; and he requested the presiding Judge, (Shepley J.) to rule, that that item ought legally to be withdrawn from the consideration of the jury, that the whole might be determined, if not otherwise settled, by a court of equity, who would have jurisdiction of the whole matter, both the

trust and the rent claimed, which was properly an incident and accessary thereto. But the presiding Judge declined so to rule. To the refusal of the presiding Judge to rule as above requested, the counsel for the plaintiff excepts."

No other ruling, or instruction, or request therefor, appears in the exceptions.

The verdict was for the defendant, and the jury allowed the item for rent, or some portion of it.

*N. Weston*, in his argument for the plaintiff, insisted that the requested instruction was erroneously withheld; and also contended, that the item for rent was not the proper subject of set-off.

*Wells*, for the defendant.

The opinion of the Court was drawn up by

WHITMAN C. J. — After the evidence had been closed in this case, the counsel for the plaintiff requested the presiding Judge to rule, that the item in the defendant's set-off, for the rent of the Barrows farm, should be excluded from the consideration of the jury; insisting that it was an item proper only for the consideration of a court of equity, as arising from the use of said farm, alleged by him to have been held in trust by the defendant for the plaintiff's use. The exception taken was to the refusal of the Judge so to instruct the jury. And no objection appears to have been made that such an item could not legally, under the provisions of the statute, authorizing the filing of cross demands in set-off, be admissible. Any such objection would seem to have been waived at the trial.

In argument now however, it is contended, that such an item could not legally have been filed in set-off. But we are to look with a single eye to the matter of the exceptions; and it seems very clear that the ruling requested, had no reference to any such question. So far as it regards the exceptions, therefore, we must consider this point as not in controversy; and we must inquire simply, whether the Judge did right in refusing the requested instruction or ruling, upon the ground insisted upon at the trial. In the first place, it required the Judge

to assume a fact, which, if existing, was not established conclusively between the parties; and the existence of which was denied by the defendant, viz., that the Barrows farm was holden by him in trust for the use of the plaintiff. And, in reference to this matter, it is alleged, that a bill in equity is pending between the parties, in which that question remains in controversy; and which the scope of the requested ruling indicates was not to be settled in this action. The most that could have been requested of the Judge, as to the propriety of allowing the item, no question having been made as to the legal right to file any such item in set-off, was, that the jury should be instructed to consider whether the rent claimed accrued from an estate held in trust by the defendant for the use of the plaintiff; and, if they found that it did, to disallow it, if otherwise to allow it. The exception, therefore, must be overruled.

But the plaintiff requests, that we should suspend the entering up of judgment upon the verdict, till his motion for an injunction, said to be pending under his bill in equity, for a stay of judgment or execution, shall have been decided. If by the verdict it should be made apparent, that, at law, the defendant has availed himself of an indemnity for all his advances in payment for the Barrows farm, out of the funds of the plaintiff; and that he holds the title to the same in trust for the benefit of the plaintiff, or of his wife, it may be that a decree should be made, requiring the transfer of the legal title to the *cestui que use*. And if, by a proceeding at law, the defendant has obtained a verdict for a balance, growing out of his legal ownership of the farm, and of the rents and profits thereof, over and above an indemnity for all his advances on account thereof, it may be reasonable, perhaps, that he should be enjoined against proceeding further to enforce his claim under the verdict. The entering up of judgment, therefore, may be suspended until the motion for the injunction shall have been decided.

JAMES T. MCCOBB *versus* WILLIAM RICHARDSON & *al. Ex'rs.*

Where the fact is equally unknown to both parties; or where each has equal information; or where the fact is doubtful from its own nature; in every such case, if the parties have acted with entire good faith, a court of equity will not interpose.

Where there was a sale of timber lands, lying in the wilderness, remote from the residence of the parties, which neither had ever seen, and of which neither had any other knowledge than from the certificates, then in the possession of a third person, and to which they had equal access, of two individuals, equally unknown to the parties, wherein was stated the amount of timber the signers thereof said they believed from examination to be upon the land; and no other representations were made by the seller to the purchaser than a mere reference to those certificates; but when in fact, as it afterwards turned out, there was not one fifteenth part of the timber upon the land, at the time, that there was represented to have been in the certificates; this is not such a case of mutual mistake as will authorize a court of equity to rescind the contract, and decree a restoration of the purchase money.

THIS was a bill in equity, and was heard on bill, answer and proof.

On July 6, 1835, the plaintiff purchased of James Hall, the testator, his interest in one undivided eighth part of a tract of twelve thousand acres of land in the County of Washington, by virtue of a bond from the owners thereof, at four dollars and one eighth of a dollar per acre. Hall had purchased one fourth of the same tract, on June 10, 1835, at the same price per acre.

The facts stated in the opinion of the Court are sufficient to understand the grounds of the decision.

The case was fully argued by

*N. Weston*, for the plaintiff; and by

*Wells*, for the executors.

The main positions on which the counsel for the plaintiff claimed to maintain the bill are stated in the opinion of the Court. In support of his argument, the plaintiff's counsel cited 1 Story's Eq. § 140, 142; Evans' Pothier on Oblig. p. 1, c. 1, note 18; 2 Kent, 468; 17 Ves. 394; 4 Mason, 418; *Hammond* v. *Allen*, 2 Sumn. 387; same case, 11 Peters, 63; *Daniel* v. *Mitchell*, 1 Story's R. 172; 1 Green's Ch. R. 277.

The code Napoleon gives relief in mistakes as to the quantity of land conveyed, and so does the code of Louisiana.

That the plaintiff was not barred of his rights by the lapse of time, the statute of limitations not having been pleaded. 2 Saund. 283, note 2; Gould on Pl. 332; 3 P. Wms. 126; 2 Story's Eq. § 1521; Angel on Lim. 333; 2 Wms. Ex'rs. 1110.

The counsel for the executors of Hall's will, examined the cases cited in support of the bill, and insisted that they did not apply to a case like this. Here was no fraud, and the parties had precisely the same knowledge, and means of knowledge of where the land was and what was upon it, and the purchase was made without seeking more information. Had the bargain been favorable, the plaintiff would have had the whole benefit of it, and the seller could not have avoided the sale, and recovered back the money, or have claimed any portion of it. And as it proves that he loses, he cannot call on the representatives of Hall to make up the loss to him. The plaintiff purchased, to take his chance of gain or loss. This must have been understood from the very nature of the property. The only mistake in the matter was in keeping the land too long on hand. There is no more ground for supporting this bill, than one to rescind a contract for the purchase of a lottery ticket, after it had been kept on hand until it had drawn a blank; or where pork, or flour, had been fairly purchased at the then market price, under the expectation of a good speculation by a further advance in price, when it proved that the price fell instead of rising. Here was no mistake of facts, but merely an ignorance of facts. He cited Story's Eq. § 140 to 151; *Bean* v. *Herrick*, 20 Maine R. 51; *Sanborn & Bell* v. *Stetson*, in the Circuit Court of U. S. in Massachusetts, by Judge Story, not then reported. To show that contracts in reference to lands are to be treated as other contracts. *Dudley* v. *Littlefield*, 21 Maine R. 418.

If the plaintiff originally had any cause of complaint, he had lost it by his delay. Although the statute of limitations was not pleaded, the Court will not, as a court of equity, entertain a stale demand. Story's Eq. § 529.

The opinion of the Court was drawn up by

WHITMAN C. J. — We have here another instance of the singular infatuation, with which many individuals were seized in the years 1835 and 1836. The plaintiff, then a young man, and but then recently introduced into business in the profession of the law, was induced to embark in the purchase of timber lands; and to invest between five and six thousand dollars, constituting the greater portion of his patrimony, in lands of that description; lying remote from his place of residence, in the wilderness part of this State, to which he had never had access, and of which he had no knowledge; relying for their quality upon the certificates of two individuals, of whom he had only heard a favorable report. In so purchasing, however, he was not singular. Many other individuals did the like. His grantor, a man of mature years, had purchased the same land, under circumstances precisely similar, as to the state of his knowledge, and for the identical price at which he sold to the plaintiff. It turns out, nevertheless, that the intrinsic value of the land was not, probably, over one tenth part of the amount paid for it.

The plaintiff in his bill alleges that the defendant's testator induced him to purchase those lands by the means of misrepresentation; or that the purchase and sale were made under mutual mistake. Of wilful misrepresentation, or indeed of any representation, as of his own knowledge, or even of belief, on the part of the testator, the evidence does not furnish the slightest pretence. He had purchased, confiding in the same sources of information, as to value, to which he referred the plaintiff; and to which they each had equal access. The testator pretended to no other knowledge on the subject than was there exhibited; viz, two certificates, then in the possession of a third person, of two individuals, who where equally unknown to the parties contracting. That the latter were under mutual misapprehension as to the intrinsic value of the premises, there can be no doubt. The only question is, was this a case of such mutual mistake as will authorize the maintenance of this bill.

On this branch of the law, it may be conceded, that there is not entire perspicuity. What shall be deemed such a mutual mistake, as will authorize the rescinding of a contract, it is not easy, in every case, to determine. Where the parties to a contract of sale are under a mutual misconception, as to a distinct, essential and certain particular of it, as for instance, the existence of a dwellinghouse, contracted to be sold, with the lot on which it had been known to stand, but which, by a flood or otherwise, had been destroyed, and that without the knowledge, at the time, of either of the parties. The house would be the thing certain, understood by both parties to be essentially the moving cause to the contract, and the principal thing intended to be conveyed; and it turning out, that the vendor had not the thing in being, which he supposed he was about to convey, it would indeed be unreasonable to hold the other party to the bargain.

It is urged here, that the timber was the thing contracted for; and that the land was but the incident, the place of deposite merely, the land without the timber being of very little, if of any, value; that both parties at the time supposed it to be covered with a valuable growth of timber, when in fact the timber thereon was from ten to twenty times less than was supposed. But there is much of fallacy in the position of the plaintiff. There was no fixed and certain item of timber, distinctly and identically in the mind of each party, as intended to be conveyed, as in the case of the dwellinghouse before instanced. Neither party could have pretended to have any certain knowledge of what was growing upon the land. Neither had ever seen it. The land itself was a specific thing, distinctly in the mind of each party; but of what was growing upon it no precise idea could be entertained. The value of the growth upon a piece of land is always a matter of uncertainty. Estimates concerning it, even by those who have had the best means of forming an opinion, are more or less merely conjectural; and are often void of the truth; and it is familiar knowledge, that nothing is more difficult than to ascertain with precision the quantity and quality of a forest growth, on a

large tract of land, in a wilderness country. This the parties must be presumed to have well understood. Neither can be supposed, in such case, to have contracted with the other in the belief, that either had any certain knowledge on the subject. Bargains of this description are necessarily made haphazard. Each party speculates, grounding his calculations upon such general information as may be at hand, placing reliance upon his own perspicacity.

This contract was entered into in days notorious for speculation, when but few if any persons, made purchases of timber lands for private use, the object being to sell again at a profit; until which, some operations, by way of getting off timber, might take place. Mistakes of the kind here complained of were without number; all understanding, from the beginning, that no inconsiderable share of hazard was to be encountered. In the absence of fraudulent or erroneous representations, or fraudulent practices on the part of the vendor, it could never have been contemplated, however gross might be the mistake on the part of the vendee, that, in case of loss, he had any ground of complaint; and if fortunate enough to buy ever so advantageously, however great the mistake of the vendor might have been, no one could have supposed, that any portion of his gains was to be refunded.

The case of the plated candlesticks, cited on the part of the plaintiff, supposed to be sold by mistake for solid silver, is surely unlike the case here. Silver candlesticks and plated candlesticks are different articles. Besides, the parties both intended, the one to sell and the other to buy, silver candlesticks. The delivery of plated candlesticks would be a sheer mistake, contrary to the clear intent of both parties. Here the land was sold. This was a thing certain in the view of both parties. If other land had been conveyed, instead of it, it would have been a mistake, which should have been rectified. What there was upon it, was a different matter. No one could have had any definite or precise idea concerning it; especially under the circumstances of this case. The similitude between this case, and that of candlesticks sold *as and for plated,*

neither party knowing any thing of the thickness of the plate, would be somewhat nearer, if a certificate of a third person, supposed to be a competent judge, were resorted to for the purpose of enabling the parties to fix a price upon them, and it should be proved, by using them, that the estimation was erroneous; and the similitude would be still increased, if it had appeared, that the seller had purchased by the same estimation. In such case it is believed, that the buyer would have no right to rescind the contract, or to recover in equity for the difference in value. So if a horse were sold and purchased, without warranty of soundness, upon an erroneous estimation of its value by a third person, the vendor knowing nothing of any defects in the horse, if, upon a trial, it proved in a great measure worthless, the buyer would have no ground of complaint against the seller. The buyer must calculate to be subject to such risks, whenever there is perfect innocence on the part of the seller.

The case put by the counsel for the plaintiff of a bale of goods, accompanied with an invoice, bears no similitude to the one here. The invoice imports verity as to the quantity and quality. The vendor so intends it, and knows that the vendee so understands the contract, and the vendor would be guilty of fraud, if it were not so, as he must be supposed to know the contents precisely. In the case here, nothing of the kind was in contemplation of the parties. But we may suppose a package of goods to have become damaged; to what extent could not be known till they were put to use; and a sale effected of the same upon the estimation of one or more persons, of the extent of the injury, which should ultimately prove erroneous, either falling short or exceeding the estimate. This would much more nearly resemble the case here; and yet the sale would be held valid.

In Story on Equity, § 150, it is laid down, that "where the fact is equally unknown to both parties; or where each has equal and adequate means of information; or *where the fact is doubtful from its own nature;* in every such case, if the parties have acted with entire good faith, a court of equity

will not interpose"; and again in § 151, it is said that "where each party is equally innocent, and there is no concealment of facts, which the other party has a right to know, and no surprise or imposition, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference. It is strictly *damnum absque injuria.*

In *Daniel* v. *Mitchell & al.* 1 Story's R. 172, cited for the plaintiff, the decree was, that "the contract of sale, and the conveyance of the premises, and the notes of the said Daniel thereupon, as set forth in the bill, were made by and between the said Otis Daniel, and the said James Todd, and other parties, *upon material misrepresentations*, and mutual mistakes, as to the quantity of timber so sold, and therefore ought to be set aside, and held null and void." The Judge, in his reasoning, says, "Here then we have a tract, represented by the vendors in their contract, as containing sixty millions of timber, and that supposed fact constituting the very basis of the bargain, when in fact it does not contain more than one twelfth part of that quantity." There was no doubt expressed, but that the representations were made in the full belief of their accuracy. But such representations, so grossly erroneous, however innocently made, were calculated to mislead; and the party purchasing, as in that case, having no other means of possessing himself of actual knowledge of how the fact was, must be expected to rely upon the representations so made; and, if wronged thereby, should find redress. But where the buyer is not led astray by any such misrepresentations, and acts without being influenced by any statements of the vendor; and in a case where there is unavoidably much of uncertainty; and in a speculation which, for aught that could be predicted, might turn out very advantageously, or very much otherwise, we cannot deem any error, into which the buyer might fall, in his calculation upon his profits, to be an adequate ground for rescinding his engagement, either in whole or in part.

The case of *Reed's adm'rs* v. *Cramer & al.* also cited on the part of the plaintiff, from 1 Green's Ch. R. 277, was one of a gross mistake on the part of the vendor of real estate, by

including in his description of the land intended to be sold, of which he was not aware, owing to his ignorance of its boundaries, a piece other and much larger than the one intended to be conveyed, and which the vendee, at the time, well knew the vendor did not know to be so included, clearly intending a fraud upon him; a case every way distinguishable from the one here.

The lapse of time intervening in this case, between the sale and the institution of the suit, might well induce a court of equity to pause before granting relief, even in a case presenting some strong indications of a want of good faith, on the part of the defendant. The testator, it would seem, lived some three or four years after the sale; and his executors had administered, and in a manner settled his estate, in the course of three or more years after his decease, without being notified of this claim. If the *gravamen* of the plaintiff's case was so enormous, as in his bill is set forth, such apathy would seem to be inexplicable. People do not often, if at all, so long slumber over such grievous injuries, without seeking for redress. And after a long period has occurred since a cause of action has accrued, and after events have rendered it highly perplexing, that the subject should be agitated, it has not been uncommon for a court of equity to decline to interfere.

On the whole, however much we may regret the misfortune of the plaintiff, we are brought to the conclusion, that his bill must be dismissed, with costs for the defendants.

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ENOCH MERRILL *versus* SOPHRONIA PARKER.

In an action for goods sold and delivered, where it appeared, that a price was offered by the defendant for the article, and accepted by the plaintiff, and the defendant then said he "would come in a short time and take it, and pay for it," and it was marked as sold to him in his presence, and set aside in the plaintiff's shop and reserved for his use, and thus remained until the commencement of the suit; *it was held*, that this action could be maintained.

THIS was an action of indebitatus assumpsit, on an account

annexed. The account is for a bureau, $20, interest, $2,50, storage of the bureau, $2,50.

The case was opened to the jury, and the plaintiff introduced a witness, who testified, that he had the care of the plaintiff's furniture shop; that some day between 15th August and 10th Sep. 1841, the defendant came to the shop; examined several bureaus. The price of one was $22. The defendant discussed the price, and it was finally put at $20. She selected that one; said she wished the witness to set it apart for her; wished witness to mark it and keep it for her, and said she would call and take it in a few days; that she did not wish to take it then, but would come in a short time and take it and pay for it. It was set aside and reserved for her; the witness inquired her name, and wrote upon the bureau, "sold S. Parker, $20;" that the defendant saw him write it; that he could not say she asked him to write it; that it is usual to write the purchaser's name in such cases; that he did not know that he moved the bureau from its place in the shop, or that there was any definite time fixed for her to come.

On cross-examination, the witness said, he expected she would pay for it when she took it; that nothing was said of the time of payment; that she never called for it or took it; that it yet remained in the shop. The plaintiff moved for leave to amend by inserting a count on the contract to buy the bureau. It was objected to, and the Court refused leave. The case was here taken from the jury, and it was agreed to submit the matter to the decision of the Court. The Court to have authority to draw inferences and decide facts as the jury might.

Redington, District Judge, ordered judgment to be rendered for the defendant, and the plaintiff appealed.

*Moor*, for the plaintiff, said the case shew, that a distinct offer was made by the defendant to purchase the article at a certain price; that the offer was accepted by the plaintiff; that the name of the defendant was marked upon it, as sold to her at that price, in her presence; and that it was put away in the shop according to her direction until she should call and take it and pay for it. This is a question between the parties merely,

and as between them, the sale was complete, and the property in the article vested in the defendant. 2 Kent, 492; 2 Black. Com. 448; 2 Com. Dig. 62; *DeFonclear* v. *Shottenkirk*, 3 Johns. R. 170; 5 B. & A. 340; 6 B. & Cr. 360; Hammond on Sales, 5, 13; 2 Stark. Ev. 870; 1 B. & Ald. 681; *Lanfear* v. *Sumner*, 17 Mass. R. 110; *Shumway* v. *Rutter*, 8 Pick. 443.

Marking and putting away the article is sufficient to take the case out of the operation of the statute of frauds. 2 H. Bl. 348; 1 Campb. 233. But when the purchase is actually made the statute is no bar.

The action for goods sold and delivered will lie; and under the same count, the storage of the same goods may be recovered. 2 Stark. Ev. 873.

*H. A. Smith*, for the defendant, said that this action could not be maintained, being for goods sold and delivered, and not for refusing to complete the contract. So long as any thing remains to be done before the purchaser is entitled to take and carry away the property, the seller cannot maintain an action for the price as for goods sold and delivered. The plaintiff here was under no necessity to part with his property until payment was made. If this suit can be maintained, the bureau was subject to be attached and taken as the property of the defendant, without payment. Unless some time is fixed for payment, the payment is to be made at the time of the delivery of the goods. The seller is not obliged to part with his goods until he has received his pay, but in such case, the sale is not so completed, that the seller can maintain an action for the price of the goods, as sold and delivered. 2 Com. on Con. 206, 216; 2 Black. Com. 446; Bul. N. P. 50; 2 Kent, 493; *Penniman* v. *Hartshorn*, 13 Mass. R. 87; *Phillips* v. *Hunnewell*, 3 Greenl. 381; *Houdlette* v. *Tallman*, 2 Shepl. 400; 7 Cowen, 85; Hill. on sales, c. 3, § 13.

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

WHITMAN C. J. — What shall be considered as constitut-

ing a sale of chattels, is not unfrequently attended with difficulty. Sales are sometimes complete as between the parties, and not so as between them and other persons. Again, sales may be good, but for the intervention of the statute of frauds, and not good where the statute applies; as where the goods sold are of the value of thirty dollars or more. The sale in this case was of a bureau, the agreed value of which was twenty dollars, and, therefore, not within the statute. The difference between cases coming within the statute, and those not affected by it, consists in certain formalities required to legalize them, in the one case, which may be dispensed with in the other. In cases coming within the statute, the forms being observed, the principles of decision are the same as in those not coming within it. We must look to the common law in either case for those principles. To constitute a sale there must be a delivery of the article sold, either actual or constructive, to entitle the vendor to recover the price of it. A mere contract of sale is not sufficient.

The bureau, charged as sold in this case, was selected by the defendant, and the price agreed upon. She directed it to be set apart, and to be kept and marked for her; and promised to call and pay for it, and take it away in a few days; accordingly it was marked, "sold S. Parker $20,00," in her presence, and within her view; and had ever since been kept for her. The question is, was this a sale, such as to authorize the maintenance of this action for the price? It is laid down in Com. Dig. Biens, D. 3, that, in all sales of goods in possession, the property is changed immediately upon the making of the contract; and Perk. § 22, adds, that such is the case, although the actual possession is retained by the vendee, until the fulfilment of the stipulated terms; and that if a man sell his horse for money, though he may keep him till he is paid, yet the property in the horse is in the bargainor or buyer; so that if he tenders the price to the seller, and he refuses it, he may take the horse, or have an action for the detainment. In the 2 Black. Com. 448, it is said, "as soon as the bargain is struck, the property of the goods is transferred to the vendee,

and that of the price to the vendor, but the vendee cannot take the goods till he tenders the price agreed on." In the 1 Camp. 233, Lord Ellenborough is reported to have said, that the defendant, having written her name upon a piece of linen with a view to denote that she had purchased it, and to be appropriated to her use, the delivery was sufficient to authorize the maintenance of an action for the price, she having afterwards refused to take it away. And in *Anderson* v. *Scott*, 1 Camp. 235, where the plaintiff bargained for a number of casks of wine, whereupon the spiles or pegs, by which the wine was tasted, were cut off, and the name of the purchaser marked thereon, in the presence of the parties, by the defendant's clerk, it was holden to amount to a delivery. In *Elmore* v. *Stone*, 1 Taunt. 458, it appeared, that a pair of horses was offered for a certain price, and the offer was accepted, with a request that the seller would keep them for the buyer, he having no conveniencies for keeping them; whereupon the seller removed them to a different stable for the purpose, and thereby incurred some additional expense, and the sale was held to be complete. This case, however, has been doubted, and considered as going to the extremest verge of the law, but has not been expressly overruled. It is also laid down in the page of the commentaries before cited, that the goods sold, as stated in the citation, are at the risk of the vendee till paid for and taken away; and if destroyed by casualty in the meantime that the vendor may recover the price. And in *Butterfield* v. *Baker*, 5 Pick. 522, it is said, the distinction is, that, where a contract of sale is complete, it gives a right as between the parties, without a delivery, and the vendee may maintain trover for the article, or the vendor assumpsit for the price.

In the statement of facts, in this case, it does not explicitly appear, what length of time had elapsed, after the making of the bargain before the suit was commenced; nor whether the defendant was called upon to pay for, and take away the bureau; but as the Court, by the statement, is expressly authorized to draw inferences as a jury might, we must presume, as no question appears to have been made at the trial, and as

none is suggested in argument here, that she had not ample notice and opportunity, before the commencement of the auction, to have paid for and to have removed the bureau, that what was proper to have been done in this particular was done. It is not uncommon in the course of trials before the jury, for facts necessary to support the issues to be considered as admitted, when no question is made about them.

On the whole, we think that what took place, when the bureau was selected, brings this case within the principles of the authorities cited; and that the delivery was such as to make the sale complete; and that the defendant, upon request, could not have refused to pay for it, and take it away, without rendering herself liable as for goods sold and delivered.

Certain decisions, however, are supposed to be in conflict with these views. Lord Holt, in *Langfort* v. *Tyler*, 1 Salk. 113, is reported to have said, "if the vendee does not come and pay and take the goods the vendor ought to go and request him; and then, if he does not come and pay for and take the goods in convenient time, the agreement is dissolved; and he is at liberty to sell them to any other person." He does not say that the vendor may not elect to hold the vendee accountable for the price, as and for goods sold and delivered; and clearly, it would seem that he could not so hold, as it would be inconsistent with the opinions in the cases before cited, povided there were a request and refusal to take the goods away. And it may be noted, that there it is not stated, that any act amounting to a delivery is noticed as having occurred. It was a case, so far as appears, of a contract of sale merely.

In *Goodall* v. *Skelton*, 2 Hen. Bl. 316, the vendor expressly made it a condition, before he would part with his goods, that they should be paid for. Hence, of course, there was no delivery; nor any thing more than an agreement to sell upon condition. Nor in *Simmons* v. *Swift*, 5 B. & C. 857, was there any delivery. It was a case of a contract of sale. The goods had not been weighed even, without which the contract of sale was not complete. The opinions expressed by the

learned justices in that case do not apply to a case like the one here. They might well say in that case, that an action for goods sold and delivered would not lie.

In *Hinde* v. *Whitehouse & al.* 7 East, 558, which was assumpsit to recover for the price of sugars sold at auction, and which had been burnt after the sale, and before delivery of any part, except a sample of each hhd., the plaintiff was allowed to recover. The delivery of the samples, as part of the whole, was held sufficient to take the case out of the statute of frauds; but for which, according to the authorities, the vendor in such case might have recovered, without an actual delivery. *Torling* v. *Baxter*, 6 B. & C. 360.

In the case of *Smith* v. *Chance*, 2 B. & A. 753, it seems to have been held, that, before a recovery, as goods sold and delivered can be had, there must be proof of delivery of the goods, or of their having been placed in the power of the vendee. In the case at bar the article sold had been set apart for the defendant by her request, and marked with her name, in her presence; and no stipulation was made that she should not take it away till paid for. It would seem that she might have taken it away at pleasure.

As agreed by the parties judgment must be entered for the plaintiff for $20, and interest thereon from the date of the writ.

Shepley J. — dissenting. The agreed statement says, "this was an action of indebitatus assumpsit on an account annexed." This is considered as equivalent to a count for goods sold and delivered. The amount claimed being less than thirty dollars, the case is not within the staute of frauds. In such a case, when the bargain of sale and purchase for ready money has been so fully completed, that the seller has nothing more to do than to deliver the goods and receive his pay, the property is vested in the purchaser. He takes the risk, and if it be lost or destroyed, without the fault of the vendor, the vendee must bear the loss. But he does not become entitled to take possession of the goods without the consent of the

vendor, unless he pays the price. *Torling* v. *Baxter*, 6 B. & C. 360. Should the purchaser neglect to pay for and remove the goods, the seller may notify him to do so, and may, after a reasonable time has been allowed for that purpose, charge him with the storage, and if he please, resell the goods, and recover for the loss. *Langfort* v. *Tyler*, 1 Salk. 113; *Maclean* v. *Dunn*, 4 Bing. 722. And after the vendor has tendered or offered the goods to the vendee, or put him in a situation to enable him to receive them without payment; and when the goods have been lost or destroyed without his fault, or a delivery has become impossible through the fault of the vendee; the vendor may recover the value by an action of indebitatus assumpsit for goods sold and delivered. *Hinde* v. *Whitehouse*, 7 East, 558; *Smith* v. *Chance*, 2 B. & A. 753; *Studely* v. *Sanders*, 5 B. & C. 628. When none of these events have happened, and the vendor retains the possession and his lien for the price, he cannot maintain such an action. In Noy's Maxims, 88, it is said, "if I sell my horse for money, I may keep him until I am paid; but I cannot have an action of debt, until he be delivered; yet the property of the horse is in the bargainor or buyee." That an action for goods sold and delivered could not be maintained by the vendor, while he retained the goods to secure the payment of the price, was decided in the case of *Goodall* v. *Skelton*, 2 H. Bl. 316. In the case of *Simmons* v. *Swift*, 5 B. & C. 857, Mr. Justice Bayley said, "and even if the property had vested in the defendant, I should have thought, that it had not been delivered, and consequently that the price could not be recovered on a count for goods sold and delivered." Mr. Justice Littledale said, in the same case, "I think further, that an action for goods bargained and sold would not lie merely because the property passed." In a case where goods were sold for ready money and were packed in boxes furnished by the purchaser and in his presence, and he requested the seller to keep them for him till he could call and pay for them and take them away; it was decided, that the seller could not recover the price on a count for goods sold and delivered; although, after a refusal to take them, he might have

recovered on a count for goods bargained and sold. *Boulter* v. *Arnott*, 1 C. & M. 333.

By the application of these principles to the case it will be perceived, that the plaintiff is not entitled to recover the price in this form of action. The case states, that the defendant said she "would come in a short time and take it and pay for it." That it was "expected she would pay for it, when she took it, that nothing was said of the time of payment." There is nothing in the case, which shows, that the plaintiff ever relinquished his right to retain the possession until the price was paid; or that he had not a right to re-sell the article, after proper notice, at the time when this action was commenced. These rights he could not preserve and recover for the price on a count for goods sold and delivered. It is an essential ingredient to the recovery in such an action that these rights should be destroyed, and that the purchaser should either have actually received possession of the goods, or have been put in a situation to have enabled him to have taken possession without any hindrance on the part of the seller.

The doctrine is perfectly settled, and it is too familiar to require, that cases should be cited to establish it; that when there is no agreement for credit, the seller is entitled to payment upon delivery of the goods. The purchaser cannot therefore take them without his consent, until he has paid for them. In this case there is not the least testimony to prove a sale upon credit. On the contrary the proof is, that payment was to be made on delivery of the article. The witness says, that the purchaser said, she "would come in a short time and take it and pay for it." The other party making no objection, that must be regarded as the express agreement of the parties, as well as the contract implied by law. It is not perceived how there can be any just ground to conclude, that the purchaser might have taken away the article at pleasure and without payment. Such a conclusion would seem to be not only without any testimony to sustain it, but contrary to the testimony stated in the case.

ISAAC MANSFIELD & *al. versus* ALDEN JACK.

It is a part of the duty of officers, employed in the levying of executions, before proceeding to levy upon an undivided portion of the estate of the debtor, to ascertain whether it presents a case, in which the setting off of a portion of it by metes and bounds will be prejudicial to, or spoil the whole. If he should persist in setting it off in severalty, when by so doing, he would injure the whole, he might subject himself to an action, as for a misfeasance; and the like would be the case, if he should unreasonably persist in setting it off in undivided portions, when it could with propriety be set off in severalty.

The return of an officer, that the land, upon which an execution is to be levied, "cannot be divided without prejudice to, or spoiling the whole," is conclusive of the fact, as between the creditor and debtor, and those claiming under them; and can be controverted only in an action against the officer, or his principal, for misfeasance.

And it would seem, that an execution may be legally levied upon an undivided portion of any lands, or buildings of the debtor, where the officer will certify, that it "cannot be divided without prejudice to, or spoiling the whole," if its value is more than sufficient to satisfy the execution.

WRIT of entry. The demanded premises were once the property of Jeremiah Potter, and both parties claimed under him. On March 27th, 1837, the demandants attached the land, entered their action, obtained judgment, and within thirty days thereafter levied their execution on the same. The statement of facts agreed on by the parties says, "it is agreed, that the levy was in all respects regular and valid, unless rendered inoperative by reason of the appraisers having set off a fractional part of the entire estate, instead of dividing the same by metes and bounds, and setting off the plaintiffs' portion in severalty." The certificate of the appraisers, and the officer's return, were referred to as part of the case; and no other facts appeared in the statement in relation to the land or to the levy. The certificate of the appraisers says, that they "entered and viewed the real estate hereinafter described; to wit. One saw and gristmill, with the privileges and appurtenances thereto belonging," particularly described by metes and bounds. "Also, one other piece of land for a passageway from said mill lot above described," bounding out a one rod road. "Also another piece of land with the buildings thereon, bounded, beginning

on the south side of the road last mentioned at the northeast corner of land owned by John Randall, thence running southerly on said Randall's line to the mill lot above described, thence easterly on said mill lot to land occupied by Joseph Wharff, jr., thence northerly by said Wharff's land to said road, thence to the point of beginning, subject, however, to the right of way above described, in connection with said mill lot; and we have on our oaths aforesaid appraised one hundred and eighty-eight undivided two hundred and fiftieth parts of said mill lot and passageway at the sum of $188, in part satisfaction of this execution; and we have also appraised one hundred and thirty-nine six hundred and seventy-fifth parts of the land and buildings last above described at the sum of $138,57, in satisfaction of the remainder of this execution and all fees. All the above described estate being so situated, that it cannot in our judgment be divided by metes and bounds without injury thereto."

The officer's return, after refering to the return of the appraisers, states, "and it not being practicable to divide either parcel of said real estate without prejudice to the whole, and the said mills, mill lot, and passageway not being sufficient to satisfy said execution, and the whole of the other parcel of real estate not being necessary for the satisfying of this execution, I have extended said execution on 168 undivided 250th parts of said mill, mill lot and passageway, and on 139 undivided 675th parts of the land and buildings in said appraisers' return described."

The defendant claimed under a purchaser from said Potter, by deed dated on March 29, 1837, two days subsequent to the attachment on the writ of the plaintiffs.

The land demanded was the tract last described in the certificate of the appraisers.

*H. W. Paine*, for the demandant, contended that the levy upon an undivided share of the estate was legal. It is the province of the appraisers to determine, whether the property upon which the levy is to be made, is of such character and

condition, as to require the setting off of the land to be of a specific portion thereof by metes and bounds, or of an undivided portion thereof. And where there is no fraud, their decision is conclusive on the subject. *Atkins* v. *Bean*, 14 Mass. R. 404; *Hilton* v. *Hanson*, 18 Maine R. 397.

*Whitmore*, for the tenant, said that this levy was made under the statute of 1821, c. 60. The general rule is found in § 27, and requires that the land set off shall be the whole or some entire portion of the estate, by metes and bounds, and not an undivided portion thereof, where the debtor, as in this case, was the owner of the whole estate. The 28th section applies only to setting off rents and profits for a term of time. The only exception, permitting the setting off of an undivided share, when the debtor owns the whole, is found in § 29. That applies merely to mills, and to other property of the same character as mills, where no part of it can be used without the use of the whole. If this be legal, then all real estate may be set off in undivided portions, instead of by metes and bounds; for it is always an injury to the whole to divide it, in such manner as to pay a debt of a particular amount without the power to divide to the best advantage. Setting off an undivided share does not cure the difficulty, but merely postpones it, and increases the expense; for the same will arise on the partition. He believed the construction contended for on the part of the tenant, had been the practical one ever since the first enactment of the statute in Massachusetts. He said, that appearing, as he did, only for a professional gentleman residing in another county, he had not had time to examine the decisions; and would therefore merely refer to the case cited for the demandant, *Hilton* v. *Hanson*, 18 Maine R. 397.

The opinion of a majority of the Court, SHEPLEY J. remarking, that he dissented both from the reasoning and the result of the opinion of his associates, was drawn up by

WHITMAN C. J. — The claim of the plaintiffs arises under a levy upon real estate; and their title depends upon the va-

lidity of it. Two several parcels of land appear to have been seized, and set off in satisfaction of an execution, obtained by the plaintiffs against one Potter; who, after the same had been attached on the original writ in the plaintiffs' action against him, conveyed the same to one, who thereafter conveyed it to the defendant. One of the parcels of land consisted of a mill lot, of which one hundred and eighty-eight two hundred fiftieth parts were set off, with a right of way, over the other parcel, in common and undivided. The other parcel seems, by the boundaries, to have been contiguous to the mill lot, consisting of land and buildings, of which one hundred and thirty-nine six hundred and seventy-fifth parts, in common and undivided, were set off. It is understood, though the statement of facts does not expressly show it, that the present controversy is in reference to the latter parcel. The defendant, as to this, contends, that the levy was void, as it was upon an undivided portion, when, as he contends, it should have been upon a distinct and severed part thereof by metes and bounds.

By the statute of 1821, ch. 60, § 29, executions might be levied "on an undivided portion of any sawmill, gristmill or other mill, factory, mill privilege, or other real estate, which cannot be divided without prejudice to or spoiling the whole," the whole not being necessary to satisfy any such execution. It is manifest, that the other real estate to be set off in common, in the clause above quoted, should be *ejusdem generis* with mills, &c. as to the impracticability of occupying it profitably, if set off in several parts. The appraisers, in reference to the levy in question, have certified, as to both parcels, that, in their judgment, they could not be "divided by metes and bounds, without injury thereto." And the officer who levied the execution, returns, that he had levied upon the undivided portions, "it not being practicable to divide either parcel of said real estate without prejudice to the whole." It is undoubtedly a part of the duty of officers, employed in the levying of executions, before proceeding to levy upon an undivided portion of the estate of the debtor, to ascertain whether it presents a case, in which the setting off of a portion of it, by metes and

bounds, will be prejudicial to, or spoil the whole. If he should persist in setting it off in severalty, when by so doing he would injure the whole, he might subject himself to an action, as for a misfeasance; and the like would be the case, if he should unreasonably persist in setting it off in undivided portions, when it could with propriety be set off in severalty. The officer in such cases must act at his peril. Must not his decision and return, so far as it affects the title, whether in one or the other of these cases, be deemed conclusive? And is there any other resource, in such cases, for the party feeling himself aggrieved, for his redress, than to an action of the case against the officer for a misfeasance? Generally the truth of an officer's return, in reference to duties enjoined upon him by law, cannot be controverted, except in an action against himself, or where strangers are concerned. The appraisers are to be freeholders. His return, that they were so, would be conclusive. *Boston* v. *Tileston*, 11 Mass. R. 468. Mr. C. J. Sewall, in *Bott* v. *Burnel*, *ib.* 163, says, in reference to a levy, "The sheriff's return is conclusive as to the formal preceedings by the appraisers and himself;" and that "The effect of these proceedings, between the creditor and debtor in the execution, is to be determined by the sheriff's return, which is not to be supplied or contradicted;" and the same is the case, without doubt, with all such as claim in privity of estate under a debtor or creditor.

In what cases a setting off of real estate in severalty would be prejudicial, and to what degree it would be so, must necessarily be a question attended with difficulty, in many, if not in most of the cases which may occur. The law is silent upon the subject. In order to the validity of a levy upon a portion of an estate to be held in common, a decision as to its necessity or propriety must be made, in the first instance, by some one; and by whom shall it be made? No one, but the officer, can make a return of the fact, that it will be prejudicial to do otherwise; and this he must do as of his own knowledge. He then must be the person to make the decision. Suppose he should err, it might be in some slight degree, and perhaps in

an instance in which but a majority of minds would judge differently, would the title be invalidated for such cause? If not, how great must the error be to authorize a Court to adjudge the levy to be void? It will certainly be difficult, as matter of law, to prescribe any limits for the guidance of an officer in such cases. In case of collusion between him and the creditor, and a manifest departure from the line of duty, might be evidence of it, especially if followed by indications of a disposition to oppress the debtor, in determining to levy upon an undivided portion, instead of a set-off of a part in severalty. It may be, that it should be allowable, for such cause, to question the title of a creditor. But so long as nothing of that kind appears, or can be presumed, it can scarcely be deemed reasonable, that the title of the creditor should be affected by a levy made under the circumstances attending the one in question.

In this case the parties have put it to the Court to determine, whether the levy is invalid for the cause assigned or not. If it be a question proper for us to decide, what are the data upon which we are to predicate a decision? We are referred to the adjudication of the appraisers, and to the return of the officer, who made the levy, for the facts. From these we gather, that the parcel of real estate in question consisted of land, the metes and bounds of which are given, and of buildings thereon, but of what kind does not appear. It adjoined the mill lot; and a right of way is reserved to run through it to that lot. This is the whole of the description. How can we determine that any portion of it could have been advantageously set off in severalty? To have set off the buildings, without the contiguous land, might have been ruinous to the value of each. The buildings, besides, may not have been susceptible of an advantageous division. It may be, that they consisted of a store and appurtenances, separate portions of which could not have been occupied by different individuals. In making partition of real estate it is often found, that very different allotments must be made, in order that the value of it may not be impaired. A valuable tavern stand or hotel, for instance,

in a process of partition, could not be allotted in separate portions to a number of individuals, without materially impairing the value of the whole. Hence provision is made by statute, in such cases, for such unequal allotments; and for compensation in money by those having the larger allotments, to those to whom smaller portions are assigned. We cannot, therefore, be sure, if it were competent for us to make the inquiry, that the levy, in this instance, on an undivided portion, was not such as was called for by imperious necessity. The plaintiffs, therefore, must have judgment for possession of the demanded premises.

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CHRISTOPHER WOLFE *& al. versus* WILLIAM DORR.

A mortgage of personal property may be valid, although the property is described therein, but as "said store (standing on land of another) and all the goods, wares and merchandize in and about the same."

And a description of the property by an officer, as the debtor's right of redeeming the property conveyed by that mortgage is sufficient to constitute an attachment thereof.

When it is intended that the testimony of a witness should be considered as discredited and destroyed, in a suit at law, the case should be presented to a jury, and not to the Court, for decision.

Under the statute of 1835, c. 188, where the debtor's right to redeem personal property mortgaged was subject to be attached on mense proces, the officer could not take actual possession of the property, and withhold it from the mortgagee or his agent, without making payment or tender of the amount due upon the mortgage; nor does the language used in the Revised Statutes on this subject give the officer any additional rights.

The burden of proof is upon the plaintiff, in an action against an officer for neglecting to attach an article of personal property upon a writ, to show that he has suffered damage by such neglect. The Court cannot infer it without proof.

THE whole evidence at the trial before TENNEY J. was reported, and the Court was authorized by the parties to draw such inferences therefrom as a jury would be authorized to do, and to render such judgment as the law would require, or make such other disposition thereof, as should preserve the legal rights of the parties.

All the facts necessary to perceive the application of the principles of law involved in the case, appear at the commencement of the opinion of the Court.

*Vose*, for the plaintiffs, contended that the mortgages on the property afforded no excuse to the officer, because those mortgages were void against attaching creditors, such as the plaintiffs, for various causes, of which were, that there was no inventory of the goods in the mortgage, or in any schedule annexed thereto, and contained no statement of the value. *Bullock* v. *Williams*, 16 Pick. 33; *Sawyer* v. *Pennell*, 19 Maine R. 173. The equity of redemption of these goods was subject to attachment. But no officer could attach it, as there was no inventory, schedule or valuation of the goods mortgaged. *Baxter* v. *Rice*, 21 Pick. 199.

The Court are authorized to draw the same inferences that a jury might fairly do. The counsel here argued, that on the facts reported, the mortgages were fraudulent as to creditors. And it was also contended, as matter of fact, that there was no satisfactory evidence, that the goods attached were included in the mortgages.

But even if the mortgages are to be considered as valid, still the action can be maintained. The officer had no right to permit the property, when attached by him, to go back into the hands of the debtor. The debtor had an attachable interest in the property, and the officer was authorized by law to take it into his hands. Stat. 1835, c. 188; *Sawyer* v. *Mason*, 19 Maine R. 52.

It was the officer's duty to have attached the store. Where there are written general directions on the writ, the officer is bound to obey verbal orders to attach particular articles. *Kimball* v. *Davis*, 19 Maine R. 310.

*B. A. G. Fuller*, for the defendant, argued in support of these, among other positions: —

At the time of the alleged attachment, the debtor had no legal or equitable interest in these goods. His right to redeem had before that time ceased to exist.

But had there been an equity, the officer had no power to take the property out of the hands of the mortgagees, without first tendering the amount due on the mortgage. The creditors might have had a remedy by the trustee process to hold any balance going to the debtor. Rev. Stat. c. 114, § 70; *Holbrook* v. *Baker*, 5 Greenl. 309; 1 Pick. 389; 8 Pick. 333; 15 Maine R. 48 and 373; 3 Fairf. 282; 18 Maine R. 358; 2 N. H. R. 16; 3 Pick. 495; 14 Pick. 497; 18 Pick. 394.

The mortgages are good, although the mortgagor was permitted by the terms of it to retain the possession until condition broken. *Abbott* v. *Goodwin*, 20 Maine R. 408; 1 Pick. 389; 2 Metc. 258; 3 Metc. 518.

But no damages could be recovered against the officer for neglecting to produce the goods to be taken, because that after the attachment and before the demand, the mortgagees had lawfully taken the property into their own hands and made sale thereof, as they had authority to do, by the terms of the mortgage.

The description of the goods, as all then in the store, without a particular description of each article, is sufficient. 7 Maine R. 241; 4 Metc. 306.

*Bradbury*, on the same side, replied to the argument for the plaintiffs.

The opinion of the Court was drawn up by

Shepley J. — This is an action on the case against the defendant, as sheriff of this county, to recover damages for an alleged default of his deputy, Joseph W. Patterson. The default alleged consists in not retaining the possession of certain goods, attached by him on a writ in favor of the plaintiffs against William H. Kittredge, and in not delivering them on demand to the officer, who had the execution issued on a judgment recovered in that suit; and also in neglecting to attach on that writ a certain store as the personal property of Kittredge.

It appears from the report of the case, that Kittredge formerly owned a store, built of wood, and standing upon land

owned by other persons; that he traded in hardware and other goods owned by him, which were in that store; that on May 25, 1840, by a deed of mortgage, recorded on the same day, he conveyed that store, and all the goods, wares and merchandise in and about the same, to Ebenezer Fuller and Henry W. Fuller, jr. with a condition, that it should be void, if he should pay certain notes and contracts described therein, on which the mortgagees and other persons had become sureties for him, and save them harmless therefrom, and from all paper substituted for them; and pay them such sums, as he then owed either of them on account. By an additional instrument, executed on November 12, 1840, and recorded on the day following, he conveyed to the same persons all the goods in the store and personal property, purchased since the date of that mortgage, to hold the same for the purposes named in it, and for the security of one hundred dollars loaned to him by H. W. Fuller, jr. There was an existing prior mortgage upon some of these goods, made to the Savings Bank of the County of Strafford. Kittredge continued in possession of the property mortgaged. The deputy, Patterson, received the writ in favor of the plaintiffs against Kittredge, with written directions to attach the goods in the store occupied by him; and on November 17, 1841, returned thereon an attachment of the goods in the store, subject to the two mortgages to the Messrs. Fullers. He admits in writing, that "said property was by me allowed to go back into the hands of the debtor upon indemnity given to me for the forthcoming of the same, when demanded upon execution." Judgment was obtained against Kittredge in that suit, and the execution issued thereon was, within thirty days after judgment, placed in the hands of an officer, and a demand was made upon Patterson to deliver the goods attached. He in writing admitted the demand, stating, that "the same having all been disposed of, it is not in my power to deliver the same."

Before the return was made of the attachment of the goods, several of the large demands secured by the mortgage, had been paid by Kittredge from the proceeds of goods sold by

him; and other demands so secured, remained unpaid; and continued to remain unpaid until June, 1842, when the mortgagees, for his neglect to pay them, took possession of the remaining goods, and sold them at auction; and received for them more than sufficient to pay the demands and claims remaining unpaid. There was a clause in the mortgage stating, that the mortgagees, in case of a sale made by them, should account to the mortgagor for any surplus. For the purpose of coming to a conclusion upon the rights of the parties, it may not be necessary to notice many other facts stated in the report.

It is contended, that the defendant can find no protection in the existence of those mortgages for the conduct of his deputy, in permitting the goods to be returned to the possession of the debtor, and in omitting to retain possession of them and to deliver them, when demanded of him. If the two last mortgages were so, it may be immaterial, whether the first mortgage was valid or not. The objections to the two last are, that they contained no inventory or other particular description of the property, or statement of its value. The remark contained in the opinion, in the case of *Bullock* v. *Williams*, 16 Pick. 33, "that the articles mortgaged must be of such a nature and so situated as to be capable of being specifically designated and identified by written description," was made in reference to the question, whether a mortgage of personal property recorded would be valid without an actual or constructive delivery of the property. The next sentence explains, that it might not be so, if the goods were "to be weighed, measured, counted off, or otherwise separated, from other and larger parcels or quantities." In the latter case these requirements might be essential to complete the sale as between the seller and purchaser. In this case all the goods in the store were sold and no such proceeding could be necessary to determine what goods were sold; and the witness, Clark, testifies, that the goods were delivered to H. W. Fuller, jr. on the mortgage. The remarks contained in the opinion in the case of *Sawyer* v. *Pennell*, 1 Appl. 167, alluded to in the argument, were

made to show, when a mortgage, if wholly recorded, would disclose a specific enumeration as well as the value of the property, that it was essential, that such information should be conveyed by the record; not that it was essential to the validity of a mortgage, that it should be disclosed in any manner. On the contrary the opinion says, "we do not mean to say, that the description in this mortgage is so general, that it would not be a valid mortgage." If a valid attachment on mesne process could have been made, without a payment or tender of payment of the mortgage debt, it must of necessity have been sufficient to have stated in the return, that the right of redeeming the property conveyed by the mortgage was attached, which would be made certain by describing the mortgage.

It is contended also, that the mortgages were fraudulent as against the creditors of the mortgagor; and various circumstances have been stated, which are said to exhibit clear evidence of it. If the mortgage made on May 25, 1840, only, were made *bona fide* and for a valuable consideration, that would be sufficient to protect the rights of those claiming under it. Kittredge testified, that the liabilities secured by it were actually existing ones, and that they had in making it no intention to defeat or delay his creditors. There is no testimony in the case, which would authorize the Court to disregard his testimony as unworthy of credit, and to come to a conclusion, that the mortgages were fraudulently made. When it is intended, that the testimony of a witness should be considered as discredited and destroyed in a suit at law, the case should be presented to a jury, and not to the Court, for decision.

It is said, that there is no satisfactory proof, that the goods returned as attached were all included in the mortgages. The answer to this objection is, that the officer does not appear to have returned an attachment of any goods not subject to them; and there is no claim made for damages for neglecting to attach any property except the store.

It is further contended, that the goods were liable to attachment, and that the officer violated his duty by permitting

them to be returned to the debtor, if the mortgages were valid; especially was he in fault for neglecting to deliver them after having taken the indemnity of B. A. G. Fuller, on Dec. 16, 1841. It is not perceived, that the liability of the sheriff for the neglect or misconduct of his deputy can be varied or affected by the indemnity, which the deputy may have taken. Their responsibilities must be determined by the law applied to their official relations, and to the legal duties, and official conduct of the deputy. The act of taking an indemnity is not an official act; it is for his personal and private benefit and protection. One of the conditions of that indemnity however was, "that the question shall be settled, that said goods were liable to be attached on said writ as the property of said Kittredge in the manner, in which the same were attached," so far as it obliged him to deliver the goods to the officer or pay the execution.

The construction of the act of 1835, c. 188, § 2, came under consideration in the case of *Paul* v. *Hayford*, 9 Shepl. 234, and the conclusion was, that if the debtor's right to redeem personal property mortgaged could be attached on mesne process, the officer could not lawfully take actual possession of the property and withhold it from the mortgagee or his agent, without making payment or tender of the amount due upon the mortgage. On the revision of the statutes the language used in § 38, 39, and 40, of c. 117, to reenact the provisions of that section, does not give the officer any additional rights. In this case he could not have lawfully taken possession of the goods conveyed in mortgage, and have withheld them from the possession of the mortgagees or their servant, the mortgagor, without a payment or tender of the mortgage debt. The case does not shew any such payment or tender, or that the officer was requested to make it, or that he was provided with the money to enable him to do it. Having no right to take or to retain possession of the goods, he could not prevent the mortgagees from taking possession of them under their mortgage and from selling them at auction; and could not be guilty of any neglect or violation of official

duty by not delivering them when demanded of him. If the attachment were valid and effectual to secure the right to redeem the goods, that right does not appear to have been impaired by any act or neglect of the deputy. There is therefore a failure to establish by the proof in the case, any claim to recover damages of the sheriff for neglect or violation of duty by his deputy, with respect to the goods returned as attached.

There is a claim to recover damages for the neglect of the deputy to attach the store. The testimony does not shew, when the writ was delivered to the deputy. Samuel Titcomb testified, that he had verbal directions to attach it "one, or two, or three, days, after it had been delivered to him." This would seem to have been sufficient to have made it his duty to attach it. The report states, that the store was put into the return of the officer and erased. This however, by reference to the writs, return and schedule, is explained to mean only, that it was enumerated in the schedule of goods attached as in the store and erased from it. The store having been included in the mortgage he could not have legally attached it except by payment or tender of the mortgage debt. The complaint is not that he did not attach the right of redeeming it. And if that can be fairly included in the ground of complaint, there is no proof in the case, that it did not remain in the same situation after judgment had been obtained, and the execution had been issued, and the right to redeem it equally liable to be seized and sold, or the store itself equally so liable. It does not appear, that the plaintiffs have suffered any loss in consequence of his neglect to attach it. On the contrary there is reason to conclude, that if it had been attached, as the other goods included in the mortgage were, that attachment would have proved to have been equally unproductive. The burden of proof is upon the plaintiffs to show, that they have suffered damage from such neglect, and the Court cannot infer it without proof.

*Plaintiffs nonsuit.*

INHABITANTS OF AUGUSTA *versus* INHABITANTS OF TURNER.

A person of the age of twenty-one years may gain a settlement in a town by having his dwelling and home therein for the space of five years together, without receiving support or supplies as a pauper, irrespective of the manner in which his home had been acquired or continued.

Thus a female, *non compos mentis*, over twenty-one years of age, who had removed into a town with her mother, and composed a part of her family during the time, was held to have been capable of gaining a settlement in her own right by such residence.

ASSUMPSIT for the support of Amelia Battles a pauper, alleged to have been an inhabitant of Turner and found in need of immediate relief in Augusta. The parties agreed upon a statement of facts, which are found at the commencement of the opinion of the Court.

*J. Baker*, for the plaintiffs.

To the point, that the pauper gained no settlement in her own right in Augusta by five years continued residence there, although twenty-one years of age, because she was *non compos mentis*, incapable of volition, and could have no *animus manendi*, he cited *Hallowell* v. *Gardiner*, 1 Maine R. 93; *Jefferson* v. *Litchfield*, *ib.* 196; *Turner* v. *Buckfield*, 3 Maine R. 229; *Lubec* v. *Eastport*, *ib.* 220; *St. George* v. *Deer Isle*, *ib.* 390; *Hampden* v. *Fairfield*, *ib.* 436; *Wiscasset* v. *Waldoboro'*, *ib.* 388; *Knox* v. *Waldoboro'*, *ib.* 455; *Westbrook* v. *Bowdoinham*, 7 Maine R. 363; *Milo* v. *Kilmarnock*, 11 Maine R. 455; *Sidney* v. *Winthrop*, 5 Maine R. 123; *Upton* v. *Northbridge*, 15 Mass. R. 237; *Winchendon* v. *Hatfield* 4 Mass. R. 123; *Springfield* v. *Wilbraham*, *ib.* 493; *Dighton* v. *Freetown*, *ib.* 539; *Newbury* v. *Harvard*, 6 Pick. 1.

The facts show, that the father's settlement was in Turner, and that the mother of the pauper was his lawful wife. Up to the time of his death, in 1838, the settlement of both the mother and daughter was in Turner, for they could have no settlement but his. The mother has gained no settlement since his death, for the writ shows the supplies were furnished in 1842. *Richmond* v. *Lisbon*, 15 Maine R. 434; *Thomaston* v. *St. George*, 17 Maine R. 117.

The pauper could gain no settlement in her own right, for the reasons before mentioned, and must have that of her mother. She was never emancipated. 2 Kent, 205, 206; *Dedham* v. *Natick*, 16 Mass. R. 135. The father had not lost or abandoned his right to her earnings, if she was capable of labor, had given no one a right to her services, and had placed no one over her *in loco parentis*. *Sumner* v. *Sebec*, 3 Maine R. 223; *Pittston* v. *Wiscasset*, 4 Maine R. 293; *Fayette* v. *Leeds*, 10 Maine R. 409; *Wells* v. *Kennebunk*, 8 Maine R. 200; *Taunton* v. *Plymouth*, 15 Mass. R. 203; *Great Barrington* v. *Tyringham*, 18 Pick. 264; *Somerset* v. *Dighton*, 12 Mass. R. 383.

*S. May* argued for the defendants,

That the clause in the settlement act, Stat. 1821, § 2, that "legitimate children shall follow and have the settlement of their father," and of their mother, in certain cases, applies only to minor children, or to children so situated, as not to have a capacity to gain a settlement in their own right. *Charlestown* v. *Boston*, 13 Mass. R. 469; *Springfield* v. *Wilbraham*, 4 Mass. R. 493.

That in this case the pauper was emancipated both by age, and by the abandonment of the father, before she came into the State, and therefore can follow no settlement acquired by him after such emancipation. And after her removal to this State, she was in a capacity to gain a settlement of her own. *Lubec* v. *Eastport*, 3 Greenl. 220; *Sidney* v. *Winthrop*, 5 Greenl. 123; *Milo* v. *Kilmarnock*, 2 Fairf. 455.

That having a capacity to gain a settlement for herself, she has actually gained one in Augusta by a continued residence therein for eight years successively, without having received supplies during the time as a pauper. *Lubec* v. *Eastport*, and *Sidney* v. *Winthrop*, before cited.

The opinion of the Court was drawn up by

Shepley J. — In this case the plaintiffs claim to recover for the support of Amelia Battles, a pauper, who is the legitimate child of Asa Battles. She was born in the town of Bridge-

water, in the Commonwealth of Massachusetts, on December 9, 1800; and has from infancy been *non compos mentis*. Her father abandoned his family during the year 1820, came into this State; and after residing in other towns for a time, established his residence in the town of Turner, where he was married to another woman, and continued to reside there until the year 1838, when he died.

It is admitted, that he gained a settlement in Turner. He never resided afterward with the abandoned family, or made any provison for their support, or exercised any control over the pauper. His wife and children, including the pauper, removed into this State during the year 1823, and have resided in Augusta for the last eight years without receiving supplies as paupers. The father had not acquired any settlement in this State until after the pauper was of age. It has been decided, that a settlement might be acquired for a person *non compos mentis* by his dwelling and having a home in a town at the date of the passage of the act of 1821. *Lubec* v. *Eastport*, 3 Greenl. 220. *Sidney* v. *Winthrop*, 5 Greenl. 123. The case of *Fairfax* v. *Vassalborough*, referred to in the former case, appears to have decided, that a settlement was acquired by such a person, under the act of 1793, by dwelling and having a home in an unincorporated place, when it was incorporated. These decisions appear to have been made upon the principle, that the statutes, which determined the settlements of the paupers, acted upon the fact, that the dwelling and home of the pauper was in a particular town at a certain period without regarding the mode, in which it had been established there. That there may be cases, in which persons may, under our statute for the relief and support of the poor, have their residences established in a town, not only without, but even against their consent, cannot be doubted. Such as minor children bound as apprentices, and persons of full age bound as idle and destitute persons for a term not exceeding one year, by the overseers of the poor. If a residence may be established without any voluntary act of the person in such a manner as to have the effect to give a settlement by dwelling

and having a home in a particular town, it is not perceived, that it may not, upon the same principle, be continued in the same manner for five successive years. The statute would in the latter case, as in the former, only act upon the fact that there had been a dwelling and home for the person for the time required, irrespective of the manner in which it had been acquired or continued. The agreed case states, that the pauper resided and had her home with her mother in Augusta for eight successive years without receiving supplies as a pauper. This brings her case within the statute, which determines that she thereby had a settlement in that town.

*Plaintiffs nonsuit.*

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JOHN NEAL *versus* REUBEN BRAINERD.

Where the plaintiff, by his agreement in writing, acknowledged that he had received of the defendant, on June 15, 1841, $40,00 and on June 4, 1842, $12,00, and promised to indemnify the defendant against a certain claim and procure a discharge therefrom, when the defendant should "pay two fifty dollar notes, signed by him and payable to the plaintiff at different times, dated Aug. 18, 1840; the above named $40,00, and $12,00, are in part pay for the two fifty dollar notes above named;" and where the defendant produced at the trial of an action on the last note, the fifty dollar note first payable, cancelled; *it was held*, that these facts furnished no legal presumption, that the note taken up was paid by other money, and not by the sums mentioned in the agreement, especially, as there was testimony tending to show, that the defendant had promised to pay the note in suit.

ASSUMPSIT upon a note made by the defendant to the plaintiff, dated Aug. 18, 1840, payable in one year with interest.

At the trial, before REDINGTON, District Judge, the note was produced and read to the jury. It had an indorsement thereon of $12,00, under date of March 22, 1842.

The defendant set up the defence of payment, and brought forward and read another note given by him to the plaintiff of the same date and sum, but payable in six months, on which was no indorsement. It was also in evidence, that there was another note of the same date given by the defendant to the plaintiff for $75,00, and that the three notes were given to

the plaintiff, at the request of the defendant, he being one of the overseers of the poor of the town, to settle a claim against him as the father of a bastard child, made by the mother, one Sarah Bouldin. The defendant also read to the jury an instrument, signed by the plaintiff, of which a copy follows. "Monmouth, Dec. 16, 1840, Received of Reuben Brainerd, seventy-six dollars, fifty cents; also June 15, 1841, forty dollars, and also June 4, 1842, twelve dollars, in consideration of which I agree to clear said Brainerd from all costs or expense for the maintenance of the child of Sarah Bouldin of Litchfield, and also procure her receipt in full for costs or damage for the same, when said Brainerd shall pay two fifty dollar notes signed by him, and payable to John Neal above named; forty dollars, and also the twelve dollars are in part pay for the two fifty dollar notes above named; which are dated Aug. 18, 1840. John Neal."

The plaintiff called a witness, who testified, that at the request of the plaintiff, in March, 1842, he called on the defendant for payment of the note in suit, and that the defendant replied, that if the witness would wait a few days, he would pay some, and if he would wait until May, he, the defendant, would pay the whole.

The case was then taken from the jury, and turned into a statement of facts agreed by the parties, and was submitted to the decision of the Court, who were to draw inferences and decide facts, upon the evidence, and order the proper judgment to be entered.

The District Judge ordered judgment to be entered for the plaintiff, assessing the damages at $33,87. The defendant appealed.

*Vose*, for the plaintiff, said that the only objection, that there could possibly be to the decision of the Court below, was, that the damages were not high enough.

*May*, for the defendant, contended, that upon the facts, the law raised a presumption of payment of the note produced by the defendant, from other means, than the sums

mentioned in the receipt, and left those sums to go in discharge of this note.

The opinion of the Court was drawn up by

TENNEY J. — On the 18th August, 1840, the defendant gave to the plaintiff, for a valid consideration, three notes of hand, one for seventy-five dollars, payable in a short time; and two others for fifty dollars each, one payable in six months, and the other in one year, all with interest. This suit is for the note which became payable in one year. The defendant insists, that it is paid, and to show the payment, introduced a paper signed by the plaintiff, in which a sum corresponding in amount with that of the first note and the interest, and two other sums, which together are a trifle less than the principal and interest upon the note, which was due in six months, is acknowledged to have been received, at different dates. By this paper, it satisfactorily appears, that the two last named notes had not been actually taken up, when the paper was given, and the one on six months, being produced at the trial by the defendant, is evidence that he took it up subsequently to the delivery of the paper aforesaid. There is nothing tending to show, that any payment was made upon the note in suit, excepting the indorsement upon it; but on the other hand there was an admission of the defendant, that he was liable thereon by his promise to pay it at a future day.

*Judgment for the plaintiff*
*for the sum due on the note.*

PETER F. SANBORN & *al. versus* ELIPHALET HOYT & *al.*

If a conveyance is made of a tract of land, described by metes and bounds, containing fifty acres, having at the time a house, barn and shed thereon, but having no particular portion of the land designated by occupation or otherwise with the buildings, and these words are in the habendum of the deed — "excepting and reserving all the buildings on said premises" — the whole land, including that under the buildings, passes to the grantee, and the grantor retains the buildings as personal property.

CASE against the defendants for encumbering the land of the plaintiffs with their buildings, and for not removing the same. At the trial, before REDINGTON, District Judge, it appeared that the defendants had conveyed to the plaintiffs a tract of land containing about forty-seven acres, describing it by metes and bounds, "excepting and reserving all the buildings on said premises." The buildings upon the land were a dwellinghouse, barn and shed. The defendants removed the barn. On Nov. 23, 1842, the plaintiffs notified the defendants to remove the other buildings. They neglected to remove them, and on Dec. 29, 1842, this action was commenced. The presiding Judge instructed the jury, that the whole land described in the deed, including that under the buildings, passed to the plaintiffs, and that the buildings became the personal property of the defendants. During the trial the Judge had ruled, that parol evidence was inadmissible to show what the parties really intended when the deed was made; but afterwards, with the design to save the necessity of another trial, if his ruling was wrong, permitted the parties respectively, to introduce the testimony of witnesses, to show whether, separate from the deed, the defendants, when they made it, did except the buildings, without excepting the land. The jury returned an affirmative answer. The verdict was for the plaintiffs, and the damages were assessed at twelve cents. The defendants filed exceptions.

*N. Weston* argued for the defendants, contending that the land under the buildings was reserved. 1 Co. Lit. 4 (b); 6 Greenl. 154 and 436; 3 Mason, 280.

But if this was not the true construction, we are under no necessity to remove the buildings. We have the right to occupy them there, while they stand. 16 Pick. 231.

The parol evidence was clearly inadmissible.

*Wells* and *Morrill*, for the plaintiffs, insisted that the construction put upon the deed by the Judge was correct. The whole land became the property of the plaintiffs, the buildings were the personal estate of the defendants; they had no right to have them remain upon the land; and they were bound to remove them within a reasonable time. As the jury have found, that this was not done, the action is supported.

The opinion of the Court was drawn up by

SHEPLEY J. — The only exception insisted upon in the argument for the defendants is, that by the reservation or exception in their deed of conveyance to the plaintiffs the land, upon which the buildings stood, was also excepted. At the time of the conveyance there were standing upon a tract of land, containing about forty-seven acres, a dwellinghouse, barn, and shed. That tract of land was conveyed by metes and bounds. It does not appear, that there was at the time, any lot, parcel of land, or curtilage, designated by occupation in connexion with the buildings. In the habendum of the deed are these words, "excepting and reserving all the buildings on said premises." By the grant of a messuage, house, mill, or store, the land, on which it stands, may pass. And an exception in a deed may have the same construction. In such cases the intention of the parties may usually be ascertained from the language, considered in connexion with the state of facts at the time. Thus if one were to grant his house or store, without explanatory words, situated upon a small lot used with it, the lot might well be considered as intended to be conveyed. And the grant of a dwellinghouse upon a farm might convey a small lot of land, fenced from the farm, or otherwise clearly designated and used with the house. It is not always true, that there is a lot so designated and used particularly in connexion with the buildings standing upon a farm,

or other considerable tract of land. Such a designation would seem to be necessary, that some certain lot might be conveyed, to admit of a construction, that land was intended to be conveyed by the conveyance of a house.

The reservation in this deed is not of a house, barn and shed; but of "the buildings on said premises." Suppose the owner of a small lot should convey the lot, reserving the buildings on said premises, or should convey the buildings on the lot without other words, could there be a doubt respecting the intention? If the lot be a large one without any evidence, that there was at the time any designation of a particular part of it as used with the buildings, it is not perceived, that there could have been an intention to reserve or except any land by "excepting and reserving the buildings on said premises."

The defendants do not appear to have been injured by the admission of the illegal testimony to explain by parol the agreements of the parties at the time.

*Exceptions overruled.*

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LUTHER SEVERANCE & *al. versus* SETH WHITTIER.

Contracts to pay for real estate, and pews in meetinghouses by statute are to be deemed such, are not voidable, unless there shall appear to have been a total failure of consideration; whether the conveyance of the same be by general warranty, or otherwise. If any thing passed by the conveyance, a note given for the consideration is recoverable; and if there be a partial failure of consideration, the grantee is remitted to his covenants, if any there be, for his remedy.

ASSUMPSIT on a note of hand for $81, dated Jan. 1, 1838, payable to A. W. Hasey, Treasurer of the Bangor Methodist Chapel Corporation, or bearer, in one year from date, with interest, given by the defendant in part payment for a pew in that house. The note remained in the hands of Hasey until it was overdue.

The facts are sufficiently stated in the opinion of the Court.

*J. Baker*, for the plaintiffs, said that the defendant had the possession of the pew for three years under his deed, and no

one has power to obtain payment from him of rent therefor. At the time of the conveyance, too, the grantors had an equity of redemption, which passed to the defendant, and gave him the right of redeeming the mortgages.

Where there is a conveyance of real estate, the failure of consideration must be total, to make good a defence to a note given for the estate sold. And it is wholly immaterial, whether there are covenants of warranty in the deed, or no covenants whatever. In the latter case, it is understood by the parties, that some uncertain, or contingent right is conveyed, and that the risk of title is on the purchaser. *Lloyd* v. *Jewell*, 1 Maine R. 352; *Reed* v. *Cummings*, 2 Maine R. 82; *Howard* v. *Witham*, *ib.* 390; *Wentworth* v. *Goodwin*, 21 Maine R. 150; Bayley on Bills, 537; *Smith* v. *Sinclair*, 15 Mass. R. 171; *Perkins* v. *Bumford*, 3 N. H. R. 522; *Green* v. *Cook*, 2 Wheat. 13; 5 Cowen, 494; 3 Kent, 402; 14 East, 485; 1 M. & Y. 338; 20 Pick. 110.

*H. W. Paine*, for the defendant, said he merely appeared for one of his professional brethren in another county, without time for preparation; and would only cite, 7 Mass. R. 31; 5 Pick. 480; 14 Pick. 293; 3 Pick. 445; 8 Cowen, 31; 2 Wend. 431; 4 Wend. 483; Bayley on B. (P. & S. Ed.) 431, and note.

The opinion of the Court was by

WHITMAN C. J. — The note of hand declared upon, appears to have been given for a pew in a meetinghouse in Bangor. The defence is, that the consideration has failed. It appears that the land, on which the meetinghouse stood, had, previous to the conveyance of the pew to the defendant, been mortgaged to secure the payment of the consideration for the land on which the meetinghouse stood; and that a lien was set up to the house by the mechanics, who had erected it. These claims, after the defendant, under his deed of the pew, had used and occupied it for nearly three years, were enforced, so that the defendant was, thereupon, ousted from the possession of his pew, and has been wholly deprived of the use of it.

By the law, as recognised in this State, *Wentworth* v. *Goodwin*, 21 Maine R. 150, contracts to pay for real estate, and pews in meetinghouses by statute are to be deemed such, are not voidable, unless there shall appear to have been a total failure of consideration; whether the conveyance of the same be by general warranty, or otherwise. If any thing passed by the conveyance a note given for the consideration is recoverable; and if there be a partial failure of consideration the grantee is remitted to his covenants, if any there be, for his remedy. If he has not been careful to secure himself by covenants of warranty, it is to be presumed that he intended to take upon himself the risk at least of any partial failure of title.

In this case the claims, which existed against the property conveyed, were but incumbrances, which might be removed. The grantors were seized of a right in equity of redemption. This passed to their grantee, the defendant. We cannot know, if that were essential, that such a right might not be valuable; and, taking no covenants of warranty, it may be reasonable to conclude, that all the defendant contemplated purchasing was the right of redemption. Having purchased this, and having entered into possession under his deed, and enjoyed the use and occupation of the premises for a number of years, without having taken measures to exonerate the same from incumbrances, we may regard him as having received all that was intended in consideration for his note; and, as agreed, judgment must be entered for the plaintiff.

FRANCIS M. ROLLINS *versus* WILLIAM C. DOW *& al.*

Where one of the alternatives in the condition of a bond, given by a debtor to procure his release from arrest on an execution, is, that the debtor shall "deliver himself into the custody of the keeper of the jail, and go into close confinement," the penalty of the bond is saved, if the debtor seasonably surrenders himself at the jail to the control and custody of the jailer.

When the debtor has once surrendered himself into the custody of the jailer, he cannot be made liable upon his bond by reason of any negligence or misconduct of the jailer.

DEBT on a bond, given to procure the release of Dow from arrest upon execution in favor of the plaintiff against him, dated Sept. 9, 1841. The defendants pleaded performance; and contended that Dow had voluntarily been delivered into the custody of the keeper of the jail, and had gone into close confinement within the six months.

The defendants called the keeper of the jail at Augusta, who produced a book containing a list of prisoners, who had been confined there, and testified that it was the regular calendar of the prison. It appeared from an entry therein, that Dow was committed to prison on March 9, 1842, and discharged on the seventeenth of the same month. The plaintiff objected to the admission of the book, and that it could not be considered a valid calendar, because it did not contain all the particulars, which were required by Rev. Stat. c. 104, § 39. The witness was then offered to testify, that Dow did in fact surrender himself into the custody of the keeper of the jail, and go into confinement. To the admission of this, the plaintiff objected, because it could not be proved by parol. The objection was overruled, and the witness testified, that on March 9, 1842, Dow did surrender himself in the jail building, and that he received Dow, and Dow submitted to his directions. After the witness had been examined and cross-examined, the case was taken from the jury, and turned into a statement of facts, and submitted to the decision of the Court, who were authorized to enter the proper judgment.

*H. A. Smith* argued for the plaintiff. His grounds of objection appear in the opinion of the Court. He cited *Free-*

*man* v. *Davis*, 7 Mass. R. 200; *Clap* v. *Cofran*, *ib.* 98; *Burroughs* v. *Lowder*, 8 Mass. R. 373; *Call* v. *Hagger*, *ib.* 423; *Winthrop* v. *Dockendorf*, 3 Greenl. 156.

*Bradbury & Rice*, for the defendants.

The opinion of the Court was by

WHITMAN C. J. — This is an action of debt, on a bond made to procure the liberation of the defendant, Nichols, from arrest on execution, in pursuance of the provisions of the statute for the relief of poor debtors. The conditions of the bond are in the alternative: if either has been performed the defence of performance is sustained. One of them is, that the debtor shall "be delivered in custody of the keeper of the prison in Augusta, in the County of Kennebec, and go into close confinement, within six months." And this, it is alleged, that the debtor performed; and the agreed statement of facts shows, that, within that time, he did surrender himself into the custody of the jailer.

But it is objected that he did not "go into close confinement." It appears that the jailer kept him in his dwelling-house, appurtenant to the jail. The debtor having surrendered himself to the custody of the jailer, it was for the latter to dispose of him as he should deem it his duty to do. The debtor could not prescribe the mode in which he should be confined. Submitting himself to the control of the jailer, at the jail house, was all that was within his power. Whatever confinement it was deemed proper to impose was with the jailer. In surrendering himself, therefore, to the control of the jailer the penalty of the bond was saved. He must be regarded as having gone into close confinement. In reference to this it is perceived, that the language of the law, and of the bond, intended to be in pursuance of it, are dissimilar. The law provides, only, that this alternative shall be, that the debtor shall "deliver himself into the custody of the keeper of the jail;" the bond adds, "and go into close confinement." The language of the bond, however, may be nothing more than is implied in the law. Delivering himself into the custody of

the keeper of the jail may well be deemed going into close confinement, so far as duty on the part of the debtor would require.

The plaintiff, however, interposes a number of objections, which we think are inapplicable to the case. They relate to the discharge of the duties of the jailer. It is urged, that he did not make proper entries in his calendar; and it may be admitted that he did not; but what is that to the debtor? If he did what was incumbent on him, by way of complying with the condition of his bond, according to the just import of its terms, whether the jailer, thereupon, neglected the performance of his duties or not, is out of the question. The debtor could not, nor was it any part of his duty to dictate how the calendar should be kept, or what entries should be made therein. This was a matter wholly under the control of the jailer; and his misconduct or negligence therein could in nowise affect the rights of the debtor.

It is further urged, that, without such entries as are required by statute to be made in the calendar, the creditor could not know, that his debtor stood committed on his execution; and that he could not have his remedy over against the jailer, or his principal, the sheriff, for an escape. This would be no concern of the debtor's, if he performed his duty; but it is not perceived that the creditor could labor under any such difficulty. It was a matter, which would be susceptible of proof, that the debtor had been surrendered into the custody of the jailer; and he or his principal might be made responsible for his neglect to the injury of the creditor, whether, in not making proper entries in the calendar, or in not keeping the debtor *in arcta et salva custodia*, or otherwise.

The plaintiff, as agreed, must become nonsuit.

AMBROSE MERRILL *versus* JOEL HOW *& al.*

Where one receives his property again, which had been unlawfully taken from him, he is considered as having received it in mitigation of damages, upon the principle, that he has thereby received a partial compensation for the injury suffered.

But in such case he cannot be required to deduct from the amount of the injury suffered beyond the benefit received; and when he has honestly and in good faith paid a sum of money to regain his property, that sum is first to be deducted from the value of the property received back.

THE District Judge, REDINGTON, at the trial, instructed the jury, that if the defendants took the horse wrongfully, and delivered it to a person of their own selection, who knew that it was not their property, under the expectation, that he would not deliver it to the owner until its keeping was paid for by him, and the keeper, with the knowledge and consent of the defendants, sold the horse, the defendants had exposed themselves to pay the value of the horse to the plaintiff; that the plaintiff, by taking the horse back, had not cut off his right of action; that the taking back of his property was to go in mitigation of damages; and that the jury should allow him reasonable damage for the wrongful taking and detention. The verdict was for the plaintiff, and the defendants filed exceptions.

*Bradbury & Rice* argued for the defendants, citing 3 Hill, 485; Yelv. 66; 2 Com. on Con. 151; 14 Maine R. 436; 2 Kent, 242; 3 Bac. Abr. 669.

*Wells* and *H. W. Paine* argued for the plaintiff, and cited 2 Ld. Raym. 166; Yelv. 67, note; 14 Pick. 356; 17 Pick. 1; 10 Johns. R. 176; 13 Maine R. 245.

The opinion of the Court was by

SHEPLEY J.—The only question presented in this bill of exceptions has reference to the amount of damages, which the plaintiff is entitled to recover in an action of trespass, for taking and carrying away his horse. It appears, that the defendant, Howe, as a constable for the town of Nobleborough, took the horse on an execution in favor of the other defendant against the plaintiff, and went with the horse into the

adjoining town of Newcastle, and put it up at an inn, directing it to be kept there until sold on the execution, where it remained twenty-two or three weeks; that execution was subsequently returned unsatisfied; and a new suit, against the plaintiff and a trustee, was commenced, and the debt was collected. No person appearing to pay the expense of keeping the horse, the innkeeper advertised and sold it at auction, and the plaintiff, through an agent, appears to have become the purchaser, paying as the price the amount claimed for keeping, and the expenses. In defence it is contended, that as the plaintiff has received his horse again, he can recover only the damages suffered from the taking and from the withholding of the use of him. And it is said, that the sale was illegal; that no property passed by it; and that the payment was a voluntary one.

When one receives his property again, which has been unlawfully taken from him, he is considered as having received it in mitigation of damages. This is upon the principle, that he has thereby received a partial compensation for the injury suffered. It would be unjust to permit him to recover for the whole injury suffered, without deducting the benefits received by a return of the property. But upon no principle can he be required to deduct from the injury suffered beyond the amount of the benefit received. Hence it is, that when he has honestly and in good faith paid a sum of money to regain his property, the benefit received by its return is but the value of the property, deducting the amount so paid to regain it. And if he might have obtained possession again by a suit at law without such payment, the wrongdoer cannot insist, that he should be subjected to the risk, expense and delay of a suit. He would be entitled to regain his property with as little delay, expense, or risk as possible. The verdict appears to have been found substantially in conformity to these principles. It is not therefore necessary to inquire, whether there was not any legal duress or constraint upon the plaintiff, when he paid the expense of keeping by a purchase of his horse.

*Exceptions overruled.*

SILAS B. WING *versus* RICHARD DUNN *& al.*

Whenever a note is purchased after the day of payment shall have elapsed, the maker is entitled to the defence of usury, in a suit by an indorsee, as fully as if the note had remained in the hands of the payee.

The sixth section of Rev. St. c. 69, entitled, "of usury," has no reference to the second section of the same statute.

The seventh section of that statute, respecting costs, is applicable only to cases in which the usury had been proved as provided in § 3, by the oath of the party; and not to cases where the damages are reduced by any other mode of proving usury.

THIS case came before the Court on the following statement. This action is assumpsit brought by the plaintiff as indorsee of a promissory note made by the defendants to one David Austin, and payable to him or his order in five months from date. It is agreed by the parties, that the plaintiff received said note from said Austin by indorsement, in good faith, and for a valuable consideration, and had not at the time of paying such consideration, actual notice, that the same had been given for an usurious consideration, or that a rate of interest above six per cent. was therein secured. It is further agreed that the plaintiff received said note as aforesaid, after its maturity, and that twelve per cent. interest was secured originally in said note.

If upon the foregoing statement, in the opinion of the Court, the plaintiff is entitled to recover the full amount of said note, notwithstanding the usury contained therein, then judgment is to be entered for the amount of said note, interest and costs of suit; otherwise the plaintiff is to have judgment for the amount of said note deducting therefrom six per cent. interest, without costs, and the defendants are to have judgment for their costs.

*Morrill* argued for the plaintiff, and remarked that by the common law usury was no defence. All interest was usury. Kyd on Bills, 280. Unless then the defendants are entitled to a deduction under the provisions of Rev. Stat. c. 69, the plaintiff should have judgment for the full amount of the note.

The defence of usury, by the provisions of the same statute, § 6, is not allowed, if the holder is an indorsee for value, where he had not, at the time of payment of the consideration, "actual notice, that the same had been given upon an usurious consideration, or upon a usurious contract." In this case the parties have agreed, that there was no actual notice. No room is left for constructive notice, and the statute is conclusive. The circumstance put into the case, that the plaintiff received the note, when overdue, is wholly immaterial. The presumption of law is here rebutted by the facts, if any such presumption could be allowed in a case under this statute.

*Vose*, for the defendants, said that our statute is in this respect, an exact copy of the New York statute on the same subject; and that therefore, the decisions in that State are in point. The question had there been decided, and he would refer to the case, instead of an argument. *Hackley* v. *Sprague*, 10 Wend. 113.

The opinion of the Court was by

WHITMAN C. J. — The plaintiff is an indorsee of the note declared upon; and the defendant is the maker of the same; and sets up the defence of usury; and it is admitted that more than at the rate of six per cent. was reserved in the note, when taken by the payee. The plaintiff, however, received it without actual knowledge, that such was the case, but after it had become payable, and paid a valuable consideration for it. The Rev. Stat. c. 69, § 2, provides, that, in an action against the debtor, on any contracts, &c. whereupon or whereby these shall be reserved or taken above the rate of six per cent. he may, under the general issue, prove it, and avoid the payment of the excess so reserved or taken. At common law, whenever a note is purchased after the day of payment shall have elapsed, the maker is entitled to any defence, which he could have made if the security had remained in the hands of the promisee. The excess, therefore, over legal interest secured in this note must be deducted.

By the arguments of counsel in this case, it seems to have been taken for granted, that § 6, of the statute, is applicable to this case. This section is, that, "The preceding section shall not extend to bills of exchange or promissory notes, payable to order or bearer, in the hands of an indorsee or holder, who shall have received the same in good faith, and for a valuable consideration; and who had not, at the time of discounting such bill or note, or paying such consideration, actual notice, that the same had been given for an usurious consideration, or upon a usurious contract." The preceding section is, "That whoever, on any such loan, shall, in any manner, pay a greater sum or value than is by law allowed to the creditor, may, or his personal representatives may, recover of the creditor, or his representatives, by action at law, the excess so received by such creditor, whether in money or other property." The sixth section, therefore, has no reference to § 2, upon which this defence is founded; and applies only to § 5, that being the section next preceding it. The Revised Statute, c. 1, § 3, Rule 14, declares, in accordance with what would otherwise have been obvious, that "the words, "preceding" and "following," when used by way of reference to any section in these Revised Statutes, shall be construed to mean the section next preceding or next following that in which reference is made, unless some other section is expressly designated." In the § 6, no other section is designated or alluded to except § 5.

In the statement of facts the plaintiff has been induced to agree, if the usurious part of the interest should be deducted, that his recovery shall be without costs for him; and that costs shall be allowed for the defendant. This agreement was, doubtless, entered into upon the supposition, that § 7, of the act, applied to his case; but by the wording of that section it would seem to be applicable only to cases, in which the usury had been proved, as provided in § 3, by the oath of the party. The seventh section is, that, "In a suit brought, where more than legal interest shall be reserved or taken, the party, so reserving and taking, shall recover no costs, but shall pay costs to the defendant; *provided*, the damages shall be reduced by

the oath of any one of the defendants, where there are more than one, by reason of such usurious interest." In this case the damages are not reduced by the oath of any one of the defendants. The plaintiff, therefore, but for his agreement, would be entitled to his costs, as in other cases, where his damages had been merely reduced below what he had claimed. If this agreement on the part of the plaintiff was entered into through mistake or misapprehension, it may be reasonable, on his motion, to discharge him from it.

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REUBEN H. GREENE *& al. versus* AMASA DINGLEY.

In replevin, where *non cepit* is pleaded, with a brief statement alleging the property in the articles replevied to be in the defendant, the plaintiff, after proving the taking, is not bound to prove property in himself; but it is incumbent on the defendant to show that he is the owner thereof.

Where the facts are ascertained, what is a reasonable time is a question of law to be decided by the Court; where the facts are in dispute, it is to be decided by the jury under the instruction of the Court in matter of law; and if the Judge decides a question rightly, which should have been submitted to the jury, a new trial will not be granted for so doing.

If the payment of a note be secured by a mortgage of personal property, a demand of payment of the amount due on the note, after it became payable, is a waiver of forfeiture of the mortgaged property.

The mortgagee may, however, in such case, take the property into his own possession, unless he has relinquished the power so to do, and hold it subject to redemption.

If the mortgagee takes the mortgaged property into his possession, after the money has become payable, with the full understanding of the parties that the same was taken in full discharge of the note secured by the mortgage, his title becomes perfect, and nothing short of a repurchase will restore the mortgagor to his former rights.

What the intention of the parties was, when the property was delivered up by the mortgagor to the mortgagee, is for the decision of the jury.

REPLEVIN for a pair of steers. Writ dated Oct. 12, 1840. Plea, *non cepit.* Brief statement, that the property in the steers was in the defendant.

At the trial, before SHEPLEY J. the plaintiffs proved the taking of the steers by the defendant, and rested. The counsel

for the defendant requested the presiding Judge to rule, that the plaintiffs must prove the property to be in themselves before they could sustain their action. This the Judge declined to do, and ruled, that the only question, besides the taking, presented by the pleadings, was, whether the property in the steers was in the defendant.

The exceptions refer to certain depositions as part of the case, but copies of them are not among the papers. They are noticed in the opinion of the Court, as also the other evidence in the case.

There was no other request for any ruling of the Court; and the only ruling, except as before given, was in these terms.

The Judge instructed the jury, that if they believed, that the plaintiffs did render and deliver up the steers, as testified to in Hutchins' deposition; and if they also believed, that the defendant, after the steers were so delivered and surrendered to him, did hold the conversation, as testified to by the plaintiffs' witnesses, that conversation was a waiver of the forfeiture, and restored to the plaintiffs the right of redeeming the steers from the defendant by payment or tender of the sum due on the note, provided the payment or tender was made in a reasonable time; and that they would consider whether it was made within a reasonable time.

The jury found a verdict for the plaintiffs, and the defendant filed exceptions.

The steers were taken from the plaintiffs by the defendant on Oct. 2, 1840, and the tender was made on the twelfth of the same month. The testimony shew, that the statements of Dingley were made between the time of his taking the steers, and the time of commencing the suit, which was on the same day the tender was made, without stating the precise day. The amount due from the plaintiffs to the defendant on the mortgage was about twenty dollars, and the steers were estimated by the witnesses to be of the value of seventy dollars.

The exceptions state, that the plaintiffs introduced testimony to prove, that between the taking of the steers by Dingley and the commencement of this suit, the defendant at different

times, in conversation with different witnesses, said, that he did not wish to take advantage of Greene; that all he wanted was his right, which, as he said, was twenty dollars and some cents, the balance due on the note secured by the mortgage. These statements of Dingley were communicated to Greene before the tender, but not at the request or with the knowledge of Dingley.

*Moor*, in his argument for the defendant, contended, among other things, that the plaintiff in replevin, in order to prevail in his action, must prove an unlawful taking or an unlawful detention of the property. *Badger* v. *Phinney*, 15 Mass. R. 359; *Baker* v. *Fales*, 16 Mass. R. 147; *Marston* v. *Baldwin*, 17 Mass. R. 606; *Simpson* v. *McFarland*, 18 Pick. 429; *Seaver* v. *Dingley*, 4 Greenl. 306.

Where personal property is mortgaged, the property is at law absolute in the mortgagee, when the condition is broken; and if the mortgagor has any remedy, it is in equity. When this action was commenced there was no equity of redemption after failure to perform the condition. The defendant had the absolute property in the steers at the time of the tender, and an offer of the amount due could not transfer the title to the plaintiffs. *Flanders* v. *Barstow*, 18 Maine R. 358; 18 Pick. 429; 17 Mass. R. 419; 1 Pick. 399; 11 Pick. 289. After the delivery up of the property by Greene to Dingley, the former ceased to have any right whatever to the steers.

The instruction that the conversation of Dingley was a waiver of the forfeiture, was erroneous. If there was a forfeiture, as the instruction seems to admit, the greatest possible right the plaintiffs could have had at that time, was a power to obtain a decree in their favor in a court of equity. The action of replevin, as the law then was, could not be maintained. *Flanders* v. *Barstow*, 18 Maine R. 358.

The presiding Judge erred in deciding, that the conversations of Dingley amounted to a waiver, instead of leaving it to the jury, with instructions as to what in law amounted to a waiver. *Swan* v. *Drury*, 22 Pick. 485. Besides, this con-

versation was not with the plaintiffs, nor intended to be communicated to them; and had it been, it was without consideration, and on that account could destroy no rights of the defendant. Verbal admissions should be received with great caution. Greenl. Ev. 233.

The Judge erred also in leaving to the jury to determine, whether the tender was made within a reasonable time. This is to be decided by the Court, and not the jury. 1 Stark. Ev. 450, 459; 2 Stark. 787; 1 Mete. 305.

The ruling, that under the pleadings the plaintiff was not bound to prove the property to be in himself, was erroneous. At the time the plea was filed, the defendant was bound to plead the general issue. Stat. 1831, c. 514. The law will not consider a plea so made an admission of any fact. If issue be joined on the right of property, the plaintiff must prove either a general or special property in himself. 2 Stark. Ev. 713. Here the brief statement put in issue the property in the steers.

*Boutelle* and *Evans*, for the plaintiffs, contended, that to support the issue of *non cepit*, the plaintiff must prove either an unlawful taking, or an unlawful detention, but not property in the plaintiffs, for this plea admits it. 2 Selw. N. P. 1213; *Seaver* v. *Dingley*, 4 Maine R. 317; *Whitwell* v. *Welles*, 24 Pick. 25. The defendant might, perhaps, under this issue have proved property in himself, because it would have shown that the plaintiffs had no claim to damages for the detention; but in such case the defendant would not have been entitled to a return of the goods. Hammond's N. P. 463.

The defendant might well plead property in himself, but he must, under that plea or brief statement, show the property to be in him, or he must fail, after the plaintiffs had proved the taking. 2 Selw. N. P. 1225; 1 Pick. 362; 4 Maine R. 317.

Although the condition of the mortgage had been broken by the nonpayment of the note, and the defendant had a right to hold the property as forfeited, he had a right to waive the forfeiture, and did, as we say, waive it. The time of perform-

ance may be enlarged, or the place be changed, and this may be shown by parol. Greenl. Ev. § 304, and cases cited; *Flanders* v. *Barstow*, 18 Maine R. 357; Chitty on Con. 110, 111, and cases cited; 1 Esp. R. 53. In some of the cases the time was enlarged before the breach, and in others afterwards. *Gage* v. *Loomis*, 7 Maine R. 394; 3 T. R. 590; 15 Maine R. 61; 7 Maine R. 70; 19 Maine R. 303; 1 Esp. R. 53.

An agreement to extend the time for the performance of an act may be implied as well as express. 8 Maine R. 213; 4 Pick. 525; 7 Maine R. 70; 19 Pick. 346.

No consideration for that particular act is necessary to support a waiver of time of performance. No case has been found where it has been required. But if a consideration is necessary, it is found in a moral obligation, or in agreeing to receive money instead of animals. It was but a continuation of the original contract, and the former consideration is sufficient. Chitty on Con. 110, 111; 1 M. & Selw. 21; 3 Stark. Ev. 104; 3 T. R. 590.

The question of waiver is generally a question of intention arising out of the circumstances, and is properly left to the jury. Chitty on Bills, 338, and cases cited; *Marston* v. *Baldwin*, 17 Mass. R. 606. It was so left here.

What is a reasonable time, or what is a waiver, is a question of law, to be determined by the Court, on certain facts, or certain evidence. *Hill* v. *Hobart*, 16 Maine R. 164.

But if the question of reasonable time or of waiver, might have been properly left to the jury, the verdict will not be set aside, when the decision, as here, was right. *Copeland* v. *Wadleigh*, 7 Maine R. 141; *Emerson* v. *Coggswell*, 16 Maine R. 77.

The opinion of the Court was prepared by

TENNEY J. — This is an action of replevin for a yoke of steers. The defendant pleaded the general issue of *non cepit*, and filed a brief statement, alleging therein that the property was in himself.

The defendant was once the owner of the steers, and sold them to the plaintiffs, taking for the purchase money a note secured by a mortgage of the steers; it was agreed that the plaintiffs should have possession of the steers till the maturity of the note. Sometime after the note was payable, the larger part thereof was received by the defendant; the balance remained unpaid for about two years, when the defendant made a demand, and on the reply of one of the plaintiffs, that he could not pay it, the defendant demanded the steers, and passed the bill of sale and note, being upon the same paper, to one of the plaintiffs, who examined them and in presence of the other plaintiff, pointed to the steers, and said, "there are your steers, take them," and on inquiry made by the defendant, told him he turned them out as his, the defendant's, property, and shortly after repeated the language, and the steers were driven away by the defendant. It appeared from the plaintiffs' evidence, that within ten days after the steers were driven away by the defendant, he said to a third person, without the knowledge of the plaintiffs or any design that it should be communicated to them, that he did not wish to take any advantage of them, that all he wanted was his right, which was the balance due upon the note. The plaintiffs were informed of this conversation, and in ten days after the defendant took away the steers, made a tender of that balance and demanded the steers; the defendant refused to deliver them, saying that the note was paid by them; and afterwards this action was commenced.

The Judge ruled, that the plaintiffs were not required, after offering proof of the taking, to show property in themselves; and instructed the jury, that if they believed the steers were delivered to the defendant in the manner stated; and also believed that the defendant did hold the conversation afterwards, as appeared from the testimony introduced by the plaintiffs, the latter was a waiver of the forfeiture and restored to the plaintiffs the right of redeeming the steers by the payment or tender of payment of the balance of the note, provided the

tender was made within a reasonable time after the demand was made of the balance of the note by the defendant.

On an issue taken upon the plea of *non cepit*, it is incumbent on the plaintiff to prove the taking alleged, but the defendant cannot question the plaintiffs' title; that must be derived in a special plea or brief statement. 1 Chitty's Pleadings, 159; *Simpson* v. *McFarland*, 18 Pick. 427. The requirement in the statute, which was in force when this action was first tried, that the general issue should in all cases be pleaded, cannot dispense with the necessity, on the part of the defendant, of showing the property to be that of the one who is alleged in the brief statement to be the owner. And if the title of the plaintiff could not be disputed under this issue, previous to the statute, it is not seen how it can be done, with any propriety, since its passage.

Another ground of exception is, that the question, whether the tender and demand of the steers were made in a reasonable time, was left to the jury. This was a question of law upon the facts, of which facts the jury were the judges. It often happens, that facts are in dispute, and what is reasonable time, is a mixed question of law and fact. In the case at bar, there was no controversy in this particular, and the jury have found that the tender and demand were made within a reasonable time. And in view of all the facts, the Court are not satisfied, that the jury erred in so deciding. If that which is the province of the Court to determine is submitted to the jury, and their decision is correct, a new trial will not be granted, when the same result must take place.

The demand of payment of the balance of the note at the time, when the defendant took away the steers, being a long time after the money was due, was a waiver of the forfeiture of the property mortgaged. It was however the right of the defendant, at any time after the note became payable, to take the property into his own possession, he not having relinquished the power to do so, longer, than the maturity of the note. It does not appear, that the note and mortgage were given up to the plaintiffs, when the steers were taken away by the defend-

ant though they were passed into the hands of one of the plaintiffs, before they turned out the steers. If there was a full understanding of the parties that the steers were taken in discharge of the note, and that no right of redemption remained in the plaintiffs, the property vested absolutely in the defendant, and his title was no less perfect, than it was before he first parted with it, and nothing short of a repurchase would restore to the plaintiffs their former rights.

But if the property was demanded by the defendant and delivered by the plaintiffs, that it might be holden only as security and to hasten or enforce the payment, and the note was undertood by the parties to be outstanding and unpaid, of which facts the conversation with third persons may be regarded as evidence, a payment or tender, and a demand of the property within a reasonable time by the plaintiffs, would entitle them to a restoration. What the intention of the parties was, when the steers were delivered to the defendant and driven away by him, was a fact which we think the jury should have settled, and the right to have it so determined was never relinquished by the defendant.

*Exceptions sustained.*

## The State *versus* Isaac C. McAllister.

Testimony, then irrelevant, may with propriety be admitted, under the expectation that it will be connected with the case by other testimony, to be laid out of the case unless so connected as to become relevant.

Testimony, having a tendency to prove the issue, is admissible for the consideration of the jury, although alone it might not justify a verdict in accordance with it.

On the trial of an indictment for passing counterfeit bank bills, knowing them to be such, testimony that the accused passed similar bills about the same time to other persons, is admissible, to show the *scienter*.

By the Rev. Stat. c. 1, § 2, all acts of incorporation are made public statutes, and the Court will judicially take notice of them.

In a criminal trial, an unnecessary omission on the part of the accused to offer evidence which might operate in his favor, if attainable, is a circumstance which the jury may consider, with other evidence in the case; and under this principle, the omission of the accused to furnish evidence of his previous good character, may be called to the consideration of the jury in support of the prosecution.

Exceptions from the Middle District Court, Redington J. presiding.

The exceptions state that this was an indictment for uttering and passing counterfeit bills, purporting to be of the Augusta Bank, viz., three bills of three dollars each, and one bill of one dollar.

The County Attorney introduced George W. Allen as a witness, (who testified, without objection, that he was cashier of the Augusta Bank,) and showed him a bill purporting to be of the Washington Bank, Boston, and inquired, if he knew the difference between the true and counterfeit bills of that bank. He testified that he did; that he had never seen the president or cashier write; that he knew their writing, as by having seen it on the bills of the bank. The County Attorney then asked him if the bill shown him was true or counterfeit. The defendant objected to the testimony. The objection was overruled, and the witness said the bill was counterfeit. But as no testimony was offered connecting the defendant with the bill, the bill did not go to the jury. The objection to Mr. Allen's testimony was, that he had not sufficient knowledge of

the difference between the true and the counterfeit bills, and his testimony was admitted, in expectation that the prosecuting officer would connect the bill with the case.

Said Allen further testified, that the bills described in the indictment, were received by him from Miss Susan Fisher, to whom it was alleged the defendant passed them; that he received them on the 13th of December, in the evening; that afterwards, the same evening, he showed them to Carleton Dole, and Thomas W. Smith and Mr. Scruton, who severally examined them; that at Dole's house and at Smith's house, they were laid upon a table; that afterwards, the same evening, he carried them to Mr. Bradbury's office; that they were there laid on the table, and examined by several persons, but he testified that said bills were not at any time out of his sight, or that he believed they were not; that the next day he put upon them the letters S. F. and placed them in the vault of the bank, and afterwards put upon them the other writing now upon them; and that he now knows them to be the same bills, which he received of Miss Fisher.

Joseph Nudd, called by the County Attorney, testified, that he was present in said Bradbury's office, when said Allen had the bills there in the evening of December 13th; that said bills were laid upon the table by said Allen; that there were as many as a dozen persons there; that said bills were examined by some of them, (while said Bradbury was making the warrant to arrest the defendant,) being passed from one to another; that said bills were by several of the persons compared with other bills to ascertain if counterfeit. The defendant contended, that this was not sufficient evidence for the jury to find that the bills introduced in evidence were the bills which said Allen received of Miss Fisher. The Court instructed the jury that they would be justified in finding that they were the same bills, if from said testimony, they were satisfied of that fact. Miss Fisher had previously testified that she delivered to Mr. Allen the bills which the defendant passed to her. Allen Wing, called by the County Attorney, testified that on the 13th December, he received from his wife two bills of the

Augusta Bank of three dollars each; that he put marks upon them; on one a single cross, and on the other a double cross, on the opposite corners of said bills; that he delivered said bills to the magistrate, who examined the defendant on the 16th of December, and has not had them since. The County Attorney offered in evidence two bills, resembling those marked by said Wing, but which said Wing said he would not swear to be the same. He testified that they resembled them; "that there are the marks and these the bills according to the best of his knowledge." Defendant contended that said evidence was not sufficient to prove that the bills so offered were the same which Wing received of his wife. But the Court ruled that the jury were at liberty to find them to be the same, if the evidence satisfied them of that fact. There was evidence introduced by the State tending to show that the defendant, at Waterville, on the evening of 12th December, passed to Mrs. Wing a counterfeit three dollar bill of the Augusta Bank, with a view to show that the defendant, when he passed to Miss Fisher the bills set out in the indictment, knew that the same were counterfeit. Defendant objected to this evidence, but the Court admitted it.

Thomas W. Smith testified, without objection, that he was president of the Augusta Bank.

In the course of the trial the County Attorney stated, that he should then put in the evidence of the existence of the Augusta Bank. He opened a book of Statute Laws, and said, this is the Act incorporating the Augusta Bank; then a book of Statute laws, and said, this is the act extending the charter, and read the dates of said acts. He then took up a manuscript book, and said it contained the stockholders' vote of acceptance of the act extending the charter, and asked said Allen if it was the bank's book of records? He replied that it was. The said acts and vote were not read, nor did the said books go to the jury, nor was any thing further said at the trial or in the argument in relation to the legal existence of the bank. The Court instructed the jury, that if the defendant passed the bills described in the indictment, as there set forth;

and if said bills were counterfeit, and known at the time to be counterfeit, and he passed them with intent to defraud Miss Fisher, they should find a verdict against the defendant. The defendant not having offered any evidence of good character, the County Attorney was, in his closing argument, proceeding to urge that circumstance upon the jury, as contributing to strengthen the case on the part of the State. The defendant objected to the offering of that argument to the jury. But the Court permitted it to proceed, and instructed the jury that said circumstance was proper for their consideration. The verdict was against the defendant.

To these several instructions and rulings, the defendant excepted.

*Wells* argued for McAllister. The objections taken are stated in the opinion of the Court.

In support of his first objection, he cited Rev. Stat. c. 157, § 10. In aid of his second, *Commonwealth* v. *Kinison*, 4 Mass. R. 646. And under his fifth, 2 Stark. Ev. 366.

*Paine*, County Attorney, replied, in behalf of the State, to the several objections; and cited *Commonwealth* v. *Turner*, 3 Metc. 119; Rosc. Cr. 18; Greenl. Ev. 53; *Coffin* v. *Collins*, 17 Maine R. 440; *State* v. *Merrick*, 19 Maine R. 398.

The opinion of the Court was drawn up by

TENNEY J. — This was an indictment for uttering and passing certain counterfeit bills purporting to be of the Augusta Bank, tried in the District Court. Several exceptions were taken to the rulings and to the instructions to the jury of the Judge; and we proceed to examine such as have been relied upon in the argument.

1. It is insisted, that George W. Allen, the cashier of the Bank, was improperly admitted to testify to his knowledge of the difference between the true and the spurious bills of the Washington Bank, situated in Boston, and that the bill purporting to be of that Bank, shown to him, was counterfeit. The Rev. Stat. c. 157, § 10, makes admissible the testimony of a witness, acquainted with the signatures of the President

and the Cashier, or having knowledge of the difference between the true and the counterfeit bills of a bank, to prove that the same are forged or counterfeit, when such officers reside out of the State, or more then forty miles from the place of trial. This evidence was admitted in the expectation of the Judge, that it would be connected with the case, and we do not perceive that it was improper, when ruled to be admissible. It did not become material, which could not have been foreseen, when the witness testified.

2. It is urged that Mr. Allen's testimony, touching the identity of the bills, should have been excluded. He testified that the bills were shown by him to several individuals, and at different places, but that they were not at any time out of his sight, or that he believed they were not, and that he knew they were those which he received from the person, who testified that she delivered to him the bills, that the defendant passed to her. This was evidence proper to go to the jury, and was of the same kind, for the want of which the verdict was set aside in the case of *Commonwealth* v. *Kinison*, 4 Mass. R. 646, cited by the defendant's counsel.

3. The evidence of Mrs. Wing, that the defendant passed to her a counterfeit bill, purporting to be of the Augusta Bank, about the time, when it was in evidence that those in question were passed by him, was undoubtedly proper, with a view to show that he knew them to be counterfeit. Such evidence has for a long time been held admissible. 2 Stark. Ev. 378 and 581, note (c.)

4. On the question of the existence of such a corporation as that of the Augusta Bank, one person testified that he was the President, and another that he was the Cashier thereof, without objection. A certain book produced was proved to be the bank's book of records. Certain books were offered as volumes of the statutes, which were said by the county attorney to contain the act of incorporation, and act extending the charter of the Augusta Bank, though no acts were read. No objection was made to the sufficiency of this evidence, nor was the Court requested to rule thereon. Rev. Stat. c. 1, § 2,

make all acts of incorporation public statutes, and such, courts notice judicially. The evidence upon this point was *prima facie* sufficient. The extended charter had not expired, and the fact that there was a president, cashier and book of records was proof that the charter had been accepted.

5. The defendant not having introduced evidence of good character, the attorney for the State was permitted to urge that circumstance to the jury, against the objection of the defendant's counsel, and the Judge instructed the jury, that the circumstance was proper for their consideration. It is a rule of law, as is contended, that every man's character is presumed to be good, till the contrary is proved; and that no evidence of bad character shall be admitted against the accused, till he has attempted to prove it good; but *he* may adduce such proof. This is upon the ground, that positive evidence adds to and tends to strengthen legal presumption. "Proof of good character may sometimes be the only mode, in which an innocent man can repel the presumption of guilt;" and, this notwithstanding the legal presumption of good character in his favor. *State* v. *Merrick*, 19 Maine R. 398. In a criminal trial, in which the character of acts depend upon the intention which prompted them, evidence of high character in the accused for integrity and uprightness, would tend strongly to excite doubts in the mind of the jury, unless the evidence was of a conclusive character. Every one is presumed to wish to offer evidence which can operate in his favor, if it is attainable; and it is a settled principle, that unnecessary omission to do this, is a circumstance, which the jury may consider with other evidence in the case; and we are not aware that the failure to produce proof of good character, in a case, where it is allowed, can form an exception. The Judge left the circumstance to be weighed by the jury, declaring no legal rule which would control their judgment. It was to have only such influence as was reasonable and just upon honest and unbiassed minds.

*Exceptions overruled.*

LOT HAMLIN *& al. versus* ELIZA JANE BRIDGE *& al.*

If a woman conveys her estate to a third person, in trust, for her own use, and then marries, the conveyance is fraudulent and void as to her prior creditors.

The bankruptcy of the husband does not take away the right of a creditor of the wife before the coverture to look to her property, fraudulently conveyed, for the payment; nor does his discharge as a bankrupt, destroy the right to enforce the debt against the property of the wife.

Where a bill in equity is brought against a married woman, with the view of obtaining payment of a debt contracted by her before her marriage, from her property fraudulently conveyed while sole, still the husband, although a certified bankrupt, should be joined as a party.

THIS was a bill in equity, and was heard on a demurrer to the bill. The facts are sufficiently stated in the opinion of the Court.

*M Cobb* argued in support of the demurrer, citing 11 Wheat. 199; 8 Wheat. 299; 5 Law Reporter, 309; 1 Mass. R. 282; 1 Burr. 436; 1 P. Wms. 244; 7 Ves. 249; 1 Story's Eq. 14, 15, 68, 69, 70, 72; 2 Story's Eq. 735; 2 Ves. 145; Story's Eq. Pl. 62, 64.

*Lancaster* argued for the plaintiff, citing 2 Kent, 162, 163.

The opinion of the Court was drawn up by

TENNEY J. — The bill charges, that Mary Jane Bridge, while sole, being indebted to the complainants, for labor done upon her house, for the purpose of securing it to her own use, transferred, in trust for her, to the other defendant, real estate, including said house and personal property of which she was then possessed; and which he received, and much thereof still retains; that this transfer was made in contemplation of her marriage with William Bridge, who soon after became her husband; that this was in fraud of the plaintiffs' rights; that since the marriage, Bridge has obtained his certificate of discharge as a bankrupt; and that the complainants have been unable to obtain payment of their debt. To this bill the defendants demur.

The conveyance by Mary Jane Bridge of the property pre-

vious to her marriage, as alleged in the bill, was a fraud upon the complainants; and they could have taken that property, so far as it was not exempt from attachment, on mesne process and execution for her debts, notwithstanding such transfer. By the marriage, Bridge did not become the owner of that property, and it could not be assets in the hands of his assignee; if he became liable for her debts by the marriage, that did not take from her creditors the right to look to her separate property fraudulently transferred. There must be some unyielding principle presented, before we can believe, that property thus situated is protected for the use of the debtor, merely because she has chosen to intermarry with a man who is insolvent, and afterwards obtains his discharge in bankruptcy. We have seen no such principle. The case cited from Peere Williams, of *Miles* v. *Williams*, does not appear analogous. There is nothing showing that there was separate property of the wife, which she had fradulently conveyed, so that all she had was not assets of the husband.

Another ground of demurrer urged in the argument for the defendant is, that the husband of Mary Jane Bridge is improperly omitted in the bill. It is laid down as a rule, that in cases respecting her separate estate, the wife may be sued without her husband, though he is ordinarily required to be joined for the sake of conformity to the rule of law, as a nominal party, whenever he is within the jurisdiction of the Court and can be made a party. 2 Story's Eq. 598. In *Dubois* v. *Hale*, 2 Vern. 613, the wife had before marriage conveyed an estate to trustees, so that her husband should not meddle with it. Part of it was claimed by the plaintiff in the bill. The husband was abroad. She was served with a subpœna, and afterwards arrested on attachment. The Court said, if the case is as laid in the bill, the wife had a separate capacity, and the husband had nothing to do with the estate, and rather than there should be a failure of justice, the process was held regular against her alone, her husband being beyond sea. In Fonblanque's Eq. Book I, c. 2, § 6, note (p), the author says, "I have not been able to find any case at law or in equity in

which she [*feme covert*] has been allowed to sue or be sued by a stranger, merely in respect to her separate property, without her husband being plaintiff or defendant." In 1 Com. on Eq. Plead. § 64, note, Judge Story says, in reference to *Regnes* v. *Lewis*, 1 Ch. Cas. 35, "where a *feme covert* sued without her husband, and a demurrer for that cause was overruled, the circumstances of the case do not appear; and the husband may have been a party defendant, as his interest was concerned."

In the case before us, it does not appear, that William Bridge is not residing within the jurisdiction of the Court, or that he has any interest in the matter adverse to that of his wife, and we think he should have been joined with her. Unless the bill is amended in this particular, it must be dismissed.

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HARRISON A. SMITH *versus* ALBERT LYFORD *& al.*

If a counsellor and attorney at law is employed by the principal to defend an action against himself and two sureties, upon a note signed by them, such employment will not, of itself, make the sureties holden for the payment of the bill for services in the defence, without the consent of the sureties, either through the agency of the principal or in some other way, that such attorney should be employed as their attorney.

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

Assumpsit against Albert Lyford, Joseph Marston and Enos Foster. The plaintiff proved that he rendered professional services to the amount of the services and disbursements charged, in defence of a suit in favor of Jewett, on a note given by Lyford, as principal, and the other defendants as his sureties, in the District and S. J. Court from 1839 to 1842, he being the only counsel in defence.

It appeared from the exceptions, which give all the testimony in the case, that the plaintiff and all the defendants lived in the same village; that Lyford applied to the plaintiff to defend the suit; that Marston, one of the other defendants, requested

a witness to attend Court for the defence, and said, Lyford would pay him, but on the refusal to attend, promised to pay if Lyford did not, and afterwards paid the witness; that at another time, during the pendency of the suit, there was a conversation between the plaintiff and Marston, in which the former requested the latter to advance the jury fees, and he refused, and told the plaintiff "that he would have nothing to do with it," the conversation having commenced by the plaintiff asking Marston what he was going to do about the Lyford case, when Marston replied, "what Lyford case?" the plaintiff answered, Jewett's, where you and Foster are sureties; to which Marston replied, he supposed it was settled long ago. A witness testified, that he thought he saw Foster in Court at the first trial. Lyford had become insolvent.

Redington, the presiding Judge, instructed the jury, that the joint liability of the defendants in the original suit, and their being jointly sued, would not of themselves alone authorize Lyford, the principal in the note, to employ counsel so as to render the other defendants liable for his fees and disbursements in defending that suit; that the plaintiff must further prove, that he was employed by consent of each of the other defendants as his counsel; that such consent might be proved by any such declarations or acts as would show their recognition, that the plaintiff was acting as their attorney; that the plaintiff's name, under that action on the docket, was not sufficient evidence of such consent; that if the jury found that Marston and Foster had knowledge of the employment of the plaintiff, by Lyford, as counsel to defend the suit, and if they knew he was defending it, they would not be liable, unless it was proved that Marston and Foster, through the agency of Lyford, or in some other way, consented that the plaintiff should be employed as their attorney in defending the suit.

The jury were requested to answer the following question. Is it, or is it not, proved that Marston (either through the agency of Lyford or in some other way) consented that Mr. Smith should be employed as *his attorney* in answering to the

former suit? The answer was, It is not proved. A similar question was put, and like answer given, as it respected Foster.

The verdict being in favor of Marston and Foster, the plaintiff filed exceptions.

*Smith* argued *pro se*, citing the following authorities. 9 Mass. R. 300; 8 Dow. & Ry. 289; 8 Cowen, 253; 20 Maine R. 83; 11 Wend. 78; 16 Maine R. 77; 7 Greenl. 121; 11 Mass. R. 34; 14 Mass. R. 172; 3 Fairf. 293.

*Bradbury* and *Noyes* argued for the defendants, Marston and Foster, citing 3 Kent, 23; 5 Mass. R. 407; 6 Pick. 198; 12 Mass. R. 565; 2 Stark. Ev. 130; Chitty on Con. 563.

The opinion of the Court was prepared by

TENNEY J. — This is an action of assumpsit to recover the disbursements made and the services rendered by the plaintiff in defending a suit upon a note of hand given by Lyford, as principal, and the other two defendants, as sureties. The jury have found that the sureties did not employ the plaintiff; but he insists that they are holden by a promise implied from their being defendants in the same action with Lyford, who did employ him.

The note was sufficient evidence of indebtedness of the makers to the holder, unless some matter was shown in defence to prevent a recovery. It was also evidence of a liability of the principal to the sureties, if they should pay it, after its maturity. The relation between principal and surety is such, that if the latter will take up the obligation, it is not in the power of the former to prevent it, and thereby cause a delay, not contemplated in the contract, and expose the surety to the risk of paying the debt, after the principal's means of making indemnity may be diminished. The principal is under an inducement to defend a suit, which may not operate with the sureties, if he thinks he can do it successfully. If he prevails, he is relieved from his liability to the other party, and also to the sureties. The sureties in any event have the security of the promise of the principal, if they pay the debt, either vol-

untarily or by compulsion. If they pay the debt, without giving him an opportunity to defend an action brought for its recovery, he may be liable therefor to them, notwithstanding he had a defence, which might prove to be perfect. For his protection, they may be willing not to take away his power of resisting the claim, by payment or suffering a judgment against themselves. But because he thinks proper to deny his obligation to fulfil the promise, which he has made, we do not perceive that a presumption is raised, that they wish to do the same. The most that can be presumed, from their silence, and omission to pay the debt is, that they interpose no objection to the denial of payment on his part.

It it contended, that the sureties having knowledge that the plaintiff was rendering services in defending the suit, and they receiving the benefit thereof, are therefore holden. This by no means follows. Their liability must depend upon the fact, whether an express promise to pay him or not was made, or whether a promise was implied by law. One may receive very important benefit from the services of another, and be under no obligation to remunerate him therefor. Benefits derived from such services, known at the time by the one receiving them, may often be strong evidence of a promise to make compensation; but where it appears that they were rendered upon another's credit, or other consideration, no liability is created. The instructions of the Judge to the jury were not inconsistent with established legal principles, and the

*Exceptions are overruled.*

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF FRANKLIN.

ARGUED AT JUNE TERM, 1844.

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## EPHRAIM WOODMAN *versus* COUNTY COMMISSIONERS OF SOMERSET COUNTY.

If it be not irregular to grant an order of notice at a court holden in another county, it is improper to call the County Commissioners out of their county, to answer to a petition for a mandamus, complaining of their acts and doings, as such, within their county.

A writ of mandamus is grantable at the discretion of the court, and not as matter of right.

Where there has been an increase of damages to land, occasioned by the location of a highway over it, by the verdict of a jury, and the prevailing party has taxed his bill of costs, and laid it before the County Commissioners for allowance, and they have allowed a part of the items, and rejected the rest, this Court will not grant a writ of mandamus to the commissioners for the purpose of correcting their decision as to the taxation of such costs, to the end that other items may be allowed.

A ROAD was laid out by the County Commissioners of the County of Somerset, passing over land of Woodman and French, the petitioners, in the town of Phillips, then in the County of Somerset. The petitioners were dissatisfied with their damages, and on their application a jury was ordered in October, 1836, and their damages were increased. On March 20, 1838, the County of Franklin was established, and the town of Phillips was included in that County. The petition

for a mandamus was presented at the October Term of this Court in Kennebec, 1843. The other facts appear in the opinion of the Court.

*J. Randall, jr.* for the petitioners, contended that they were clearly entitled to their legal costs, when the verdict of the jury was accepted and recorded, as matter of right, they being the prevailing party. It was the duty of the Commissioners, as a ministerial act, to enter up judgment for costs for the petitioners. St. 1821, c. 118, § 5; St. 1828, c. 399, § 6; St. 1831, c. 500, § 5.

He also contended that this was the appropriate remedy, where the County Commissioners refuse to perform their duty. *Morse, Pet'r.* 18 Pick. 446.

*Leavitt*, County Attorney of Somerset, for the respondents.

The opinion of the Court, TENNEY J. being an inhabitant of the County of Somerset, and having once been of counsel in the case, taking no part in the decision, was drawn up by

WHITMAN C. J. — This petition was addressed to the Court, sitting within and for the County of Kennebec; and an order was there obtained to notify the County Attorney, and chairman of the County Commissioners of Somerset, to appear at the term of this Court, then next to be holden in and for the County of Franklin, to show cause, &c. This order must have been inadvertently issued. The petition should have been addressed to this Court, at a term holden in Somerset; and I am of opinion that the order of notice should have issued from thence. There is no provision of law, that would authorize an order of notice in such case to be passed at a Court sitting elsewhere than in the county, where the subject matter of the petition was to be considered and acted upon. In many cases, it is true, that special provision has been made by statute, that orders of notice may be passed in any county; but there is no such provision in reference to a petition for a mandamus, and these special provisions seem to indicate very clearly, that, in the absence of any such provision, the power does not exist.

But, however that may be, to call the County Commissioners out of their county, to answer to a petition complaining of their acts and doings, as such, within their county, is, to say the least of it, irregular and vexatious; and should not be tolerated. A writ of mandamus is grantable at the discretion of the Court; and surely no Court would, in the exercise of a sound discretion, issue a mandate for them to appear to answer to such an application, out of their county, but from imperious necessity, of which this case does not afford the slightest indication.

It may be remarked also, that this petition does not appear to have been verified by oath or affirmation, which is also an irregularity.

For these reasons this petition, and all the proceedings under it must be quashed.

But if the proceedings were all regular, so that we could be called upon for a decision, in reference to the propriety of issuing a writ of mandamus, we are very far from coming to a conclusion, that, under the circumstances set forth in the petition, one should be granted. The petitioners were, without doubt, entitled to costs; but costs were allowed them. The object of the petition is to obtain a further allowance of costs, consisting of items for the travel and attendance of the petitioners, at six terms before the County Commissioners, and on one occasion, before the jury, and for counsel fees. The statute in the particular case is silent as to what shall constitute the items of cost to be allowed. These must necessarily be subject to the examination and discretion of the tribunal by which they are to be allowed. The Commissioners appear to have allowed the petitioners all their actual expenditures for court, sheriff and jury fees, amounting to sixty-eight dollars and sixty-eight cents. Whether it was intended that the party's travel, attendance and counsel fees should be allowed, does not explicitly appear. It was therefore a question of judicial construction, to be referred necessarily to the Court for their decision. To authorize the issuing of a writ of mandamus for the correction of every error, which a court of limited juris-

diction might commit, in allowing or refuting items in the taxation of costs, would be a perversion of the process.

The Supreme Court, in the State of New York, in *The People* v. *The Judges of Dutchess Com. Pleas*, 20 Wend. 658, held, that a mandamus would not lie to a subordinate court for the correction of judicial errors, and that all they could do in the exercise of their supervisory power, was to require inferior tribunals to proceed to judgment, without dictating the judgment to be rendered. And again; in *The People* v. *Collins*, 19 Wend. 56, they say, the appropriate office of this court is to set subordinate tribunals in motion.

In *Chase & al.* v. *The Blackstone Canal Company*, 10 Pick. 244, in a case in which the County Commissioners had wholly refused to allow costs, the court say, "without expressing any opinion whether the petitioners were entitled to costs, as a matter of right, or whether the commissioners had a discretionary authority to grant costs, or under the circumstances of the case, ought to have granted them, we are clearly of opinion that the writ of mandamus ought not to issue. This writ lies, either to compel the performance of ministerial duties, or is addressed to subordinate tribunals, requiring them to exercise their functions, and to render some judgment in a case before them."

Mr. C. J. Shaw has, however, in *Morse, pet'r.* &c. 18 Pick. 443, thought it proper to introduce an explanation of some of the language used in the case last cited, lest it should be deemed to decide, that, in reference to an act merely ministerial, required to be performed by a subordinate tribunal, no mandamus should issue; and instances, among other acts merely ministerial, the requirement by statute, that costs should be allowed, and in which the Court had wholly refused to allow any; which is not this case. The County Commissioners here had yielded to the requirement of the statute; and had allowed costs to a considerable amount; but had not thought proper to allow all that was claimed.

*Petition and proceedings in reference to it quashed.*

JOEL IRELAND *versus* JACOB ABBOTT.

Since the statute of 1821, c. 39, a mortgage cannot be foreclosed, except by pursuing one of the modes provided by statute for that purpose.

BILL in equity. Ireland mortgaged certain lands to Abbott, on March 1, 1824, to secure the payment of three notes, the last payment to be made on Jan. 1, 1826. The bill alleged, that Abbott had taken and received the rents and profits of the land from April 1, 1829, to the date of the bill, Jan. 7, 1842, and appropriated the same to his own use; that the entry into possession by the mortgagee was not for condition broken, and not in conformity with law for the purpose of foreclosing the mortgage; that on Sept. 17, 1841, the mortgagor, in writing, requested the mortgagee to render an account of the rents and profits and of the sum due at that time, and that the mortgagee wholly refused. Abbott, in his answer, alleged that he conveyed the land to Ireland on the same day the mortgage was given, which was to secure the purchase money, that Ireland failed to pay for the land, and in Oct. 1828, offered to quit the premises and deliver up the same to Abbott, if he might remain during the winter ensuing, and that Abbott consented thereto; that prior to March 1, 1829, Ireland abandoned the premises; and that he, Abbott, "meaning and intending to take possession of said premises for the condition broken of said mortgage deed, and to foreclose the same, on March 30, 1829, put one J. P. into full possession of the premises, and contracted to sell his right to the same to him;" that Abbott, and those claiming under him, had held the quiet possession of the premises from March 1, 1829, to the present time, and the mortgage had thereby been foreclosed; and denied any right in Ireland to redeem the same.

*Wells*, for the plaintiff, contended that under the statute of 1821, c. 39, concerning mortgages, there could be no foreclosure of a mortgage, except in one of the modes pointed out in the statute. Here was a mere parol sale of the equity, and the mortgagee not only failed to pursue some one of the

modes pointed out in the statute, but entered into the premises as owner, and not as mortgagee. *Boyd* v. *Shaw*, 14 Maine R. 58, and note at the end of the case.

*H. & H. Belcher*, for the defendant, contended that there had been a foreclosure of the mortgage. When the mortgagee enters into the actual possession and occupation of the premises after the condition of the mortgage has been broken, the law presumes the entry to have been made for condition broken, and for the purpose of foreclosing the mortgage. The entry in the modes provided by the statutes, is necessary only where the mortgagor is suffered to remain in possession. *Taylor* v. *Weld*, 5 Mass. R. 109; *Skinner* v. *Brewer*, 4 Pick. 468.

The opinion of the Court was by

WHITMAN C. J. — This is a bill in equity by a mortgagor against his mortgagee. The mortgage was made in March, 1824, to secure the payment of three several notes of hand, one of which has been paid. Those remaining unpaid were, one for ninety dollars, payable in January, 1826, and the other for one hundred and eighty dollars, payable in January, 1827, with interest annually. In March, 1829, these two notes remaining wholly unpaid, the defendant, in pursuance of an arrangement between him and the plaintiff, entered upon and took peaceable possession of the mortgaged premises. The object of the bill is to obtain a redemption thereof. For this purpose the plaintiff avers, that he, in writing, duly demanded of the defendant an account, as provided by statute, exhibiting the amount due, which he refused to render; and this allegation is not traversed by the defendant, and may therefore, be taken to be true.

The defence is, that the entry, in 1829, was for condition broken, and that more than three years having elapsed thereafter, before the institution of this suit, the right of redemption is barred; and we see no reason to doubt, that such was the object of that entry. But by the statute of 1821, c. 39, § 1, it is provided, that the entry, to foreclose a mortgage shall be by process of law, consent in writing of the mortgagor, or by

taking open and peaceable possession in the presence of two witnesses. The entry of the defendant does not appear to have been in conformity to either of these provisions. We are aware of the doubt, thrown out by Mr. C. J. Weston, in *Boyd* v. *Shaw*, 14 Maine, R. 58. It was but a doubt, however; and not in reference to a matter essential in the decision of that case. The language of the statute seems to be plain and unambiguous; and we cannot hesitate in coming to a conclusion, that the defendant, in order to avoid the plaintiff's right of redemption, must bring himself within one of the provisions named. Not having done so, however much we may regret it, under the peculiar circumstances of this case, there must be a decree, that the plaintiff shall redeem the premises on paying to the defendant what is due in equity and good conscience.

A master in chancery must be appointed, who will cast the current interest, on the amount unpaid, to the first of April, 1830; and ascertain the net amount of the rents and profits, deducting the cost of repairs, improvements on the premises, and the amount assessed for taxes thereon, which the defendant realized, or might, by the use of reasonable and ordinary diligence, have realized for the year then next preceding, over and above a reasonable compensation for taking care of and managing the estate; and set one off against the other; and, according as the balance may be found to be, deduct it from, or add it to the principal; and so continue to do, from year to year, to the time of making his report; provided the debt shall not be thereby wholly cancelled; and if it should be, and any balance shall remain of said net rents and profits, such balance will be ascertained and reported.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF SOMERSET.

ARGUED AT JUNE TERM, 1844.

## REUEL WRIGHT *versus* HOWARD C. KEITH.

When an officer has a precept wherein he is commanded to arrest the body of an individual, he has the right to select such particular time of day as he thinks most expedient, under the circumstances, and is authorized to make use of so much force as is necessary to accomplish the object.

Where an officer has arrested a debtor on an execution, and committed him to prison, and returned several items of fees for his services, some of which are legal, and some illegal; and the debtor brings an action against the officer, alleging generally, that by reason of such illegal fees, he was detained in prison longer, than he otherwise would have been, but does not show that he has either paid, or offered to pay the debt, or the legal fees, but was discharged by taking the poor debtor's oath, such action cannot be maintained.

In an action against an officer for a false return, made by mistake, in certifying that he had left with the plaintiff a true copy of a notice to appear and submit to an examination, &c. that he might thereby prevent the issuing of an execution against his body, (under the poor debtor act of 1831,) when in fact there was an error in the copy; and the mistake was known to the present plaintiff in season to have avoided any inconvenience thereby, at a trifling expense; *it was held*, that the plaintiff was entitled to recover only such sum as would have fully paid him for ascertaining the truth, and not damages for the injury sustained by him in being arrested and imprisoned on the execution.

CASE against the defendant for misconduct as a deputy sheriff. The declaration contained three counts, the substance of which appears in the opinion of the Court.

One Gilman, on Aug. 19, 1833, recovered a judgment against the present plaintiff; and in order that an execution

might be obtained which should run against the body, as the law then was, (poor debtor act of March 31, 1831,) applied to a justice of the peace, who issued a citation to the now plaintiff to appear before two justices of the peace and of the quorum, "on the 28th day of September, A. D. 1833, at eleven of the clock in the forenoon, at the office of George Mason, in Canaan in said county, for the purposes in the foregoing application named." This notice was delivered by Gilman, the creditor, to Keith for service. He returned that he had left an attested copy of the notice at the dwellinghouse of Wright; and as the latter did not appear at the time and place to make his disclosure, an execution issued against his body. This execution was delivered to Keith, a deputy sheriff, for service, and he arrested the debtor, being the present plaintiff, and committed him to prison on the thirteenth day of December, 1833. The defendant returned as fees on said execution, "dollarage," travel, copy, expenses, and paid assistant, "in arresting Reuel Wright, he refusing to be arrested and carried to jail."

At the trial, before WHITMAN C. J. the plaintiff introduced his son, George P. Wright, as a witness, who testified, that he was at his father's house, when the defendant left the copy of the citation, and took it from the defendant, and carried it to his mother, who read it, and remarked, that it did not say where the plaintiff must go; that his father was then at Bangor, where he went in about a week, and his father came home with him; that he thought his father saw and knew of the citation soon afterwards and before Sept. 28, 1833; that he was present when the defendant came for his father on the execution; that it was then about dark, and his father objected to going that night, and wished to delay until next morning to see the creditor; that he said there was a mistake in the judgment, and his mother said there was an error in the copy of the citation left; that Keith replied he cared nothing about that, for he did his business right; that his father refused going that night, and Keith rapped on the window, and a large man

came in; that his father dropped on the floor, and both seized him and carried him out; that blood was visible from the door to the wagon, and the plaintiff's stocking was bloody; that he could not tell, whether his father put his foot against the walls of the room, or was hurt in some other way on being carried out; that the plaintiff made no resistance other than by dropping upon the floor; and that the defendant used no language of a violent character. A daughter of the plaintiff gave a deposition to which she attached the copy, which she said was left by the defendant. It was a printed form, and the words "George Mason" and "Canaan," which appear in the citation, were omitted in the copy. It appeared that the plaintiff was discharged from jail by taking the poor debtor's oath on Jan. 21, 1834. The justice who signed the citation lived nine miles from the house of the plaintiff.

Upon that testimony the presiding Judge ruled, that the plaintiff was entitled to nothing more than compensation for going to the justice, to ascertain the place where the citation was returnable; and that what he suffered beyond that was attributable to his omitting so to do.

Thereupon a default was entered by consent, estimating the damages at five dollars; and it was agreed, that if the plaintiff was entitled to recover for any thing more than a fair compensation for going to the justice, and ascertaining when the hearing was to be, the default was to be taken off and the action stand for trial; otherwise judgment was to be entered on the default.

*J. S. Abbott*, for the plaintiff, contended that the plaintiff had a right to presume, that the defendant would do his duty as an officer, and make a true return of his doings; and that therefore the justices could not have proceeded, as no legal notice had been given. It was not the duty of the plaintiff to presume that the officer had made a false return, and travel off and seek means of ascertaining whether he had done so or not. He said, he could find no law requiring a man to run about the country, to ascertain where a precept against him was

made returnable; or that he was even bound to regard any information gratuitously bestowed, other than a legal service. This ruling, it was respectfully contended, was in direct conflict with the express requirements of law; that it would be full of danger in practice; that it would be ruinous to parties against whom precepts should issue; and would encourage carelessness and neglect of official duty.

But had the plaintiff gone to the justice who signed the citation, he would, probably, have been wholly unable to have afforded any information. He merely signed a paper, not returnable before himself and of which he kept no record, and could not be expected to remember the contents, if he ever knew them.

He also contended, that the plaintiff was entitled to damages, under the second and third counts. Some damages should be given, because the illegal taxation of fees made it more difficult to obtain his release from imprisonment, as a greater sum must have been paid to procure his release, than was lawfully due. The precept of the defendant afforded him no justification for the unnecessary and cruel violence with which the defendant was treated by him.

*Wells*, for the defendant, said that the plaintiff had never suffered the slightest injury by the taxation of the fees complained of. He had never paid them, nor the debt, and never would.

The plaintiff's witness, his own son, says that the plaintiff refused to submit himself to lawful authority, and threw himself upon the floor; and that the officer merely made use of sufficient force to comply with his duty, and obey his precept. Justice has been done by the verdict, and the Court will not disturb it. In fact, the second and third counts were practically abandoned at the trial, and forgotten.

The cause of complaint in the first count was a mere mistake of the officer, and was so considered by the plaintiff and his family at the time. If an intimation of the mistake had been made to the officer, he would have corrected it, or fur-

nished a new copy. And he might have ascertained from the justice who issued the citation, *the place*, the only error. His own children were his witnesses, and he did not intimate the slightest intention of making a disclosure. The citation in this and all other cases under that law was mere matter of form, as no one disclosed until the execution came. Now although the return be not exactly true, yet the officer making it is not liable to *any damages*, if the facts of the case, truly stated, would have produced the same result to the party complaining. *Smith* v. *Ford*, 1 Wend. 48. But if the action can be maintained, the injury and loss which the plaintiff actually sustained by the false return, are the only proper measure of damages. *Norton* v. *Valentine*, 15 Maine R. 36.

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

WHITMAN C. J.—It is perceived, from the arguments of the plaintiff's counsel, that he insists on his right to recover upon his second and third counts. One of these is for wanton abuse and ill usage, at the time of the arrest on the execution; the other for certifying, for his services on said execution, illegal fees, by reason of which, he alleges, that he was detained in prison for the space of forty days. But in the report of the case it does not appear, that either ground of complaint was insisted on at the trial. All that would seem to have been agitated on that occasion had reference to the falsity of the defendant's return of notice to the plaintiff, upon the citation in the first count set forth. It is true, nevertheless, that, by the declaration and pleadings, the other matters were, on the record, in issue between the parties; but would seem to have been unnoticed by the Court; and hence the ruling was manifestly without reference thereto.

We must now, however, consider whether the evidence, as reported, would have been deemed sufficient, in reference to either of those grounds, to have authorized a jury to have

returned a verdict for the plaintiff. If it would, a new trial must be granted.

We will consider, first, of the alleged wanton violence and ill usage. No question is made but that the precept, by virtue of which the defendant acted, was in due form, and issued by a competent tribunal. He, then, was bound to execute it. For want of goods and estate of the plaintiff, it commanded him to arrest his person. The particular moment of time when it should be done, anterior to the return day of the precept, was intrusted to the discretion of the defendant. He would be expected to select the moment when it could best be accomplished. Much precaution would be requisite in arresting some individuals; while, as to others, an officer would know that it could be done at any time, and without difficulty. The dwellings of some individuals must be approached stealthily for the purpose; and hence the evening would be selected, and aid also. The defendant, in making the arrest in question, made use of these precautions; with what propriety may be gathered from the conduct of the plaintiff, the evidence in reference to which comes from his son. The plaintiff objected to going with the defendant that evening; and insisted on a postponement till the next day. It was not for him to control the defendant in this particular. Yet, if the defendant had been without aid, it may, from what finally took place, well be doubted whether he would not have been compelled to desist. The moment it was discovered that aid was at hand, the plaintiff dropped upon the floor; and placed himself in a posture to require great exertion to move him. The son says, whether he braced his feet against the sides of the door or not, when in the act of being carried out, he could not tell; but that he traced blood from the door to the defendant's wagon; and saw some on the plaintiff's stocking; that no harsh language was used. This was all the evidence of violence; and from it there is not the slightest ground to find that more force was used, than was indispensable to accomplish the arrest.

Now, as to the detention for the space of forty days, by reason of the alleged return of illegal fees upon the commit-

ment, the burthen of proof was upon the plaintiff. It does not appear that he offered to pay, or would have paid either the fees, however correctly charged, or the debt. On the contrary, he took the poor debtor's oath, without doing either. Moreover, in his declaration he does not specify the item or items of illegal fees; nor does there appear to have been any attempt to do it at the trial. All the fees charged were not illegal; and if any of them were, they should have been particularly designated. The plaintiff is clearly without merits upon this point.

If the plaintiff can be considered as having established any legitimate cause of action, the foundation of it must be sought for in the falsity of the defendant's return on the citation, set forth in his first count. The citation itself was in due form; and it was the duty of the defendant to have left with the plaintiff a true copy of it; but, in making out the copy, he left out the designation of the place, where the examination was to take place. This was, it would seem, at most, but an inadvertency on the part of the defendant. There could have been no reason to suppose it could have been done from design; and it cannot be reasonable to believe that the plaintiff could have supposed it was done intentionally. He could not have been under a misapprehension as to the object of the citation; nor of the consequences of his inattention to it; and it would not seem that he had the slightest solicitude concerning it. It certainly does not appear that he exhibited any. It would rather seem that he of choice preferred to let the worst happen that could occur; and then seek a vindictive satisfaction of the defendant for the oversight he had accidentally committed. If this were not the case, how easy would it have been for him to have inquired of the defendant, or of the justice who issued the citation, and have ascertained the place appointed for the examination? This would, to be sure, have been of some inconvenience to him; and for this he would have been entitled to an adequate remuneration; and the sum, for which the defendant consented to be defaulted, was confessedly ample for that purpose.

But it is argued that he was under no obligation to make such inquiry; that he had a right to lie by, and let the worst come that could come, however remote from the cause, and however easy it might have been for him to have prevented it; and then hold the defendant responsible for the consequent injury. This certainly would not be in accordance with the duties incident to the social relations between man and man; and it is believed is not sanctioned by the prescribed rules of law. "In assessing damages the direct and immediate consequences of the injurious act are to be regarded, and not remote, speculative and contingent consequences, which the party injured might easily have avoided by his own act." *Loker* v. *Damon & al.* 17 Pick. 284. "If the party injured has it in his power to take measures, by which his loss may be less aggravated, this will be expected of him." And again; "if the party entitled to the benefit of a contract can protect himself from a loss, arising from a breach, at a trifling expense, or with reasonable exertions, he fails in social duty if he omits to do so." *Miller* v. *Mariners' Church*, 7 Greenl. 51. And in *Berry & al.* v. *Carle*, 3 *ib.* 269, which was trespass *de bonis asportatis*, the Court say, in relation to logs lodged on the original defendant's dam, "they could be removed only with as little injury as possible"; and the jury having found "that they could have been saved to the original plaintiff with little inconvenience to the original defendants," it was held that the verdict was properly returned for him. These *dicta* were uttered in reference to acts, which were voluntary and intentional, under a claim of right. With how much more force would they apply where the act complained of was evidently inadvertent, and which the individual, liable to be injured by it, must have apprehended to be so?

But there is much reason for doubt, whether the damages justly recoverable in this action, might not have been much less than the sum for which the defendant consented to be defaulted. It does not appear to have been alleged in the plaintiff's declaration, or to have been offered to be proved at the trial, that the plaintiff was in a condition, if he had ap-

peared before the justices, to have obtained a discharge from arrest in that case. If he was not, and we have a right to presume he was not, as it may be believed he would otherwise have averred and proved the fact, could he have been entitled to recover any thing more than mere nominal damages on account of the falsity of the return? The seeming indifference which he manifested, concerning the object of the citation, tends to fortify the presumption, either, that he was not in a condition to obtain a discharge, or that he was not disposed to make an exhibit of his affairs.

On the whole, we think judgment should be entered upon the default.

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JOHN WARE *versus* JAMES JACKSON & *al.*

When the proceedings, intended for a performance of the condition of a poor debtor's bond, take place before justices having no jurisdiction, they are wholly void.

When provisions are contained in the condition of a poor debtor's bond, unauthorized by the statutes then in force, it is not valid as a statute bond, can be good only at common law, and is subject to chancery.

Since the act of 1842, c. 31, amendatory of the Revised Statutes, was in force, the damages in such cases are again to be assessed by the Court, and not by the jury.

DEBT on a bond, dated July 3, 1841, given to procure the release of the principals from arrest on an execution in favor of the plaintiff against them.

The material parts of the bond, and the facts in the case, appear in the opinion of the Court.

*Hutchinson*, for the plaintiff, contended that the justices who undertook to administer the oath were not constituted according to the law in force at the time, and therefore that all their acts were void. *Barnard* v. *Bryant*, 21 Maine R. 206; *Brooks* v. *Adams*, 11 Pick. 441. One of the justices was not disinterested, as that word is defined in the Rev. St. c. 1, § 3, Rule 22.

The damages are regulated by Rev. St. c. 148, § 39, and by the decision of this Court in the case *Barnard* v. *Bryant*, before cited.

*P. M. Foster*, for the defendants, contended that all objections to the justices were waived by the plaintiff, by his appearing before them, and putting interrogatories.

But if this cannot be considered as a performance of the condition of the bond, because one of them should not have acted, still the damages are to be assessed by a jury. Act of Amendment of 1842, of Rev. St. c. 115, § 78.

This is not a statute bond, because it contains other and more burdensome provisions to the debtor than the law permits. The damages actually sustained, are all to which the plaintiff is entitled; and it is immaterial whether they are to be assessed by the Court or the jury.

The opinion of the Court was drawn up by

Shepley J. — This is a suit on a poor debtor's bond made before the Revised Statutes took effect, and containing unusual provisions. There was a performance of the condition attempted to be made according to the provisions of those statutes, but it was ineffectual. The examination of the debtor did not take place "before two disinterested justices of the peace and of the quorum," as required by Rev. St. c. 148, § 24. One of those justices was the brother-in-law of one of the debtors, who made a disclosure and took the oath; and he was not disinterested as required by Rev. Stat. c. 1, § 3, Rule 22. The proceedings designed for a performance took place before justices having no jurisdiction and were wholly void.

The condition of the bond provided, that the oath should be taken "before two justices of the peace quorum unus." That the debtor should offer and tender to the creditor "all personal property and real estate, the value of the same to be come at by the appraisal of two disinterested men, to be chosen and designated by said justices who take said disclosure, provided

the parties do not agree to the value," except property exempted from attachment. That the debtor should "give priority to this said demand, unless the said debtor shall be under bond of an earlier date, on which he has not been discharged by his oath, or by settlement." These provisions of the bond were unauthorized by the statutes then in force. It can be good only as a bond at common law, and is subject to chancery. It has been forfeited by neglect to perform in a legal manner any of the acts required by its condition. By the act of amendment of 1842, c. 31, § 9, of c. 115, § 78, the jury are to assess the damages in actions upon bonds conditioned for the performance of any covenants or agreements. This is not such a bond, as was decided in *Hathaway* v. *Crosby*, 17 Maine R. 448. It is the duty of the Court, upon a hearing in chancery, to assess such damages as the plaintiff shall prove, that he has actually suffered.

The default will remain and the defendants be heard in damages.

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SAMUEL PARKER, *in review*, *versus* OLIVER L. CURRIER.

As the order of the Major General of a division, convening a court martial, was required by the militia act of 1834, c. 121, to be recorded by the orderly officer of the division in the orderly book kept by him, a copy of such record properly certified by him, was legally admissible in evidence.

The orignal papers, signed and sealed by the president of a court martial, holden in pursuance of an order from the Major General of the division, setting forth particularly the proceedings of such Court, were, as well as certified copies of the same, competent and sufficient evidence to sustain an action for the recovery of a fine imposed by such court martial.

An application for a review of an action, being addressed to the discretionary power of the Court, will not be granted, if the Court are satisfied, that if the review should be granted, a trial would result in a verdict similar to the one before returned, on which judgment must be rendered.

PETITION for a review of an action brought by Oliver L. Currier, as Division Advocate, of the eighth division, against Samuel Parker, formerly captain of a company of militia, with-

in the Division, on a judgment of a Court Martial, held in June, 1840, to recover a penalty of forty dollars imposed upon Parker for neglect of duty and disobedience of orders.

On the trial in the District Court, REDINGTON J. ruled, that the evidence offered and admitted was sufficient to enable the Judge Advocate to maintain the action, and the jury returned a verdict against Parker. The trial was at the close of the term, and exceptions were prepared in behalf of the defendant, and agreed to by the Judge Advocate, but from misapprehension were not brought forward in such manner, that the Court could consider them, and hence this petition for a review.

In the opinion of the Court will be found a sufficient statement of the proceedings to understand the questions decided by this Court.

Very full written arguments were furnished to the Court, in which the militia laws then in force, in relation to Courts Martial and to the duty of officers of the militia, were examined with great attention and ability. But as those laws have ceased to be in force, the interest and value of the arguments have so far ceased with them, that they are omitted.

*J. T. Leavitt*, for Parker.

*O. L. Currier, pro se.*

The opinion of the Court was prepared by

TENNEY J. — The order of the Major General convening the Court Martial for the trial of the petitioner, upon the charges and specifications filed with him by the Division Advocate, was required to be recorded by the orderly officer of the Division in the orderly book kept by him. Stat. 1834, c. 121, § 44, art. 34. The orderly officer had possession of the record, and he could properly certify a copy taken therefrom, which would be legally admissible as evidence.

The paper signed and sealed by the President of the Court Martial, holden in pursuance of the general order of the Major General, details the preliminary proceedings, sets forth the charges and specifications contained in the order against the

accused, his answer thereto, his plea of not guilty, the substance of the evidence adduced, and the judgment of the Court Martial, that he was guilty of a part and not guilty of another part of the offences with which he was charged; also the sentence of the Court, that he be removed from the office, which he held in the Militia of Maine, and pay a fine of forty dollars, and be disqualified for and incapable of holding any military office under the State for the term of two years. These papers contain every thing required by the statute to constitute a valid judgment of a Court Martial; they are original papers and are equally competent as evidence, as would be the authenticated copies of the same. *Vose* v. *Manly*, 19 Maine R. 331. By the statute of 1837, c. 276, § 10, the "copy of the record of any Court Martial, certified by the President of such Court, together with a duly authenticated copy of the order, convening said Court, shall be conclusive and sufficient evidence to sustain in any Court any action commenced for the recovery of any fine and costs, or either, agreeably to the provisions of an act to which this is additional."

The application before us is to the discretion of the Court, and we are satisfied from all the papers filed in the case, that a review of the action would result in a verdict similar to the one before returned; and the Petition is dismissed.

## William Atkinson *versus* St. Croix Manufacturing Company.

The certificate of the person who takes a deposition, that "the witness was sworn according to law," is sufficient evidence that the oath was administered in the terms required by the statute, and in a mode which practice had sanctioned.

The certificate of the justice, that "the deponent was examined, and cautioned, and sworn agreeably to law to the deposition aforesaid by him subscribed," does not furnish evidence that the deponent was sworn before he commenced giving his deposition, as required by Rev. Stat. c. 133, § 15.

A statement at the commencement of the deposition, in the handwriting of the justice, that the deponent "being duly sworn," testified to certain facts therein set forth, does not cure the omission in the certificate.

Proof that a person was agent of an incorporated company, "and had charge of the business and property of said company" at a certain place, is not alone sufficient to show, that such person was authorized to draw a bill or note in behalf of the company.

The acceptance of a draft by the treasurer of an incorporated company, without evidence of any authority in him to perform such acts, does not thereby render the company liable thereon.

Exceptions from the Middle District Court, Redington J. presiding.

After the plaintiff had read the draft declared on, and the depositions of Smith and Williams, objections having been seasonably made by the defendants to the reading of either, and the Court having permitted the reading to proceed, the counsel for the defendants, upon this evidence, requested the presiding Judge to instruct the jury, that no sufficient legal evidence had been offered to prove any authority on the part of the accepter to accept the same so as to bind the company; and that there was not sufficient legal evidence in the case to entitle the plaintiff to a verdict. These instructions were refused. The Judge instructed the jury, that if they believed the depositions, and that the draft mentioned in the deposition of Williams was the same draft annexed to the deposition of Smith, sufficient evidence had been presented by the plaintiff to obtain their verdict for the amount of the draft.

A verdict was returned for the plaintiff, and the defendants excepted.

The material facts are given in the opinion.

*J. S. Abbott*, for the defendants, contended that the deposition of Noah Smith, jr. was improperly admitted, because it did not appear that the deponent was sworn before he testified, as the statute requires. Rev. Stat. c. 133, § 15, 17. This should appear by the certificate. The statute requires that it should show, "that the deponent was sworn according to law, and when." The word *when* refers, not to the day, but to the requirement of § 15, that the deponent shall be first sworn. In this case, the certificate not only is wanting in a material fact, but shows that he was sworn afterwards, only "to the deposition aforesaid by him subscribed." Having assumed to act as agent, he would be personally liable, if he was not; and would therefore be directly interested in the question, whether he was agent or not. He could not prove his own agency.

There was no evidence that Copeland was the treasurer of the company at the time, or even that he assumed to act as such in any other instance. And had there been evidence that he was treasurer, there is not the pretence of proof, that Greene had any authority to draw the draft for Smith.

*P. M. Foster*, for the plaintiff, contended that enough appeared to show, that the provisions of the statute had been complied with in taking the deposition of Smith.

The justice in the commencement of the deposition, states that the deponent was duly sworn. The certificate shows, that he "was examined and cautioned" on the day of the taking of the deposition, and "sworn agreeably to law to the deposition aforesaid." Now the justice certainly could not be supposed to have cautioned the deponent after the deposition was completed and signed. The fair construction appears to be this; that the deponent was cautioned and sworn before he commenced, and after he had finished, and signed his deposition, was again sworn.

An agent, or servant, may prove his authority to act for another, and of course that he acted within the power given him. Greenl. Ev. § 417, and cases there cited.

Smith was the general agent of the company, and had authority to accept bills as such. Williams, the deponent, called several times at the counting-room of the defendants, and there saw Smith acting as their agent. Smith saw the draft, with Copeland's acceptance, and promised to pay it. This is evidence to show the authority of Copeland, or a ratification of his act by Smith, the agent.

It is not necessary to prove the agency by records of the company. Greenl. Ev. § 113.

The opinion of the Court was prepared by

TENNEY J. — This action, which is upon a draft, alleged to have been drawn by an agent of the company and accepted by their treasurer, and also for money had and received, was attempted to be supported by a draft purporting to be signed "Noah Smith, jr., agent of the St. Croix Manufacturing Company, by Sam'l H. Greene," and in other respects corresponding with the one described in the writ; and also by the depositions of Noah Smith, jr. and one Benjamin Williams. Said Smith testified as follows, viz.: — "In 1841, I was agent of the St. Croix Manufacturing Company, and have been so ever since said company was incorporated, and have had charge of the business and property of said company in the town of Calais, during the whole time. Benjamin F. Copeland, of Boston, acted as treasurer of said company. I am acquainted with the handwriting of said Benjamin F. Copeland; the acceptance of said draft is said Copeland's handwriting. I do not know William Atkinson. The company never had any account with him to my recollection." The justice, who took the deposition of Smith, certified among other things, that "on the 27th day of January, 1843, the aforesaid deponent was examined, and cautioned and sworn agreeably to law to the deposition aforesaid by him subscribed;" and there was nothing besides the above showing the time when the oath was administered to the deponent. The deposition of Williams relates wholly to the presentment of the draft described therein, to said Smith, and a demand of payment, and his neglect to pay the same. The

defendants objected to the deposition of Smith on the alleged grounds, "that it did not appear in the certificate of the magistrate, *when* the deponent was sworn, nor that he was sworn before giving the deposition, but that the certificate shows that the oath was administered afterwards; also because it is not competent for the plaintiff to prove Smith's agency by himself; and not competent to prove the other matters contained in said deposition in that mode." These objections were overruled. The counsel for the defendants requested the Judge to instruct the jury, that the evidence adduced by the plaintiff was insufficient to authorize a verdict in his favor; this he declined to do, but instructed them, that if they believed the testimony in the depositions, and the draft offered in proof was the one referred to by Williams in his deposition, the action could be maintained. Exceptions were taken to those rulings and instructions, and we think they must be sustained. The certificate of the magistrate who took the deposition of Noah Smith, jr. was materially defective; and the evidence in the case fails to show sufficient authority in Noah Smith, jr. to make the draft in question, so as to bind the defendants.

The statute requires, that the deponent should be sworn before he proceeds to give his testimony in the case; and it is contended by the defendants, that the proof of this must be in the magistrate's certificate. Whether it be so or not, must depend upon the construction to be put upon the language, "that the deponent was sworn according to law, and when." The statute has pointed out specifically what must take place before, and at the time of taking a deposition, in order that the facts stated therein may be legal proof; it is not left to be presumed that the magistrate, who may take it, conformed to the law, but he is to certify to the facts, attending the caption; by whom the deposition was written, &c. From analogy we might suppose, that it was equally important, that it should also appear in the certificate, whether the deponent was *first* sworn to testify the truth, the whole truth and nothing but the truth. It is undoubtedly necessary that the day, when the deposition was taken, should appear, that it might be known whether it was

legally taken in pursuance of the notice given. But we think this was not the only purpose which the legislature had in view, when they required, that the justice or notary should certify "that the deponent was sworn according to law, and when." We cannot doubt, that when the statute shows, that its authors were careful that the certificate should show particularly what was done, and how it was done, that the Court, before which the deposition should be offered, should know, whether the requirements of the law had been fulfilled, it is necessary also, that it should appear in the same manner, that the deponent was testifying under the sanction of an oath, such as is prescribed. A different construction would often leave it uncertain, whether depositions contained the whole knowledge of the witness on the subject concerning which he testified, and nothing more, or whether it was simply an affidavit of the truth of the facts stated, when other facts, which might be known to the witness would essentially control the effect of the statement made.

The certificate annexed to the deposition, which was admitted, shows that the witness was "sworn agreeably to law." This is sufficient evidence, that the oath was administered in the terms of the statute, and in a mode which practice had sanctioned. But it must also appear "when" this was done, and we cannot think, that the language used, implies that the oath was taken before the testimony was given. It is contended, that the terms used at the commencement of the deposition, "being duly sworn," written by the magistrate, supplies the defect in the certificate. This is no part of the certificate, which alone is made the proof of certain of the proceedings, and it is not a fact, which can be looked at any more than any other in the deposition, till it is shown, that it was legally taken.

2. If the deposition of Noah Smith, jr. was legally admissible, there is not evidence therein, that he was authorized to draw a negotiable paper in favor of one, who had no claim upon, or connexion with the defendants. The whole proof of his agency, and the extent thereof is found in his deposition and in the words following. "In 1841, I was agent of the

St. Croix Manufacturing Company, and have been so ever since said company was incorporated, and have had charge of the business and property of said company in the town of Calais, during the whole time."

It is true, that an agent appointed for a certain purpose is clothed with the power to effect the object. "As if an agent is authorized to buy a cargo for his principal, if no other means are provided, has an incidental authority to give notes or draw and negotiate bills on his principal for the amount." Story on Agency, 93. Such a power is implied from the object of the agency. "But an agency is never construed to extend beyond the obvious purposes, for which it was apparently created." *Ibid*, 93. "The principal is bound for the acts of the agent, done within the scope of his agency." *Ibid*, 219.

In the case before us there was no evidence showing the nature of the business of the defendants, whether it required funds for its accomplishment or not. Neither is there any thing from which we can infer the character of the duties contemplated to be performed by Noah Smith, jr. as their agent, or what he had ever done before the draft was drawn, in their behalf. Without proof of this, to some extent at least, we cannot believe, that he was vested with a power to give notes or draw bills in the name of the Company.

The acceptance of the draft by the treasurer of the company, without evidence of any authority in him to perform such acts, does not in any degree render the defendants liable. A treasurer of a corporation is only an agent for another purpose, and his acceptance can no more bind his principal, without authority to make it, than would the draft made by Smith.

Waiving any consideration of other objections urged in the argument, the exceptions are sustained.

JOHN WARE *versus* JAMES ADAMS.

A guaranty of payment of a pre-existing promissory note, where the only consideration is a past benefit or favor conferred, and without any design or expectation of remuneration, is without valuable consideration, and cannot be enforced.

THE plaintiff declared against the defendant as guarantor of the payment of a promissory note, and also as indorser of the same note. The defendant was the payee of the note, and at a time subsequent to the making of the note and the delivery thereof to the plaintiff, but bearing a date prior to the existence of the note, made the following writing upon the back thereof. "July 8, 1835. I hereby transfer and assign the within note to John Ware, and guarantee the payment of one third part of the same. James Adams."

*Boutelle* and *Hutchinson* argued for the plaintiff: contending that the defendant was liable as indorser, as well as in the character of guarantor.

*Wells* and *Adams*, for the defendant, contended, that here was no consideration for the promise. A promise of guaranty to be valid must be founded on a sufficient consideration. *Tenney* v. *Prince*, 4 Pick. 385; *Talbot* v. *Gay*, 18 Pick. 534.

It is a completed contract, and is not that of an indorser, but of a guarantor. But if it can be considered as an indorsement, the defendant is not liable, as there has been no demand or notice.

The opinion of the Court was drawn up by

SHEPLEY J. — From the testimony presented in this case it appears, that the plaintiff, defendant, and Abram Sanborn, during the early part of the year 1835, had agreed to share alike the profits, which might be made by them by the purchase and sale of land and of contracts for the same. The defendant, after this, having ascertained that Isaac Child could convey a tract of land in the County of Penobscot, applied to him to obtain a bond, obliging him to convey the same to the

defendant, or his assignees, upon certain terms. This Child was ready to do, provided he could obtain a loan of money upon good security. The plaintiff, having been informed thereof by the defendant, agreed to loan the amount desired, upon a note, that would be satisfactory to him. Such a note was procured, and the plaintiff loaned the money to Child, who thereupon made the bond desired to the defendant, for his own benefit, and for the benefit of the plaintiff and Sanborn. The note was by mistake made payable to the defendant instead of to the plaintiff, who consented to receive it without alteration, because the sureties were not present, and it was inconvenient to alter it. The money appears to have been loaned and the note to have been made on the day of its date, August 8, 1835. Under date of July 8, 1835, the defendant signed the following contract written upon the back of the note. "I hereby transfer and assign the within note to John Ware, and guarantee the payment of one third part of the same." It is admitted, that the date of July 8, was erroneous; and that Ellis G. Loring would testify, "that the said James Adams signed the transfer of said note, including the contract of guaranty declared on, on the day of the date of said note and subsequently to the making in order of time." Mr. Sanborn testified, that it was signed by the defendant in his office on August 25, 1835, and assigned as a reason for his confident belief, that he did so, that the plaintiff and defendant then first informed him of the transactions relative to the loan; that the plaintiff said that the witness and the defendant ought each to guaranty the payment of one third part of the amount of the note; that upon inquiry he stated, that there was no such agreement made when the note was taken; and that if the witness would guaranty the payment of a third part of it, the defendant would. Taking these circumstances with the testimony of Seth Adams, that Mr Loring informed him, that he had no recollection respecting the time or mode of transfer, into consideration, it is most probable that the transaction was correctly stated by Mr. Sanborn.

Some consideration must be found to make the contract of guaranty, signed by the defendant, obligatory upon him. It can be found only in the arrangements for the loan, or in the transfer of the note. There was an equitable ground shown, by the necessity for a loan to obtain a bond for the benefit of those three persons, for requiring the defendant and Sanborn each to guaranty one third part of the amount of the note. But the existence of any agreement or expectation, that they would do so, as an inducement to the plaintiff to make the loan, is disproved by the testimony, which shows also, that the loan was agreed upon, the note made and received, the bond made and delivered, and the whole business completed, before any intimation was made, that such a guaranty was desired. The rights of the defendant, under the bond, had become perfect before he was requested to sign that contract. By yielding to the request he secured no new rights or benefits. And the plaintiff assumed no new risks or liabilities. The only perceptible consideration for the guaranty of the defendant was the favor or benefit conferred by the plaintiff by making the loan upon security entirely satisfactory to enable him to obtain the bond. A past favor or benefit, conferred upon sufficient inducement and without any design or expectation of remuneration, does not impose upon the person receiving it any legal or moral obligation to assume any pecuniary risk or to make any pecuniary compensation. And it cannot therefore constitute a valuable consideration for a contract for the payment of money. As the contract of guaranty in this case appears to have been made some days, after the note had been received as satisfactory, and without any valuable consideration, it is not necessary to consider the other points made in the defence.

***Plaintiff nonsuit.***

MORRAL GREEN, JR. *versus* WILLIAM HASKELL.

In an action upon a recognizance to prosecute an appeal from a judgment of a justice of the peace, it should appear from the record, that the justice who rendered the judgment from which the appeal was taken, had jurisdiction of the cause; and also, that the recognizance was entered into before the same justice who rendered the judgment; otherwise the recognizance has no validity. Nothing is to be presumed in favor of the jurisdiction of inferior magistrates, it not being general, but confined and limited by particular statutes.

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

Debt upon a recognizance. The defendant pleaded *nul tiel record*, and filed a brief statement, in which one objection was this. That it does not appear from the recognizance, that the justice who took the same had jurisdiction of the cause in which said recognizance was taken.

The brief statement set forth other grounds of defence; but it is not necessary to state them, or the facts, or arguments of counsel on those points, as they were not considered by the Court.

The recognizance was as follows: —

"Somerset, ss. Memorandum. That on the 11th day of March, 1837, personally appeared before me, Goff Moore, jr. Esq. one of the justices of the peace for said county, David H. Patterson as principal, and William Haskell as surety, and acknowledged themselves to be severally indebted to Morral Green, jr. in the sum of thirty dollars, to be levied upon their goods or chattels, lands or tenements, and in want thereof, upon their bodies to the use of the said Morral Green, jr. if default be made in the performance of the conditions following, to wit. — Whereas the said Morral Green, jr. has this day recovered judgment against the said David H. Patterson, in an action of trespass, as fully set forth in the plaintiff's writ, for cost of suit in said action, and the said Patterson having claimed an appeal from said judgment to the next Court of Common Pleas, to be held at Norridgewock, within and for said County of Somerset, on the second Tuesday of March

next. Now therefore if the said David H. Patterson shall appear at the Court aforesaid, and shall prosecute his said appeal with effect, and shall pay all intervening damages and costs, then this recognizance shall be void, otherwise to remain in full force and virtue."

This recognizance was objected to by the defendant; and he contended, that if admissible, it was wholly defective, and did not show, that the justice had jurisdiction, and so it was void. The presiding Judge ruled, that it was sufficient to enable the plaintiff to maintain his action, and so instructed the jury. The verdict was for the plaintiff, and the defendant excepted.

*Boutelle*, for the defendant, contended, that the recognizance did not give such a description of the action tried by the justice, as to show that he had jurisdiction of it. No presumption is to be made, in such case, in favor of the jurisdiction of the justice. Nor can the Court, whatever the averments in the declaration may be, go out of the recognizance to cure the defects or supply the omission.

*P. M. Foster*, for the plaintiff, contended, that the recognizance so described the action, as to show that the justice had jurisdiction. The recognizance describes the action as trespass, and to remove all doubt, refers to the writ as part of the recognizance. The writ shows most conclusively, that the justice acted within his powers.

The opinion of the Court was drawn up by

TENNEY J. — This is an action of debt upon a recognizance, given to prosecute an appeal with effect, from a judgment rendered by a justice of the peace, in an action of trespass, which is stated in the condition of the recognizance to be more fully set forth in the writ. The Judge, who presided at the trial ruled, that the recognizance was sufficient for the maintenance of the action, and instructed the jury to find a verdict for the plaintiff; a verdict was returned accordingly. Exceptions were taken to the above named ruling and instruction; and also to other rulings which it is unnecessary to consider.

Nothing is to be presumed in favor of the jurisdiction of an inferior magistrate, it not being general, but confined and limited by particular statutes. It should appear from the record that the justice of the peace, who rendered a judgment, from which an appeal is taken, had jurisdiction of the cause; and also that the recognizance was entered into before the justice, who rendered the judgment. Stat. 1821, c. 76, § 10. Otherwise the recognizance has no validity.

In the case at bar, it does not appear, that any record was offered at the trial, excepting the record of a copy of the recognizance. In that the name of the justice of the peace, who took it, and the county for which he was commissioned, are inserted; it also appears in the condition, that the action, in which the judgment was rendered was that of trespass. But it does not appear that the justice, before whom the defendant recognized, rendered the judgment from which the appeal was claimed.

Was the action for trespass upon real estate, or *de bonis aspotatis?* If for the former, the issue presented at the trial should have been stated, that it would be seen whether the justice of the peace had authority to render a judgment therein; if for the latter, the jurisdiction of the justice would depend upon the evidence of one or both of the parties. The record offered was essentially defective. The power of the magistrate to render the judgment, or to take the recognizance, was not sufficiently shown.

*Exceptions sustained.*

JOHN WARE *versus* NATHAN FOWLER.

In an action against an officer to recover damages occasioned by neglect of official duty, in omitting to serve and return an execution in favor of the plaintiff, the measure of damages is the amount of the injury actually sustained.

Where the officer arrested the debtor, who gave a poor debtor's bond, which was approved by two justices, and the debtor released, but neither the execution nor the bond was returned into the clerk's office, *it was held*, that the defendant might show, in mitigation of damages, that the obligors were insolvent and unable to pay the debt.

CASE against the defendant, as late sheriff of this county, for the default of a deputy in omitting to collect and return an execution in favor of the plaintiff against one Raymond.

The execution was delivered to the deputy, who collected about one half of it by sale of the personal property of the debtor, and paid it over to the plaintiff. He then arrested the body of the debtor, who gave a poor debtor's bond, and was released. This bond was approved by two justices of the quorum, but neither the execution nor the bond was returned into the clerk's office at the return day thereof.

The defendant then proposed to introduce evidence to show, that both the debtor and the surety in the bond were poor, and wholly unable to pay the debt, from the time the bond was given until the commencement of the suit; and that since that time, one of them had died insolvent, and the other had remained destitute of property. The plaintiff objected to the admission of this evidence. TENNEY J. presiding at the trial, admitted the evidence, and instructed the jury, that if they were satisfied from the evidence of such facts, they might return a verdict for the plaintiff, with damages from one cent to the whole amount of the balance of the execution and interest; and that without evidence of the inability of the obligors to make payment, the plaintiff was entitled to recover the whole amount due on his execution.

A verdict was returned for the plaintiff, and his damages were assessed at one dollar. If the rulings or instructions of the Judge were erroneous, a new trial was to be ordered.

*Hutchinson*, for the plaintiff, contended, that the testimony objected to at the trial was improperly admitted; and cited *Varrill* v. *Heald*, 2 Greenl. 91.

And that the instructions given to the jury by the presiding Judge were erroneous. *Simmons* v. *Bradford*, 15 Mass. R. 82; *Donelly* v. *Dunn*, 2 B. & P. 45.

*Leavitt*, for the defendant, said that it was settled law, that in a case of this description, such testimony was admissible in mitigation of damages. The plaintiff is entitled to nothing more than what he actually lost. *Varrill* v. *Heald*, 2 Greenl. 91; *Weld* v. *Bartlett*, 10 Mass. R. 470; *Nye* v. *Smith*, 11 Mass. R. 188; *Rice* v. *Hosmer*, 12 Mass. R. 127; *Dearborn* v. *Dearborn*, 15 Mass. R. 316.

The opinion of the Court was drawn up by

Shepley J. — This is an action on the case against the former sheriff of this county, to recover damages for the neglect of official duty by a deputy, to return an execution and a bond taken on the liberation of one of the debtors, who had been arrested on that execution. The bond had been approved by two justices of the peace as required by law. The measure of damages in such cases is the injury actually sustained. Testimony tending to prove, that the plaintiff could not have suffered essential injury from that neglect of duty, was legally admitted. The cases relied upon by the counsel for the plaintiff are not analogous. In the case of *Simmons* v. *Bradford*, 15 Mass. R. 82, testimony offered to prove, that the deputy did not take a bail bond, was rejected, because it would contradict his return, stating that he had taken one. The proof in this case, that the bond was of no value, would not contradict the return of the deputy. He was not to judge of its sufficiency. That duty the law had confided to others; and the officer was not chargeable with their neglect or misconduct. The case of *Donelly* v. *Dunn*, 2 B. & P. 45, appears to have been decided on the ground, that the bankrupt only, and not his bail, could plead his certificate of discharge. That case differs from the present in principle. Its

authority has also been doubted. *Olcott* v. *Lilly*, 4 Johns. R. 407. A portion of the argument, if addressed to a jury to persuade them, that the plaintiff had suffered more than nominal damages, might be worthy of much consideration; but it was their appropriate duty to determine the amount of damages, and the accuracy of the conclusion is not presented by this report for the consideration of the Court.

*Judgment on the verdict.*

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SAMUEL E. SMITH *& ux. & al. versus* PEOPLE'S BANK.

The interest of a mortgagee of lands, after entry for the purpose of foreclosing the mortgage and before a foreclosure has taken place, cannot be transferred by an attachment and levy thereon as the real estate of the mortgagee.

To constitute a mortgage, it is not necessary that there should be any collateral or personal security for the debt secured by the mortgage.

WRIT OF ENTRY. The demandants are the heirs at law of the late H. W. Fuller of Augusta. They claim title to the land demanded, situated in the County of Somerset, under a quitclaim deed from Warren Preston to the intestate. Preston originally owned the premises, and made a conveyance thereof to one Norton, on April 18, 1834, who on the same day reconveyed the same to Preston by a mortgage deed with this condition. "If the said Norton, his heirs, executors, or administrators, shall well and truly pay to the said Preston, his executors, administrators, or assigns, the sum of one thousand four hundred and seventy-seven dollars and thirty-three cents in three equal annual payments, with interest annually on the same, then this deed shall be void, otherwise remain in full force." On March 25, 1837, Preston recovered judgment against Norton upon the mortgage, the conditional judgment being rendered, that a writ of possession should issue, unless Norton should pay within two months, the sum of $638,61. A writ of possession issued, and on June 6, 1837, Preston was

put in possession of the premises by virtue of it. On Sept. 30, 1839, the money remaining unpaid, Preston conveyed all his right, title and interest to said H. W. Fuller, deceased, and the deed was forthwith recorded. It did not appear that any note, bond, or other security than the mortgage, was taken.

The defendants, on August 3, 1838, sued out a writ in their favor against Preston, and a return of an attachment of the demanded premises was made thereon by an officer on Sept. 6, 1838. They entered their action, and recovered judgment against Preston, in Dec. 1841, and on Dec. 30, 1841, levied their execution upon the whole of the demanded premises, in due form of law, and the levy was seasonably recorded.

The Court were to render such judgment, upon nonsuit or default, as in their opinion was required by law.

*B. A. G. Fuller* argued for the demandants. He considered, that the only question in the case was, whether the interest of the mortgagee, after entry for the purpose, but before foreclosure, is transferred to a creditor by an attachment and levy thereon as the real estate of the mortgagee; and contended that it could not be done in that mode.

It is well settled, that this cannot be done before an entry to foreclose. 12 Mass. R. 518; 4 Kent, 153; 4 Pick. 131; 20 Maine R. 117; 19 Maine R. 433; Powell on Mort. 221, 245; 11 Johns. R. 538; 15 Johns. R. 319; 8 Pick. 336; 19 Maine R. 99; Dougl. 610; 4 Conn. R. 235; 3 Pick. 484; 4 Johns. R. 41 and 221; 19 Pick. 346; 12 Pick. 57; 14 Pick. 399; 3 Metc. 89.

The character of the interest of the mortgagee and mortgagor is not varied by an entry to foreclose. The mortgagor may still pay the amount due, and his land is discharged from the incumbrance of the mortgage, and it ceases to have validity; the interest of the mortgagee is still personal estate, and passes by a devise of personal estate and not of lands; an attaching creditor is not authorized to receive money or discharge the mortgage. 4 Kent, 161; 4 Dane, 153; Powell on Mort. 185; 2 Ves. 44; 13 Mass. R. 309; 16 Mass. R. 18;

4 Pick. 19 and 349; 3 Mason, 528; 2 Story's Eq. 287; 7 Greenl. 31 and 377; 20 Maine R. 117. Levies might be made on distinct portions of the property, which would create a difficulty in redeeming, which the law does not permit. 5 Pick. 283. A title to the property is acquired only on foreclosure. 7 Mass. R. 131; 11 Mass. R. 469; 19 Maine R. 433; 4 Pick. 439.

The mortgage was legally assigned to the intestate by the quitclaim deed. *Dorkray* v. *Noble*, 8 Greenl. 278.

The mortgage had been assigned to the intestate long prior to the levy, and the latter must relate back to the time of the attachment. 6 Mass. R. 242. To give the defendants any title, it should have been subject to be taken on execution when the attachment was made.

*T. A. Hill* furnished a written argument in behalf of the defendants, wherein he contended, among other grounds, that the Rev. Stat. c. 94, § 1, provides that all real estate of the debtor, and rights of entry into land, and rights of redeeming lands mortgaged, may be taken in execution. And by c. 114, all real estate which is liable to be taken on execution, may be attached on mesne process. These provisions are but re-enactments of former statutes. Rev. Stat. c. 1, shows how extensive a signification the word *land* is to have. The phrase *real estate*, comprehends every species of estate in lands. 14 Mass. R. 26.

The deed of Norton to Preston conveyed a conditional fee simple estate, which is an attachable interest. The estate of Preston might have been defeated, but the attachment and subsequent levy transferred to the defendants all Preston's interest in the land. The intestate so considered it, or he would not have taken a deed of the land, but an assignment. 2 Vern. 701. The reasoning, therefore, founded on the assumption, that the deed to Preston was a mortgage, falls to the ground, and the authorities cited are wholly inapplicable.

But were this so far in the nature of a mortgage, that there must be a foreclosure, still the reasoning of the counsel for the

demandants is not applicable. Here was no personal security, and the mortgage could not be merely attendant upon the note or bond secured, as contended for by the plaintiffs.

The cases cited for the demandants to show that the right of the mortgagee was only a chattel interest, are all predicated on the fact, that in those cases no possession had been taken to foreclose. They show, that the Courts considered, that after an entry to foreclose, the interest of the mortgagee was subject to be attached and levied upon as real estate.

As Norton did not claim his right to regain his land by performance of the condition, the estate became absolute in Preston; and as the levy had relation back to the time of the attachment, the defendants acquired a perfect title to the land. 11 Mass. R. 474.

In the case, *Blanchard* v. *Coburn*, 16 Mass. R. 345, the Court concede, that nothing but an entry by the mortgagee was necessary to make the land attachable as the property of the mortgagee. See also, 6 Mass. R. 50; 12 Mass. R. 447; 2 Binney, 4.

The statute requiring attachments of real estate to be recorded has essentially changed the relation between a mortgagee and his assignee. The latter must now be presumed to have notice of all attachments of the mortgagee's interest in real estate, and cannot claim to be protected against an attachment duly made and recorded prior to his claim by assignment.

The title of the defendants is sustained by the opinion and reasoning of Judge Trowbridge, found in the appendix to 8 Mass. R. which have not been overruled or shaken by any later decisions, so far as it respects the present case.

*Fuller*, in his reply, said that the opinion of Judge Trowbridge, referred to by the defendants' counsel, had been repeatedly overruled, and that it was unnecessary further to notice it, save to remark, that Judge Trowbridge makes no difference between mortgages before and after an entry to foreclose.

The opinion of the Court was drawn up by

TENNEY J. — It has been held by Courts in several of the

States, that the interest of the mortgagee in real estate, before an entry for condition broken, with a view to foreclosure, cannot be taken in satisfaction of a judgment and execution against him. This principle has been so frequently discussed, and re-affirmed, that it may be considered fully established. Whether his interest is so changed by such entry, that it becomes attachable, is a question, which does not appear from the cases examined, to have been distinctly presented for adjudication. In several opinions, Courts have carefully limited the doctrine to the cases before them, where there had been no entry for a breach of the condition, or when the mortgagor was in possession; and in others, they have intimated, in terms far from implying doubts, that the respective rights of the parties to a mortgage were not so materially changed by the entry of the mortgagee, that his creditor could better avail himself of his interest afterwards, than before. It will be proper to examine the rights of the respective parties to a mortgage and the reasons for denying to a creditor the power to satisfy his debt from the estate of the mortgagee before entry for a breach of the condition; and to ascertain whether those reasons do or do not apply to a case, where such an entry has been made.

The doctrine of the common law, in the time of Lord Coke, that land conveyed in mortgage passes presently to the mortgagee, and that the mortgagor has only the condition left, and no estate in the land, which he can assign over, has been essentially changed by statutes and the adoption, by the Courts of common law, of the principles by which Courts of equity are governed. Lord Mansfield, in *Martin* v. *Mowlin*, 2 Bur. 969, is reported to have said, "that a mortgage is a charge upon the land, and whatever would give the money will carry the estate in the land along with it to every purpose. The estate in the land is the same thing as the money due upon it; it will be liable to debts; it will go to the executors; it will pass by will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt and forgiving it, will draw the land after it, as a conveyance; nay, it would do it, though the debt were forgiven only by

parol, for the right to the land would follow, notwithstanding the statute of frauds." These views were regarded by the learned Judge Trowbridge, so absurd, that he did not believe they could have been uttered without important qualifications and restrictions; and in Massachusetts their authority has been denied. *Parsons* v. *Welles & al.* 17 Mass. R. 419. In *Vose* v. *Handy*, 2 Greenl. 322, Chief Justice Mellen says, "the case of *Martin* v. *Mowlin*, has so long been the subject of the critical animadversion by Judge Trowbridge and many learned Judges since his time, that it cannot be deemed authority." And yet the correctness of the opinions, as reported in that case, has to a great extent, to say the least, been admitted by Courts and jurists of the present day. In St. Michaels' Bath, the same great Judge said, "it was an affront to common sense, to say that a mortgagor has no interest in the mortgaged premises. The law recognizes his interest. In case of a freehold, he has a right to vote for members of parliament." "Consider what in strictnes is the interest of the mortgagor; after the usual time given for payment is expired, the estate becomes absolute in the mortgagee at law; but neither the Courts of law or equity lose sight of what the parties intended." "A mortgagor in possession gains a settlement, because the mortgagee notwithstanding the form, has but a chattel and the mortgage is only security." These principles were adopted by the King's Bench in 1801, in the case of *The King* v. *Eddington*, 1 East, 288; Lord Hardwick, in *Richards* v. *Sims*, Barnd. Ch. Rep. 90, said that a discharge of a debt even by parol was considered a discharge of the mortgage, so that in ejectment upon the mortgage, evidence that the debt was satisfied, would defeat the estate in the land, which shows, that even the law considers the debt as the principal, and the mortgage as the incident only." In *Jackson* v. *Willard*, 4 Johns. R. 41, Kent J. says, "the real nature of a mortgage in the equity sense of it, has been repeatedly recognized in the Courts of law, since the time of Lord Hardwick." "Until foreclosure, or at least until possession, the mortgage remains in the light of a *chose in action*, it is but an incident attached

to the debt, and in reason and propriety, it cannot and ought not to be detached from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor, who holds the bond. *Accessorium non ducit, sed sequitur principale.* It is difficult to conceive what right can be sold, which does not carry the debt with it. The control of the mortgaged premises must essentially reside in him, who holds the debt." "There is no way to render a mortgage vendible, but by allowing the debt to go with it, and this would be repugnant to all rule, for it is well understood that a *chose in action* is not the subject of sale on an execution."

In New York it is the settled doctrine, that the transfer of a note secured by a mortgage, being in writing, the mere delivery of the mortgage security, is a sufficient assignment, and that mortgages are not now considered as conveyances of land within the statute of frauds. *Green* v. *Hart*, 1 Johns. R. 580; *Pattison* v. *Hull & al.* 9 Cow. 747; *Jackson* v. *Blodget*, 5 Cow. 202. In Massachusetts and in this State, Courts have held, that to create a valid assignment of a mortgage, the transfer must be by deed; but in a court of equity, the debt is the principal and the mortgage the accessory. *Warden* v. *Adams*, 15 Mass. R. 233; *Parsons* v. *Welles & al.* before cited. They have considered, however, that the mortgagee held the relation of trustee of the one to whom the debt secured by the mortgage was assigned; *Crane* v. *March*, 4 Pick. 131; making the distinction rather matter of form than of substance. And the Courts in Massachusetts distinctly recognize the principle, that the land mortgaged is only a pledge for the debt, which may be, and often is assignable in its nature, and if it be assigned the mortgagor may pay it to the assignee and thus discharge the mortgage, notwithstanding the creditors of the mortgagee may have taken the land in execution. *Blanchard* v. *Coburn & ux.* 16 Mass. R. 345; *Eaton* v. *Whitney*, 3 Pick. 484. The Court say, in the case last named, "It [the mortgage] is in fact but a *chose in action*, at least until entry to foreclose, and although

the legal effect of the mortgage is to give an immediate right of entry, or of an action to the mortgagee, yet the estate does not become his in fact, till he does some act to divest the mortgagor, who to all intents and purposes remains the owner of the land, till the mortgagee chooses to assert his rights under the deed. It is, as before said, in the nature of a pledge."

If the mortgagee resort to an action to obtain possession after breach of the condition, the Court can render only a conditional judgment; and are to determine what is due in equity and good conscience; and if that sum is paid in two months, there can be no writ of possession. And if there be nothing due, the result must be the same; and the action will be utterly fruitless. "The plea of payment and satisfaction, after the day, is a good bar to any suit by the mortgagee, after condition broken, for possession of the estate." *Vose* v. *Handy*, 2 Greenl. 322; *Gray* v. *Jenks & al.* 3 Mason, 520. In *Fay* v. *Cheney*, 14 Pick. 399, the Court say, "the remedies designed for the mortgagee were such as to enable him to obtain payment of the debt, or an indefeasible title to the estate pledged for its security, but not both." Entry of the mortgagee after the condition is broken is not payment of the debt or any part of it; the mortgagee notwithstanding his possession can assert his right to payment on his personal security, if he have such, and the entry and possession is no bar, the whole being but a process to compel payment. *West* v. *Chamberlain*, 8 Pick. 336; *Portland Bank* v. *Fox*, 19 Maine R. 99.

It has been determined, that by general principles relating to mortgages, confirmed by the statute of 1788, c. 51, of which the statute of this State, passed in 1821, c. 39, § 9 & 10, is a transcript, the heirs of a deceased mortgagee have not such an interest in the lands as will entitle them to enter or to have an action upon the mortgage for condition broken. For as the debt belongs to the executor or administrator to be administered according to law; so does the mortgage which is only security for the debt. *Smith & al.* v. *Dyer*, 16 Mass. R. 18; *Dewey & al.* v. *Van Deusen*, 4 Pick 19. In *Fay* v.

*Cheney*, before referred to, it was held, that nothing short of a foreclosure would enable the heir to maintain an action against the mortgagor upon the mortgage. "The equity of redemption is considered to be the real and beneficial estate, tantamount to the fee at law, and it is accordingly held to be descendible by inheritance, devisable by will, and alienable by deed, precisely, as if it were an absolute estate at law. The Courts of law have also, by a gradual and almost insensible progress, adoped these equitable views of the subject, which are founded in justice, and accord with the true interest and inherent nature of every such transaction." 4 Kent's Com. § 57, p. 153.

The result is to be drawn from the principles, which we have considered, that the breach of the condition in a mortgage in no respect changes the nature of the estate in the respective parties. Notwithstanding such breach, the mortgagor is still considered the owner against all but the mortgagee; he may sell and convey the fee; may lease the land, if in possession; and in every respect deal with it as his own. The equity of redemption remains little, if at all, affected by an entry of the mortgagee, after breach of the condition; the rights of the mortgagor are not essentially impaired till foreclosure. It may be taken on execution against the owner and disposed of as well after as before such entry; and the interest acquired by the creditor differs in no respect from that which he would have obtained, if made before breach of the condition. The mortgagee, by his entry, acquires no absolute interest presently, which he would not have done by taking possession before the breach of the condition. In both cases he would hold the land subject to redemption and be obliged to account strictly for the net value of the rents and profits; if they should be equal to the amount of the debt secured by the mortgage, before the expiration of the time necessary to work a foreclosure, the mortgage would be discharged thereby as effectually, as by any other mode of payment. In the view of a court of equity, the rents and profits are incidents *de jure* to the ownership of the equity of redemption. *Gordon* v. *Lewis*

*& al.* 2 Sumn. 143. In no sense can they be the property of the mortgagee, till foreclosure. He surrenders no rights, which he before possessed by the entry. In the language of Chief Justice Shaw, in *Fay* v. *Cheney*, "the entry does little or nothing to change the relative rights of the parties. It fixes the commencement of three years, the lapse of which by force of law, if the estate be not redeemed, will work a foreclosure." Until that takes place the mortgage is as before, a security for the debt, and remains the personal property of the mortgagee, passing on his death to the executor and not to the heir. No new property is added to it by entry, which did not previously belong to it, so as to make it liable for the debts of the mortgagee. All the difficulties and inconveniences, which would result from a levy of an execution upon such an estate, before entry, would exist in even a greater degree afterwards. In addition to the fact, that an execution might require but a small part of the land to satisfy it, and several levies might be made by several persons, which would be an embarrassment to the mortgagor or his representative, if they should wish to redeem, there would be the greater difficulty arising from the rents and profits, for the value of which the latter would be entitled. In such a case, who would be held to account for them, a part having been received by the mortgagee, and a part by several creditors, who might claim to succeed to his rights as the mortgagee? Against whom must the mortgagor bring his bill in equity, that he may be restored to his estate? Was it supposed, that by the acts of strangers he should be turned from the plain and straight course of seeking his equities from the mortgagee and his assigns? To whom must the tender be made to entitle the owner of the equity of redemption to the rights secured to him by law? But a difficulty greater than inconveniencies presents itself as an insurmountable obstacle to the levy upon a mortgagee's right before foreclosure. The mortgage is "a pledge," "a chose in action," "an accident," until foreclosure. Such cannot be taken and sold on execution, unless by express statute provision, much less if possible, can it be the subject of levy by a set-off.

If the interest of a mortgagee cannot be taken in satisfaction of an execution, it cannot be the subject of attachment upon mesne process. No attachment can be made, where there is no right of the debtor which is attachable. *Eaton* v. *Whiting*, before cited; Stat. of 1821, c. 60, § 1.

In the case at bar, the attachment upon mesne process in favor of the defendants against Preston, made after his entry for breach of the condition and before foreclosure, was a nullity. The levy of the execution was subsequent to the conveyance by quitclaim deed, duly acknowledged and recorded, of Preston to the demandant's ancestor, which was a valid assignment of the mortgage, and there was nothing upon which the levy could rest.

It is however insisted by the defendants, that the deed from Norton to Preston was not a mortgage, inasmuch as there was no personal obligation given for any debt, from the former to the latter. A mortgage is the conveyance of an estate by way of pledge for security of a debt, and to become void on the payment of it. 4 Kent's Com. 129. "It is none the less a mortgage because there was no collateral personal security for the debt taken at the time." *Rice & al.* v. *Rice*, 4 Pick. 349. If at the time of making a conveyance, the grantor take a bond of defeasance, the transaction is a mortgage. *Taylor* v. *Weld & al.* 5 Mass. R. 109, and in the case cited there was no collateral personal security for the debt. The defendants offered the execution issued upon the conditional judgment in favor of Preston against Norton, and the return thereon, that seizin and possession was delivered to the former. But for that possession, they do not argue that they have a defence, and yet that execution is upon a judgment, when the Court adjudged a debt to be due and payable from Norton to Preston.

*The defendants must be defaulted.*

ROBERT AYER *versus* JOHN WOODMAN *& al.*

A certificate of two justices of the peace and of the quorum, showing that the creditor had been duly notified, and that the debtor had taken the oath prescribed by the statute for the relief of poor debtors, may be amended by them after it has once been signed, by stating by whom they were selected as justices.

The mere fact that a justice of the peace and of the quorum has issued a citation to the creditor, does not disqualify him from acting in the same case in the examination of the debtor.

When the justices have been selected according to the provisions of the statute and have entered upon the performance of their duties, preparatory to the examination of the debtor, neither party can interrupt the performance of them by denying, or attempting to revoke, the authority of one of the justices, without the consent of the parties interested.

Where the official certificate of two justices of the peace and of the quorum, of their doings in the examination of a poor debtor, had been introduced in evidence, and both justices had been examined as witnesses at the trial, and their testimony in relation to facts, stated in the certificate, was conflicting, it is admissible as evidence tending to corroborate the statement of one of them.

Remarks which do not state any rule or principle of law, made by the presiding Judge at a trial, upon the testimony, are not the proper subject for consideration for the whole Court.

THIS was an action of debt upon a bond, dated June 24, 1841, given to procure the release of John Woodman from an arrest, made on an execution in favor of the plaintiff against him. The defendants read in evidence, at the trial before TENNEY J. a certificate signed by Fowler and Purinton, two justices of the peace and of the quorum. The plaintiff was cited to appear on Dec. 18, and the certificate was dated Dec. 21. To the admission of this certificate the plaintiff excepted, but the exceptions do not state the ground of objection. It was admitted. Several witnesses testified to doings and sayings said to have taken place before, at and after the time the justices were selected and acted, in granting the certificate that they had administered the poor debtor's oath to Woodman. This evidence will be sufficiently disclosed by the instructions of the Judge at the trial and in the opinion of the Court.

The presiding Judge instructed the jury, that if said Smith, being an attorney at law in this Court, did make the selection of a justice as the attorney of the plaintiff, and held himself out as such, the plaintiff would be bound by his acts, there being no evidence that he was not his attorney; that it was not necessary that the selection should be made in express terms, but the jury would be authorized to infer it from facts in the case, if such facts satisfied them that it was made; that if the counsel for the plaintiff held out by acts or words, at the time of the return of the citation, that he was willing that Purinton should act as the justice selected by him, and the debtor had reason to believe therefrom, that the selection and appointment was so made, it would be equivalent to an appointment, although they might now suppose that such was not his design; that if he wished to mislead the debtor and induce him to suppose, that he had made choice of Purinton, that the plaintiff cannot avail himself of such intention, but the jury would look at the acts and declarations of the plaintiff's counsel, and give to them the same effect, as if made in sincerity; that if the counsel for the plaintiff made such appointment on Dec. 18, and it was agreed between him and Woodman in the presence of the justices that Purinton should act as a justice, unless the plaintiff should bring another at the time to which the matter was adjourned, and he did not bring another, it would be the same as if he had made an unconditional agreement that Purinton should act, and it was not competent for him to revoke it afterwards, even if it were before they proceeded in the matter; and that the testimony offered by the defendants to prove a selection of a justice by the plaintiff's counsel, might be considered as corroborated by the allegation of the fact in the certificate of the justices, as that certificate was a fact in the case for their consideration. On the return of a verdict against him, the counsel for the plaintiff filed exceptions to the rulings and instructions of the Judge.

*H. A. Smith*, for the plaintiff, among other grounds, contended: —

That there was but one justice selected on the 18th, that one justice could not legally adjourn, and that therefore the proceedings on the twenty-first of Dec. were void. Rev. St. c. 148, § 24.

The justice, who signed the citation, could not legally act as a justice on the examination. 1 Mass. R. 158; 7 Mass. R. 74. Notice to the creditor of the time and place is essential to the jurisdiction of the justices. Whether both justices acted on the 18th was a question of fact for the decision of the jury.

The certificate should not have been admitted. It was not the original certificate, nor a copy of the original record, but a paper manufactured for the occasion, since the commencement of the action. There was nothing to amend by, and so no amendment could be made. *Colby* v. *Moody*, 19 Maine R. 111; 4 Metc. 455.

Purinton did not act on the day named in the citation, and no authority given for him to act at another time, could remedy the omission to have a Court the first day.

The Judge erred also in saying, that if the appointment had once been made, it could not be revoked, although no act had been done under it. 4 Greenl. 459.

*Noyes*, for the defendants, said that the jury had settled, under the instructions, that the Court was organized on the day named in the citation, and that both justices acted in the adjournment, which was made at the request of the plaintiff's counsel.

The certificate of the justices, that they were selected in the manner required by law, is *prima facie* evidence of that fact; and of course proper evidence in corroboration of the testimony of the witnesses. 18 Maine R. 342; 19 Maine R. 111; 4 Metc. 455.

The instruction of the Judge was correct, that if the attorney for the plaintiff so conducted himself at the time, as to induce the defendants to believe that he had selected Purinton as a justice, it was not competent for the plaintiff to deny that

fact. He cannot now set up his fraudulent acts for his own advantage. The proof, therefore, that this was a contrivance, and that he did not intend in fact to appoint one, cannot now avail him. 8 Wend. 483; 6 Ado. & El. 474; 21 Maine R. 130; 18 Maine R. 145.

When an appointment of both the justices has been made, they are the tribunal for that purpose, and it is not in the power of one party to change it. The statute provides for but one appointment.

Nor does the statute, c. 148, § 46, point out the mode in which the selection shall be made. The jury are to decide whether one was, or was not, actually made.

The opinion of the Court was drawn up by

SHEPLEY J — This suit is upon a poor debtor's bond. The defendants introduced a certificate signed by two justices of the peace and of the quorum shewing, that the creditor had been duly notified and that the debtor had taken the oath prescribed by the statute for the relief of poor debtors, c. 148, § 28. This certificate had been made since the commencement of the suit. The justices had previously made another certificate according to the form prescribed by the statute, which did not state, that one of the justices had been selected by the creditor and the other by the debtor. The statement of a fact, which must exist, if the proceedings were legal, though not required by the prescribed form, would seem to be appropriate and desirable; and its insertion would not destroy the effect of a certificate otherwise formed. It has been decided, that the delivery of the certificate to the prison keeper is not essential to the performance of the condition of the bond. And that the form of it may be amended or varied in accordance with the truth after the commencement of the suit. The last certificate only accomplishes the same purpose in a little different form.

The objection, that the notice was returned before one justice only, who ordered a continuance according to the agreement of the parties, cannot prevail. The jury have

found, that the justices were selected before the continuance was ordered. Whether they were authorized by the testimony to come to such a conclusion cannot be the subject of inquiry and consideration under a bill of exceptions. Nor can the objection prevail, that the justice, who issued the citation, could not legally act in the subsequent proceedings. Any justice of the peace of the county is authorized by the twenty-first section to issue the citation. The twenty-fourth section requires that the examination shall be before two disinterested justices of the peace and of the quorum. The mere fact, that a justice has issued a citation, cannot prevent his being regarded as disinterested, and being otherwise qualified, he will come within the provisions of the statute, and be authorized to act. The instructions relating to the right of the party to revoke the authority of the justice, who has been selected by him, do not admit of a construction, that his right to do so was denied, if exercised before the justice had entered upon the performance of the duty. They did but state in effect, that if the plaintiff, by his attorney, had, on December 18, selected a justice, who had so far entered upon the performance of his duties as to concur in an order for a continuance, and had agreed, that such justice should continue to act at the adjournment on December 20, unless he should bring with him another justice to perform those duties, he could not revoke the authority so imparted and existing, without complying with the condition upon which that right had been reserved to him. When the tribunal has been organized according to the provisions of the statute, and has entered upon the performance of its duties, neither party can interrupt the performance of them by denying or attempting to revoke the authority of one of the justices, without the consent of the parties interested. The instruction, "that the testimony offered by the defendants, to prove a selection by plaintiff's counsel, might be considered as corroborated by the allegation of the fact in the certificate of the justices," must, like all other instructions, be considered with reference to the state of facts to which it was applied. One of the justices had been called by the plaintiff and had

testified. The other had been called by the defendants and had testified. Their testimony was not in perfect accordance. The jury must endeavor to ascertain the truth from their testimony considered in connexion with the other facts and circumstances. They had both signed a certificate under the sanction of their official oaths and characters stating, that one of them had been selected for the creditor. This was to be considered, and it could not be erroneous to state, that the testimony of the one, who stated that fact on the trial, might be corroborated, or the opposing testimony weakened, by the fact, that both had before signed a paper stating the same thing.

It is urged that the signature of one of the justices was obtained to that certificate by the fraud or misrepresentation of the other. It does not appear, that any such point was made at the trial. If so, it would have been the proper subject for the consideration and decision of the jury; but the Court cannot act upon any such state of facts.

It is not perceived, that there was any error in the other instructions. Remarks, which do not state any rule or principle of law, made by a presiding judge upon the testimony, are not the proper subject for consideration before a court of law. In this case those, which are considered by the plaintiff's counsel as unauthorized or uncalled for by the testimony, appear to have been made only hypothetically.

*Exceptions overruled.*

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF PISCATAQUIS.

ARGUED AT JUNE TERM, 1844.

## BENJAMIN P. GILMAN & *al. versus* SAMUEL VEAZIE.

Where the defendant signed a subscription paper, agreeing therein to pay a certain sum "for cutting the road from S. to C. provided J. H. G. (one of the plaintiffs) will agree to make a passable winter road the present season, to cut and bridge": — *it was held*, that parol evidence was inadmissible to show a parol agreement, made at the same time, that the sum subscribed by the defendant should be paid to the plaintiffs; and that they should make the necessary arrangements and contracts, superintend the expenditure of the money, and be responsible that the road should be made.

If the defendant signs a written contract, there can be no presumption of law, that another contract, not signed by him, and materially different from the first mentioned, constituted a part of the contract, so signed by the defendant, from the circumstance, that the two papers were seen, two or three weeks after the date, attached together by a wafer.

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

At the trial, the plaintiff offered in evidence the paper marked A. It was excluded by the presiding Judge. The plaintiff then read in evidence the paper marked B, and proved that the papers marked A and B were seen wafered together two or three weeks after the date of the latter; and then offered again the paper A, and it was again rejected.

The plaintiff then offered to prove, that at the time the defendant signed the paper B, it was agreed, the defendant as-

senting thereto, that the subscriptions should be paid to the plaintiffs, and that they should see to the expenditure of the money and the opening of the road referred to, and make the necessary contracts and arrangements therefor, and be responsible that the road should be made, and that the plaintiffs assented to this agreement, "and in pursuance of said agreement, did so." And they further offered to prove, that the defendant owned a township of land through which the road passed, and was benefitted by it; and that the road was completed according to contract, and at an expense beyond the whole amount of the subscriptions.

The Judge was of opinion, that if these facts were proved the action could not be sustained, and excluded the evidence; and, no more being offered, ordered a nonsuit. The plaintiffs filed exceptions.

A copy of the paper A, which was not signed by the defendant, follows. "Sebec, Sept. 1842. For a valuable consideration paid us by B. P. Gilman & Co. we agree to pay the sums set opposite our names to said Gilman & Co. for the purpose of cutting out and opening the road recently located from Sebec village to the head of Chesuncook Lake by Gilmore, Barker and others, under the direction of said Benjamin P. and John H. Gilman, to be paid in labor, produce or money." No day of the month was inserted.

Paper B, signed by the defendant and several others, was as follows: —

"We, the subscribers, hereby agree to pay the several sums set against our names, in cutting the road from Sebec to Chesuncook Lake, as laid out by R. Gilmore and others, provided Mr. John H. Gilman will agree to make a passable winter road the present season, to cut and bridge. Bangor, Sept. 28. 1842.

*S. H. Blake* argued for the plaintiffs, and cited *Brown* v. *Gilman*, 13 Mass. R. 158; *Farmington Academy* v. *Allen*, 14 Mass. R. 172; *Williams College* v. *Danforth*, 12 Pick. 541; *Homes* v. *Dana*, 12 Mass. R. 190; *Wilkinson* v. *Scott*,

17 Mass. R. 249; *Davenport* v. *Mason*, 15 Mass. R. 85; 3 Stark. Ev. 1002, 1054.

*Cutting* argued for the defendant.

The opinion of the Court was by

SHEPLEY J. — This suit was commenced by Benjamin P. Gilman and John H. Gilman to recover the sum of one hundred dollars subscribed by the defendant to aid in the construction of a winter road from Sebec to the Chesuncook lake. The writ contains four counts. The first is indebitatis assumpsit, for money laid out and expended; the second for labor and service performed; the third is upon the subscription paper marked A; and the fourth upon the subscription paper marked B. The latter is an informal conditional contract with John H. Gilman only, to pay one hundred dollars, provided he "will agree to make a passable winter road the present season, to cut and bridge," from Sebec to Chesuncook lake as laid out by R. Gilmore and others. This would not authorize the two plaintiffs to maintain this suit. They offered to prove a parol agreement made at the same time, that the sum subscribed by the defendant should be paid to them, that they should make the necessary arrangements and contracts, superintend the expenditure of the money, and be responsible, that the road was made. Such testimony could only prove an agreement made at the same time, and different from the written agreement, or subscription, signed by the defendant; and it could not have been legally admitted. The contract or subscription paper, marked A, was not subscribed by the defendant, or referred to in the one, which he did subscribe; and it differs from that one by being a contract with B. P. Gilman & Co. instead of with one member of the firm; by providing that the amount subscribed might be paid in labor or produce; and by the omission of any stipulation, that the road should be made passable that season. No presumption could arise, that one so differing from it constituted a part of the contract subscribed by the defendant, because the papers, on which they were written, were found two or three weeks afterward

connected together by wafers. The paper, marked A, was not therefore by any connexion with the defendant admissible as testimony against him. This action in the name of two persons, cannot be sustained upon the contract or paper signed by the defendant, or by the aid of the other contract made with the firm, which he did not subscribe. Nor can it be sustained by the proof relating to the counts for money paid and labor performed. Although the defendant may have derived benefit from the use of the road, there is no legal testimony to prove, that the plaintiffs expended money, or performed labor, at his request. Nor is there any testimony offered, which would prove, that they have in fact expended their own money, or performed labor upon that road. The contract marked C, between them and Cilley and Nelson, did not oblige them to pay any money or perform any labor. They thereby only agree, that Cilley and Nelson "shall have the entire benefit derived or to be derived from said subscriptions." The expenditure of money or performance of labor by Cilley and Nelson under that contract, cannot sustain the counts for money expended and labor performed by the plaintiffs.

*Exceptions overruled.*

INHABITANTS OF WILLIAMSBURG, *in error*, *versus* JOHN GILMAN.

In an action against a town or plantation for neglecting to furnish money instead of rations for soldiers present at a militia review, under the provisions of the militia act of 1834, the clerk of the company is entitled to maintain the action, by showing that the soldier named in the writ was an inhabitant of the town, and a member of a militia company; that he performed militia duty as a member thereof at an inspection and review ordered by the Major General of the division; and that the commanding officer of the company made a requisition of the selectmen for the money for the soldiers under his command, to be paid at the time of the inspection and review, as provided for by the statute.

Defining the limits of militia companies by the selectmen of towns, was not made a condition to be performed before the members of companies were required to perform militia service.

Being actually present with the company, armed and equipped, and doing militia duty at an inspection and review, is *prima facie* evidence, that the soldier belonged to the company.

If a soldier, who had cause to have been excused from the militia duty which the law designed he should perform, chose to waive the right, and did actually do the duty, that he could have been excused from, does not relieve the town from its obligation to furnish the money required by the statute.

It is not necessary that the requirement of the selectmen of a town by the commanding officer of a militia company to furnish money for the soldiers at an inspection and review, should contain, or be accompanied with, a list of the names of the soldiers; or that if one was furnished, that the list should be accurate, if it contained a sufficient number.

The commanding officer of the company is a competent witness on the trial of such action.

THE following is a copy of the errors assigned: —

1st. That it appears by the record aforesaid that judgment was given for the said John Gilman, whereas by law it ought to have been given in favor of said inhabitants against said Gilman.

2d. That the plaintiff did not prove the assignment of the limits of said company by the assessors or selectmen of Brownville and Williamsburg, or that the limits of said company were assigned by the selectmen or assessors of either town, or in any other way.

3d. That the order of the Major General, ordering the military review and inspection, on Sept. 16, 1840, was not recorded in the book of the clerk of said company.

4th. That the order signed by Nymphas Turner, Lieut. Col. of 5th regiment, and directed to ensign Warren Abbe, was illegal and insufficient.

5th. That Jediah H. Morrill was not legally notified and warned to appear at the inspection and review on Sept. 16, 1840.

6th. That Jediah H. Morrill was not legally enrolled in said company.

7th. That said Morrill was not liable to do military duty until the expiration of six months from the date of his enrolment and notice thereof.

8th. That the amendment of the time of his enrolment after the trial began was illegal.

9th. That the selectmen of Williamsburg were not legally required to furnish the rations required by statute.

10th. That the requisition for rations should have been served on the selectmen of Williamsburg more than five days next previous to the time of inspection and review.

11th. That parol testimony ought not to have been admitted to prove that Ebenezer Greenleaf and Eben P. Greenleaf were two of the selectmen of Williamsburg.

The case was elaborately argued in writing by

*C. A. Everett*, for the plaintiffs in error; and by

*H. G. O. Morrison*, for the original plaintiff.

The opinion of the Court was prepared by

TENNEY J.—This is a suit brought to reverse the judgment of a justice of the peace against the defendants for the neglect of the selectmen in not furnishing money in lieu of rations for one Jediah H. Morrill, who, it was alleged in the writ, was present at the inspection and review of the 5th Reg. 1st Brig. 3d Division, on the 16th September, A. D. 1840, as a member of the G company, armed and equipped, and did duty therein as a soldier.

The statute of 1834, c. 121, § 28, provided, that upon the requisition of any commanding officer of a company for that purpose, at five days [notice] the selectmen of towns and the

assessors of plantations shall pay at the place of inspection and review, to each officer and member of such company belonging to such town or plantation, who shall then and there appear duly equipped, and perform military duty, the sum of fifty cents, in lieu of rations. And every town and plantation which shall fail to pay said sums as aforesaid, shall forfeit to the use of said company a sum equal to fifty cents for every such person who shall do duty on such inspection and review, to be sued for and recovered by the clerk of said company before any court of competent jurisdiction.

The plaintiff, as clerk, was entitled to maintain the action by showing the soldier named in the writ an inhabitant of the town of Williamsburg and a member of the G. company, and that he did perform military duty as a member thereof, at the inspection and review ordered by the Major General on the 16th Sept. 1840, and that the commanding officer of that company made requisition of the selectmen for the money provided for by the statute, for the soldiers under his command, to be paid at the time and place of the inspection and review.

One of the errors relied upon is, that the limits of the G company were not properly assigned, inasmuch as the selectmen of the town of Williamsburg had not defined the limits thereof, according to the statute of 1836, c. 209, § 1, and also by that of 1840. A general order duly authenticated was introduced, by which it appeared, that on the 27th Dec. 1839, the limits of that company were so extended as to embrace the town of Williamsburg, and that the limits of that town and the town of Brownville, should thereafter be the limits of that company. If it is admitted, that these statutes applied to companies, whose limits are those of entire towns, the boundaries of which are fixed by public statutes, the town of Williamsburg was not affected by the former, as that provided, that the limits of companies should be so defined, prior to a period which elapsed before the general order, before named, was passed; and so became *functus officio.* And the statute of 1840 was only to allow a further time within which the duty omitted by selectmen and assessors, under the law of 1836,

might be completed before the first of September then next. It was in no case made a condition to be performed, before the members of companies were required to do military service.

By the record of the justice it appears, that the inspection and review of the Regiment to which the G company was attached, took place on Sept. 16, 1840, in pursuance of an order of the Major General.

Another error assigned is, that the evidence adduced did not show that Morrill was legally enrolled. His name was upon a paper purporting to be the roll of the company, attested by the plaintiff as clerk. A record of the roll of the same company, as corrected on the first Tuesday of May, 1840, was introduced, and upon it was the name of Morrill, and against his name in the column headed, "time of additional enrolments made after the first Tuesday of May," and the date of the additional enrolment as it stood till the trial, "Sept. —— 1840"; evidence was introduced that he was present at a training of the company on the 9th Sept. 1840, and that the company then and there were duly warned by the commanding officer to appear at the inspection and review on the 16th Sept. Morrill was present at the inspection and review, armed and equipped, and did duty in that company. This was *prima facie* evidence that he was a member of that company, and no proof was offered of an opposing character. It is not assigned as an error, that Morrill did not belong to the town of Williamsburg.

The defects pointed out as errors in the third, fourth, fifth and seventh errors assigned, are those of which the defendants can take no advantage. If the soldier would have been excused from the duty, which the law designed he should perform, the town cannot be relieved from their obligations, if he chose to waive the objections which he might make, and appeared armed and equipped, and did duty in the company. The liability of the town, by the statute, does not depend upon the strict preformance of all the duties of other officers, which the member of the company, belonging to the town, may re-

quire before he is subjected to the payment of the penalty for a neglect of his duty.

It is insisted, that there was no legal requirement made of the selectmen to furnish the money for Morrill. The requisition was in a paper signed by the commanding officer of the company, seasonably delivered to two persons as selectmen of the town, in the following terms. "The selectmen of Williamsburg are hereby notified to have the money in readiness provided by law for the soldiers under my command, to be paid on Wednesday the 16th day of September, 1840, at or near the dwellinghouse of Joseph Chase, in Sebec, a list of names being hereunto annexed." A list of names was annexed, which did not embrace that of Morrill; but the list contained as many names, as there were soldiers at the inspection and review, including Morrill. The requisition, without the list, was a substantial compliance with the statute. The company not being a company raised at large, the list was not required, no inconvenience could arise from it to the selectmen, and it may be rejected as unnecessarily appended. The notice was given to two of the selectmen of the town, according to the testimony in the case. No objection appears to have been made to the competency of this evidence at the trial, and the objection on that account cannot be sustained. It cannot be regarded as erroneous, that the notice was not given to more than two selectmen when it does not appear, that two were not a majority of the board.

It is insisted in the argument that the proceedings were erroneous, because the commanding officer of the company was admitted as a witness to prove certain facts, and that he was incompetent on the ground of interest. It does not appear to us, that he was disqualified, for that reason; and the record does not show, that he was objected to at the trial.

The eighth error assigned is, that the record of the roll was amended at the trial in a matter, which could not properly be amended. An amendment can be made by the proper officer, to conform to the truth, in many instances, long after the re-

cord is made up. Whether this was made with propriety is unnecessary to inquire, as the evidence was sufficient for the purpose, for which it was offered, without the amendment.

*Judgment of the justice affirmed.*

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DAVID N. FALES *& al. versus* DAVID DOW *& al.*

If one of the conditions of a bond, made, since the Revised Statutes were in force, to procure the discharge of the principal from arrest on an execution, be "to cite the creditors before *two justices of the peace, quorum unus*, and submit himself to examination, and take the oath or affirmation as prescribed by law for the relief of poor debtors," instead of before *two justices of the peace and of the quorum*, such bond is not a statute bond; but it is valid as a bond at common law, if the creditors accept it.

Taking the oath required by law before two justices of the peace, *quorum unus*, would be a compliance with the latter clause of the condition; but his showing that he had caused to be "cited David Fales and Levi H. Dana," when the creditors were rightly named in the execution and in the bond as "David N. Fales and Levi H. Dana," does not prove, that he has performed the first clause of the condition, requiring him to cite the creditors before two justices.

If the debtor has not performed the condition of such bond, the damages are to be assessed by the Court, and not by the jury, under the provisions of the statute of 1842, c. 31, § 9.

DEBT upon a bond, dated July 11, 1842, given by the defendants to the plaintiffs to procure the discharge of the principals from arrest on an execution in favor of the plaintiffs against them. The condition of this bond is recited at the commencement of the opinion of the Court. On August 27, 1842, the oath prescribed by the Revised Statutes was administered to the debtors by two justices of the peace, of whom one was commissioned as of the quorum, but the other was not. The plaintiffs are described in the bond as David N. Fales and Levi H. Dana. In the certificate of the justices, the creditors are named David Fales and Levi H. Dana, when describing the judgment; and the evidence of notice to the creditors was contained in these words in the certificate: — "We have

caused David Fales and Levi H. Dana, the creditors, to be notified according to law of their, the said debtors', desire of taking the benefit," &c. Neither the certificate of the magistrates, nor the facts agreed, show that the creditors appeared at the examination.

The facts were agreed; and further, that if the action was not sustainable, the plaintiffs were to become nonsuit; but if it could be maintained, the defendants were to be defaulted, and judgment was to be rendered for such amount as they were entitled to by law, to be assessed by a jury or by the Court, as the Court may determine to be the proper mode.

*J. Appleton*, for the defendants.

*S. H. Blake*, for the plaintiffs. He cited 5 Greenl. 353; 1 Fairf. 121; 16 Maine R. 292; 17 Maine R. 448; 19 Maine R. 454; 20 Maine R. 376; 21 Maine R. 206; 20 Pick. 436.

The opinion of the Court was drawn up by

TENNEY J. — The condition in the bond declared on is, "that if the principal obligors shall in six months from the date, cite the creditors before two justices of the peace, quorum unus, and submit themselves to examination, and take the oath or affirmation as prescribed by law for the relief of poor debtors; or pay the debt, interest, costs and fees, arising in said execution; or be delivered in custody of the keeper of the prison," &c. the obligation to be void. The Revised Statutes, c. 148, § 20, require a bond conditioned, that the debtor shall cite the creditor before two justices of the peace and of the quorum. The difference between the condition required and that in the bond is material, and the bond is not a statute bond; but as the creditors accepted it and put it in suit, it is valid as a bond at common law.

It is contended by the defendants' counsel, that the condition has been performed, inasmuch as the oath was administered by magistrates commissioned according to the requirement in the bond. By the language used, the oath in the form prescribed by law, administered by two justices of the

peace, quorum unus, was a compliance with that part of the condition, but it was required also that the principal obligors should *cite the creditors.* The certificate shows, that David Fales and Levi H. Dana were cited, but the creditors named in the bond are David N. Fales and Levi H. Dana. These names are not the same, and by the authority of decided cases, the certificate is insufficient as a defence to the action, and the defendants must be defaulted.

The bond is not such an instrument, as is referred to in c. 31, § 9 of 1842, in which a jury are to assess the damages. The only evidence as to the ability of the debtors is found in the certificate, and the damages to the plaintiffs can be nominal only. Judgment for the penalty of the bond, and execution to issue for one cent damages and costs.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF PENOBSCOT.

ARGUED AT JULY TERM, 1844.

## SAMUEL G. OAKES *versus* CYRUS MOORE *& al.*

The word *lien*, in common parlance, is somewhat indefinitely used, as if it embraced every species of special property which one may have in goods, the general ownership of which is in another. It originally, and more appropriately, was used to signify the right of detention which artisans and others, who had bestowed labor upon an article, or done some act in reference to it, had, in some instances, of a right of detention thereof till reimbursed for their expenditures and labor bestowed thereon. Such may be termed a lien at common law.

In cutting and removing timber from the land of another, at an agreed price, and for the purpose of being sawed into boards, no lien, without a special contract therefor, can be acquired.

In the cases of liens of the above description, as at common law, in order to the continuance of the lien, it was and is indispensable, that it should be accompanied by possession. The moment that possession is voluntarily surrendered, the lien is gone.

Where one contracts with the proprietors of land to cut timber therefrom and deliver it at a place appointed, to be sawed into boards, for an agreed price per thousand feet, to be paid at different times after the work should be completed, "*said logs to be holden to said O. (the contractor) until all is paid, or satisfactory* security given;" this is rather in the nature of a mortgage, than of a lien, and the claim of the contractor upon the logs, will not be lost by his suffering them to go into the possession of the proprietors of the land, subject to his right to resume it, in case of non-payment according to the contract.

And if the contractor permits the logs to go into the possession of the proprietors of the land, to be sawed into boards, with an expectation, raised by them, that he should have the avails of it to the extent of his claim,

and they disappoint him in that expectation, they will not be permitted to come into Court and say, that he has thereby relinquished his right to regain the possession.

Where a contract is made whereby one party engages to cut and haul timber from land of the other at a stipulated price per thousand feet, "to be estimated by P. (a surveyor named) and cut to his satisfaction," the parties are bound by his estimate, it not appearing that such surveyor acted corruptly, or made any gross mistake.

TROVER for a quantity of pine logs. The whole evidence given at the trial, the objections raised to the right of the plaintiff to recover, and the ruling and instructions of the presiding Judge, all appear in the exceptions. The law of the case, on the view taken by the Court, will be understood, without any more particular statement of the facts, than will be found in the instructions to the jury, and in the opinion of the Court.

By the agreement between the plaintiff and Jefferds, assuming to be the agent of the proprietors, the plaintiff was to cut a large quantity of pine timber, on a township of land, and drive it to the boom near Oldtown, in a certain manner, and if he neglected, he would "pay the proprietors, should they drive for him." The agreement provides, that the plaintiff should be paid $3,50 per thousand, board measure, for cutting, hauling and driving the logs, "to be estimated by said Pond and cut to his satisfaction, and to be scaled at the landing on said township, where the logs are deposited." The agreement contains this stipulation: — "The said Jefferds further agrees, that the said Oakes shall receive one third part pay for hauling and driving on the delivery of said logs at the Pea Cove Boom, one third in thirty days, and one third in sixty days, *said logs to be holden to said Oakes until all is paid, or satisfactory security given.*" By the contract between Moore, as agent for the proprietors, and Paine, the latter was to take the logs from the boom, saw them, and run the boards to Bangor.

The bill of exceptions concludes as follows: —

The defendants' counsel insisted, that the written contract between Moore and Paine, and the delivery of the logs in

pursuance of its provisions by the plaintiff, deprived Moore of the possession of the logs, and was such as to prevent him from resuming it; and therefore this action could not be maintained; but if otherwise, yet the refusal of Moore to deliver the logs on demand of the plaintiff, would not make Wilcox, the other defendant, liable, unless he gave direction to Moore to refuse to deliver them; and that every alteration in the contract, under which the plaintiff cut and hauled the logs, was a waiver on his part of his lien.

TENNEY J. presiding at the trial, instructed the jury, that the plaintiff must have had the possession of the property, or the right of immediate possession, in order to maintain this action. That the contract between Moore and Paine, if the plaintiff delivered the lumber to Paine in pursuance of its provisions, did not give Paine the control of the logs against Moore, although, if Moore took them, he might be liable, to the extent of the price of sawing them, to Paine. That so far as Moore had the lumber under his control, unless the lien was waived, his refusal to deliver them on the plaintiff's demand was evidence of a conversion by him, but that refusal was insufficient to render his principal liable, unless the principal directed or in some way sanctioned it; but that notice to the agent of the claim and demand was a notice to and a demand of the principal, and if after the refusal of the agent the principal made use of the logs, it was a conversion by the latter. That the plaintiff's lien would be annulled by an express agreement to that effect, or by any agreement which would be inconsistent with that which created it, so far as the lien was concerned; but a modification which was intended to produce the money, with which to pay the plaintiff, and which modification had no reference to the lien, and was not inconsistent with its continuance, would not discharge it. That the question of the waiver of the lien was to be determined by ascertaining the intention of the parties. That if the plaintiff agreed that the lumber should be sold unconditionally, and he to receive the proceeds so far as the lumber was sold in pursuance of such agreement,

the lien would be discharged and the defendants would not be guilty of a conversion of the lumber so sold. But if it were intended by the parties, that the lumber unsold should continue charged with the lien, a refusal to deliver such on demand was evidence of a conversion in the one who refused; but there would be a liability no farther than the value of such lumber unsold. That the survey of Pond was conclusive, unless the jury were satisfied that he was guilty of fraud in the survey, or unless he acted under a misapprehension of a material fact, such for example as estimating lumber which grew on another tract. That an error in judgment in estimating the timber, or determining whether the timber came within the terms of the contract, could not be corrected by the jury. The defendants' counsel requested the presiding Judge to instruct the jury, that if they believed that Oakes and Moore made the contract according to the testimony of Ivory Jefferds, the plaintiff could not recover. The Judge declined doing this, but instructed them, that if, from all the testimony in the case touching that question, they were satisfied, that it was the intention of the parties, that the lien should be waived, or that any agreement was made inconsistent with its continuance, they would find for the defendants. The jury returned a verdict for the plaintiff, and the defendants filed exceptions to the instructions given by the Judge.

*Kent* and *A. G. Jewett* argued for the defendants.

In support of their position, that the lien of the plaintiff was dissolved by a voluntary surrender of the logs, and delivery of them over into the possession of the owners, or their agents, they cited 6 East, 27; 15 Mass. R. 396; 12 Pick. 81; 4 Campb. 291; 14 East, 308; 1 Atk. 234; 7 Taunt. 14. That Paine had a right to retain possession of the logs until his contract was fulfilled. *Townsend* v. *Newell*, 14 Pick. 332; 2 Kent, 586; Story on Bailm. § 394, 395, 424; 3 Verm. R. 302; 8 Pick. 75. That the action of trover could not be maintained, as Paine had the right to the possession under his contract, when the action was commenced. 3 Greenl. 183;

13 Pick. 294; 3 Pick 258; 7 T. R. 9; 9 Pick. 156; 22 Pick. 535.

*J. Appleton* and *G. F. Shepley* argued for the plaintiff. On the point, that the instruction requested was rightfully refused, because it was predicated on the testimony of one witness, assuming it to be true, when it was in conflict with other evidence, and when the story was in itself improbable, they cited 17 Peters, 20. The objections made by the defendants to the instructions, they contended, were grounded on a misconception of what the instructions were. The argument assumes that the plaintiff assented to the contract between Moore and Paine, when the jury have found, under the instructions, that he did not. The possession of Paine was the possession of the plaintiff, and not of the proprietors of the land. The principal is liable to third persons for the acts of his agent, in a civil action. Story's Ag. § 451, 452; 7 Bingh. 543; 1 Moore & P. 448. And notice to the agent is constructive notice to the principal. Story's Ag. § 140.

The opinion of the Court was by

WHITMAN C. J. — Exceptions are taken to the Judge's instructions to the jury, in general terms, without pointing out any part in particular, which is deemed erroneous. This mode of taking exceptions may be very convenient, so far as the counsel are concerned, as it leaves them to find out, at their leisure, in what particular, if any, the instructions are erroneous. To the Court, nevertheless, it may be somewhat inconvenient, as it will not be apprised of any casual mistake or omission, into which it may, in the hurry of a trial, have been momentarily led, in season to correct or supply it. It may be doubtful whether the Court should in such case consider a party aggrieved, so as to be entitled to have exceptions so taken allowed. At common law it would be necessary that the particular ground of exception should be designated, and in season to put the Court upon consideration of the supposed error, so that it might be corrected in time to prevent an improper effect from it. Possibly the statute, providing for the

taking of summary exceptions, may admit of the mode adopted in this case; and we proceed to the consideration of the Judge's instructions as reported. In doing this we do not propose to notice minutely the particular grounds of exception upon which the counsel, in their arguments, have insisted. It will suffice that we take a general view of the case, such as shall substantially amount to a reply to the questions raised.

The plaintiff claims to have had, what he terms, a lien upon the logs, to recover the value of which, this action was instituted. The word lien, in common parlance, is somewhat indiscriminately used, as if it embraced every species of special property, which one may have in goods, the general ownership of which is in another. It originally, and more appropriately, was used to signify the right of detention, which artizans and others, who had bestowed labor upon an article, or done some act in reference to it, had, in some instances, of a right of detention thereof till reimbursed for their expenditures and labor bestowed thereon. Such may be termed a lien at common law. The lien, if it may be termed such, upon which the plaintiff must rely, is not one of this description. In cutting and removing timber from the land of another, at an agreed price, and for the purpose of being sawed into boards, no lien, without a special contract therefor, can be acquired. In the cases of liens of the above description, as at common law, in order to the continuance of the lien, it was and is indispensable, that it should be accompanied by possession. The moment that possession was voluntarily surrendered, the lien was gone. And the authorities cited by the counsel for the defendant are conclusive upon this point; but may be wide of touching the case at bar.

It seems to be admitted, in the arguments of the counsel, that the plaintiff had a lien. If he had, it is important to see how it arose, and, what the particular nature of it may have been. We have seen that it could not have been a lien at common law; and neither party contends that it was. If it existed, then it arose upon a special contract; a contract, which was entered into by the plaintiff with one Jefferds, act-

ing as agent for the proprietors of the land, from which the timber in question was taken, and therein we find a stipulation to such an effect was contained. Although Jefferds now says, that he was not authorized to pledge the timber as security for the pay for cutting and removing it, the evidence does not show that the owners ever gave the plaintiff any seasonable notice of their dissatisfaction with this particular stipulation in the contract; nor did they in their instructions to Moore, in April, 1836, notice any such objection. They may, therefore, well be considered as having ratified it. This stipulation will be found to have created, what may be more properly termed, a mortgage, than a mere lien; for it is manifest, that actual possession by the plaintiff was not to be continued; and that the logs were intended to go into the possession of the general owner, subject to the right of the plaintiff to resume it in case of non-payment for his labor, &c. as had been agreed upon. The stipulation for a term of credit therefor, is clearly indicative of such an understanding between the parties; and it might be inferred from the well known character of such transactions. The term of credit was given for some purpose; and may well be believed to have been given to enable the general owner to avail himself of funds to meet his liabilities from the sale, or other disposition, of the timber.

The plaintiff, then, having parted with his possession of the logs, after having performed his contract in reference to them, might or might not resume it upon the expiration of the terms of credit. If he saw that the owners were conducting in a manner affording a reasonable prospect of his availing himself of payment, as soon as his necessities would require it, he might suffer them to continue their possession. In this case, it would seem, that he witnessed the negotiation between their agent and Paine, and saw that it was an arrangement professedly made, with a view to enable them to make payments to him; and doubtless expected to realize therefrom the whole amount due him. He accordingly seems to have waited till the termination of that contract, and, not finding his expectations realized, demanded and sought to regain possession of

the logs. We do not see but he might well do so. He had not, in express terms, relinquished his right to the timber as secured by his contract; and if he looked on, and saw the owners making arrangements to dispose of it, it cannot be doubted, but that it was with an expectation raised by them, that he should have the avails of it to the extent of his claim. They, having disappointed him in this expectation, should not be permitted now to say, that he has relinquished his right to regain possession; nor to withhold from him the value of the timber to the extent of his first demand. No demand, as evidence of a conversion, would seem to have been necessary; for an actual conversion seems to have been abundantly proved. The defendant, Moore, has undertaken, in his contract with Paine, to deal with the timber as being the property absolutely either of himself, or of Wilcox and others; and, moreover, the defendants now dispute the right of the plaintiff to any claim upon it. Whether a demand of the timber, therefore, was made upon the agent, or upon the principals, it does not seem important to inquire.

The instructions, in reference to the survey of the timber by Pond, were not erroneous. He had been mutually agreed upon by the parties to perform that service. They should, therefore, be concluded by what he did, as it did not appear that he acted corruptly, or made any gross mistake.

The supposed mistake, noticed by one of the counsel for the defendants, in ascertaining the amount due to the plaintiff, does not come before us upon this bill of exceptions, and cannot therefore be noticed.

*Exceptions overruled.*

MICAJAH HASKELL *& al. versus* ABIJAH JONES.

To maintain the action of trover, it is necessary that all the tenants in common should join as plaintiffs; and that they should be the legal owners of the goods, and entitled to the possession of them.

If A, for a consideration received from B, by an instrument under seal, "sells and delivers to C, the agent and attorney for said B," certain personal property, on condition that the conveyance should be void on the payment by A of the consideration received from B, C having power on certain contingencies to take the property into his possession, and make sale thereof for the payment of the debt to B; the owership of the goods is in C, and B cannot maintain trover therefor.

THE action was trover, brought by Micajah Haskell, Francis Lecompte and H. A. Warren against Jones, a deputy sheriff, who had attached the property, alleged to have been converted by him, on a writ against W. D. Lecompte and Asa Porter in favor of one of their creditors.

The facts are stated in the opinion of the Court.

After the evidence was all before the jury, a nonsuit was entered by consent of parties, which was to be confirmed, or to be set aside, and a new trial granted, as the Court might adjudge to be in conformity with law, upon a report of the evidence.

*Warren*, for the plaintiffs, contended that the action was rightly brought. The principals may maintain an action in their own names on a contract made by their agents, even if a suit could be sustained in the name of the agents. Story's Agency, 431, 98, 99, 150, 154, 407; 17 Wend. 40; 5 Mass. R. 491; 19 Johns. R. 60; 4 Wend. 285; 2 Brod. & B. 402.

The conveyance of the property was, however, to the plaintiffs, and not to their attorneys or agents.

*Kent*, for the defendant, said that all the tenants in common of personal property must join in action of trover, to recover the value thereof. And if the action is brought in the name of wrong plaintiffs, the defendant may avail himself of it at the trial, without pleading in abatement. *Gilmore* v. *Wilbur*, 12

Pick. 120; 2 Saund. 116, (a) note 2; 8 T. R. 430; 7 T. R. 45; 4 Kent, 310.

The opinion of the Court was by

SHEPLEY J. — To maintain the action of trover it is necessary, that the plaintiffs should appear to be legal owners of the goods and entitled to the possession of them. It is also necessary, that all the tenants in common should join in the action. The question arises in this case, whether two of the plaintiffs have exhibited any proof, that they had any legal interest in the goods; or whether Messrs. Warren and Brown must be regarded as legal owners.

This will depend upon the construction of the sealed instrument of conveyance made by Lecompte and Porter, bearing date on December 2, 1836. It recites, that the vendors were indebted to the plaintiffs, and that the consideration of that conveyance was such indebtment. And it declares, that they "do hereby sell and deliver to Henry Warren and A. J. Brown, agents and attorneys for said Haskell and H. A. Warren, and to said Francis Lecompte," the goods therein described. There is a condition, that the deed shall be void upon payment of the debts due to the plaintiffs in the manner prescribed. There was another instrument made by Lecompte and Porter on the following day, by which the goods were to be redelivered to them; and Lecompte testified, "that said conveyance and said agreement to take back said goods of the 3d of December were all one transaction and in pursuance of the original bargain." The latter acknowledges the reception of the goods "for the purpose of carrying on the business of confectioners and of selling the goods at retail as the agents of Warrren and Brown and Lecompte." And it authorizes Warren and Brown, in case of failure, to make the payments or to conduct the business in a manner satisfactory to them, to take possession of the goods, "and sell at auction so much as shall be sufficient to pay our said debts to said Haskell and H. A. Warren, and hold the remainder subject to the direction of said Francis Lecompte." It appears from these

instruments, considerd in connexion, that two third parts of the goods were conveyed to Warren and Brown to be sold at retail by their agents, Lecompte and Porter; and that Warren and Brown were upon certain contingencies entitled to take possession and to sell such portion of them, as should produce sufficient to pay the debts due to their principals. It does not appear to have been the intention, that their principals should in any event become entitled to the possession of the goods, or that the title should so vest in them, that the goods could be sold as their property The recitals, that the consideration proceeded from the principals and that Warren and Brown were their agents and attorneys in taking the conveyance, are not inconsistent with those provisions. Lecompte and Porter might have been unwilling to convey their goods to the principals, and to allow them to have the right to take possession of them at their pleasure, and to make sale of sufficient to pay themselves immediately; and yet have been willing to convey the title to their attorneys and to give them such powers. These recitals would become consistent and appropriate to carry into effect such an intention, and to shew, that while Warren and Brown held the legal title to that portion of the goods, they held it not for their own benefit, but for the benefit of their principals. To decide that the title passed by that conveyance immediately to their principals, would be to violate the apparent intention of the parties, and to destroy those clauses in the instruments, which in effect declare that the goods were to be sold as the property of Warren and Brown, and that confidence was reposed in them to superintend and control the management and sale of them by Lecompte and Porter.

*Nonsuit confirmed.*

WILLIAM I. THOMAS *versus* ISRAEL WASHBURN, JR. *& al.*

The liability of the indorser of a writ is incurred when the writ is indorsed.

Where the liability of an indorser of a writ was incurred before the Revised Statutes were in operation, and an action against him was commenced after they had become laws in force, the provisions of those statutes in relation to the form of action and the limitation of suits do not apply.

In an action against the indorser of a writ the return of an officer on the execution, showing that no property of the judgment debtor was to be found within his precinct, is conclusive of the fact so returned between the parties.

But such return is not conclusive evidence of the inability of the judgment debtor.

The liability of indorsers of writs depends upon the inability or avoidance of the debtor; and if it be shown that he was possessed of property, which it is reasonable to suppose could have been seized upon execution by the creditor, he exercising ordinary care and vigilance, in any other county in the State than the one to which the officer's return refers, it would be a defence to an action against an indorser of a writ for want of ability in the debtor.

THIS was *scire facias*, against the defendants, Messrs. Washburn & Prentiss, as indorsers of a writ in favor of William Irving against the present plaintiff. The plaintiff relied upon a judgment in his favor in said action; execution issued on the same, with the officer's return; and the certificate of two justices of the peace and quorum, admitting the execution debtor to the benefit of the poor debtor's oath. The judgment in favor of Thomas against Irving was rendered on July 3, 1840. The following is a copy of the officer's return on the execution. "Penobscot, ss. Sept. 11, 1840. For want of property of the within named Irving, to be found in my precinct, wherewith to satisfy this execution, I have arrested his body, and have discharged him from said arrest upon his giving a bond as required by law, said bond being herewith returned.

"J. H. Wilson, Dep'y. Sh'ff."

This writ was dated Oct. 11, 1841. The bond given by Irving and his surety was in the common form of a poor debtor's bond. There was no evidence of avoidance of Irving. The defendants contended that *scire facias* could not be

maintained; that the action was not seasonably commenced, and relied upon the statute of limitations, c. 146, § 6, Revised Statutes; and that the evidence of the plaintiff was not *prima facie* evidence of avoidance or inability of said Irving. TENNEY J. presiding at the trial, ruled that the abovenamed evidence was sufficient to put the other party upon his defence. The defendants then offered to prove the ability of said Irving from the time of judgment against him till the present time, by showing that he was the owner of personal property in the county of Penobscot of $200 value, and real estate of great value; that he was the owner of other personal property in Penobscot county, from the time of said judgment until the 28th August, 1840, of the value of $400; that during all said period he was the owner in fee of real estate in a county adjoining Penobscot, in this State, of the value of $300, on which the execution against him might at any time have been satisfied. But the presiding Judge ruled, that the evidence was inadmissible. If the evidence offered by the defendants was improperly excluded, and it is competent for them to prove these facts, a new trial was to be granted, unless the evidence relied upon by the plaintiff is insufficient, in which case he was to become nonsuit. But if the proof offered by the defendants was properly excluded, and the plaintiff's evidence is sufficient to make out a case for him, then the defendants were to be defaulted.

*Washburn* and *Prentiss, pro se*, contended that this action could not be maintained, as since the Revised Statutes went into operation, the only remedy against the indorser of a writ was by an action of the case.

The action is barred by the statute of limitations. The provisions of the Revised Statutes apply. They affect only the remedy. 22 Pick. 430.

The plaintiff did not show sufficient evidence of the inability or avoidance of the execution debtor, to enable him to maintain the action. *Dillingham* v. *Codman*, 18 Maine R. 75. But the most that can be made of the plaintiff's evidence is,

that it may show a *prima facie* case, which would have been wholly disproved, if the evidence we offered had been admitted. It was admissible, and would have shown that due diligence had not been used to collect the execution of the debtor. *Palister* v. *Little*, 6 Greenl. 350; *Harkness* v. *Farley*, 2 Fairf. 491; *Wilson* v. *Chase*, 20 Maine R. 385.

*Wilson*, for the plaintiff, contended that the cause of action in this case accrued before the Revised Statutes went into effect, and so those statutes did not apply.

This also is a sufficient answer to the ground taken, that the action is barred by the statute of limitations.

The officer's return is conclusive evidence of the inability of the judgment debtor, and parol evidence is inadmissible to contradict or to control it. 6 Mass. R. 494; 2 Fairf. 491; 15 Maine R. 64; Howe's Prac. 119.

The evidence offered was properly excluded. The officer's return was conclusive in the county of Penobscot, and the plaintiff was not obliged to give out his execution and get a return in every county in the State, and it would have been impossible to have done it seasonably. They did not offer to show, that the plaintiff or his attorney knew of any property of the debtor, and they had a right to presume that the officer had done his duty.

The opinion of the Court was drawn up by

TENNEY J. — The Rev. Stat. c. 114, § 18, have changed the remedy from *scire facias* to *case*, in claims against indorsers of writs, and have limited the time within which actions shall be commenced, to one year next after the judgment in the original action. But by the same section, the provisions therein contained are not to extend to any liability incurred before the passage of the Revised Statutes. This clause must have effect, notwithstanding the general provision in the second section of the repealing act, "that the proceedings in every such case shall be conformed, when necessary, to the provisions of the Revised Statutes." The liability was incurred, when

the defendants indorsed the writ, though it had not then become fixed and absolute; and we think the Revised Statutes do not apply to this case.

The judgment against Irving was rendered July 3, 1840, and on the 21st Sept. 1840, a deputy sheriff of the county of Penobscot returned upon an execution issued thereon; "For want of property of the within named Irving, to be found within my precinct, to satisfy this execution, I have arrested his body and have discharged him from said arrest, upon his giving bond as is required by law." It was the officer's duty to make search for property, and from it, if found, to cause the execution to be satisfied, and his return is evidence, that he did all which was legally required of him; and as between the parties now before the Court, is conclusive, that no property of the plaintiff in the original action was to be found in his precinct. *Craig* v. *Fessenden & al.* 21 Maine R. 34. But it is not conclusive evidence of inability, as was decided in *Palister* v. *Little*, 6 Greenl. 350.

The liability of indorsers of writs depends upon the inability or avoidance of the debtor, and if it be shown that he was possessed of property, which it is reasonable to suppose could have been seized upon execution by the creditor, he exercising ordinary care and vigilance, in any other county in the State than the one to which the officer's return refers, it would be a defence to an action against an indorser for want of ability in the debtor. But this liability is not fixed and made to depend upon the inability of the debtor at any precise time; the provision is intended to give to the defendant in the original action security against the loss of costs, which he may recover in a suit against him, which shall prove to be groundless. And it has received such a construction, that to hold an indorser, reasonable diligence shall be made use of to obtain satisfaction of the debtor, in the judgment, whose inability must be shown by an officer's return upon an execution issued within one year from the rendition of the judgment. *Wilson* v. *Chase*, 20 Maine R. 385. There has been no laches of the plaintiff in this action in this respect. An execution was issued and a

return of the arrest, and giving bond, made within three months from the time of rendering the judgment; and the ordinary means of obtaining satisfaction was in process.

The offer of the defendants was to prove the ability of the debtor, from the time of judgment against him, till the time when the action was tried, by showing that he was the owner of personal property in the County of Penobscot, of two hundred dollars in value, and of real estate of great value, that he was the owner of other personal property in Penobscot County, from the time of said judgment until the 28th of August, 1840, of the value of four hundred dollars; "that during all said period he was the owner in fee of real estate in a county adjoining Penobscot, in this State, of the value of three hundred dollars, on which the execution against him might have been levied and satisfied at any time."

If the debtor did not hold this real estate longer than till the 28th of August, 1840, it was not evidence of such ability as would discharge the indorsers. There was no offer of proof, that the creditor was notified of the existence of any property belonging to the debtor, or that he, or his attorney, knew that he was the owner of the real estate last mentioned. It was not reasonable to expect, that without some information or knowledge of the fact, the creditor would abandon the course of proceeding, which he had adopted, speedily to obtain satisfaction.

But if the debtor was the owner of such real estate till the time of the trial of this action, he was unquestionably of ability to pay the judgment at the time, when this action was commenced. It is not entirely clear, whether the offer to prove, that the debtor was the owner of this real estate, refers to the whole time from the rendition of judgment to the trial of this action, or to the 28th of August, 1840. Upon a fair construction of the language, it may refer to the former, and if so, a successful attempt to make such proof would have been a defence. We think this opportunity should have been given, and by the agreement of parties, the action must stand for trial.

JOHN BARKER *versus* JOSEPH CHASE.

Where the owner of goods assigns and delivers them to another person, as security for the payment of a debt, by a valid assignment; and the assignee makes an assignment of them to the plaintiff, by an instrument which is void as against the provisions of the statute on that subject, and delivers them over to the plaintiff with the assent of the original owner; an action of trespass can be maintained therefor by the plaintiff against one who takes them without right and as a mere wrongdoer.

An officer has no right by virtue of a writ against the mortgagor to attach and take goods from the possession of a bailee of the mortgagee, without first paying or tendering the amount due upon the mortgage.

AFTER all the evidence, which appears at length in the report of the case, was before the jury, the defendant became defaulted. If upon the evidence the action could be supported, in the opinion of the Court, the default was to stand; and if not maintainable, the default was to be taken off, and the plaintiff become nonsuit.

*J. Appleton* and *M. L. Appleton* argued for the defendant.

*Moody*, for the plaintiff.

In support of his position, that if the assignment was void, and the plaintiff held the property as the mere bailee of Crosby, still he could maintain the action against the defendant, a mere stranger and wrongdoer, he cited 1 Chitty's Pl. 170; 1 B. & P. 45; 8 Pick. 33; 7 Pick. 52; 10 Pick. 135; 20 Pick. 247; 22 Pick. 253.

The opinion of the Court was drawn up by

SHEPLEY J. — This is an action of trespass, brought against the former sheriff of the county of Piscataquis, to recover the value of certain lumber attached by his deputy, on a writ in favor of Henry Rice and others against Benjamin H. Davis, on January 20, 1840. The logs from which the lumber was made, appear to have been cut by Davis on the lands of the North American Lumber Company, during the season of 1839, by virtue of a written license or permit from their agent, on November 16, 1838. This license, with his rights under it, was assigned, on February 22, 1839, by Davis to Stephen S.

Crosby to secure the payment for certain goods, furnished to enable him to carry on the operation. Crosby, on July 11, 1839, made an assignment of all his property to the plaintiff, for the benefit of his creditors, upon certain conditions, and at the same time and as part of the same transaction also assigned to him his interest in that license. That assignment, as this Court has already decided, was invalid. Davis testified, that he, after a formal delivery of the property, took possession of the lumber as the agent of the plaintiff, and manufactured and transported it to market for him, and that the plaintiff paid the wages of the men employed and all the expenses of manufacture and transportation. Although the plaintiff did not acquire any title to the property by that assignment, this testimony shews, that it was lawfully in his possession at the time of the attachment, by the consent of both Davis and Crosby. And that is sufficient to enable him to maintain this action against a stranger and wrongdoer. Davis, long before the attachment, had parted with all his interest to Crosby, unless there should be a balance left after all the bills were paid. It is insisted, that the plaintiff should not be allowed to recover the value of the lumber, because it appeared at the time of the trial, that he had been repaid all sums advanced by him. But the right of property did not thereby revert to Davis; it remained in Crosby, who must be considered as only parting with the possession to the plaintiff, as his substitute and bailee, to carry out the original design. And he, as such, may recover the value of the property against the defendant, who fails to show any title in Davis; and hold the amount instead of the lumber to be restored to the owner or to his creditors. If Davis should be regarded as mortgagor, and Crosby as mortgagee of the lumber at the time of the attachment, the officer could not have taken it from the possession of the bailee of the mortgagee, without first paying or tendering the amount due upon the mortgage.

*Judgment on the default.*

THE STATE *versus* JOHN R. GODFREY & *al.*

If all the facts alleged in an indictment may be true, and yet constitute no offence, the indictment is insufficient. And a verdict does nothing more than to verify the facts charged.

Where an offence is created by statute, and there is an exception in the enacting clause, the indictment must negative the exceptions. But if there be a proviso which furnishes matter of excuse to the party, it need not be negatived in the indictment, but he must show it, if he would avail himself of it.

Where certain persons were authorized by an act of the legislature to erect a dam across a river which had by prescription become a public highway, in a certain manner, and within prescribed limits, and they had proceeded to erect a dam across the river, at or near the same place; and an indictment at common law was found against them for causing a nuisance by the erection of the dam; such indictment is insufficient, and on the return of a verdict of guilty thereupon, judgment must be arrested, if the indictment contains no averment that the dam was beyond the limits prescribed in the charter, and does not in any way allege, that it was not erected in pursuance of the authority given by the statute.

THIS was an indictment at common law, for a nuisance occasioned by the erection, by the defendants, of a dam across the Penobscot river. The indictment was found in 1834, and was tried, and a verdict of guilty returned by the jury. Certain questions of law were reserved on a report of the presiding Judge, which were decided against the respondents. A report of the case then before the Court, is found in 3 Fairf. 361.

A motion in arrest of judgment, for insufficiency of the indictment, was filed at the term at which the trial took place. At the July term, 1844, this motion was argued by

*F. Allen*, for the respondents, and by

*Bridges*, Attorney General, for the State.

In his argument, Allen cited *Rex* v. *Mayor, &c. of Liverpool*, 3 East, 86; 1 Chitty's Cr. L. 283; *Commonwealth* v. *Dana*, 2 Metc. 340; *Little* v. *Thompson*, 2 Greenl. 228; *Williams* v. *Hingham Turnp. Cor.* 4 Pick. 341; *Smith* v. *Moor*, 6 Greenl. 274; *Commonwealth* v. *Squire*, 1 Metc. 258; 3 Chitty's Cr. L. 641, 642, 643; 4 Barn. & Ad. 30.

*Bridges*, in support of his argument, cited *State* v. *Godfrey*,

3 Fairf. 361; Davis' Precedents, 193; 3 Chitty's Cr. L. 641, 642, 643; 4 Barn. & Ado. 30; *Commonwealth* v. *Hall*, 15 Mass. R. 240.

The opinion of the Court was made known in June, 1845, as drawn up by

TENNEY J. — This indictment is at common law, and alleges that the Penobscot river, between the towns of Orono and Hampden, for more than twenty years next preceding, had been a navigable river and an ancient and common highway for the passage and navigation of boats, rafts and craft, at the pleasure of all the good citizens of this State, and charges the defendants with having erected thereon a dam of certain dimensions across said river, to the damage and injury of the citizens of the State, in exposing to destruction their boats, rafts and craft, in their passage upon said river, and to their common nuisance, &c. A verdict of guilty having been rendered by the jury, the defendants have filed a motion in arrest of judgment, on the ground, that no offence is charged in the indictment.

It is a well established principle, that if all the facts alleged in an indictment may be true, and yet constitute no offence, the indictment is insufficient. A verdict does nothing more than to verify the facts charged, and if these do not show the party guilty, he cannot be considered as having violated the law. *Rex* v. *Lyme Regis*, Dougl. 153; *Commonwealth* v. *Odlin*, 23 Pick. 275. In *Rex* v. *Horne*, Cowper, 672, Lord Chief Justice De Grey lays down the rule thus. "The charge must contain such a description of the crime, that the defendant may know what crime it is, which he is called upon to answer; that the jury may appear to be warranted in their conclusions of guilty or not guilty upon the premises delivered to them, and that the Court may see such a definite crime, that they may apply the punishment, which the law prescribes." A defective indictment is not aided by verdict, and a judgment may be arrested thereon. 4 Bl. Com. 375.

By an act of the legislature of this State, passed Feb. 12, 1828, which is declared therein to be a public act, certain persons named, and their associates and successors, were "empowered to erect and keep a dam or dams across the Penobscot river from Bangor to Brewer or Eddington, with such canals, locks, sluices, wharves, piers and side booms at such place or places as they may deem most safe and convenient, between the foot of Rose's or Treat's falls in Bangor, and McMahon's falls in Eddington, for the purpose of flowing the water a sufficient height for the safe and convenient passage of rafts and boats from the foot of Eager's falls, in Orono, to Bangor. And said corporation may erect mills and factories, and use the water flowed by said dam or dams; and may hold and possess real and personal estate not exceeding the value of two hundred thousand dollars, and the same or any part thereof, may sell and convey in fee simple, or any less estate. Provided, that by the erection and maintenance of any dam or other works by said corporation, the navigation and free passage of vessels, boats, rafts, lumber and fish in and upon said Penobscot river, shall not be impaired, lessened or impeded more than the same shall be improved and benefitted by the acts of said corporation."

The indictment refers to no exception, consequently does not negative the erection as being within the charter granted; there is no allegation, that the dam was placed beyond the limits prescribed, or that any of the provisions mentioned in the proviso were not followed. The charge is for making those erections, that are fully authorized by the statute, which Courts are bound officially to notice as a part of the public law of the land. The question then is presented, whether the indictment should allege, that the dam was not erected in pursuance of the authority of the statute, or whether the privilege conferred thereby should be pleaded by the defendants.

When an offence is created by statute and there is an exception in the enacting clause, the indictment must negative the exception. But if there be a proviso, which furnishes matter of

excuse for the defendant, it need not be negatived in the indictment, but he must plead it. *Speirs* v. *Parker*, 1 Term R. 144, 145; 6 *ibid.* 559; *King* v. *Pratten*; *Rex* v. *Jarvis*, 1 East. 644, 645, note h; *Burnett* v. *Hurd*, 3 Johns. R. 438; *Teele* v. *Fonda*, 4 Johns. R. 304; *Commonwealth* v. *Odlin*, 23 Pick. 275. In this case the indictment is not for a violation of any statute, but for a nuisance upon a river, which had by prescription become a public highway. The statute modified the common law, and so long as it should be in force suspended the privileges previously enjoyed, which were inconsistent therewith. The common law no longer existed, so far as this modification extended. If the erection as described in the indictment, was only such, as was authorized by the statute, there was no law which was infringed. The case of the *King* v. *the Mayor &c. of Liverpool*, is in point. It was an indictment for non-repair of a highway within a certain limit, charging the corporation of Liverpool with a prescriptive liability to repair all common highways, &c. within such limits, excepting such as ought to be repaired according to the form of the several statutes in such cases made, without alleging that the highway in question, was not within any of the exceptions. Lord Ellenborough C. J. asks, "what answer can be given to the objection, that as the prosecutor has pleaded a prescription to repair within the exception of these statutes, he ought to have averred that the street in question was not within any of the exceptions?" and Lawrence J. said, "suppose a statute had passed to say that the corporation were not bound to repair new streets, made after the first of January, 1801, must there not have been an averment, that the street was made before that time?" and judgment was arrested.

The indictment is not in conformity to established rules of criminal pleading, and

*Judgment is arrested.*

ISAAC S. WHITMAN, *Assignee, versus* PROPRIETORS OF GRANITE CHURCH.

The record books of a corporation, duly authenticated, are evidence of its corporate acts. But before they are received as the books of the corporation, there must be proof, that they are the books of that corporation; that they have been kept as its records; and that the entries made therein have been made by the proper acting officer for that purpose.

Where the report of the case states, "that all the aforesaid testimony and evidence offered are subject to all legal objections," the opposing party is not precluded from objecting to the testimony, on the hearing of the law question, because no specific objection thereto appears to have been made at the trial.

ASSUMPSIT for money had and received, and money paid, laid out and expended.

*Kent* and *Cutting*, for the plaintiff.

*A. Gilman*, for the defendants.

The opinion of the Court was drawn up by

SHEPLEY J.—The report states, that the plaintiff "introduced in evidence a book purporting to be the records of the Granite Church." There does not appear to have been any proof, that it was the book of records of a corporation called the Granite Church, or that it was kept as such, and that the entries were made by a proper officer of the corporation. It is contended, that the book was admitted without objection. And if it does not so appear by the case as presented, that the book of records on inspection proves itself. It does not appear, that any specific objection was made to the introduction of the book; but the case states, that "all the aforesaid testimony and evidence offered are subject to all legal objections." An inspection of the book can only shew, what the case states, that it purported to be the book of records. In the case of *Sumner* v. *Sebec*, 3 Greenl. 223, the book, which was decided to have been legal testimony, was produced by the town clerk, who testified, that he received it from the former town clerk, who delivered it to him as the record of births and marriages in that town.

The general rule appears to be, that the record books of a corporation duly authenticated are evidence of its corporate acts. But before they are received as such, there must be proof, that they are the books of the corporation; that they have been kept as its records, and that the entries made therein have been made by the proper acting officer for that purpose. *Rex* v. *Mothersell*, 1 Strange, 93; *Turnpike Company* v. *McKean*, 10 Johns. R. 154. There is nothing in this case indicating, that it should form an exception to the general rule.

In case the plaintiff is not entitled to recover, the report states, that the default is to be taken off and a nonsuit is to be entered; but as there is apparently only a technical difficulty, which may be easily removed, the default is taken off and a new trial is granted.

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WILLIAM MERRILL *versus* ASA WALKER, JR.

Before the Revised Statutes, (c. 114, § 18,) provided that suits against indorsers of writs should be by *action on the case*, the only remedy was by *writ of scire facias*.

The provisions of the Revised Statutes in relation to the indorsement of writs, do not apply to cases where the writ had been indorsed before those statutes went into operation, although judgment was rendered in the action after that time.

Where at the time of the indorsement of the writ, one of the plaintiffs resided within the State, and the other without its limits; and before judgment the latter had removed within the State, and ever afterwards resided therein, and the defendant in that action was seasonably notified thereof; reasonable diligence must be used to collect the costs of him, before the indorser can be made liable.

THIS action was case against the defendant as indorser of a writ of replevin, in a suit brought by Joel Hills of Bangor, and William McLellan of Boston, against the plaintiff, on Jan. 8, 1838. That replevin suit was finally tried, and judgment rendered in favor of Merrill, at the October term of this Court, 1841, for a return of the property replevied, and for a bill of costs. An execution issued, and was returned unsatisfied by an officer of the county of Penobscot, on June 14, 1842. Be-

fore judgment was recovered in the replevin suit, McLellan had removed from Boston and resided at Warren, in the county of Lincoln, in this State, and has continued to reside there since. The present defendant notified the attorney of Merrill, soon after judgment, and while the first execution was in the hands of said attorney, that McLellan resided at Warren, and that he should insist that legal steps should be taken to recover the costs of McLellan.

*D. T. Jewett*, for the plaintiff, contended that the action could be maintained in its present form, a special action on the case. Although the writ was indorsed before the Revised Statutes went into operation, yet judgment was not rendered until afterwards. Those statutes, c. 114, § 18, provide, that all suits against indorsers of writs shall be by action on the case, but the provisions do not extend to "liabilities heretofore incurred." No liability was incurred by the defendant until after judgment, and therefore the present case comes within the provisions of the Revised Statutes.

But if it is to be considered, that the liability was incurred at the time the writ was indorsed, still *case* is an appropriate remedy, although *scire facias* would also lie. *How* v. *Codman*, 4 Greenl. 79.

An action can be maintained against the indorser of a writ of replevin, although the bond provides for the payment of the costs. *Gould* v. *Barnard*, 3 Mass. R. 199.

*Walker, pro se*, contended that the Revised Statutes could have no application to this case: — first, because they do not require a writ to be indorsed, where either of the plaintiffs resides within the State; and secondly, because all liabilities previously incurred are expressly excepted from the operation of those statutes. The liability was here incurred, when the indorsement was made. Were it otherwise, the repeal of the statute, requiring an indorser in a case like this, would have taken away all remedy against the indorser.

Before the Revised Statutes made provision for a different one, in cases arising after they went into operation, the only

remedy against an indorser of a writ was by *scire facias*. 1 Chitty on Pl. 94, 106; *Ruggles* v. *Ives*, 6 Mass. R. 494; *How* v. *Codman*, 4 Greenl. 79; 2 Salk. 598; *Woodcock* v. *Walker*, 14 Mass. R. 386; *Reed* v. *Blaney*, 2 Greenl. 128.

Another fatal objection to this action is, that the statute regulating replevin requires that a bond should be given with sufficient sureties, conditioned among other things for the payment of costs; and in this case the bond has been paid and given up. *Gould* v. *Barnard*, 3 Mass. R. 199.

The action cannot be supported, because by due diligence the costs could have been collected of McLellan.

The opinion of the Court was by

Whitman C. J. — This is a special action of the case, against the defendant as an indorser of a writ, and comes before us upon an agreed statement of facts. The writ endorsed was replevin to recover a yoke of oxen.

The first question raised, and discussed by the counsel for the parties, is as to the form of action adopted in this case; the defendant contending, that it should have been *scire facias*, and not case. The Revised Statutes, c. 114, § 18, have provided, that suits against indorsers of writs shall be by special action on the case; but, in the conclusion of the same section, it is provided, that the same shall not extend to any liability, as indorser, theretofore incurred. This liability was incurred before the passage of those statutes. If, therefore, an action of the case would not lie, in such cases, before that event, it will not lie in this case.

Before that time, it is believed, no such action was ever brought. Writs of *scire facias*, against indorsers of writs, have been very frequently in use; and no question was ever directly made, in reference to their suitableness for the purpose of recovering costs incurred by the defendants, in groundless suits against them, by plaintiffs, who were not responsible, or had avoided the payment of them, except in the case of *How* v. *Codman*, 4 Greenl. 79, in which C. J. Mellen uses this language; "We do not say that an action of the case would

not be as convenient and correct as the remedy by writ of *scire facias;* but there can be no advantage in changing a long established course of proceeding, which relates merely to the remedy, and has no connection with a right." The Chief Justice meant merely to suggest a doubt, it may be presumed, whether the remedy by action of the case might not originally have been adopted with propriety, instead of *scire facias.* This is inferable from his immediately adding "but there can be no advantage in changing a long established course of proceeding." His impression doubtless was that it would be incorrect to do so.

When there is a well established course of proceeding at law, there is great advantage in adhering to it; and in suffering no unnecessary departure from it. It tends to certainty, simplicity and precision in legal proceedings. Any departure from it is accompanied with embarrassment and perplexity. It is like leaving a well trodden highway, in which all the incidents are familiar, and well known, for one untrodden, and in which the obstacles to be encountered cannot be foreseen.

Besides, if a statute creates a right, and prescribes the mode of proceeding to obtain the benefit of it, that mode must be followed, and none other. When it prescribes no mode, one must be devised, and sanctioned by the Court; and, when so sanctioned, there is the same utility, and the same good sense, in holding it to be the only mode of proceeding admissible.

The proceeding by *scire facias* was an appropriate mode for the purpose, and judiciously adopted. The case of indorsers is analogous to that of bail. The one is to secure the plaintiff in case of the avoidance of the defendant, and the other to secure the defendant in case of the avoidance of the plaintiff. In both cases the cause of action arises from matter of record. In both cases the cause of action is but an incident to a principal cause of action, already determined, the proceedings in which are matters of record. A proceeding, therefore, by a species of judicial writ, to complete the remedy growing out of the original action, is obviously appropriate;

and should not be departed from till a statute alteration to the contrary shall have taken effect.

Another ground of defence is set up, which we think might well be relied on. It is, that the attorney of the debtors, before the issuing of the alias execution against them, the doings upon which are relied upon to show avoidance in this case, apprised the present plaintiff of the fact that McLellan, one of those debtors, though of Boston when the original writ was sued out by them against the plaintiff, had removed into, and had become an inhabitant of Warren, in this State; and nevertheless no endeavors were made to collect the amount due on the execution of him; and there was no evidence to show that he had not estate sufficient to have discharged it, or that he in any manner avoided the payment of the amount necessary to discharge it. Before an indorser of a writ can be called upon for costs, for which judgment may be recovered against a plaintiff, reasonable diligence must appear to have been used to obtain them of him. Now here no such diligence was used against one of the original plaintiffs, who might have been called upon, and if called upon, might, for aught that appears, have discharged the execution. His being named in the original writ against the present plaintiff as of Boston, cannot form an excuse for such an omission; when it appears, as it does here, that the plaintiff had been apprised that McLellan had removed to this State, and had become a resident therein, and within the reach of the process of this Court.

*Plaintiff nonsuit.*

## Cyrus Moore *versus* Thomas Boyd.

In trespass *quare clausum*, it is not necessary to prove the trespass to have been committed on the day alleged in the declaration; and an amendment, changing the time, although unnecessary, may be permitted by the presiding Judge.

An entry upon the premises by the owner for that purpose, will have the effect to determine the estate of a tenant at will, and restore the legal possession to the owner in a qualified manner, subject to the right of the tenant to remove his property within a reasonable time.

After an entry upon the premises to terminate a tenancy at will, the tenant has no longer any other rights, than those of ingress, egress and regress, for a reasonable time, to take care of and remove his property, and can no longer continue the occupation for the purposes of ordinary business.

But although an entry into real estate by the owner thereof, to terminate a tenancy at will, may be lawful and justifiable, yet if the tenant should be thrust out with violence, or without allowing him a reasonable time to remove, that act would be unlawful, and would be such a violation of his rights of occupation for a special purpose, as would enable him to maintain an action of trespass *quare clausum*.

This was an action of trespass *quare clausum*. The trespass was alleged to have been committed on August 4 and 5, 1840. During the trial, the plaintiff moved for leave to amend his declaration by adding a new count, alleging the same trespass to have been committed on July 17, 1840. This was objected to by the defendant, but permitted by the Judge, and made.

The case came before the Court on a report of the case, reciting the whole testimony, the substance of which will be found at the commencement of the opinion of the Court; and on a motion for a new trial, because the verdict was against evidence.

Upon the evidence, Tenney J. presiding at the trial, instructed the jury, that they could only find two distinct trespasses; that the question was not when they were committed, but whether they were committed at all; that the plaintiff had a right to amend and allege the trespass as committed on the 17th of July, but under this declaration the jury could find only two distinct trespasses; that if the relation of landlord

and tenant by a parol lease existed between the plaintiff and defendant, and the agreement between them was that the plaintiff should pay the rent at the time agreed upon, as a condition to be performed by him to entitle him to continue the occupation, and he failed therein, he could not complain, if he were required to remove immediately, and his lease would be terminated on that failure, but if there was no such condition, but the agreement was that the plaintiff might continue a year, and the defendant should receive his rent quarterly, or at any particular time, the obligation would be such, that the plaintiff would be entitled to a reasonable time within which to remove his property from the mill, if by the terms of the lease the time had not expired; and the defendant would not have the right to hinder him in such removal; that both parties could put an end to the lease before the expiration of the time, or one only could do so; but if the defendant chose to put an end to the lease without the consent of the plaintiff, before the expiration of it by its terms, that the plaintiff should have a reasonable opportunity to remove his property from the mill, and the premises leased, before he interrupted him in going in and out, to take away the machinery, &c. and if this was not allowed this action could be maintained; that what was a reasonable time, was a question of fact, depending upon all the circumstances of the case, and for the jury to settle under certain rules and instructions of the Court; that if the jury were satisfied that the defendant, on the 17th of July, went into the mill and directed Gould, who was in the mill, to stop the same, and exercised acts of ownership over it, the jury might regard it as an entry; and if Gould gave notice thereof to Veazie, the agent of the plaintiff, it was the same as if given to the plaintiff; and if they further found, that between that and the next interruption by the defendant, if on the 17th July, the seasonable opportunity to remove as aforesaid was given, they should return a verdict for the defendant, but if they should find the first entry was on the 17th, or any other time after that, any interruption to the removal of the property of the plaintiff was made by the defendants before a reasonable

time had elapsed, the plaintiff would be entitled to recover, but not for the shutting up the mill the first part of August, if the shutting up was at that time, and if that was after the expiration of such reasonable time after the entry and notice; that in determining whether the time was reasonable or not, the nature of the occupation and employment and condition of the property was to be regarded; that the plaintiff was not bound to use extraordinary diligence, he was entitled to reasonable opportunity to take out his property and set it up in some other place; that in assessing damages they would lay out of the case any losses which the plaintiff might have sustained by losing an opportunity to saw the blocks, in fulfilment of his contract, nor were damages recoverable for a violation of defendant's contract in the lease with the defendant; that if they found a reasonable opportunity to remove the machinery and other property belonging to the plaintiff had not been given, they would be authorized to return a verdict for the loss occasioned by such reasonable opportunity not being given, and if the defendant took out the machinery or other property and put it in any other place without giving the plaintiff such reasonable opportunity to remove it, and gave no notice thereof to the plaintiff, the jury would be allowed to return a verdict for the value of the same, but in such case they would not return any thing for the loss arising from such opportunity not being given.

The defendant's counsel requested the Court to give the following instructions, viz: —

1. That no notice to quit was by law necessary.

2. That if the plaintiff had any remedy it was in assumpsit, and not in the present form of action.

3. That the defendant had a right of entry, and could enter at any time to terminate the lease, and consequently the plaintiff's action could not be maintained.

4. That in the present action the plaintiff is not entitled to recover damages, if any, for other than that done to the plaintiff's machinery in removing it from the mill.

1st, 2d, and 4th requests; the presiding Judge declined to give any further or different instructions, than those expressed in the general instructions to the jury. Under the third request, he instructed them, that in a parol lease the landlord had a right of entry for the purpose of terminating the lease at any time, but declined giving them the instruction; that therefore this action could not be maintained any further than is contained in the previous instructions. The verdict was for the plaintiff.

If the foregoing rulings were correct, and the instructions given to the jury were also correct, and those requested and not given were properly withheld, judgment was to be rendered on the verdict; but if otherwise, the verdict was to be set aside, and a new trial granted.

*Hobbs* argued for the defendant, and in the course of his remarks, cited *Ellis* v. *Paige*, 1 Pick. 47; Cruise, Tit. 9, c. 1, § 18; Co. Litt. 55 (b); *Curl* v. *Lowell*, 19 Pick. 25; *Moshier* v. *Reding*, 3 Fairf. 483; *Davis* v. *Thompson*, 13 Maine R. 209; *Rising* v. *Stannard*, 17 Mass. R. 282; No. 44, of American Jurist, 460; 2 Chitty's Pr. 753; *Barnstable* v. *Thatcher*, 3 Metc. 342; 14 Pick. 552; 4 Johns. R. 15; 14 Johns. R. 135; 4 Kent, 116; 1 Chitty's Pl. 54.

*A. G. Jewett* and *T. McGaw* argued for the plaintiff, citing *Ellis* v. *Paige*, 1 Pick. 43; *Davis* v. *Thompson*, 13 Maine R. 209; *Bishop* v. *Baker*, 19 Maine R. 517.

The opinion of the Court was drawn up by

Shepley J. — This case is presented for consideration on a report by the presiding Judge, and on a motion for a new trial, because the verdict was against the weight of evidence. There appears to be an error in the testimony of some of the witnesses respecting the time, when certain acts were done; and it may not be easy to reconcile the whole of the testimony; or to determine the precise time, when certain events occurred. But it will not, it is believed, be difficult to state the order of events, with the material facts attending them. There is no

sufficient reason to doubt, that a verbal agreement was made between the plaintiff and defendant, during the latter part of the month of April, 1840, for a lease of the saw mill to the plaintiff for the term of one year, for the purpose of sawing paving blocks. And that the plaintiff, by his agents, entered and made the alterations, and introduced the machinery necessary for the performance of that business, the defendant having a full knowledge of it and making no objection to it; and that the workmen commenced and continued for a time to saw the blocks. The defendant afterward entered into the mill, probably the latter part of the month of June, forbid the workmen to saw, and directed them to shut down the millgate. The order was obeyed. And one of the workmen proceeded to Bangor and informed the plaintiff's agent, Veazie, of these proceedings. While he was absent for this purpose, the "cutting off saw" was removed from the mill, probably by the defendant, or by his order, as it was afterward produced by his agent, who states, that it was found in a store occupied by the defendant. After this the defendant appears to have left that place on a journey to Boston, and to have left the mills in charge of Ellis as his agent. The agent of the plaintiff then visited the mill and obtained permission from Ellis to occupy it as before, until the defendant returned. He obtained the saw from Ellis, and the workmen commenced again to saw in the mill, and so continued until after the defendant returned. The defendant again entered into the mill probably about the middle of the month of July, forbid the workmen to saw, and took out the "cutting off saw" and the mill chain. The agent of the plaintiff being informed of it, again visited the mill and endeavored to induce the defendant to permit him to continue to use it, but without success. He then informed him, that he should "get a chain and saw and carry on the mill;" and he did so, and the workmen continued to saw in the mill until the fourth day of the next August, when they were arrested by an officer and removed from it by virtue of a legal process. On the following day the mill "was planked up."

The action is trespass *quare clausum.* The declaration alleged a trespass on the fourth and fifth days of August, 1840. The plaintiff was permitted to amend by alleging the same acts to have been committed on the seventeenth day of the preceding month. It is not necessary in this form of action to prove the trespass to have been committed on the day alleged. Although the amendment was unnecessary, it might well be permitted.

It remains to consider the legal effect of these proceedings, and the rights of the parties arising out of them. The plaintiff had acquired only the rights belonging to a lessee at will. The defendant might terminate those rights at his pleasure. He could do no illegal act under pretence of doing it. It will not be important to consider the effect of the entry made by the defendant in June, if his agent could authorize the agent of the plaintiff to resume and continue the occupation. The entry made in July would then have the effect to determine the estate of the plaintiff, and to restore the legal possession to the defendant in a qualified manner, subject to the right of the plaintiff to remove his property within a reasonable time. But the plaintiff could have no longer any other rights, than those of ingress, egress, and regress, for a reasonable time to take care of and remove his property. He could no longer lawfully continue the occupation for the purpose of sawing his paving blocks. *Davis* v. *Thompson,* 1 Shepl. 209; *Curl* v. *Lowell,* 19 Pick. 25. An entry may be lawful and justifiable for one purpose, and unlawful and unjustifiable for another. While an entry to determine an estate is lawful, yet if the tenant should be thrust out with violence, or without allowing him a reasonable time to remove, that act would be unlawful, and would be such a violation of his right of occupation for a special purpose as to enable him to maintain the action of trespass *quare clausum. Ellis* v. *Paige,* 1 Pick. 43. In this case the defendant would then appear to have violated the plaintiff's right of occupation for a special purpose, by the removal and detention of the "cutting off saw," (it being the

property of the plaintiff) when he made the entry in July. And he could not therefore fully justify that entry and his proceedings under it. The agent of the plaintiff, instead of submitting to the determination of his estate and proceeding to make preparations for a removal of his property, as he should have done, "told the defendant he should get a chain and saw and carry on the mill." He did so; and withheld the possession from the defendant, not for the special purpose of removing the plaintiff's property, but for the purpose of continuing to use the mill, as before, for sawing the blocks. And he so continued to occupy the mill from the seventeenth day of July to the fourth day of August, without making apparently the least preparation for removal of the property and without exhibiting any indications of such an intention. And from his own declarations it would seem to be clearly proved, that he intended to persist in the course he had commenced. The defendant was not obliged to submit to such a declared and open violation of his rights. He might lawfully use the means necessary to prevent it, and might, if necessary for that purpose, close up the mill. His entry and proceedings therefore on the fourth and fifth days of August were not necessarily illegal, even if a reasonable time had not elapsed for the removal of the property, because the possession does not appear to have been withheld from him for the purpose of such a removal. If the plaintiff have no cause to complain, that he was excluded from such an occupation, he can have none for a continuance of that exclusion, unless it should appear, that he was afterward refused entrance and opportunity to remove his property on application for that purpose. Upon the testimony now presented, the plaintiff, if duly authorized to continue to saw after the first entry, would appear to be entitled to recover for all injuries suffered by the removal of the "cutting off saw" from the mill on two different occasions, and for its value, as he withheld it, when it was demanded of him. He would not seem to be entitled to recover any further damages, unless it should be made to appear, that the defendant had unnecessarily injured his property

by removing it from the mill, or had injured it while in his possession, or had refused to permit the removal of it, when requested.

There is another aspect of the case presented by the testimony less favorable to the plaintiff. Ellis testified, that the defendant "charged him to let no one occupy the mills." According to this statement he had no authority, as the agent of the defendant, to permit the agent of the plaintiff to commence again to saw after the first entry. And unless that act has been ratified by the defendant, the plaintiff would appear to have been conducting unlawfully, while he continued to use the mill after that time for sawing blocks. And in such case, the defendant would be entitled to make the second entry with the rights and upon the principles already stated in relation to the last entry. The case not having been submitted to the jury upon these principles, the verdict is set aside and a new trial is granted.

HENRY B. FARNHAM *versus* SAMUEL A. GILMAN *& al.*

SAME *versus* SAME.

If an attorney, to whom a demand is entrusted for the purpose of receiving or securing the amount due, authorizes an officer, who may receive a writ thereon, to take the receipt of a certain individual for the goods which he directed to be attached, or approves the same after it is so taken, the officer is discharged from his liability for not retaining the possession. This, however, does not release those who had given the receipt, but is only an adoption of the act by the creditor for his own benefit, who thereby acquires an equitable interest therein, which will be protected by the Court.

And if the creditor has brought a suit against the officer for neglecting to keep the goods attached, so that they might be taken on the execution, and has failed therein on the ground, that the receipt was approved by the attorney of the creditor, this furnishes no bar to a recovery upon the receipt.

Where goods were attached, and the debtor, with a surety, gave a receipt therefor to the officer, and such proceedings were had, that both had become liable upon the receipt; and then the principal debtor went into bankruptcy and obtained his certificate of discharge as a bankrupt, under the laws of the United States; such certificate will discharge the bankrupt only, and not the other receipter.

And it seems to have been held by a majority of the Court, that prior to the statute of 1844, c. 115, that on such discharge of the bankrupt, he was entitled to costs against the plaintiff.

Where by a mistake of the clerk of the Court the execution upon which the demand upon the receipters was made, was issued for too large a sum, and this error was afterwards corrected, the goods having been disposed of so that they could not be delivered to the officer when the demand was made, *it was held*, that the objection of a want of due demand of the goods could not prevail.

ASSUMPSIT upon receipts for goods attached by the plaintiff, then a deputy sheriff, as the property of Samuel A. Gilman, in suits, Henry Rice against him.

There were two distinct suits, tried at different times, when different Judges were presiding, but the questions of law embraced in one case included all that were raised in the other. Only one of the cases will therefore be mentioned hereafter.

The plaintiff proved an attachment of the property in the suit, *Rice* v. *Samuel A. Gilman*, receipt therefor signed by him and by the other defendant, a judgment in favor of the plaintiff, issuing of an execution, delivery of the same to an

officer, and demand of the property within thirty days after judgment, and refusal to deliver it.

The defendants then introduced in evidence a certificate of the discharge of Samuel A. Gilman in bankruptcy, under the laws of the United States, obtained long since the pendency of this suit. The plaintiff moved for leave to discontinue against Samuel A. Gilman, which was permitted, and the discontinuance entered. Gilman moved that his costs should be allowed him. The decision of this question was reserved for the consideration of the whole Court.

The defendants then offered in evidence the record of the judgment in an action, *Henry Rice* v. *Daniel Wilkins*, late sheriff of the county, for the default of the plaintiff, his deputy, in not safely keeping the property attached and receipted for by the defendants, wherein the verdict was that Wilkins was not guilty.

The plaintiff then called J. Cutting, Esq. one of the counsel in that suit, and put to him the following interrogatory. Was the defence in the case, *Rice* v. *Wilkins*, placed by his counsel on the ground, that Farnham in taking the receipt had acted under the direction of Rice, or of his attorneys? This question was objected to by the defendants, but TENNEY J. presiding at the trial, permitted it to be answered. The answer was, I think that was the ground of the defence, and that he took the receipt by direction of said Rice's counsel, and that after the taking of it, his doings were ratified by the attorney of the plaintiff. This question was one of the prominent points presented in the defence. The plaintiff, in that case, claimed that the receipt had been taken without his consent, and that the officer was responsible for so taking it. M. L. Appleton testified, that the present suit was brought by him by direction of Farnham, the witness supposing that Farnham was liable for the execution, *Rice* v. *Gilman;* that the receipt was not taken by his direction or consent, nor, as far as he knew, by the direction or assent of his deceased partner, Mr. Starrett; and that as Rice failed in the action against Wilkins, this suit was now prosecuted for his benefit.

The defendants proved, that the goods were never removed from the possession of S. A. Gilman, the debtor, and were disposed of by him before the demand.

The plaintiff then offered in evidence the report of the Judge, presenting the question of law, in the case, *Rice* v. *Wilkins*. Its admission was objected to by the defendants, and excluded by the Judge.

The judgment and execution were referred to in the report of the Judge, but no copies appear in the case. It was, however, contended at the argument, that the demand on one of the receipts was void, because the execution on which the demand was made, was issued for an amount greater than that to which the creditor was entitled. The facts relative to it are stated in the opinion of the Court.

The consideration of the case was then taken from the jury, and submitted to the decision of the Court upon the evidence, or such of it as was legally admissible; and the Court were authorized to draw inferences, and enter the proper judgment by nonsuit or default.

*M. L. Appleton* argued for the plaintiff; and

*A. Gilman* and *J. Appleton*, for the defendants.

The opinion of the Court was drawn up by

Tenney J. — In 1837, Henry Rice obtained two judgments in this Court against Samuel A. Gilman. On the original writs, the plaintiff, as deputy sheriff, returned goods attached; receipts were taken therefor, and the goods were sold by the debtor in the due course of business, they not having been removed from the shelves. Executions were issued upon these judgments and put into the hands of an officer, who made demand of the plaintiff, he not being then in office, for the goods returned, that they might be seized and sold to satisfy the executions; no delivery being made, the receipts were duly presented to those who gave them, and the goods called for, but not produced. These demands were all made within thirty days after the rendition of the judgments. A suit was brought against Daniel Wilkins, who was sheriff at the time of

the attachments, for the default of the plaintiff, his deputy, in not keeping the goods, so that they could be sold, and the proceeds applied in satisfaction of the executions. The suit was defended upon the ground, that the attachments were made and the receipts taken in pursuance of the direction of the attorneys of Rice, and his doings afterwards approved and ratified by them. It appears, that the suits upon the receipts are now prosecuted for the benefit of Rice, though his attorney did not understand, they were so commenced. At the trial of these actions, it appeared that Samuel A. Gilman, who had till that time been a defendant therein, had received his certificate of discharge as a bankrupt. The writs were amended by striking out his name, his counsel objecting, unless the costs were paid. The question, whether he was entitled to costs, is submitted to the Court, who are to award them or not as the law may authorize and require.

It is contended, that these actions cannot be maintained. 1st. The plaintiff and the sheriff, whose deputy he was, being relieved from all liability, there is no one who can claim the damages sought to be recovered, after they may be obtained. And 2nd. That the discharge of the original debtor in bankruptcy is to be regarded as payment of the debt. The right of the plaintiff to prove the ground on which the defence of the action of Rice against Wilkins was placed, was denied at the trial. This objection was not relied upon in the argument, though it was not positively abandoned. The receipts were signed by the original debtor and the present defendant, acknowledging the goods to have been attached as the property of the former, and there is sufficient evidence in the case to make them liable, after the seasonable demand upon them, and their refusal to deliver the goods, and the actions being prosecuted for the benefit of the original creditor. We do not perceive any legal objection to this evidence, although there seems to have been little necessity for its introduction.

If an attorney to whom a demand is entrusted for the purpose of receiving or securing the amount due, authorizes an officer, who may receive a writ thereon, to take the receipt of

a certain individual for the goods, which he directs to be attached, or approves the same after it is so taken, the officer is discharged from his liability for not retaining possession. *Jenney* v. *Delesdernier*, 20 Maine R. 183; *Rice* v. *Wilkins*, 21 Maine R. 558. This however by no means releases those who may give the receipt, but is only the adoption thereof by the creditor for his own benefit; he acquires thereby an equitable interest, founded on a sufficient consideration, which has long been recognized and protected by Courts of law. *Dunn* v. *Snell & al.* 15 Mass. R. 481; *Vose* v. *Handy*, 2 Greenl. 322.

From the evidence we are satisfied, that the original creditor had an equitable interest in those receipts, that there has been no release by him or the plaintiff to discharge their liability, and that the actions thereon can be maintained, unless the other ground of defence shall be allowed to prevail.

By the bankrupt act of 1841, § 4, "No discharge of any bankrupt under this act shall relieve or discharge any person, who may be liable for the same debt as partner, joint contractor, indorser, surety or otherwise, for or with the bankrupt." The certificate of discharge is sufficient to release the bankrupt from his previous liability, but it is not a payment of the debt. If such a consequence results from a discharge, the words of the proviso just quoted would be without meaning; for if the debt be paid, no liability can rest upon any one therefor. A promise, obligatory at the time of the passage of the bankrupt law, to pay the debt of another, does not cease to be binding by the discharge of the latter. If a person gives a note as surety for one, who afterwards becomes a certificated bankrupt, as collateral security for a debt, by bond, judgment or otherwise, the discharge of the principal could not relieve the surety. And such a promise, made upon a condition of some act to be done by the one, to whom it is made, becomes absolute on the performance of the condition. By such a promise, the surety becomes a debtor on his own contract, upon which the certificate could have no retrospective effect, and he can derive no benefit therefrom. *Champion* v. *Noyes*, 2 Mass. R. 481.

Prior to the time when Samuel A. Gilman filed his petition in bankruptcy every thing had been done to render the signers of the receipts liable absolutely; a new promise had been made upon consideration and broken; there was a new and distinct cause of action against both, which has in no way been invalidated, as it existed against the present defendant. It is not perceived, that he holds any different relation to the nominal plaintiff and to Samuel A. Gilman, than he would have held, had he given his note with the latter as collateral security for the debt.

It is insisted for the defendant, that upon one of the receipts there has been no demand, which can bind him, inasmuch as it was made upon an execution, not corresponding with any judgment introduced. It appears, that the debt in the judgment on which this execution was issued, was made up for a greater amount, than the evidence offered in support of the declaration warranted, through the misprision of the clerk of this Court; this error has since been corrected by the Court; the judgment has not been reversed or annulled from the time it was rendered; it was one upon which an execution was legally issued, and could have been renewed, conforming to the judgment after the error was corrected at any time before the discharge of the debtor; it was issued upon no other judgment. The error could not discharge the obligation, created by the receipt; it in no manner operated to the prejudice of the defendant. He has proved the goods sold, so that he could not have delivered them, if he had wished so to have done. By the agreement, a default must be entered.

A majority of the Court perceives no reason why costs should not be awarded to Samuel A. Gilman under the agreement. He was entitled to them as a condition upon which the amendment was made, had it not been agreed that the question of costs should be presented with others in the case. He is the prevailing party also; and is not affected by the statute of 1844, c. 115, which was subsequent to the time when his claim arose. The suit was not pending against him at the time when the statute was enacted.

THE AGRICULTURAL BANK *versus* CALEB H. H. BURR & *al.*

A person becomes legally entitled to shares in a bank by having them transferred to him on the books of the bank. The certificate of ownership is but additional evidence of title.

The legal title to shares in a bank, evidenced by the records of the corporation, will not be affected by the owner's permitting the bank to treat them as its own property.

Whether a bank has paid in fifty per cent. of its capital stock in gold or silver within six months after receiving its charter, is to be ascertained and proved in the manner prescribed in the statute, by the certificate of the commissioners appointed for that purpose.

When a bank has been in operation for several years, it is to be presumed that the remaining fifty per cent. of its capital stock has been paid within twelve months after the reception of its charter.

Where a bank charter is received and takes effect on the first day of a certain month, the corporation may legally act under the charter on that day; and a legal transfer of shares in the bank may be made on the first day of the same month of the next year.

In no proper sense can individuals be considered as agents of a bank in making their own note payable to the same bank.

When an agreement has been reduced to writing, purporting to be between certain individuals in relation to the transfer of shares in a bank, but not signed by all the parties, their rights must depend, not upon what they considered them to be, nor upon the fact, that the parties considered the agreement to be closed, and one party claimed the benefit thereof; but upon the application of the principles of law to the facts proved.

THIS action was submitted for the decision of the Court upon the facts stated in the deposition of Cornelius Bedlow, jr. formerly cashier of the bank, with the paper annexed thereto; and the Court was authorized to order a nonsuit or default to carry the decision into effect. The substance of the contents of the deposition appear in the opinion of the Court.

*Hobbs*, for the defendants.

1. The note declared on is void, it being made in substitution for one given in violation of the statute regulating banks and banking. Stat. 1831, c. 519, § 3.

It was substituted for the note of Holbrook and Joel Wilson of Oct. 12, 1836, which note was received in payment for the capital stock to enable the bank to go into operation. The capital stock should have been paid in, in gold or silver.

Taking the notes was a fraud and a violation of the statute. The substituted note is tainted with the fraud.

2. If it is said that the note was given in consideration of a transfer of the stock, the answer is, that that too is a violation of the statute, because no transfer thereof could be made "except by execution or distress, or by administrators or executors," until the whole amount of the capital stock had been paid in; no part of these 68 shares was ever paid in.

3. But there was no transfer of the stock to the defendants, and so no consideration for the note. The facts agreed, or testimony of Bedlow, put this beyond doubt.

The defendants *appeared* on the books of the bank to be stockholders, but no certificates of stock were ever delivered to them. Besides, the bank treated this stock as its own; received the dividends and paid the taxes, and what is more, sold two shares to French, without the intervention of the defendants, and took the proceeds to their own use.

4. But if the note is valid then the defendants contend, that they were the mere agents of the bank; and that the directors' bond of indemnity, and the action of the bank in regard to this stock, are evidence to prove, and does in fact establish such agency.

The commencement of the present suit is in violation of the agreement of the parties; and although said agreement, or bond of indemnity cannot, perhaps, be pleaded in bar of the action, yet to avoid circuity of action, the Court will treat it as matter of recital and admission, to operate as an estoppel. The authorities to this point are collected in Saunders' Pl. and Ev. vol. 1, title, admission; 1 Greenleaf on Ev. § 22, 23, 24.

The defendants were induced to sign the notes upon the representations and covenants of the plaintiffs. They cannot acquire an advantage to themselves by violating their covenants or agreements, which, for the purposes of the present defence, may well be treated as admissions. Stark. Ev. part 4, title, admissions. Jan'y 4, 1845.

*E. Kent* and *S. W. Robinson*, for the plaintiffs.

This action is prosecuted by the receivers of the bank, for

the benefit of its creditors, and also of the other stockholders. It appears, from the deposition of Bedlow, that when the bank was about to go into operation, it was found that the 68 shares now represented by the defendants, had not been taken up. It was supposed to be necessary that they should be, in order to put the concern into operation. Accordingly, an agreement was made between the then directors or managers of the concern on one side, and the defendant, Burr, and one Wilson, on the other, by which the latter agreed to take these shares till some other arrangement should be made, giving their note therefor at the par value. This was 12th October, 1836. In this agreement, it was stipulated that Burr and Wilson should not be considered liable on their note, but should be indemnified therefor by the other party. Subsequently, for reasons stated in the deposition of Bedlow, a new arrangement was made, 1st April, 1837, by which Holbrook was substituted for Wilson, as a stockholder, and Burr and Holbrook, the present defendants, gave their note for the amount, which is the note in suit.

How far the private agreement in favor of Burr and Wilson above mentioned, was renewed in the new arrangement with Burr and Holbrook, and when, if at all, will be considered presently. It is sufficient here, to observe that the agreement was throughout, from its nature, a secret one. Its very purpose and object required that it should be concealed from the public, and the case furnishes no grounds for supposing that it was known to the other stockholders, who undoubtedly paid in their money in the full reliance, that the defendants were *bona fide* subscribers to these 68 shares.

To the maintenance of this action, several objections are raised by the defendants' counsel.

1. That the note is void, as being in violation of the statute of 1831, c. 519, § 3.

That section requires that, before a bank goes into operation, 50 per cent. of its capital stock shall have been actually paid in, &c. Not that each individual stockholder shall have paid in 50 per centum on the amount of his stock, but merely that

that proportion of the whole capital shall have been paid in. It is to be presumed that this provision had been duly complied with by the other stockholders, else the bank could not have gone into operation. The contrary supposition would make the commissioners guilty of fraud and perjury, in certifying what was not true.

2. The clause in the same section of the act of 1831, restricting transfers of stock, is also relied on by the defendants. That clause does not apply to a case like the present. It intends, obviously, a transfer of shares from one already a stockholder to some other person, in the ordinary way of bargain and sale, as merchandize. Here was no such transfer. The original subscription was rescinded, with the consent of certain officers of the bank, so far as Wilson was concerned, and Holbrook was substituted in his place, and occupied his position, just as if he had been an original subscriber.

Whether such an arrangement was authorized by the law or not, it is not competent for the defendants to avail themselves of the objection, as we shall attempt to show in conclusion of the argument.

3. It is insisted that here was no consideration for the note, because the stock was not actually conveyed to the defendants.

It is a sufficient answer to say that they consented to be held out to the public as stockholders, by being entered on the bank books as such, and gave their note for the amount. This made them stockholders. No delivery of certificates was necessary for that purpose. They were legally entitled to such certificates, and might have had them if they had desired it.

The circumstances testified to by Bedlow, of the control exercised by the directors over these 68 shares, after they were taken by the defendants, and the sale of two of them to French, show only that the defendants were not expected to be permanent stockholders. They consented to take the stock for the time being, with the understanding that as fast as the directors should find persons willing to take shares and pay for them, they would relinquish the required proportion of stock

and have an indorsement made on their note *pro tanto.* If the business of the bank had been prosperous, we should never have heard of this defence. It has turned out otherwise, but they must abide by the liabilities they have assumed. They consented to take their chance in the adventure. "As they have sown, so must they reap."

4. As to the effect of the supposed contract between the directors and the defendants.

Bedlow testifies under the impression that the written contract, made Oct. 12, 1836, with Burr and Wilson, was renewed April 1, 1837, in favor of Burr and Holbrook; and that the contract of Dec. 1, 1841, a copy of which is annexed to his deposition, was a renewal of this second contract. In this he is certainly mistaken, as is demonstrated by subsequent parts of his own testimony. He refers to the memorandum in brackets, at the end of the last contract; and this shows it to have been a renewal, not of the supposed contract of April 1, 1837, but of the original one of Oct. 12, 1836. It is manifest that there never were but these two contracts reduced to writing; though the other may have been *talked of,* and hence the confusion in the witness' mind.

But if the facts had been as he supposes, they would still amount to nothing, as neither of the contracts was ever executed to the defendants, or delivered to them; hence they are to be regarded as mere nullities. It cannot be pretended that Bedlow was the agent of the defendants so far as to make a delivery to him of the papers, equivalent to a delivery to them; for he expressly says they were placed in his hands for the purpose of being delivered to the parties when they should have been signed by the defendants, which was never done. Bedlow seems to think he was in some sort an agent or trustee of the defendants, but no fact is disclosed showing him to have been invested with any such character. All that appears is, that on one occassion he advised Burr to have the contract signed, &c. But the latter did not comply with the advice, and his reply to Bedlow, translated into plain English, amounts to this, "I prefer to let the matter stand. Perhaps the con-

cern may prove a good speculation, but if it is likely to turn out otherwise, if you see any danger, let me know in season that I may claim the benefit of the contract." Matters remained thus till a few days before the bank failed, when it seems there was an "apprehension" of something, and the old dead contract was resuscitated in a new draft; but even this was never signed by the defendants, nor delivered to them, but remains in Bedlow's hands to this day.

Again, if the supposed contract had been duly executed, so as to bind all the parties to it, still it cannot avail the defendants to defeat the action. It is not a contract with the plaintiffs, but one between them and certain individuals who do not even assume to contract for or bind the plaintiffs. It does not appear that these were directors, and the contract at most amounts only to an agreement by a third party to indemnify the defendants for signing the note; and to that party they must look for redress.

But, placing this matter on the ground the most favorable for the defendants which can possibly be claimed, the defence is still unavailing. Supposing those who contracted with them to have been the actual board of directors (which does not appear) and that they had contracted in that capacity (which they did not,) still, their contract cannot bind the plaintiffs for the following reasons: —

1st. They had no authority to bind the plaintiffs by any such arrangement.

2d. It was a fraud upon the creditors and *bona fide* stockholders of the bank, who have a right to rely upon this note as a portion of the common assets. They are interested to have this note collected and brought into the common fund, that equal justice may be meted out to all. They have parted with their own money or given their securities in good faith, and now it is sought to add to their already severe losses by releasing these defendants from the payment of their note. The creditors and the *bona fide* stockholders are represented by the receivers, who have brought this suit for their benefit. The arrangement relied upon in the defence, was a deliberate

scheme of fraud and deception, to which the defendants voluntarily lent themselves. They cannot be relieved from the consequences of their imprudent act, without gross injustice and wrong to innocent parties, and therefore the defence must fail. March 5, 1845.

*Hobbs* in reply: —

The arrangements made between the defendants and the individuals named in the agreement, whatever they were, were adopted by the plaintiffs, and acted upon by them, as binding upon the bank, from the time it went into operation, in Oct. 1836, till its affairs were placed in the hands of the receivers. That agreement was signed by said individuals as directors. Such is the testimony of Bedlow; or a fair inference from what he testified. But whether the directors had authority to make such an agreement, or not, it is enough for the defendants, that the bank approved it and treated the stock as its own. The fact that the receivers have charge of the bank's concerns, cannot change the nature of things, or its relations to others.

It is competent for the debtors of the bank to show fraud, usury or any other matters in defence of claims existing against them on the books, or in the papers, of the bank.

The real stockholders have no cause of complaint. These 68 shares are their property and have been managed as such. They have had the dividends on them. They have paid the tax. The creditors of the bank have ample security against the *bona fide* holders of stock.

The receivers have nothing to do with the relative rights of stockholders. Their commission ends with the payment of the debts due to bill holders and other creditors of the bank. Rev. St. c. 77, § 75.

The case finds, that the defendants were not subscribers to the 68 shares, before or at the time the bank went into operation, but that said shares had been subscribed for or agreed for "by certain persons in Bangor, who afterwards failed to pay for them," so that when the bank went into operation these shares were the property of the bank, and on which the bank

must have advanced the half required by law. There is no pretence that the defendants, Burr and Wilson, ever paid anything to put the bank in operation.

If the arrangement of Oct. 12, 1836, was a fraud, the plaintiffs were parties to it and cannot take advantage of it.

The bank being thus a stockholder could not sell or transfer its shares until the whole capital had been paid in, in gold or silver. The sale to the defendants, if it be such, was in violation of Stat. 1831, c. 519, § 3. The distinction between a sale by the bank, and by a stockholder, "as merchandize," attempted to be raised by plaintiffs' counsel, does not exist. The language of the statute is general, "no shares, &c."

But there was no consideration for the notes; no certificates of stock were delivered; none were recorded; no evidence of any transfer of stock to the defendants. Every fact tending to show a transfer is negatived by the conduct of the bank in relation to these shares, treating them always and uniformly as their own; and by that of the defendants in not claiming dividends thereon. March 11, 1845.

The opinion of a majority of the Court, WHITMAN C. J. concurring with the other Judges in the result, but giving his reasons in a separate opinion, was drawn up by

SHEPLEY J. — This suit is upon a negotiable promissory note for the sum of seven thousand and three dollars, made by the defendants on April 1, 1837, and payable to the bank on the first day of October following. The case is submitted, as an agreed statement, upon the deposition of Cornelius Bedlow, jr. who was formerly the cashier of the bank.

Several grounds of defence are presented in a written argument for the defendants. The burden of proof is upon them. One is, that the promise was made without consideration. Bedlow states, that "the amount of stock taken by them, for which said note was given, was sixty-eight shares;" and that they became stockholders on the books of the bank for those shares on that day; but no certificates of stock were ever delivered to them. A person becomes legally entitled to shares

by having them transferred to him upon the books of the bank. The certificate is but additional evidence of his title. That the title was conveyed by a transfer upon the bank books is shown by several provisions of the statutes then in force. That was the evidence of title, upon which they might be attached on a writ, or seized and sold upon an execution; and upon which the cashier was to rely, when he gave to an officer a certificate to enable him to attach and sell them. The sale by an officer would transfer the title without regard to any certificate, which the owner might hold. Ch. 60, § 6, 7, 8, and Ch. 519, § 18. The cashier might be required by the twenty-second section of the last named chapter to make a return under oath of the names of the stockholders and of the amount of stock owned by each. This he could only do by an inspection of the bank books. The twenty-eighth section provided, that the liability of a stockholder should not continue beyond the term of one year after he should have duly transferred his stock, showing that the title passed by the transfer. Indeed, it was then the only mode of conveying the title; for this transfer was made before the passage of the act of 1838, c. 325, which authorized a transfer by an indorsement and delivery of the certificates and an entry of that transfer upon the records of the corporation. The fact, therefore, that no certificates were delivered, did not prevent the defendants from becoming the legal owners of the shares. Nor did the other facts stated by the cashier, that the directors exercised the entire control of the stock, and managed it as the property of the bank, received the dividends, and paid the taxes upon it, change or destroy their legal title. The sale of the two shares could have been effectual, by the directors, only by a transfer on the books made by the defendants, or by their consent. They might at any time have transferred the other shares, and the bank could not have resisted their right to do so. Those shares might have been seized and sold on an execution against them, and conveyed as their property. The legal title would not be affected by their permitting the bank to treat them as its own property.

It is further contended, that they did not become the owners of those shares, because they were illegally transferred before the capital had been wholly paid into the bank. The statute, c. 519, § 3, provided, that the capital should be paid "in gold and silver money in manner following, to wit: one half within six months and the other half within twelve months after receiving said charter." And that no bank should go into operation until fifty per cent. of its capital had been thus paid. This fact was to be ascertained and proved in the manner prescribed by the statute; by the appointment of commissioners to examine and count the money actually in its vaults; and to ascertain by the oaths of a majority of its directors, that so much of its capital had been paid towards payment of their respective shares; and to return a certificate of the facts to the office of the secretary of state. As the bank continued in operation for several years, this must be presumed to have been done. No mode of proof was prescribed by the statute, that the last half of the capital had been paid within the time allowed. These enactments were probably designed to insure a solid capital, and to prevent irresponsible persons from taking the stock, that they might speculate upon it by a transfer without being obliged to pay for it. The intention was to prohibit a transfer until after the whole capital was required to be paid in. The intention could not have been to prohibit and render illegal, transfers made many years after that time, upon proof, that the whole capital of the bank had never, in fact, been wholly paid in. The effect of such a construction would be, that such sales made between parties, both of whom were innocent and ignorant of any error or violation of law, must be considered as illegal and void, if it should be proved, that some fraud had been practised upon the commissioners, to procure an erroneous certificate, or that the last half of the capital, by some error or misconduct, had not in fact been all paid in. Such consequences could not have been intended; and the language does not necessarily require such a construction. The design appears to have been to require the whole capital to be paid within twelve months after receiving the

charter, and to prohibit a transfer of the shares during that time. The charter of this bank, being then a private act, took effect, and was therefore received, on April 1, 1836; and the transfer of these shares on April 1, 1837, was not made within twelve months after receiving the charter; for an act might have been legally done under the charter on April 1, 1836. Com. Dig. Temps, A.; *Castle* v. *Burditt*, 3 T. R. 623; *Priest* v. *Tarlton*, 3 N. H. R. 93; *Wheeler* v. *Bent*, 4 Pick. 167; *Windsor* v. *China*, 4 Greenl. 303.

Another ground of defence is, that the defendants held the shares as agents of the bank; and that the bank, by a written contract, agreed to indemnify and save them harmless from this note.

In no proper sense can they be considered as the agents of the bank, in making their own note payable to the bank. Whether they can be enabled to resist successfully the payment of it by such a contract, must depend upon the testimony of the witness. He states, in substance, that there was an agreement, reduced to writing, when the note was made; that he made two copies of it, one for each party; that these were signed by the directors, and not by the defendants; that both parts remained in the bank until the month of January, 1842; that he asked one of the defendants, on two different occasions, whether it was not best to have the contract signed, as he might feel safer to have it, who replied in substance, that he trusted to him, that all was safe, and to be informed, if there was apprehension of any thing; that in 1841 the defendants desired to have the contract renewed, and signed by the directors then in office; that he thereupon copied it, substituting the names of the existing directors for those of the former, and altering the date to December 1, 1841. This does not appear to have been signed by either party; and the defendants must rely upon the one bearing date on April 1, 1837, a copy of which is annexed to the deposition. Speaking of that, the witness says, "the parties considered the agreement as closed on the part of the bank; and the papers were left with me to be passed or delivered to the respective parties, whenever they

should be signed by Messrs. Burr and Holbrook;" that they "always claimed the benefit of said agreement;" and "throughout the whole time" they "considered me as holding the bond for them."

Their rights must depend, not upon what they, or the parties, considered them to be; nor upon the facts, that the parties considered the agreement closed on the part of the bank, and that the defendants claimed the benefit of it; but upon the application of the principles of law to the facts proved. The copy annexed to the deposition purports to be an agreement between certain persons named, of the first part, and the defendants of the second part, by which the parties of the first part engage to indemnify and save harmless the parties of the second part, from this note, and from all paper arising out of it, and to pay all taxes on the shares. While the parties of the second part, upon performance and a surrender of their note, engage to convey the shares to the parties of the first part, and to permit them to receive all dividends. The persons named as the first party, are not stated to be directors of the bank; and they do not profess to make the agreement in that capacity, or to act in behalf of the bank, or for its benefit. The shares were not to be conveyed to the bank, but to them. The contract purports to be one made between individuals acting for themselves alone. It does not, however, appear to have become binding upon any person. The copy signed by the parties of the first part, was not to be delivered, until the counterpart of it had been signed by the other party. It is apparent, that they could not have intended to be bound to indemnify the defendants without being entitled to a conveyance of the shares. The defendants chose not to bind themselves by signing to make a conveyance of them. Instead of doing it, they required a new contract, in December, 1841. The supposed contract cannot, therefore, affect the rights of these parties.

*Defendants to be defaulted.*

WHITMAN C. J.—It seems to me that the same principles

should govern in the decision of each of these cases. I shall therefore, proceed to the consideration of them together. By an act of the legislature the plaintiffs were, in 1836, incorporated as a banking company; and were authorized to raise a capital of fifty thousand dollars to be employed in banking operations; with all the powers and privileges, and subject to all the duties, liabilities and requirements specified in the act, "entitled an Act to regulate banks and banking," passed in 1831.

It is well known that the legislature have at all times been solicitous to guard, as far as might be practicable, against abuses in banking operations. In accomplishing such a desirable object numerous difficulties have been encountered. Banks in comparatively obscure places, with capitals of inferior magnitude, have been called for. The cupidity of individuals, in such cases, too frequently comes in conflict with the safety and rights of large portions of the people, who are continually, and in accordance with the obvious design of banking institutions, becoming creditors thereto. The act of 1831, contains numerous provisions, designed to guard against evils resulting from such causes. It is therein enacted, (§ 2) that no bank shall make loans upon a pledge of its own stock; and in § 3, that no bank, thereafter incorporated, shall go into operation until fifty per centum of its capital shall have been paid in gold and silver; and be actually in its vaults; and that this shall be proved by the oaths of a majority of its directors; and that the same has been paid in by its stockholders, toward payment for *their respective shares*, and for no other purpose; and that it is to remain a part of its capital stock. And it is provided, further, in the same section, that the residue of the capital stock shall also be paid in gold and silver in six months next thereafter; and that no part of the capital stock of any bank shall be sold or transferred, except on execution or distress, or by executors and administrators, until the whole of the capital stock shall have been so paid in. And in § 27, it is provided, that no stockholder shall, at any one time, hold and own more that twenty per centum of

its capital stock. By § 33 and 34, in case a bank shall fail to pay any of its creditors within a certain time after demand therefor made, and after certain proceedings shall have taken place preparatory thereto, commissioners may be appointed, who are to take its funds into their hands, and are authorized to commence and prosecute, in the name of the corporation, or in their capacity of commissioners, any action necessary to the collection of debts due to it. And by the act, c. 315, of 1828, § 3, it was provided, if any director or other stockholder shall aid and abet any person in borrowing and receiving from any bank any sum of money, or in otherwise becoming, for a valuable consideration, indebted to such bank with a fraudulent intent, that such sum borrowed, or debt owed, shall not be paid, and that creditors thereby shall suffer loss, and that the bank bills or bank notes, due from such bank, shall not be paid, he shall be subjected to a penalty. These provisions are all in substance reenacted in the Revised Statutes; and show very fully what is intended to be insisted upon by the legislature. We should now look into the cases before us, and see whether these rules have been infringed.

It appears, that this bank went into operation in September or October, of the year its charter was granted; and on the stock, in reference to which the notes of the defendants were given, there is not the least reason to believe, that any percentage, in gold or silver, was ever paid into the bank. This stock amounted to one hundred and eighty-eight shares, being nearly nineteen fiftieth parts of the whole capital stock. The defendants deposited their notes in the bank for the par value of these shares; and for what purpose? It was not, as they contend, because they were, in consideration thereof, to become the real *bona fide* owners of the stock. The bank, as they contend, had become virtually the owners of the whole of it; and ever afterwards treated it as their own. For what purpose, and with what understanding, then, did the defendants give their notes? Clearly to enable the bank to hold out to the public the appearance of that portion of its funds as genuine, when in fact both the defendants and the bank meant

it for nothing but a fiction. Such a transaction can be regarded in no other light than as an attempt to perpetrate a gross fraud.

It is, however, contended, that the parties were *in pari delicto*; and that, therefore, *potior est conditio defendentis.* This proposition would avail the defendants, if the nominal plaintiffs were the exclusive and real parties in interest; but this is not the case. Banking corporations are but trustees. They are artificial bodies; created with a view, in a great measure, to the public interest. The enactments before recited show, that, although they are entrusted with the funds of a large number of stockholders, and bound to manage them for their interest, they are also under obligations to hold, and so manage those funds, as to secure to their creditors, if practicable, an entire exemption from loss. This the nominal plaintiffs, the trustees in this case, have not done; and the defendants colluded with them in their misconduct. The *cestuis que trust*, the creditors of the bank, and the real parties in interest in this case, are innocent; and, if the conspiracy between the nominal plaintiffs, and the defendants, should be allowed to succeed, must be the sufferers. This action is prosecuted by those, who have been appointed by authority, in pursuance of the laws before referred to, solely to look after and secure the rights of the creditors of the nominal plaintiffs. When this shall have been accomplished the funds, if any remaining, are to be restored to the corporation. We cannot, under such circumstances, shut our eyes, and refuse to see that creditors may be defrauded, unless the defendants are holden responsible. The creditors therefore are not to be affected by the maxim referred to. The defendants cannot succeed, but by taking advantage of their own wrong against innocent parties, which the law will not permit. The pretended agreement, therefore, between the nominal plaintiffs and the defendants, as to the cancelling of the notes without actual payment, if it ever existed, must, so far as the parties in interest here are concerned, be regarded as null and void.

It is further insisted in the defence, that there was no consideration for the promises of the defendants. And it may be admitted, that they have derived no pecuniary benefit from the stock, in reference to which their notes were given. But a consideration may consist of harm to the promisee in interest when no benefit may have accrued to the promisor. The defendants promised the nominal plaintiffs, to pay them large sums, with a design, as we must believe, to aid them in practising a deception upon all, who might be induced to give credit to the ability and solvency of the institution; and especially to the plaintiffs in interest in these suits. The notes, according to the showing of the defendants themselves, were given and continued among the ostensible assets of the nominal plaintiffs, for nearly or quite the whole time, the bank was in operation, a period of nearly six years. During all that time the bank was enabled to exhibit these notes to the bank commissioners, annually appointed to inspect the doings of the banks; and to make return semi-annually of their affairs to the Governor and Council, comprising the amount due on these notes among the debts due *bona fide* to the bank; thus concealing from the public, and the plaintiffs in interest, that these notes were not regarded as constituting a part of their available assets, if such were the fact; and the defendants cannot be regarded otherwise, than as having aided the nominal plaintiffs, wittingly and willingly, in holding out to the plaintiffs in interest, these notes as a substantial portion of the resources of the bank, to enable it to redeem its circulating paper. The defendants, therefore, it seems to me, cannot be permitted, now to set up, in defence of this action, that their notes were not given for a valuable consideration.

But a distinction is supposed to exist between the two first named cases, and the last; and that defaults must be entered in the two former, in which I concur, and that a nonsuit must be entered in the latter, in which, for the foregoing reasons, I do not concur. It is true that a fact exists in the latter, which does not exist in the former. This fact, however, which is, that the stock for which the note of the defendants in the

latter was given, was not actually transferred to them by name, but stood in that of the bank. To me, so far as it regarded the bank, and the defendants, in relation to their respective rights this was but a mere formality. True it is, that, as it might have affected the rights of the creditors of the defendants, it might have been otherwise. But no such question arises; and aside therefrom, and, as between the bank and the defendants, there was essentially no distinction intended or actually existing. The stock in the one case stood in the names of the defendants on the books of the bank, and, in the other, in the name of the bank. Nevertheless, the parties concerned, regarded their situation, in reference thereto, as precisely alike. The bank, in neither case, considered the defendants as the owners of the stock; but treated it upon all occasions as their own; and the defendants, without the slightest pretence of claim on their part, have ever acquiesced in their doing so; and, moreover, the testimony of the cashier of the bank fully proves such to have been in accordance with the explicit understanding and agreement of the parties. There was, then, the same consideration for the promise in the one case as in the others. No position is more frequently laid down, nor more uniformly adhered to, than that contracts between parties, when the rights of third persons are not in question, are to be interpreted as they themselves understood them, when no stern rule of law interferes to prevent it, and none such occurs in this case. No one can fail to perceive, that the imputation of a fraudulent purpose may be made with equal propriety in reference to either of the defendants, without the slightest discrimination. To my apprehension, therefore, it is clear, that they stand upon an equal footing; and that it will be a palpable perversion of justice to suffer any of them to escape from the liability to the plaintiffs in interest, which, by the terms of their contract, and by their conduct for a series of years they have deliberately incurred.

THE AGRICULTURAL BANK *versus* JOEL WILSON & *al.*

The transfer of stock of a bank on its books, although no certificate of ownership is given, is sufficient to pass the property in the shares; and constitutes a valid consideration for a note given to the bank therefor.

THIS action was submitted to the decision of the Court upon the facts stated in the deposition of Cornelius Bedlow, jr. the former cashier of the bank.

The facts appear in the opinion.

The counsel submitted the case, upon the arguments in the action, in favor of the same plaintiffs against Burr & al. *ante*, p. 256.

*Kent* and *Robinson*, for the plaintiffs.

*Hobbs*, for the defendants.

The opinion of the majority of the Court, WHITMAN C. J. concurring in the result, but giving a separate opinion, was drawn up by

SHEPLEY J. — This suit is upon a promissory note for the sum of two thousand one hundred and twenty-four dollars and fifty cents, made by the defendants on the first day of October, 1838, and payable to the bank in six months from the date. The case is submitted, as an agreed statement, upon the deposition of the former cashier of the bank. He states, in substance, that, "two thousand dollars worth" of the stock of the bank, which before that time appeared to have been the property of other persons, was at the request of the directors of the bank transferred to one of these defendants, and that it continued to stand in his name upon the books of the bank, until the receivers took possession of its assets; that no certificates were received by him; that this note was at the request of the directors given for that stock; that they promised that the defendants should not be called upon to pay it; that no formal vote was passed on the subject; that no written agreement was made, "but that it was agreed or understood, that the debtors should be indemnified in the same manner as expressed in the written agreement executed by said directors,

with Messrs. Burr and Holbrook; and that reference was specially made in the arrangement to said agreement with Burr and Holbrook, which was then in the bank." He also states, that the former owners of the stock had never paid for it except by their notes, which were in the bank, when it commenced business, and were delivered up to them on an agreement made by the directors with them, that they should convey their stock to the bank and receive their notes. By the application of the principles of law stated in the case of this bank against Burr and Holbrook, decided at this term, to the facts in this case, the plaintiffs will be entitled to recover.

*Defendants to be defaulted.*

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THE AGRICULTURAL BANK *versus* HENRY K. ROBINSON *& al.*

To enable a banking corporation to maintain an action on a note made to it by an individual, there must be a consideration at the time of making the contract; and no injurious consequences to the parties or to others, which may afterwards happen from its having been made, can constitute a legal consideration for it.

If a note be made to a bank, without consideration, for the purpose of enabling the corporation, by including it as a part of its funds, to make a colorable and false statement of its actual condition, although it might have been a just cause for a revocation of the charter, and perhaps of indictment of the persons concerned for a conspiracy to defraud, yet the bank cannot maintain an action on such note.

THIS action was against Henry K. Robinson and Putnam Wilson, and was, like the two preceding, submitted by the parties to the decision of the Court upon the facts stated in the deposition of Cornelius Bedlow, jr. formerly cashier of the Agricultural Bank.

The facts in this case are stated in the opinion of the Court. Unlike the two preceding cases, no shares in the bank were conveyed to the defendants, nor to any other person or corporation at their request, or in trust for them.

*Hobbs*, for the defendants.

1. The note declared on is void, it having been made in

substitution for one given in violation of the statute regulating banks and banking. c. 519, § 3.

The capital stock should have been paid in, in gold and silver. Taking the notes of Emerson and others was a fraud on the statute. The substitution of the note declared on is equally so.

2. If it is said, that the note was given in consideration of the transfer of stock, the answer is, that no stock was ever transferred to the defendants; but if it was, it was done in violation of the statute, because, until the whole capital stock had been paid in, there could be no transfer thereof, except by execution or distress, or by administrators or executors. The case finds that no part of this stock was ever paid for, except by notes in fraud of the law. Section 3.

3. The note is without consideration and void. The notes of Emerson & al. were given up, on their transferring their stock, not to the defendants, but to the bank, by which it was ever afterwards held, and managed.

4. The bank has adopted and acted upon the arrangement of its directors with the defendants; and the whole transaction originating and ending in fraud on the part of the plaintiffs, they cannot recover. January 21, 1845.

*Kent* and *S. W. Robinson*, for the plaintiffs, submitted this case on their part, upon their argument made in the case of the same plaintiffs against Burr & al. *ante*, p. 256.

The opinion of a majority of the Court, WHITMAN C. J. dissenting therefrom, for reasons given, *ante*, p. 271, in an opinion with reference to this and the two preceding cases, was drawn up by

SHEPLEY J. — This suit is upon a promissory note for the sum of ten thousand nine hundred and sixty-one dollars and twenty-five cents, made by the defendants on April 1, 1838, payable to the bank, or order, in six months after date. The case is submitted, as an agreed statement, upon the deposition of the former cashier of the bank. He states, in substance, that five persons named, and one firm composed of two other

persons named, owned stock in the bank to the amount of two thousand dollars each; that their several notes for two thousand dollars each, given for that stock, remained in the bank from the commencement of its operations until their stock was transferred, when they were delivered up to them respectively, by order of the directors; that they transferred this stock, to the amount of two thousand dollars, to Stillman Wilson, and the remainder, amounting to ten thousand dollars, to the bank; that this note was made to the bank on the occasion of such transfer of stock to the bank; and that the only consideration for it was such transfer of stock to the bank.

There was no agreement, that the bank should hold it in trust or for the benefit of the defendants. On the contrary there was, as the witness states, a verbal agreement made at the time, that they should not be called upon to pay the note. By such a transfer and arrangement, the defendants neither obtained, nor could obtain, any legal or beneficial interest in that stock. The stock was not transferred to the bank at their solicitation. That arrangement, according to the testimony, was wholly made between the former owners of the stock and the bank. The corporation parted with nothing to obtain the note; nor did it incur any liability or suffer any injury on account of receiving it. The only purpose disclosed for making the note, appears to have been to enable the corporation, by including it as a part of its funds, to make a colorable and false statement of its actual condition. This might have been a just cause for a revocation of its charter; and the persons concerned in such an arrangement to deceive, might perhaps have been indicted and punished for a conspiracy, with intent to deceive and defraud the creditors or stockholders of the bank. But such illegal proceedings and liabilities could not change the fact, that there was neither benefit to the one party nor loss to the other, to form a consideration for the promise. If a man of property were to make a note without any consideration therefor, to a person of doubtful credit, to enable him to use it by an exhibition of it to obtain credit, and he should thus use it, and obtain the desired credit; is the law such, that

the promisee, upon such proof, could recover the note of the promisor? When the law shall conclude, that an agreement between two persons to deceive and defraud a third constitutes a valuable consideration for the contract between themselves, he may; but not till then. The bank in this case does not appear to be able to place itself in a more favorable condition for a recovery. Nor can any injury, which a creditor or stockholder of the bank may be supposed to have suffered by it, constitute a consideration for the note. There is, in the first place, no proof, that any particular creditor or stockholder has in fact suffered by the making of the note. And the Court cannot properly enter upon a wide range of conjecture, and infer, that some one must have suffered by it, because the assets of the bank, as an insolvent corporation, were nearly four years afterward, placed in the hands of receivers.

Moreover, if the doctrine were admitted, that the probability of loss or injury, which the creditors or stockholders of a corporation might sustain by its taking a note and making a false exhibit of its funds, constituted a sufficient consideration for it, it would be difficult for any one to avoid his contract with a corporation by proof of a want, or a failure of consideration. It would not be difficult, in many cases, for the corporation to prove, that such contract had been exhibited as constituting a part of its assets, and that debts had been contracted with those, who relied upon such assets as the means of payment; or that its stock had been sold, and dividends declared upon it, on the faith, that such contract constituted a part of its funds. But a more conclusive answer is, that there must be a consideration at the time of making the contract. And that no injurious consequences to the parties or to others, which may afterward happen from their having made it, can constitute a legal consideration for it.

*A nonsuit is to be entered.*

SILAS SEARS *versus* WINSLOW WRIGHT.

Where a note is made payable "from the avails of the logs bought of M. M., when there is a sale made," it is not payable upon a contingency, but absolutely; and when a reasonable time has elapsed to make sale of the logs.

Parol evidence is inadmissible to show, that it was the intention of the parties, when the note was given, that if it turned out, that on manufacturing the logs, there was a total loss thereof to the owner, the note was not to be paid.

ASSUMPSIT on a note of the following tenor: — "Bangor, June 15, 1836. For value received, we promise to pay Silas Sears two hundred and thirty-three dollars and ninety-six cents, from the avails of the logs bought of Martin Mower, when there is a sale made. $233,96. Winslow Wright & Co."

The action was commenced on June 24, 1841. At the trial, before WHITMAN C. J. Martin Mower, for the plaintiff, testified that he saw the defendant sign the note; that on the same day the defendant had purchased of Martin Mower logs to the amount of $6496,02, which were the logs referred to in said note; that one Hervey Pond, in the summer and fall of 1836, acted as the agent of the defendant in manufacturing and shipping said lumber, but could not state as to the quantity so disposed of by said Pond; that he heard defendant say, that Pond was to take charge of said lumber.

Upon this evidence, together with the legal presumption of "a sale made," arising from the lapse of time between the date of the note and of the writ, the plaintiff relied.

The defendant then offered to show, that he made endeavors to sell the logs referred to in the note, without manufacturing, as they lay, and advertised them for sale at public auction, but was unable at the time appointed for the sale at auction to obtain a bidder; that he then undertook to run and manufacture the same into boards in a prudent and careful manner, to the best advantage, and that the expense of running, boomage, sawing and manufacturing exceeded the value of the lumber by two thousand dollars; that the defendant actually lost and paid out for the running, sawing and manufacturing more than

$1500 more than he realized from the proceeds of the lumber, when sold; and that this was done with the knowledge of the plaintiff; that at the time said note was given, it was understood, that said Wright was not to pay the same unless there were funds in his hands, after paying the expenses of sawing and running, and manufacturing; that the plaintiff frequently called while the logs were being manufactured, and afterwards, to know if there would be any funds after paying the bills; and that the loss of two thousand dollars, by manufacturing, &c. was exclusive of the cost of the logs and amount paid by the defendant to Martin Mower, the whole loss being about $7000. This testimony the Court ruled to be inadmissible, and thereupon the defendant consented to be defaulted, the default to to be taken off if the ruling was erroneous.

*M. L. Appleton*, for the defendant, contended, that the default should be taken off on either of two grounds: —

1. This was not an absolute promise to pay the sum mentioned in the note, but a conditional one, depending on whether the defendant realized sufficient for that purpose from the logs. There is no legal presumption, that this was done; and it was incumbent on the plaintiff to show that fact, before he was entitled to recover. The note was merely payable from a particular fund. The "avails of the logs" can mean only the amount realized, "when there is a sale made," above paying the expenses. *Storer* v. *Logan*, 9 Mass. R. 60.

2. But if this is not the true construction, then the parol evidence was admissible, to show that there were no "avails," if the burthen of proof, in that respect, was on us, and to show what the intention of the parties to the contract really was, it having uncertain and equivocal words, if our view of the meaning is not the correct one. 3 Stark. Ev. 1028, 1035; 1 Mason, 11; 10 Mass. R. 379; 14 Maine R. 185.

*Cutting*, for the plaintiff, contended that the words, "avails of the logs," and "when there is a sale made," had reference merely to the time of payment. The money is payable absolutely and unconditionally.

Here the parol evidence offered, was principally to show conversations at the time the note was given, which all the authorities on the subject say are inadmissible. The words are intelligible in themselves, and cannot be explained by parol.

But what are *avails*, but the proceeds of the sale? The defendant had received a much larger amount than our demand. Besides, the defendant had no right to manufacture the logs, but was to sell them. And it is ridiculous to pretend, that the whole value of the logs would not pay this small note.

The opinion of the Court was drawn up by

WHITMAN C. J. — The note in suit was payable, "from the avails of the logs bought of Martin Mower, when there is a sale made." The logs referred to, were sold to the defendant for $6496,02; and many years had elapsed after the giving of the note, before the suit was commenced. It is contended, that the logs could not be sold; and that, on being manufactured into boards, there was a total loss to the owners; and it was offered to be proved, that it was the understanding of the parties, if such should turn out to be the case, that the note was not to be paid. We think the Judge at the trial did right in not permitting such a defence to be set up, as it would have been manifestly opposed to the spirit and meaning of the written contract, into which the defendant had entered. By the terms of that contract it could not be inferred, that the plaintiff had consented to subject himself to any such contingency. His agreement in terms was to wait till the logs could be sold. Thus the defendants had a duty to perform. They were bound to sell the logs and to do it within a reasonable time. A reasonable time for such purpose, had long since elapsed. To pretend that a quantity of logs, for which the defendant had been contented to pay $6496,02, could not be sold for the amount, ($233,91, and interest) due to the plaintiff, cannot be deemed otherwise than preposterous. Judgment must be entered upon the default.

THE INHABITANTS OF HAMPDEN *versus* THE INHABITANTS OF BREWER.

Under the Stat. 1821, c. 122, a legitimate child, after he has become twenty-one years of age, although voluntarily living with his father, no longer has a derivative settlement under him, if the father acquires a new one; but the settlement of the child when he became twenty-one years of age, remains, until he gains a new one for himself.

ASSUMPSIT for supplies furnished one Nancy Johnson, a pauper, whose settlement was alleged to have been in Brewer. The only question was, in which of these towns was the lawful settlement of the pauper.

Nancy Johnson was the legitimate child of Ephraim Johnson, and was born on August 28, 1817. On Sept. 30, 1834, the legal settlement of Nancy Johnson and Ephraim Johnson, was in Brewer, and on that day they removed to Hampden, and the said Ephraim has ever since resided there. On the same 30th of September, 1834, a guardian was appointed over said Ephraim, on complaint of the selectmen of Brewer, because of his spending his estate by idleness and excessive drinking. This guardianship still continues. On October 15, 1834, the guardian of Ephraim Johnson purchased, on his account, a farm in Hampden, which has not yet been conveyed away.

Nancy Johnson had her home at her father's until January 25, 1838, working out at different places from time to time. She had not resided five years in Hampden, after she became twenty-one years of age, when this suit was brought.

*H. Hamlin*, for the plaintiffs.

*Kent* and *Cutting*, for the defendants.

The opinion of the Court was drawn up by

SHEPLEY J. — The parties agree, that the pauper and her father had a legal settlement in the town of Brewer, on September 30, 1834. Her father removed from that town on October 15, 1834, to the town of Hampden, where he has since continued to reside; and where he has since gained a

legal settlement. The pauper continued to be a member of his family, until January 25, 1838. And she does not appear to have gained any settlement of her own. Her father had not gained a new settlement in Hampden on August 28, 1838, when she became of the age of twenty-one years. The act of February 11, 1794, provided, that legitimate children should follow and have the settlement of their father, if he should have any within the State, until they gained a settlement of their own. By a literal construction of the language, such a child would follow and have the settlement of its father, gained after it became of age, until it had gained one of its own. It was decided however in the case of *Springfield* v. *Wilbraham*, 4 Mass. R. 493, that such could not have been the intention of the legislature; and that when the father ceased to have any right to the service of the child, it would no longer have a derivative settlement from its father on his acquiring a new one. The same language was used in the act of 1821, c. 122; and it must be presumed with a knowledge of the construction, which it had received in that State.

The pauper could not therefore derive a settlement from her father, acquired by him after she became of age; and her settlement in the town of Brewer, remains unaffected by the settlement of her father in the town of Hampden.

*Judgment for the plaintiffs.*

SAMUEL A. MOULTON *versus* WILLIAM BLAISDELL.

As the law was in 1837, the improved land of non-resident owners living within the State, could not be legally sold for the payment of taxes thereon, without giving the owner notice in writing two months before advertising the same for sale.

Where land of a non-resident owner living within the State, part thereof being improved and the other part unimproved, is taxed as one estate, and sold at auction for the payment of such taxes for one integral sum at one bid, the sale must be valid for the whole, or the title entirely fails.

In order that a collector's sale of land of non-resident owners for the payment of taxes thereon, for the year 1837, should be legal, the collector in his proceedings should have conformed to the law applicable to the real estate as it in fact existed; and if the assessors inserted it upon their lists of assessments as essentially different from what in truth it was, and a sale was made conforming to the law applicable to the estate as so represented, but inapplicable as it really was, the sale is invalid.

WRIT of entry, demanding a tract of land in Hermon, in this county, with a dwellinghouse and barn standing thereon. At the trial, before WHITMAN C. J. the demandant proved a title in himself, prior to April 25, 1838, and was to have judgment, unless the title under a collector's sale for the payment of taxes thereon for 1837, made on April 25, 1838, under which the tenant claimed, should prove valid and legal.

All the material facts, found in the report of the case, are given in the opinion of the Court.

Such judgment was to be entered, upon nonsuit or default, as should appear to the Court to be in conformity to law.

*A. W. Paine*, for the demandant, contended that no title was acquired by the tenant or his grantor by the collector's sale, because the tax was illegally assessed, and also because the collector had not proceeded according to law in making the sale. He cited Stat. 1821, c. 116, § 1, 30, 31; Tax act of 1835, § 2, 4; *Lunt* v. *Wormell*, 19 Maine R. 100; *Foxcroft* v. *Nevens*, 4 Greenl. 72; *Abbott* v. *Hermon*, 7 Greenl. 118; Stat. 1826, c. 337, § 8.

*J. Godfrey*, for the tenant, contended that the taxes were legally assessed, and that the collector had proceeded legally; and moreover, that however this may have been, the collector

had proceeded strictly in conformity with the provisions of the Stat. 1831, c. 501, and that therefore the sale was valid, and the title acquired thereby good.

The opinion of the Court was prepared by

TENNEY J. — The tax act of 1835, which was the last tax act before the assessment of the taxes by virtue of which the land in controversy was sold, § 4, provides that there shall be inserted in the lists of assessment the number of acres of unimproved land, which the assessors may have taxed on each non-resident proprietor of lands, and the value, at which they may have estimated the same. By the statute of 1821, c. 116, § 30, "where no person appears to discharge the taxes on the unimproved lands of non-resident proprietors, or improved lands of proprietors living out of the limits of this State, to the collector thereof, he shall advertise in the mode therein prescribed, and if no person shall appear thereupon to discharge the said taxes and all necessary intervening charges, he shall proceed to sell so much only of said lands, as shall be sufficient to discharge said taxes and the necessary intervening charges." Previous to such sale, the collector is not required to give to the owner of the lands any notice in writing of the intended sale, if the taxes are unpaid. In section 31 of the same chapter, a notice in writing must be given to the owner two months before a sale of improved lands, where the owner lives in the State, but not in the town where the lands are situated; and in other respects, the officer, who may have the taxes committed to him to collect, shall observe the requirements mentioned in the preceding section, before a sale can be made.

The case finds the facts upon which the Court are to decide the questions before them; and it appears, that the owners of the land in controversy, lived in Bangor from 1835 to 1838; the land taxed was in part improved, having a dwellinghouse upon it, and in part unimproved, the whole being taxed and sold as one estate altogether. There was no proof that any notice in writing was given to the owners, or either of them,

before the sale, which was necessary before the *improved land* could be legally sold; the whole, both improved and unimproved, being sold at auction for one integral sum, upon one bid, the sale cannot be good in part and bad in part; but if not valid for the whole, the title entirely fails. *Hayden* v. *Foster*, 13 Pick. 492.

But the counsel for the tenant invokes the statute of 1831, c. 501, § 2, and contends that the evidence thereby made conclusive, is plenary in this case. The first section of that statute refers to real estate, which shall be sold by any collector of taxes by virtue of the acts, to which that is additional; and section 2nd provides, that "in any trial in law or equity involving the validity of such sale, it shall be sufficient for the party claiming under such sale, to produce in evidence certain documents mentioned, and to prove that such collector complied with the requirements of law in selling such real estate; and such evidence shall be deemed and taken to be conclusive evidence of the purchaser's title to such real estate, as against the owner or owners of such real estate and his or their heirs or assigns."

This statute is additional to those previously enacted on the same subject, and the latter are in force, excepting so far as the provisions therein are inconsistent with subsequent enactments. If land sold for the taxes assessed thereon was not subject to taxation at all, or was assessed in a manner not contemplated by the statute, the tax would be illegal, and would be no basis on which any supposed title derived from a sale could rest, however perfectly the collector may have pursued the steps of the law, in advertising and selling the land, such as it appears to have been, upon the bills and the list of assessments. The language of the statute is clear and unequivocal, that such evidence is conclusive, when the collector has complied with the law, *in selling such real estate.* The collector must conform to the law applicable to the real estate, as it in fact exists; if the assessors have inserted it upon their lists of assessments, as essentially different real estate, from that which in truth it is, and a sale is made conforming to the law

applicable to the estate as represented, but inapplicable to it, as it should be inserted, the sale is invalid. The sale of the land in question was not made in the manner required by law, and a default must be entered.

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EDMUND BOYNTON & *al. versus* SAMUEL VEAZIE & *al.*

The law relating to the delivery of personal property does not require parties to a sale to perform acts extremely inconvenient, if not impossible; but it accommodates itself to their business and to the nature of the property.

Thus, when all the logs and boards designated by a particular mark are sold while floating upon the waters, a constructive or symbolical delivery only is required. And this may be done by the performance of any act which shows, that the seller has parted with the right and claim to control the property, and that the purchaser has acquired that right.

In such case, the delivery of one raft of boards, upon the water, having the same mark as of the logs upon it, for the whole lumber thus marked, would afford sufficient evidence of such a delivery. And the same raft may be used to make such a delivery of the whole lumber having the same mark, although it had before been used to make a delivery of a portion thereof between the same parties.

The possession of the logs and boards for a particular purpose, after the sale, such as to run them to a place named, there to be taken by the purchaser, and to be by him sold, and the proceeds credited to the seller, is not that description of possession by the seller, which will prevent the purchaser, during the time, from maintaining an action of trover therefor.

THE substance of what was contained in the bill of exceptions will be found in the opinion of the Court.

*Kent* and *A. G. Jewett*, for the defendants.

On their point, that nothing passed by the parol sale of the logs, there being, as they alleged, no delivery, they cited 1 C. & P. 372. That if there was a delivery, still this action of trover could not be maintained, because Grant, one of the defendants, had the logs in his possession, to be by him manufactured into boards, and to be delivered to the plaintiffs at Bangor. 2 East, 614; 2 Pick. 213; Long on Sales, 154; 3 Greenl. 183; 13 Pick. 396; 3 Pick. 258; 9 Pick. 156; 22 Pick. 535.

*McCrillis* and *Ingersoll*, for the plaintiffs.

In support of their position, that this was a sufficient delivery, situated as this property was, and must of necessity continue to be until manufactured, they cited *Jewett* v. *Warren*, 12 Mass. R. 300; *Austin* v. *Rice*, 17 Mass. R. 197; *Shurtleff* v. *Willard*, 19 Pick. 202.

A sale by parol is sufficient. *Damon* v. *Osborn*, 1 Pick. 476; *Parks* v. *Hall*, 2 Pick. 206.

The opinion of the Court was by

Shepley J. — The bill of exceptions does not fully and clearly set forth all the facts. It was admitted in argument, that Grant, one of the defendants, had cut a large number of mill logs, on two different tracts of land, which were all marked with the same mark; that he was called upon by Stephen Chase, to pay for the value of the trees standing on township numbered one, in the ninth range, on which part of the logs were cut; and that he induced the plaintiffs to pay to Chase the sum of $1268,50, therefor. To repay them he conveyed to them the logs named in the bill of sale bearing date on July 1, 1840. Robert Gibson was called to witness that conveyance and a delivery of the property; and he testifies, that he did so, and signed the memorandum, made on the bill of sale, stating, that a raft of boards in the dock at Bangor, having on it the same mark as the mark of the logs, was delivered as the lumber described in the bill of sale. He further states, that after this business had been completed, Boynton observed to Grant, that in addition to that sum, he had advanced to him various sums, in supplies, &c. and expected to advance more, probably, than all his lumber would amount to, and that Grant was to deliver to him all the lumber in boards and logs of that mark. Most of the lumber was stated to be at Oldtown, below the boom, the raft of boards before noticed only being then in the dock. Gibson testifies, that "Grant said he delivered this lumber and all he had on the river to pay him, for what he paid at that time, and for what he had paid before." And that "Grant delivered the raft for all in the river of that

mark." The jury were instructed "that if they believed the witness, a sufficient sale in trust and delivery was proved." It is contended, that there was no legal delivery of those logs, which were not included in the bill of sale. That the raft of boards, which had been used to make a delivery of those logs included in the bill of sale, could not properly be again used to make delivery of those not included in it. And that a delivery of part for the whole would not be good, unless most of the logs were together, and so near at the time as to be under the control of the person, who was to make the delivery.

The law relating to a delivery of property, does not require parties to a sale, to perform acts extremely inconvenient, if not impossible. It accommodates itself to their business and to the nature of the property. When all the logs designated by a particular mark are sold while floating upon the waters, those acquainted with the business must be aware, that it may not be possible to obtain possession of any great number of them at one time and place, until they have been mostly stopped and rafted. And then any delivery, which could be made, would ordinarily leave them still floating upon the same waters. They might indeed, in this condition, be floated from one place to another, and be enclosed in a private enclosure of the purchaser. But it is not probable, that he could in that manner obtain possession of very nearly the whole number of logs designated by the mark. Usually, however, logs floating in the waters are not expected to be in the actual, but only in the constructive possession of the owner. And he cannot be expected to do more than to make, what is denominated a symbolical delivery. This may be done by the performance of any act, which shows, that the seller has parted with the right and claim to control the property, and that the purchaser has acquired that right. *Ludwig* v. *Fuller*, 5 Shep. 166, and cases there cited. The delivery of the raft of boards having the mark of the logs upon it, for the whole lumber thus marked, would afford sufficient evidence of such a delivery. And it is not perceived, that it might not be appropriately used to make such a delivery, although it had been before used to make a

delivery of a portion of the logs having the same mark. It is further contended, that the sale and delivery were not completed, so as to enable the plaintiffs to maintain an action of trover, because Grant was to saw the logs and run the boards to their agent at Bangor, who was to ship them to Boston, where they were to be received and sold by them, and the net proceeds were to be credited to Grant. But this arrangement was not inconsistent with the right of the plaintiffs to the property and to the possession of it. A refusal by either party to conform to it, could not have affected those rights. The possession of the logs and boards by Grant was only for a special purpose, and in submission to the rights of the plaintiffs. He was, in effect, only employed by them to do those acts as their agent, to be paid therefor by being credited, not with the price of the logs sold, but with the net proceeds of the boards sawed out of them. These were not acts to be performed before the title either to the property or to the possession should fully pass to them, but after it had passed. And he would act unlawfully by making use of the logs or boards for any other purpose.

*Exceptions overruled.*

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RICHARD JENNESS *versus* MIGHILL PARKER.

In this State, it has not been authoritatively settled, that a total want of title in a grantor will not be a good defence to a note given in consideration of his conveyance, when not in the hands of an innocent indorsee.

To constitute a valid defence, in an action between the parties or wherein the same defence may be made, to a note given in consideration of land conveyed by deed with covenants of warranty, the defect of title must be entire; and so that nothing valuable passes by the conveyance.

If, in such case, any thing valuable does pass to the grantee short of an absolute interest, in conformity to the terms of the deed, it becomes a case of unliquidated damages, the remedy for which should be sought by an action of covenant broken.

ASSUMPSIT upon a note of hand made by the defendant, on the 29th day of November, 1834, for $288,88, payable to

John A. French, or order, in three years from date, with interest annually; and by him indorsed to Thomas Jenness, and by him to the plaintiff; in each case without recourse. On April 8, 1836, an indorsement of $135,50, was made. It was in proof that the note was indorsed after it became due. Thomas Jenness testified, that the defendant promised to pay the note after it was indorsed to him, and before it was sued; and after it was sued he offered to pay as much as it would cost him to defend the action. The defendant introduced proof that John A. French, the payee of the note, on November 17, 1834, made his deed of mortgage of a certain lot of land containing 121 acres, situated in Bangor, to secure the payment of four notes of hand, amounting in the whole to $1784,84, with interest, to Asa Davis, which was duly recorded the next day. He also introduced proof, that John A. French, on the 29th day of November, 1834, conveyed to him one undivided moiety of the land he had mortgaged to Asa Davis, with the usual covenants of warranty, for the consideration of $1155,55; and that the note in suit was given for a part of said consideration.

The defendant introduced proof tending to show, that the amount due on the mortgage of John A. French to Asa Davis, from the time it was given until its foreclosure, exceeded the value of the mortgaged premises. It was proved, that Asa Davis gave notice of his intention to foreclose said mortgage in the Bangor Courier, three weeks successively, and caused said notice to be recorded in the Registry of Deeds of this county on the 30th October, 1838.

The plaintiff proved, that John A. French and the defendant, on the 8th of April, 1836, conveyed to Philip H. Coombs a portion of the land so mortgaged, by deed with the usual covenants of warranty, for the consideration of $1142. Asa Davis, in answer to the inquiry of the plaintiff's counsel, stated that he contracted to sell the lot for $18 per acre, before he sold it to John A. French; that he received $500, from the original contractor, who had taken that value of lumber from the land, and then by consent sold the land to French for

$1784,84; that about two years after the purchase, he was requested by the defendant to survey a quantity of wood, about 350 cords, cut from about 15 acres of the land, which was mostly soft wood; that he did not know that the defendant had any part of the wood; that he did not go with him; that he charged the survey to French; that the amount of the wood, hard and soft, upon the acre was thirty cords, on fifty acres of it; and that two fifths of it was hard wood.

If the Court, upon the whole of the facts, (all which are above stated,) are of opinion, that the action is maintained, the defendant is to be defaulted; otherwise the plaintiff shall become nonsuit.

*M. L. Appleton*, for the plaintiff, considered the law to be settled, that a partial failure of title to land conveyed by deed of warranty, constituted no defence to a note given for the consideration. *Homes* v. *Smyth*, 16 Maine R. 177; *Wentworth* v. *Goodwin*, 21 Maine R. 150.

Even a total failure of title has been decided in this State to furnish no defence to a note given for the consideration money. *Lloyd* v. *Jewell*, 1 Greenl. 352.

Here the purchaser acquired at least an equity of redemption, and a valuable one; and received the rents and profits for several years, for which he cannot be compelled to account to any one. In no case has it been decided, that a mere incumbrance upon land conveyed by deed of warranty, furnishes a defence, wholly or partially, to a note given for the consideration of the purchase.

*Abbott*, for the defendant.

This action was brought upon a note of hand, by the indorsee against the maker. The note was indorsed after it became due, and therefore the same defence may be made, that might have been, if the action had been brought in the name of the payee.

The defence offered is a *total failure of consideration*. The note was given for land purchased of John A. French, which, at the time of the conveyance was under a mortgage, made by

said French to Asa Davis, to an amount exceeding the whole value of the land; which mortgage has been foreclosed, without any fault on the part of the defendant.

The case finds, that the amount secured by the mortgage of French to Davis was near $1800, and that the consideration paid for a moiety of the land by the defendant, was about $1150. To remove the incumbrance the defendant would have been compelled to pay off the mortgage to Davis, a burden he was under no legal obligation to assume, and to take an assignment of the mortgage, which was not worth the amount due thereon, or look to the uncertain remedy against French upon his covenants. If the suit had been brought by French, the defendant might have brought a cross action upon the covenants and offset one judgment against the other. The leaning of the Courts, at present, is to avoid circuity of action and do justice directly between the parties. *M'Allister* v. *Reab*, 4 Wendell, 490.

There was an entire failure of consideration for the note, notwithstanding the covenants in the deed.

The conveyance of French to Davis was absolute in its terms, subject however to be defeated by the payment of the notes. The notes not being paid, the mortgage was foreclosed; and thus an entire failure of consideration occurred. That this is a good defence, hardly admits of question. *Knapp* v. *Lee*, 3 Pick. 452; Bayley on Bills, 340, and notes. The covenants in the deed make no difference. *Rice* v. *Goddard*, 14 Pick. 293; *Dickinson* v. *Hall*, *Ibid.* 217; *Trask* v. *Vinton*, 20 Pick. 110; *Frisbie* v. *Hofnagle*, 11 Johns. R. 50; 13 Johns. R. 54; *Tillotson* v. *Grapes*, 4 N. H. R. 448; *Chandler* v. *Marsh*, 3 Vermont R. 162; *Lawrence* v. *Stonington Bank*, 6 Conn. R. 521; 1 Sargent and Rawle, 447; 5 Binney, 232; 1 Bay, 278; *Ib.* 327; *Homes* v. *Smyth*, 16 Maine R. 177.

The only authority opposed to this position is that of *Lloyd* v. *Jewell*, 1 Greenl. 352. This was a case of partial failure of consideration, and, therefore, what was said by the Judge was not necessary in that case. But admitting it to be entitled to all the authority justly due to the Court, it is certainly con-

trary to the uniform current of authorities in a large number of the States, and has been overruled in more recent decisions. See *Rice* v. *Goddard*, *Dickinson* v. *Hall*, and *Trask* v. *Vinton*, above cited.

The conveyance of part of the land to Coombs, does not affect the case. The defendant is liable to him on his covenants to the full extent of the purchase money. And even, if the defendant had cut wood from the land, of which there is no sufficient evidence, he would be liable in trespass to Davis for its value. *Stowell* v. *Pike*, 2 Greenl. 387; *Knapp* v. *Lee*, before cited. But even if he had derived any benefit from the purchase, it does not appear to have exceeded the amount indorsed on the note. *Dyer* v. *Homer*, 22 Pick. 260; *Darnell* v. *Williams*, 2 Stark. 166; *Spaulding* v. *Vandercook*, 2 Wendell, 431.

The promise to pay the note, if it was without any new consideration, was void. *Warder* v. *Tucker*, 7 Mass. R. 449; *Garland* v. *Salem Bank*, 9 Mass. R. 408.

The opinion of the Court was drawn up by

WHITMAN C. J. — This is an action of assumpsit on a note of hand. The plaintiff is an indorsee. The defence is a total want of consideration; and it is admitted that the note was indorsed after it became due, so that the defendant is entitled to defend as if the note were still in the hands of the payee. The note appears to have been given to one French, for one fourth part of the consideration for the conveyance of an undivided moiety of a tract of land in Bangor. The conveyance was by deed of general warranty, in common form, bearing date Nov. 29, 1834. The whole consideration agreed to be paid therefor was $1155,55. On the seventeenth of the same November French mortgaged the whole tract to one Davis, to secure the payment to him of $1784,84.

At the trial the defendant offered evidence tending to prove, that the land so mortgaged was not at the time, and had not been since, equal in value to the sum for which it was mortgaged, and therefore, that there was no consideration for the deed

made to him; and further, that the said Davis, on the thirtieth of October, 1838, had given notice of his claim to a foreclosure of his mortgage, as provided in the Revised Statute, ch. 125, § 5. It did not appear that any actual entry by Davis had ever been made upon, or that the defendant had ever been dispossessed of, the premises conveyed to him.

It appeared that, about two years after the defendant purchased, he called upon a surveyor to measure three hundred and fifty cords of wood, cut on fifteen acres of said tract; and that French paid the surveyor for his services; and that in 1836, French and the defendant joined in a conveyance by deed of warranty, of a portion of said tract, to one Coombs, for the consideration of $1142; and that there was, on fifty acres of the mortgaged premises, thirty cords of wood, principally hard wood, to the acre. It was also proved, that French had, under the act of the United States, passed in 1841, ch. 9, become a certified bankrupt.

Upon these facts, proved and offered to be proved, it was agreed, that judgment should be entered upon nonsuit or default, as the Court upon consideration should direct.

It seems now to be well settled in Massachusetts, New York and New Hampshire, and indeed generally, notwithstanding covenants of general warranty may be contained in deeds of conveyance, yet, if the grantor had no title to the land conveyed, that this may be given in evidence, in suits between the original parties, in defence to notes of hand given for the consideration thereof; and so also against indorsees of such notes, when affected with notice, at the time of indorsement, of such defect of title.

In this State, in *Lloyd* v. *Jewell*, the late Chief Justice Mellen, in delivering the opinion of the Court, was led to suppose, from certain dicta to be found in some of the earlier volumes of the Massachusetts Reports, that the law had been settled otherwise in that State. That cause, however, is not to be regarded as having been actually decided upon that ground, as there was in that case evidence of a failure of title in the grantor to but a small portion of the land conveyed. In such

case it is fully settled in England, and generally in this country, that the grantee must be remitted, for his remedy, solely to the covenants in his conveyance. It has not, therefore, been directly and authoritatively settled in this State, that a total want of title in a grantor will not be a good defence to a note given in consideration of his conveyance, when not in the hands of an innocent indorsee.

In the case of *Wentworth* v. *Goodwin*, 21 Maine R. 150, the defence set up to a note of hand, was a total failure of consideration; and it seems to have been tacitly admitted, that an entire want of title in a grantor would authorize such a defence to a note given for the consideration. That case, nevertheless, was decided on other grounds. It did not appear that the want of consideration was total; and therefore it was considered, that the defence set up was not sustained.

That case, in many of its features, was analogous to the one before us; and in principle would scarcely seem distinguishable from it. Certain real estate had been attached by a creditor of the owner, who, afterwards, conveyed it by deed of warranty, and took the note therein in suit for the amount of the consideration. When the creditor obtained his judgment he took out his execution, and levied upon the whole of the land conveyed.

One reason assigned, in delivering the opinion in that case, why the failure was not total, was, that it did not appear, that the defendant had not been in the enjoyment of the rents and profits, for which he would not be answerable to any one else. So in the case at bar, it does not appear, that the defendant has not been in the actual receipt of the rents and profits from the time he took his deed, in 1834, to the time of the institution of this suit. And there is reason to presume from the evidence, that he had availed himself of the rents and profits thereof; and for which he is not accountable to any one, the mortgagee, until after actual entry, not being entitled thereto.

Again, in the case cited it is said, that it does not appear that the land was set off for its full value, and that the presumption is not that it was so, as the law secures to the debtor

a right of redemption, which is subject to attachment and sale. Whether the presumption in the case at bar is one way or the other, as to the value of the mortgaged premises in comparison with the amount for which they were mortgaged, it is unnecessary to inquire, for in this case it must necessarily be inferred, that the defendant deliberately admitted, that the right of redemption was of considerable value. How else could he, in twelve days after the mortgage was made of the whole tract, to secure but $1784,84, agree to give for a moiety only of the same premises $1155,55, thereby showing in his estimation that the whole was worth $2311,10? He offers, however, to prove that this estimate was incorrect. But we are not quite prepared, in the absence of all pretence of fraud, to come to the conclusion, that, for the purpose of avoiding the note of hand in suit, it is competent for him to controvert his admission so made.

To constitute a valid defence, in a case like the present, we understand, that the defect of title must be entire; and so that nothing valuable passes by the deed of conveyance. If any thing valuable does pass to the grantee short of an absolute interest, in conformity to the terms of the deed, it becomes a case of unliquidated damages, the remedy for which should be sought by an action of covenant broken. The defendant's grantor, French, at the time of the conveyance, was the owner in fee of the mortgaged premises, against all persons, the mortgagee excepted; and, as to him, he was the owner of a right of redemption. This right of French, by his deed, passed to the defendant. Some estate therefore passed by the deed.

It is contended that the bankruptcy of French should be admitted to vary the case, in conformity to the principles laid down in the case of *Knapp, adm'r*, v. *Lee*, 3 Pick. 452. But the cases are dissimilar. It is apparent that the defendant here must have had full knowledge of the incumbrance, the deed creating it having been put on record the day after its date, and an advertisement of a claim to a foreclosure having been published in 1838. Until French became a bankrupt,

which could not have been before some time in 1842, for aught that appears, he was solvent. During all the time, from 1834 to 1842, it would seem, that he and the defendant were in the joint occupation of the mortgaged premises, with the exception of what they had conjointly sold to Coombs; and no effort, during that time, was made by the defendant to have the incumbrance removed. He might have redeemed the mortgaged premises, and have held the whole till reimbursed; and at the same time have maintained an action against French for reimbursement; but he resorted to no measure of the kind, and suffered the three years to elapse after the advertisement of the claim to a foreclosure, whereby the title, both in himself and French, became extinct; and enforced no claim against French upon his covenants until barred by a certificate of bankruptcy, nearly eight years after his cause of action accrued. To allow of this branch of the defence, under such circumstances, would be admitting him to take advantage of no inconsiderable degree of negligence on his part, which we think would not be consistent with the rules of law, or the justice of the case.

*Defendant defaulted.*

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JABEZ TRUE *versus* JOEL HALEY.

When the assignee of the mortgagor has conveyed the land by deed with the usual covenants of warranty, he has no such interest as will enable him to maintain a bill in equity against the mortgagee to redeem the mortgage.

BILL in equity. The plaintiff in equity, under the belief that the mortgage had been extinguished, conveyed the premises to one Elder, by a common deed of warranty. Afterwards, finding that the mortgage had not been fully paid, and his grantee being unwilling to move in the matter, the plaintiff demanded an account of the holder of the mortgage, which was refused, and made a tender of the sum supposed to be due; and then brought this bill.

*Hobbs*, for the plaintiff, contended that whoever had an interest that the mortgage should be redeemed, could maintain a bill in equity for that purpose. It is the only way in which he can preserve his rights. By his deed, he has bound himself to free the land from all incumbrances, and has no power to do so, unless this mode is open to him. If the mortgagee receives all that is due to him, it is immaterial by whom it is paid. The plaintiff is not a mere stranger, but has a direct claim under the mortgagor. 7 Mass. R. 444; Story's Eq. § 1023; 4 Kent, 162; 9 Mass. R. 422; Co. Lit. 207 (b); 1 Rand's Powell on Mort. 322.

*J. Appleton*, for the defendant, said that the redemption of mortgages in this State was regulated entirely by statute. There can be but one person at a time, who is entitled to redeem, and he is the mortgagor, or his assignee. No one is entitled to redeem, but such as has an interest in the land at the time. In this case the plaintiff had divested himself of all interest in the land before he brought his bill. 2 Pick. 276; 5 Pick. 281; 9 Mass. R. 422; 1 Powell, 261.

The opinion of the Court was by

TENNEY J. — The equity of redemption, under a mortgage, is a subsisting estate in the land in the mortgagor, his heirs, devisees, assignees and representatives, and Courts of general equity jurisdiction have held, that not only such had the right of redemption, but that it exists in every other person, who has acquired any interest in the lands mortgaged by operation of law, or otherwise, in privity of title. But no case has been cited, and we have been able to find none, where one who once held the mortgagor's interest, and has assigned the same with covenants of warranty, absolutely, has the right of redemption by reason of the covenants. He has no remaining interest in the land and no privity of title therein.

In this State the rights of those interested in mortgaged estates, are defined and regulated in a great degree by statute. By c. 125, § 6, "the mortgagor or person claiming under him may redeem." This provision cannot admit of the construc-

tion, that the mortgagor, who has assigned his interest can redeem; but whoever holds an interest under him is entitled to that privilege; but further than that, the right cannot be extended. The complainant had assigned all his interest in the equity of redemption by his deed to Elder, dated May 20, 1841, duly acknowledged and recorded. After that he could not in any sense be considered as claiming under the mortgagor. It is a subject of regret that the estate could not be disincumbered of the mortgage, when he was willing to pay whatever was due thereon, and thereby relieve himself from liability on his covenants; but if he chose to deprive himself of the power by his own conveyance, and a loss results, it must be imputed to that rather than to any defect in the laws.

*Bill dismissed.*

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JAMES WHITE, *Treasurer, versus* DANIEL WILKINS *& al.*
SAME *versus* SAME.

Since the Revised Statutes were in force, (c. 104, § 13,) more than one suit may be sustained upon the official bond of a sheriff to the treasurer of the State, for the benefit of different claimants and for separate and independent acts of official neglect or misconduct; and the pendency of one such suit furnishes no cause for the abatement of another, commenced subsequently.

And it is immaterial whether such bond was made before or after the Revised Statutes went into operation as laws.

The statute of 1842, c. 19, providing that when an action is pending on an official bond of the sheriff to the State, any other person, "who may have a right of action on such bond, may file an additional declaration in the same action," and "have all the rights of a plaintiff in the suit," affects the remedy only, and is not unconstitutional.

No private suit can be maintained on an official bond made to the State, or its treasurer, without its consent. And when the statute giving consent prescribes the remedy, that remedy must be pursued.

The statute of 1842, c. 19, does not take away the right to institute and maintain more than one suit upon such bond.

THE first of these actions was originally commenced by Silas Pierce & Co. in the name of the treasurer of the State

against Wilkins, late sheriff of the county of Penobscot, and against his sureties, for neglect of official duty in one of his deputies. Additional declarations were afterwards filed in that suit by Dinsmore & al., by Homes & al., by Harriman and by Pratt, for injuries alleged by them to have been respectively sustained by other defaults of deputies of Wilkins.

The second suit was an action brought on the same bond as the first for the benefit of Joseph Eaton, to obtain satisfaction for the loss alleged to have been sustained by him by another neglect of official duty by a deputy of Wilkins.

To each of the additional declarations, and to the second suit, a plea in abatement was filed, because a prior suit was pending for the same cause of action. To each of these pleas there was a replication, alleging, that the suit, or additional declaration, was instituted for the benefit of different persons, and for a separate neglect of official duty. To each of the replications there was a demurrer, which was joined.

Able and elaborate written arguments were furnished to the Court, on January first, 1845, by

*A. W. Paine*, for the plaintiff in interest in the second action, and for some of those who had filed additional declarations: — by

*I. Washburn, jr.* for others who had filed additional declarations: — and by

*J. B. Hill*, for the defendants.

The opinion of the Court was drawn up by

Shepley J. — In the action first named, James Dinsmore & al. Henry Homes & al. James T. Harriman and Eleazer F. Pratt & al. have filed additional declarations, and caused the defendants to be summoned to answer them by virtue of the provisions of the act passed on March 14, 1842. The defendants have appeared, and filed pleas in abatement, alleging the pendency of a prior suit between the same parties for the same cause of action. To the second suit above named a like plea in abatement has been pleaded. Replications have

been made to the several pleas, and the cases are presented upon a demurrer to them. Admitting the pleas in abatement to contain all the necessary averments, their effect must depend upon a construction of the Rev. Stat. c. 104, § 13, and the act of 1842, c. 19. It appears by the pleadings, that the prior and the present suits were instituted upon the official bond of Wilkins, as sheriff of the county of Penobscot. And that the prior suit was instituted for the benefit of a different person from those appearing in the later suits.

The Stat. c. 104, § 13, provides, that, when the condition of such a bond shall be broken to the injury of any person, such person may, at his own expense, institute an action in the name of the treasurer of the State, and prosecute the same to final judgment and execution; and that in such case the writ shall be indorsed by the person, for whose benefit the suit is commenced, and with the name of his attorney, which indorser shall be alone answerable for all costs. It could not have been the intention, that any suit should be commenced by a writ of *scire facias* on a judgment; for the action is to be upon the bond, and is to be prosecuted to final judgment. There can be no doubt, that the language is sufficiently broad to authorize each injured person to commence a separate suit for his own benefit. The provisions of the act of February 20, 1821, c. 50, § 3, which authorized a writ of *scire facias* to be sued out for the recovery of further damages, after a judgment had been obtained for the penalty on a breach of such a bond, were repealed without being reenacted in the Revised Statutes. To determine, that the legislature did not intend to permit several suits to be pending at the same time for the benefit of different persons, although between the same parties, and upon the same bond, is to conclude, that it omitted to provide any remedy whatever for any other person than that one, who should first commence and obtain a judgment in an action upon the bond; and to make such a conclusion, when the statute declares, that any person injured may have an action on the bond at his own expense and for his own benefit. It is contended, however, that the legislature did "either by

accident or design," omit to reenact the former provision, authorizing a suit by *scire facias*. And that the thirteenth section cannot be construed to authorize several actions, on such an official bond, to be pending at the same time, because it is but a reenactment of the provisions contained in the sixth section of c. 91, of the statute of 1821, which had received a contrary construction. And it is true, that provisions essentially the same were contained in the statute last named. And that they appear there to have been little more than a reenactment of the provisions contained in the first section of the act of Massachusetts, passed on March 13, 1806. Although no case has been cited, which decides, that no action could have been maintained upon the bond after a judgment in one had been obtained for the penalty, and that all further remedy was to be sought by a writ of *scire facias* founded on that judgment; it may be admitted, that such was or would have been the judicial construction, taking into consideration those provisions in connexion with the provisions of the act affording a remedy in subsequent cases by a writ of *scire facias* on the judgment. For although the language might be sufficiently comprehensive to admit of several suits upon the bond, yet, where the Court perceived a special provision in another act for a different remedy in all future cases, after there had been a judgment entered in one suit for the penal sum of the bond, it might properly conclude, that the intention was, that such prescribed remedy should be pursued. But it would by no means follow, that such should be the construction, when the Court finds, that the legislature, on a revision of the statutes, has provided a remedy by the use of the former general language, and that it has wholly omitted to reenact the provision for a different remedy, which operated to restrain the effect of that general language. The inference would rather be, that it was the intention to permit such general language to have its full and unrestrained effect. It is contended, that this would not be a correct inference, because the writ of *scire facias* may still be maintained without any statute provision authorizing it. *Scire facias* on a judgment in a personal action

could not be maintained before the statute of Westminster 2, which gave it, because the party might have a new action upon his judgment. That statute having been a part of the law received by our ancestors, the writ may usually be maintained here without any statute provision. But not in a case like the present; for no private suit can be maintained on an official bond made to the State, or its treasurer, without its consent. *Commonwealth* v. *Hatch*, 5 Mass. R. 191. And when the statute giving consent prescribes the remedy, that remedy must be pursued.

It is further insisted that if such be the true construction, this bond, which was made before the revision of the statutes, should not be affected by it; because it would give to it a new character and subject the obligors to an indefinite number of suits upon it. The only change in the statutes, since the bond was made, is to deprive a person injured of a remedy to enforce the performance, which before existed. There has been no attempt to vary the terms of the contract or its obligations. The present statute, if such be the true construction, will not necessarily increase the number of suits. It will only change most of them from *scire facias* on the judgment to an action on the bond, which will give to the defendants greater privileges than the former process would have permitted, by allowing them to deny and contest anew its execution and the breach of it.

The act of March 14, 1842, c. 19, does not afford a remedy by the writ of *scire facias;* nor does it require, that the person injured should institute a new suit upon the bond, or deny to him the right to do so. It provides a remedy before unknown to the law, by authorizing him to file an additional declaration in a writ already sued out upon the bond, and by a summons, issued by the clerk and indorsed by the person for whose benefit it is issued, to call upon the defendants to answer to that declaration. It is not perceived, that the responsibilities of the obligors on such an official bond can be increased, or that their rights cannot be as fully protected by these enactments, as they would have been by the former pro-

visions of the statutes. It will be unnecessary to inquire, whether the pleas contain all the necessary averments. They are all adjudged to be bad; and the defendants are to answer over in each process.

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CHARLES G. BRYANT *versus* MARCENA JOHNSON.

Injury, or danger of injury, is essential to the maintenance of an action of *audita querela*.

Such action is in the nature of a bill in equity, to obtain relief against oppression. It lies where, after judgment, the debt has been paid or released, and yet the debtor is arrested, or in danger of being arrested, on an execution issued on such judgment; and where the debtor has had no opportunity to avail himself of such payment or release, in defence; and in other cases where a defendant had good matter to offer in defence, but had no opportunity to offer it before judgment against him.

If a levy on land be nugatory and void, the action of *audita querela* cannot be maintained by reason of such levy.

When an execution is issued under the seal of the Court, the presumption is, that it was issued by order of Court.

THIS was an action of *audita querela*. The facts appear at the commencement of the opinion of the Court.

*Kent*, for the plaintiff, said that although this was an unusual action, yet it was expressly given by statute, which regulated the process and gave the form. St. 1821, c. 63, § 7; Rev. St. c. 141.

If judgment has been rendered, but an execution has improperly issued, and been executed upon the property of the debtor, this is the appropriate remedy. *Johnson* v. *Harvey*, 4 Mass. R. 483; *Lovejoy* v. *Webber*, 10 Mass. R. 101; *Skillings* v. *Coolidge*, 14 Mass. R. 43; *Thacher* v. *Gammon*, 12 Mass. R. 270; *Brackett* v. *Winslow*, 17 Mass. R. 153.

Here two executions were issued, purporting to be in force, at the same time, on the same judgment. The last one was erroneously issued, and the proceedings under it vexatious and illegal. It is this execution and those proceedings that we

seek to set aside by this process. Stat. 1820, c. 60. The issuing of an execution is a mere ministerial act of the clerk, and not a judicial one of the Court. 10 Mass. R. 356; 1 Pick. 214.

The process was rightly brought against the judgment creditor, and not against the assignee. Petersd. Abr. Title, Audita Querela; 2 Little, 357.

*Hathaway*, for the defendant, said that the attorney had no lien on the execution beyond the amount tendered, and therefore it was wrongfully withheld by him. *Ocean Ins. Co.* v. *Rider*, 22 Pick. 210. The act of the clerk was entirely proper in itself, and was the only means of saving the attachment by which alone the debt could be obtained.

No one but a person injured can maintain this process. 6 Dane, 319; Com. Dig. Title, Aud. Qu. E. 6; *Lovejoy* v. *Webber*, 10 Mass. R. 103; *Brackett* v. *Winslow*, 17 Mass. R. 158. Here was no misconduct in the creditor, but only a laudable vigilance to secure his debt; and no injury to the debtor, if he is an honest man, or willing to submit to the laws of the land.

If the proceedings under this execution were illegal and void, as is alleged for the plaintiff, this action cannot be maintained; for it will not lie, where the plaintiff's matter of grievance is void. 1 Ld. Raym. 439; 1 Salk. 264.

And besides, if there was any thing wrong in issuing the execution, the clerk, being a mere ministerial officer, is liable for it. *Briggs* v. *Wardwell*, 10 Mass. R. 356.

This is an equitable action in the nature of a bill in equity. 3 Black. Com. 405. There can be no equity in this attempt to defraud a creditor by defeating the levy.

The judgment was assigned, all the proceedings were at the instance of the assignee, and the present defendant neither knew nor assented to them. The suit then should not have been brought against him; and had there been ground for it, the action should have been brought against the assignee. Hammond on Parties, c. 4.

The opinion of the Court was drawn up by

WHITMAN C. J. — The defendant having sued out a writ against the plaintiff and caused his real estate to be attached, and afterwards, having recovered judgment against the plaintiff in the same suit, his attorney took out execution thereon, which he refused to have levied upon the real estate attached or to deliver the same to the defendent, till paid a balance due on account, or for his fees and disbursements in the suit. The defendant, afterwards, assigned his judgment to one Hinkley, who tendered to the attorney the amount of the costs, as taxed in the suit, and demanded the execution, which the attorney refused to deliver. Hinkley, thereupon, applied to the clerk of the Court, in which the judgment was rendered, for an execution on the judgment, presenting at the same time an affidavit setting forth the above facts; and the clerk thereupon issued one, as if no previous execution had issued; and it was levied in due form upon the real estate attached, and duly returned and recorded as being fully satisfied. No use was ever made of the former execution; and it has long ceased to be in force.

This writ of *audita querela* was brought for the purpose of having the execution, last issued, and the levy made by virtue of it, set aside. Such process, according to the authorities, is "in the nature of a bill in equity, to be relieved against the oppression of the plaintiff." It lies where, after judgment, the debt has been paid or released, and yet the debtor is arrested, or in danger of being arrested, on an execution issued on such judgment; and where the debtor has had no opportunity to avail himself of such payment or release, in defence; and in other cases where a defendant had good matter to offer in defence, but had no opportunity to offer it before judgment against him. 3 Bl. Com. 405. Injury, or danger of injury, seems to be essential to the maintenance of the action.

In this instance it seems to be difficult to perceive how the plaintiff here has been injured. He had not paid the debt before the levy was made. And he has not yet paid it, unless

the levy is valid; and if the levy is valid, he has sustained no injury, unless the payment of an honest debt can be accounted an injury, which, whatever he may think, cannot be so regarded by Courts of justice. He is not under arrest, nor is he in danger of being arrested, on either of the executions; or of being otherwise affected thereby; nor, unless he can disturb the levy, is he in any danger from the judgment recovered against him.

And if the levy is nugatory and void, he cannot be injured by it; and in such case, can have no need of this process. One, says Dane, c. 186, art. 1, need not have this writ where the matter of his grievance is void, as if an extent be sued against him without right; citing 1 Roll. 304, A.

It is manifest that this species of process was never designed to admit of taking advantage of mere clerical errors, or technical irregularities, having no connection with the substantial justice of the case. Whether the issuing of the second execution was, on the part of the clerk, an irregularity or not, we do not, in this prosecution, feel ourselves called upon to inquire. Instances have not been unfrequent in which Courts have, where it has been impossible for a creditor in a judgment to avail himself of satisfaction upon a first execution, ordered another to be issued. And, when an execution is issued under the seal of the Court, the presumption is, that it was issued by order of Court. If the clerk should take it upon him to issue an alias execution, when it would not be sanctioned by the Court, and any injury should accrue from it, he, being a mere ministerial officer, might be rendered amenable for it to the party injured. In Jacob, title Execution, it is said that, "if an execution be executed and filed, the party can have no execution upon the judgment." And again, "but if the execution be not returned and filed another execution may be had."

*Plaintiff nonsuit.*

JOSIAH GREGORY *versus* JOHN TOZIER.

In a writ of entry, where the tenant pleads that he was not tenant of the freehold, but merely tenant at will to another who had the title, the demandant may, since the Revised Statutes were in force, (c. 145, § 10) elect to consider the person so in possession a disseizor, for the purpose of trying the right, if he has actually ousted the demandant, or withheld from him the possession of the premises; and the demandant may prevail if his title be paramount to that of him under whom the tenant in possession holds.

Where a levy is made upon an undivided share of certain real estate, in order that such levy should be supported against any one but the debtor and those claiming under him, it should not appear, that he was tenant in common of a larger tract, including the premises levied upon; nor otherwise than that he was the owner of an undivided portion of that particular parcel, or that, owning the whole of that parcel, in severalty, the levy could not be made thereon of a particular portion, setting it out by metes and bounds, without damage to the estate.

WRIT of entry. After the demandant had introduced his evidence, a nonsuit was entered subject to the opinion of the Court. If the Court should be of opinion that upon the evidence the action could be supported, the tenant was to be defaulted; and if it could not, then the demandant was to be nonsuited. The view taken of the evidence by the Court appears in the opinion.

*Williamson*, for the demandant.

*Blake*, for the tenant.

The opinion of the Court was by

WHITMAN C. J. — The plaintiff demands of the defendant seizin and possession of one undivided half part of eighty-three acres, describing it by metes and bounds, being a part of lot No. 7, in the town of Corinth; and, for his title, relies upon a levy upon the same half part, made in 1837, by virtue of an execution in his favor, and against the defendant.

The defendant pleads the general issue; and files a brief statement, setting forth that he was not, at the time of the service of the writ in this case, tenant of the freehold; but was in possession of the whole of lot No. 7, as tenant under

S. H. Blake and Andrew S. Tozier, who he avers, were owners in fee of the same.

In reference to defences of this kind the Revised Statutes, c. 145, § 10, have provided, that "If the person in possession have actually ousted the demandant, or withheld the possession of the premises, he may, at the election of the demandant, be considered as a disseizor, for the purpose of trying the right; though he should claim an estate less than freehold." The defendant in this case does not pretend, and, without doubt, could not, that he has not withheld the possession of the demanded premises from the plaintiff. The plaintiff, therefore, has a right, as against him, to prevail, if his title be paramount to that of those under whom the defendant holds.

The plaintiff's levy was on an undivided half of a certain parcel of real estate, as the property of the defendant. To support such a levy, as against any one, but the debtor, and those claiming under him, it should not appear that he was tenant in common of a larger tract, including the premises levied upon, nor otherwise than that he was the owner of an undivided portion of that particular parcel, or that, owning the whole of such parcel in severalty, the levy could not be made thereon of a particular portion, setting it out by metes and bounds, without damage to the estate. Rev. St. c. 94, § 13. If the right of John Tozier alone, as opposed to the claim of the plaintiff, were in question, and it should appear, that, at the time of the levy, he was a tenant in common of the whole lot, the levy, as against him, might perhaps be upheld. *Bartlet* v. *Harlow*, 12 Mass. R. 348.

But if Andrew S. Tozier and Blake have acquired such a title to the premises as that the levy, as against them, would be unavailing to the plaintiff, he cannot recover. It appears, that in May, 1820, the plaintiff conveyed to the defendant the one undivided half of the whole lot. In 1823, Benjamin Joy, being the owner of the other undivided half of the lot, conveyed the same half to the plaintiff and defendant, taking back, at the same time, a mortgage as collateral security for the con-

sideration agreed upon for the conveyance. The plaintiff, on the seventh of September, 1829, conveyed the quarter part derived by him from Joy, to Thornton McGaw, who, on the eighteenth day of July, 1832, conveyed the same to the defendant; so that the defendant, but for a conveyance to be presently noticed, would have become seized of one undivided half of the whole lot in fee, and of the other half also subject to the mortgage to Joy. But the defendant on the twenty-third of April, 1830, had conveyed to one Payson fifty acres, being the southerly part of the lot, and Payson on the twenty-third of April, 1842, conveyed the same to Blake. This conveyance must be regarded as good against John Tozier, and those claiming under him by virtue of a subsequent conveyance; and consequently against the plaintiff; for his levy is but a conveyance made in the manner prescribed by statute. Thus Blake, so far as it respects any claim on the part of the plaintiff, must be considered as the owner of fifty acres in severalty, being the south part of the lot.

Joy, in his life time, entered under his mortgage and foreclosed the right of redemption, and after his decease, his heirs conveyed the half of the lot, of which he died seized, to Andrew S. Tozier, who thereupon became seized of the same. Neither the levy, nor the conveyance to Blake, would interfere with his right to have partition of any part of the lot. His share may be set off, regard being had to quality as well as quantity, so as to take the whole of what is described in the levy, and not covered by the deed to Blake. The plaintiff's claim, therefore, as against Andrew S. Tozier and Blake, cannot be sustained to an undivided part of any specific portion of the lot; and the nonsuit must be confirmed.

EDMUND HALL *versus* ROBERT MCDUFF.

Where the grantee enters into the actual occupation and improvement of the premises under his deed, but does not record it, the title cannot be revested in the grantor, by the delivery back of the deed, for one purpose, and yet remain in the grantee for another.

If the grantee consents to the delivery back of such unrecorded deed to the grantor, for the purpose of having security given by mortgage for a portion of the consideration money remaining unpaid, no authority is thereby given to the grantor to make an absolute conveyance of the estate.

The grantee in possession cannot create an equitable mortgage by a pledge of his unrecorded deed, and thereby defeat a prior recorded mortgage of the same premises.

WRIT of entry. After the whole testimony was before the jury, it was all reported, and thereupon a nonsuit was entered by consent, to be set aside, if in the opinion of the Court the action could be maintained.

The facts proved by that testimony are stated at the commencement of the opinion of the Court.

*Ingersoll*, for the demandant, contended that the testimony shew, that the deed was voluntarily delivered back to the grantor, with the expectation that security was to be given upon the estate for the money due. The mode of doing it was at the option of the grantor. And if the tenant chooses to take a course which will enable the grantor to induce a third person to believe he has a good title, it is too late to complain afterwards. If an unrecorded deed is understandingly and fairly given up, the title is revested in the grantor. 1 Greenl. 73; 21 Maine R. 160; 10 Mass. R. 403.

*Washburn*, for the tenant, said that the tenant never consented to the giving up of the deed, but merely that the grantor might take it to have the money procured by a mortgage, which was not given. The tenant entered into possession under his deed, and thus acquired as full and complete a title, as if it had been recorded. All the facts were known to all the parties. The deed was never cancelled, nor agreed to be cancelled. And where the property has once vested, and other rights have intervened, the mere delivery back of the

deed by the grantee to the grantor will not revest the estate. 6 Greenl. 56; 10 Mass. R. 60; *Marshall* v. *Fiske*, 6 Mass. R. 24; 21 Maine R. 160.

If the demandant has any claim, it is but as an equitable mortgage; and it must be enforced in equity, but not at law.

The opinion of the Court was by

SHEPLEY J. — The demandant claims the premises demanded, by virtue of a deed of conveyance to himself, made by Alexander Alden, on March 15, 1841, and recorded on the twenty-eighth day of the same month. The tenant claims under a conveyance from the same person to himself, made in the year 1833, but not recorded. There is proof, however, that he immediately entered into possession of the premises under his deed, soon built a house and barn upon the land, and has continued to reside upon it since that time. The demandant attempts to destroy this older title by proof, that the grantor, before he made the last conveyance, obtained possession of the former deed, and held it by consent of the tenant, until he should be paid a part of the purchase money remaining unpaid. That the tenant, having failed to make that payment, consented that he should obtain the money of some other person and "give security on the land for the money." That he accordingly procured the money of the demandant and conveyed the land to him. That after the money was obtained the tenant was satisfied, although he soon after became dissatisfied. It appears also that the grantor first obtained that deed for the purpose of having a mortgage deed of the premises made to himself to secure his debt, but finding, that the tenant had before made a mortgage of the same to Bates, he concluded to retain his unrecorded deed as security for the purchase money.

That deed was not cancelled, and the title revested in the grantor, by these proceedings. Such does not appear to have been their intention. The deed was only pledged as an equitable mortgage of the estate. The tenant had before that time mortgaged the estate to Bates, and the law would not permit

them to destroy, in that mode, the title of the tenant, to the injury of Bates, if such had been their design. The title could not be revested in the grantor for one purpose and yet remain in the tenant for another. If the tenant consented to a conveyance, it was only to one for the purpose of security, not to an absolute conveyance of the title. His declaration, made after the last conveyance, that he was satisfied, could not have the effect to destroy a title, which had never been divested.

*Nonsuit confirmed.*

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DUDLEY OAKES *& al. versus* EDWARD J. CUSHING.

Where the plaintiff performed labor upon a vessel and charged it to the same, and afterwards requested payment therefor of the defendant, supposing him to be the owner; and the defendant wrote to the plaintiff, saying that he held the vessel for security, and that it did not belong to him to pay any bills on her, but at the same time that he was holden for them, and requested the plaintiff to take an order on a third person for the amount; this was held to be sufficient to authorize the jury to find a verdict for the plaintiff.

And as such labor increased the value of the security, that was held to be a sufficient consideration for the written promise of the defendant to pay therefor.

THIS was an action of assumpsit to recover of the defendant payment for work done on the schooner Respect in 1840.

The plaintiffs introduced their books in which "schooner Respect" is charged for the work. They also introduced a witness who testified that the plaintiffs did certain work upon the schooner in 1840, that he worked on her for them, and that I. Porter had run the vessel till she was repaired, and came on board several times, when she was undergoing her repairs, to oversee them, as he supposed. He did not know who run her after she was repaired. They then introduced the following letters: —

"Boston, May 25th, 1840.

"Dear Sir. Please send me by return of mail the amount

of all bills on the schooner Respect you now hold against her. Do not fail of sending as above, and much oblige

"Yours, E. J. Cushing.

"Directed to Dudley Oakes, Esq., Brewer, Maine."

"Boston, June 2d, 1840.

"Dear Sir. I received yours of 29th instant, this day, and would say in regard to my paying the bills of $131,48, on schooner Respect, I hold her for security and it does not belong to me to pay any bills on her, but at the same time am holden for them. I should wish you to take an order on Mr. I. Porter for the amount of same. If so, please send me word to that effect by William Gutterson, whom you will find at Messrs. Emery, Stetson & Co., Bangor. I wish to get the thing settled by Mr. Porter. "Respectfully yours,

"E. J. Cushing.

"Directed to Dudley Oakes, Esq., Brewer, Maine."

This was all the evidence in the case, and upon it the counsel for the defendant requested the Judge to instruct the jury, that the defendant, being mortgagee out of possession and not having the control of the schooner, was not liable for repairs, except by reason of his admission in his letter of 29th June, and that if they were satisfied that admission was made under a misapprehension of his liability as mortgagee, he was not then bound; and that they were to pass upon the question whether there was a misapprehension of his liability from the whole letter and evidence in the case. Allen, the presiding District Judge, instructed the jury, that the defendant, being mortgagee, if he was out of possession, and had no control of the vessel, was not liable for repairs.

The Judge further instructed the jury, that the letter of 29th June amounted to an express promise to pay; and that the burthen of proof was upon the defendant to show further than had been disclosed, either by the letter or other evidence, that the promise was made upon a belief of his liability in consequence of his having security upon the schooner; that the letter was sufficient as a matter of law, unexplained by the evidence, to charge the defendant, and that the language of

the letter accompanying the admission, and the other evidence, was not sufficient to warrant them in finding that the promise was made under a misapprehension of his liability.

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

*Blake*, for the defendant.

*J. Godfrey*, for the plaintiffs.

The opinion of the Court was drawn up by

TENNEY J. — This case comes before us on exceptions taken to the instructions of the Judge of the District Court to the jury. The plaintiffs performed labor upon the schooner Respect in 1840. The defendant wrote to Oakes, one of the plaintiffs, on May 25, 1840, requesting that the amount of all bills on the vessel which Oakes held against her, might be immediately sent to him. Subsequently he wrote again (in answer to a letter addressed to him by Oakes,) saying he held the vessel for security, and that it did not belong to him to pay any bills on her; but admitted, that he was holden for them; and then requested Oakes to take an order on Mr. I. Porter, who it appears had had some oversight of the repairs made by the plaintiffs, and who had previously run the vessel, stating as a reason for the request, that he wished to get the thing settled by Mr. Porter.

The counsel for the defendant contended, that the admission of liability was made under a misapprehension of his rights, and that therefore he ought not to be holden. The Judge instructed the jury that the evidence was not sufficient to warrant them to conclude, that he wrote under such misapprehension, and that the letters, unexplained, were sufficient to charge the defendant.

The import of the last letter is, that as between the defendant and Porter, the former ought not to pay the plaintiffs' claim, but that he was liable to the plaintiffs notwithstanding. There is nothing in the evidence showing that the defendant did not fully understand his rights. The letter does not ex-

plain the grounds of his admitted liability. He may have believed himself liable in consequence of his holding the vessel as security, without ever having had possession. But this reason for his belief is not given in the letter. He may have been holden by reason of a lien, which the plaintiffs had at one time, and which may have continued; or by his own promise before the repairs were made.

It is insisted for the defendant, that the promise contained in the letter, or implied thereby, was without consideration. The vessel was held by him as security, and we are to presume, that the security was increased by the repairs. This would be a sufficient consideration for a promise in writing, if no other existed.

*Exceptions overruled.*

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JEREMIAH LEBALLISTER *versus* SAMUEL NASH.

Where a person promises, by his note, to deliver a certain quantity of hay, of a stipulated quality, at a place named, and within a stated time, the promise is performed, if hay, sufficient in quantity and quality, was deposited at the place within the time agreed upon, and set apart and appropriated to the payment of the note.

It is not necessary, in such case, that the hay "should be weighed and specially turned out." The quantity may be otherwise ascertained, at the risk of the person making the payment; and no turning out, or change of position, is necessary, further than to separate or set it apart, so that it may be identified and removed by the owner.

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

Trover to recover the value of a quantity of hay alleged to have been taken and converted by the defendant. The plaintiff introduced a note of which the following is a copy: —

"Enfield, Treat's Mills, Sept. 13, 1838. — For value received I promise to pay Jeremiah Leballister, or order, three tons of good English hay, at my barn, in Enfield, within six months.

"Daniel Nash."

On the above note was the following indorsement: — "March 15, 1839. Received twenty-one hundred of the within note."

The plaintiff then introduced the deposition of Abner True, who testified that some time in the spring of 1841, he bargained with the plaintiff for this note, and agreed to take the hay, if he could get it on the note, and that within a week or ten days after he went to the defendant, and asked him, if there was any hay in his barn, left there by his brother for the plaintiff, and showed him the note. He said his brother left some hay for Leballister, who had taken away part of it, and the rest he himself fed out to his sheep; and that the indorsement was on the note at that time. The plaintiff also introduced Samuel Pratt, who testified that some time in March, 1839, he went with the plaintiff to Enfield, and called on the defendant for the hay due on the note, which the plaintiff had with him, and asked defendant if his brother left hay there; that the defendant replied, that it was down in such a barn, pointing to the barn, but did not go with them to the barn, and said the hay was in the barn, and that they might take it; that they went to the barn, and found, as the witness calculated, about three tons of hay in it; and that the barn did not appear to have been used that winter; that there was no road to it, and that the snow was not beat down; that the barn was a small sized one, and that there was no appearance of cattle having been recently about there. He further testified, that they took away two small loads, which were weighed after they arrived at Oldtown, where they carried it, and the amount was indorsed on the note. He also testified, that the defendant said, that his brother had moved away, and that every thing had been moved away, and at the same time lent them a pitchfork for the purpose of loading the hay.

Whereupon the counsel for the defendant requested the presiding Judge to instruct the jury, that in order to vest the hay in the plaintiff, so as to entitle him to recover in this action, it was necessary that a sufficient quantity of hay to pay the note should have been weighed, and specially turned out, set apart, and ready to be delivered at the time and place

designated in the note, in payment of the same; and that unless this was proved, the plaintiff could not recover in this action.

But the Court instructed the jury, that if Daniel Nash had a greater amount of hay than was necessary to pay the note, and was willing to weigh off enough for its payment, but never did it, that no part of the hay would vest in the plaintiff; but if he had left at his barn in Enfield three tons of hay for the payment of said note, that the property in the hay would vest in the plaintiff, and he might maintain trover for its conversion by the defendant.

He further instructed the jury, that although the hay in the barn never had been weighed, yet if the evidence satisfied them, that Daniel Nash had placed in his barn an amount of hay for the purpose of paying said note, and that the plaintiff, or any one under him, had taken a portion of the hay and applied it in part payment of said note, that the property in the residue of the hay, which was the subject matter of this suit, became vested in the plaintiff; and he might maintain trover for its conversion by the defendant. The verdict was for the plaintiff; and the defendant filed exceptions to the instructions of the Judge, and to his refusal to give the instructions requested.

*J. H. Hilliard*, for the defendant, said, that unless the hay was left in such a state, and at such a time, as the law requires, in order to discharge the note; or unless the plaintiff actually received it in payment thereof; the plaintiff cannot recover. There was here such an uncertainty as to the quality, quantity, and time when it was turned out, if ever, as would prevent the recovery by the plaintiff. Chipman on Con. 212; *Wyman* v. *Winslow*, 2 Fairf. 398; *Houdlette* v. *Tallman*, 2 Shepl. 400. The note remained unpaid, and the property in the hay unchanged.

The taking of a part of the hay by the plaintiff, under the circumstances, was not evidence of an acceptance of the hay in payment of the note, but the reverse of it. He did not consider the whole note as paid, or he would not have indorsed upon it a partial payment. Besides, the doctrine of the de-

livery of a part for the whole of a quantity of goods is applicable only to the sale of goods.

The instructions tended to lead the jury to draw a wrong inference from the facts, and therefore the verdict should be set aside. 6 Shepl. 436.

*Cony*, for the plaintiff, said that the defendant attempted to escape the consequences of appropriating to his own use property he knew did not belong to him, by denying that other parties have fulfilled a contract in which he had no interest. He contended, that Daniel Nash, the promisor, had done every thing the law required, by delivering the hay according to the terms of the note. The note was paid, and the hay became the property of the plaintiff. *Wyman* v. *Winslow*, 2 Fairf. 398.

No weighing or turning out of the hay was necessary. And besides, if the maker of the note had not done all that was necessary to make a legal tender of the hay in payment of the note, still the plaintiff might, if he chose, waive any irregularities, and accept the hay in payment. *Hoyt* v. *Byrnes*, 2 Fairf. 475.

In this case there was both a legal tender, and an acceptance; and the instruction to the jury was correct. But even if there was an error or omission, still upon the whole case, as reported, the plaintiff is entitled to recover; and the Court, therefore, will not set aside the verdict. *McDonald* v. *Trafton*, 15 Maine R. 225; *French* v. *Stanley*, 21 Maine R. 512.

The opinion of the Court was drawn up by

Shepley J. — It appears from the bill of exceptions, that Daniel Nash, on September 13, 1838, by a contract in writing promised to deliver to the plaintiff three tons of good English hay, at his barn in Enfield, within six months. Before that time had elapsed, he removed from that place, leaving a quantity of hay in his barn there, estimated to be about three tons. The plaintiff's right to recover in this action, which is trover for a conversion of a part of that hay by the defendant, must depend upon the question, whether Daniel Nash, before

the maturity of the contract, had designated and set apart in the proper place, three tons of hay of a suitable quality in payment of the note. If he had, the property would be thereby vested in the plaintiff. If he had not, he would continue to be the owner, and the defendant, having used it, should account to him for it. The quantity of hay appears to have been deposited and left in the place named in the note within the time agreed upon. The acceptance of a part of it by the plaintiff would authorize the conclusion, in the absence of all opposing testimony, that it was of a suitable quality. If there be any defect, it will be found in the testimony to prove, that it was designated and set apart for the payment of the plaintiff's note. When Daniel Nash removed, the testimony shows, that he carried away all his other property, leaving hay of the quantity and quality, and within the time and at the place named in the note. It does not appear, that there was left any other hay or property, with which it could have been mixed.

The defendant, who is a brother of Daniel, having been called upon by the plaintiff "for the hay due on the note," pointed to a barn "and said, the hay was in the barn, and that they might take it." The jury would be authorized to infer from this conversation, in connexion with the other facts, that the hay had been set apart by Daniel Nash and left in his barn in payment of the plaintiff's note, and that the defendant knew it, if he was not the agent of his brother to deliver it. The fact, that the plaintiff weighed that part of the hay, which he removed about the time, when his note became payable, and indorsed it on the note, might indicate, that he did not intend to receive the quantity found in the barn in full payment of his note, should it fall short in quantity. Such intention could not alter the rights of Daniel Nash, or prevent his tender from becoming effectual, if he had in fact performed his contract. It might have been proper, and perhaps desirable, that the instructions of the presiding Judge should have stated more plainly, that the jury should be satisfied, that the hay was of the quality and was deposited

at the place, and within the time, agreed upon, and that it had been set apart and appropriated to the payment of the note. But there does not appear to have been any contest respecting the quality, or any conflict of testimony respecting the quantity, or the time, when it was deposited. The jury having been required to find, that the hay had been left for the payment of the note, would probably understand, that it should appear to have been set apart for that purpose. If there was any want of explicitness in the instructions, it might have been obviated by a proper request. The request presented, was properly refused. It was not necessary, that the hay "should have been weighed and specially turned out." The quantity might have been otherwise ascertained at the risk of the person making the payment. And no turning out, or change of position, was necessary, further than to separate or set it apart, so that it might be identified and removed by the owner.

*Exceptions overruled.*

LITTLETON REED *& al. versus* WILLIAM H. JOHNSON *& al.*

If the bill, as presented, does not exhibit a case for the interference of a court of equity, it may be dismissed on demurrer for want of equity.

In a bill in equity brought by two partners against the third and against an officer who had taken goods alleged to belong to the partnership on a demand against the defendant partner for his individual debt, the partnership creditors not being made parties, where the object sought was merely to obtain a decision that the goods were owned by the partnership, without acting in any other manner upon the rights or interests of the partnership or of its members, or upon those of the creditors of the partnership, or of one or more of them, the Court will not require the officer to deliver over the goods, or the proceeds of the sales thereof, to the plaintiff partners, but will withhold its aid until there can be a distribution of the whole partnership property, first among the partnership creditors, and then among the partners themselves, or their representatives.

Jurisdiction is not given to this Court as a court of equity, by the Rev. St. c. 96, § 10, in all cases where a partnership or partners may be interested; but was conferred to provide a remedy in certain cases for persons, or the representatives of their interests, who were, or had been, partners with other persons, and who on that account had either no remedy, or an imperfect one, by the common law.

That is not a case of partnership within the equity jurisdiction of this Court, where the bill alleges that one, not a partner or representing a partner's interest, has taken goods belonging to the partnership, which goods such person denies to be partnership property.

And if one partner is omitted as plaintiff, and made a party defendant with such other person, still the Court will not have equity jurisdiction as it respects the latter.

THE facts are stated in the opinion of the Court.

*Cutting*, for the defendants, said that this Court had no jurisdiction of the case. Its jurisdiction is limited by the Revised Statutes to particular subjects; and as it respects partnership, to cases between partners themselves. Equity powers are given to the Court in derogation of the common law, and therefore the statute is to be construed strictly.

The whole creditors of the partnership should have been made parties. The rights of the creditors cannot be decided on the answer of the officer. He does his duty merely and is frequently compelled to do it against his inclination, and has nothing to do with the settlement of partnership concerns in

a court of equity, by reason of serving a writ upon one or more of them.

There is a perfect remedy at law, on their own showing. *Waddle* v. *Cook*, 2 Hill, 47; *Melville* v. *Brown*, 15 Mass. R. 82; *Douglas* v. *Winslow*, 20 Maine R. 89.

*A. W. Paine*, argued for the plaintiffs, under these general propositions.

1. As to the parties. The bill is rightly brought by the two solvent partners against the debtor partner, and the officer, and the creditors under whom the officer acted. Story on Part. § 235; *Melville* v. *Brown*, 15 Mass. R. 82; *Waddle* v. *Cook*, 2 Hill, 47; Story on Part. 368, 371; Dougl. 650.

2. The Court has jurisdiction of the case. Under Rev. St. c. 96, § 10; 1 Story's Eq. § 683; *Waddle* v. *Cook*, 2 Hill, 47. And as a case of fraud. 1 Story's Eq. § 308, 328; 2 Story's Eq. § 1257; *Hill* v. *Simpson*, 7 Ves. 166. And as a case of trust.

3. There is no plain and adequate remedy at law. 15 Mass. R. 82; 2 Hill, 47; *Phillips* v. *Cook*, 24 Wend. 389.

4. The Court has power to grant the relief prayed for in the bill.

The officer can sell nothing more than the interest of one partner in the surplus, after payment of all the partnership debts, and by doing more he becomes a trespasser *ab initio*. 15 Mass. R. 82; 2 Hill, 47; 4 Johns. C. R. 522; Story on Part. 373; 1 Story's Eq. § 677; *Rice* v. *Austin*, 17 Mass. R. 197; Collyer on Part. B. 3, c. 6, § 10. The other partners have a lien on the whole partnership property for the payment of debts and for a general balance. Story on Part. 135, 374; *Taylor* v. *Field*, 4 Ves. 396; *Hoxie* v. *Carr*, 1 Sumn. 181; *United States* v. *Hack*, 8 Peters, 271; Coll. on Part. B. 2, c. 1, § 1; *Egberts* v. *Wood*, 3 Paige, 517. And each partner has a right to have the property applied to the payment of all the debts of the firm, before either of the partners, or his creditors, can divert any part of it to the payment of individual debts. Story on Part. § 97; Collyer, B. 2, c. 1, § 1, and c. 3, § 5; 2 Story's Eq. § 1253; 4 Ves. 396. And if a

sale of the property has taken place, a court of equity will interfere to stop the funds from being paid over, and will order an account to be taken, and the funds to be paid over to the other partners. Story on Part. 137; 1 Ves. Sen'r, 239; 3 Mason, 232; 2 Swanst. 586; 12 Wend. 131. The Court will sustain such bill for those purposes; and the proper parties as defendants are the debtor partner and officer. Collyer, B. 3, c. 6, § 10; 1 Sim. 371; 24 Wend. 407; Dougl. 650; 1 Madd. Ch. Pr. 131; 2 Johns. C. R. 280; 1 Madd. R. 423; *Allen* v. *Wells*, 22 Pick. 458. The creditors of the partnership have a preference to be paid out of the partnership funds before creditors of an individual member. Story on Part. 135, 381; 1 Story's Eq. § 675; *Com. Bank* v. *Wilkins*, 9 Greenl. 28.

5. On general equity principles we are entitled to relief. 2 Story's Eq. § 1243; 1 Sumn. 181; 4 Johns. C. R. 522; 1 Ves. Sen'r, 239; 2 Fonbl. Eq. B. 2, c. 1, § 1; 3 Mason, 232; 3 M. & Selw. 574; 20 Maine R. 89.

6. The officer is subject to this process. Collyer, B. 3, c. 6, § 10; 1 Sim. 371; Dougl. 650; 24 Wend. 407; 3 Mason, 317; 2 Mason, 192; 16 Ves. 321; 3 Johns. C. R. 555; 4 Paige, 23.

*Kent* replied for the defendants.

The opinion of the Court was drawn up by

Shepley J. — It appears from the allegations in the bill, that the two plaintiffs formed a partnership with William B. Reed, whose stock of goods was purchased by the partnership, and paid for by the partnership notes delivered to him. That certain creditors of W. B. Reed brought suits against him and caused a part of those goods to be attached by the defendant, Johnson, as a deputy of the sheriff. That they obtained judgments, and caused the goods so attached to be sold on the executions issued thereon by the same deputy, who now holds the proceeds in his hands. That the partnership at the time, when these goods were sold, was indebted to nearly the whole amount of its property and credits; and that W. B. Reed had

no interest in them above the amount required to pay the debts of the partnership. The bill does not state, that the goods were seized and sold as partnership goods; on the contrary it alleges in substance that the officer sold the goods as the goods of W. B. Reed, and not his interest therein as a partner. The creditors of the partnership are not parties plaintiff, and do not complain. The judgment creditors of W. B. Reed are made parties defendant, but do not, and may never appear before the Court. W. B. Reed is made a party defendant, and so is the officer, who demurs generally to the bill.

The bill does not seek to have the business of the partnership settled, and its effects applied first to pay its debts. The prayer is, that an account may be taken, and that the defendants may be decreed to pay the full value of the goods attached and the money, for which the same were sold, and all proper damages.

The object sought is in effect simply to obtain a decision, that the goods were owned by the partnership, and not solely by one member of it, and to have their proceeds restored to the partnership without acting in any other manner upon the rights or interests of the partnership, or of its members, or upon those of the creditors of the partnership, or of one or more of its members. And one question presented at the argument upon the demurrer was, whether this Court as a court of equity, has jurisdiction of such a case. It is not enough for the plaintiffs, that the case is within the jurisdiction of courts of equity, having a general jurisdiction. It must be shown to be within the limited jurisdiction of this Court, as conferred by the provisions of the statute, c. 96, § 10.

It is said, that jurisdiction is conferred by the seventh specification of "all cases of partnership." The basis of jurisdiction under that clause is, that the case is a case of partnership. It is not given in all cases, where a partnership or partners may be a party, or interested. Such a construction would permit all cases to be carried into equity, when a partnership was a party, or interested in the suit. This jurisdiction was doubtless conferred to provide a remedy in certain cases

for persons, or the representatives of their interests, who were, or had been partners with other persons, and who on that account had either no remedy, or an imperfect one, by the common law. It is obvious, that such cases would be cases of partnership. And there may therefore be such cases, when the parties to the bill have not been and are not members of a partnership. As where the legal representatives of a deceased partner, seek for a settlement of the affairs of the partnership, or to enforce any rights of the deceased arising out of it. Or where an assignee of one or more members of the partnership does the like. That cannot be a case of partnership, where all the partners allege, that one not a partner, or representing a partner's interest, has taken goods alleged to belong to the partnership, and which such person denies do belong to it. Can such a case be converted into a case of partnership within the meaning of the statute by omitting the name of one of the partners, as plaintiff, and inserting it as defendant? Or to bring the case within the jurisdiction, is it necessary, that the bill should present the rights of creditors of the partnership in such a manner, that their rights may be the subject of direct action before the Court, as well as the whole affairs of the partnership for the like purpose? This case may not require a decision on the point of jurisdiction. For if the bill as presented does not exhibit a case for the interference of a court of equity, it may be disposed of on the demurrer for want of equity. No person complains, but two members of the partnership. Their bill states that the goods attached were "the same purchased as aforesaid, of said Wm. B. Reed." His creditors, existing before that sale, are represented by the officer; and they had a just right to be paid out of that property or its proceeds, unless their debtor had other means of payment. And from the statements made in the bill, there is reason to conclude, that he had not. Under such circumstances he sells that property to himself and two other persons composing a partnership. There are no allegations in the bill, that the plaintiffs are actors in this process to secure his equities. And if there were, he can have none against his creditors

before the sale. The plaintiffs themselves cannot be considered as injured by the sale, for the law permits the interest of their partner to be sold and his right in the goods to be transferred to a purchaser. And if the officer assumed to sell more and the purchasers should be entitled to hold the property as against them, they will have their remedy upon their partner. If that be good, they will have little cause to complain of those who were creditors of that partner before their contract with him. And if that remedy be not good, so far as these goods are concerned, their rights to them arise under the contracts of sale, and partnership, and they stand equitably as purchasing with one, who was indebted to others, the property, from which alone the prior creditors of that one could obtain payment.

If the proceeds of the goods attached should be applied to pay a separate debt of their copartner, it does not appear from any averments in this bill, that the plaintiffs may not be able to protect themselves against any loss occasioned thereby. Those goods are alleged to have been of the value of $2997,13. The bill states that one of the notes passed to their copartner in payment for his stock of goods remained unpaid, "which note has been negotiated by said William B. Reed, and is now in suit by Sylvanus Rich, jr." This note was for $4070,99, and there is no averment, that it was negotiated before it was due, and under such circumstances as to prevent the plaintiffs from making the same defence to it, which they could have made, if the suit had been commenced in the name of their copartner, other than such as might arise from the relation of the parties.

If this be the true aspect of the case, they cannot pretend to have equities superior to those of the prior creditors of their partner. Nor can they claim to have the whole property, or its proceeds, turned over to them as the purchasers for a valuable consideration; for they were not the purchasers of the whole, but of undivided shares of it. And if the partnership creditors do not complain, his share at least, of this property, may be applied to pay his former creditors. There is another consideration, so far as these plaintiffs are concerned, that

should induce a court of equity to pause, lest it be made an instrument to administer the law of partnership in such a manner as to aid fraudulent debtors, who have purchased goods on credit, to make sale of those goods to themselves and others, composing partnerships, to delay or defeat the rights of their creditors, by setting up the new partnership debts as entitled to be first paid out of goods thus purchased. That this is such a case, the Court is not authorized on a demurrer to the bill to conclude. That there is nothing in the bill to exclude the idea, that it may not be such a case, is the ground of caution in the admission of principles, that may lead to such results. The creditors of the partnership may have reposed confidence in it as the owner of such a stock of goods; and may have an equitable claim to be paid even out of these goods in preference to the prior creditors of one of the partners. But the plaintiffs do not profess to represent such creditors. There are no allegations in the bill, that they are acting in their behalf. And it may be, that the creditors of the partnership are otherwise secured, or that they have the means and prefer to obtain payment from other property of these two partners, and to permit this property, formerly owned by one of the partners, to be applied to pay the prior debts of that one. They may feel, that it would be unjust to deprive the creditors of that one of the means of obtaining payment, it may be, out of the very goods purchased of them, and from which purchase their debts accrued. And these plaintiffs are not entitled to present their rights without authority from them. In the case of *Dutton* v. *Morrison*, 17 Ves. 206, the Lord Chancellor says, "that upon an execution against one partner, or a *quasi* execution in bankruptcy, no more of the property, which the individual has, should be carried into the partnership, than that quantum of interest, which he could extract out of the concerns of the partnership, after all the accounts of the partnership were taken, and the effects of the partnership were reduced into a dry mass of property, upon which no person, except the partners themselves, had any claim." It will be perceived, that to ascertain in this manner

the interest, which could be held by a seizure upon an execution against a partner for his separate debt, there must be a sale of all the effects of the partnership, and a collection of all debts due to it, and a payment of all claims against it. And this could not be properly done on such a bill as the present, if it could in any case, without the interposition of the creditors of the partnership, or of some one on their behalf. In the case of *Moody* v. *Payne*, 2 Johns. Ch. R. 548, the bill appears to have been filed by one of the former partners after a dissolution of the partnership, which is alleged to have been insolvent. And the Chancellor dissolved an injunction against a sale of the partnership goods on an execution issued on a judgment for a separate debt of the other partner. Mr. Justice Story expresses the opinion, that "it would seem perfectly proper in cases of this sort to restrain any sale by the sheriff." 1 Eq. Com. § 678. And speaking of the partner, who may be the judgment debtor, he remarks, "if he has no right in such a case to maintain a bill to save his own interest; it furnishes no ground, why the Court, should not interfere in his favor through the equities of the other partners." That there may not be a case presented, where the equity of such a partner would be so great and so apparent, as to induce the Court for his sake to interpose through the other partners, it is not necessary to deny. But that it ought to differ greatly from the case presented by this bill, is quite certain. Mr. Justice Story does not appear to impugn the case of *Moody* v. *Payne*, so far as it denies the right of the party plaintiff to interpose, to prevent the sale as an injury to his own rights. And the cases referred to by Mr. Justice Story in a note to that section, as the true result of the English decisions, do not appear to affirm it. In the case of *Brewster* v. *Hammet*, 4 Conn. R. 540, speaking of the rights of a separate creditor of a member of an insolvent partnership, Hosmer C. J. says, "if the creditor take the property, he assumes a liability to the equitable demands of the creditors of the firm upon him; and their interest will be better promoted by leaving them to the redress, to which they have a claim, than by placing the fund in the

possession of their insolvent debtors." The bill does not in this case state, that the partnership is insolvent, but it states it to be so nearly in that condition, that it may be quite as safe to leave the fund in the hands of others until the partnership creditors choose to interpose. In the case of *McDonald* v. *Beach*, 2 Blackf. 58, the opinion says, "it is contended, that the separate debt of one partner should not be paid out of the partnership estate, until all the debts of the firm are discharged. This doctrine is correct; but it does not apply until the partners cease to have a legal right to dispose of the property, as they please. It is applicable only, when the principles of equity are brought to interfere in the distribution of the partnership property among the creditors." This position is quoted with approbation in the case of *Phillips* v. *Cook*, 24 Wend. 399. In which case the opinion, after having noticed many decided cases, says, "it follows, if there be no creditors, no claim of surplus, or if the partners be insolvent, even a court of chancery will withhold its aid." When, as in this case, the creditors of the firm do not appear, if the Court can recognize their existence at all, it must consider them as preferring not to interpose their claims through the present plaintiffs. If the officer were required to answer, he must, having no personal knowledge of the facts, and representing the rights of others, deny the allegations made in the bill. And it would become necessary to ascertain by some mode of liquidation of the affairs of the partnership, that the partner made respondent could have no interest in the partnership fund on a final adjustment. To make this certain, the amount due to and from the partnership must be determined by a collection and payment of its debts. And the stock in trade and all other property must be converted into ready money by a sale. Such a liquidation and settlement of the whole affairs of the partnership is not one of the objects of this bill, nor are there the proper averments or parties in this bill to enable the Court to accomplish such a purpose.

The demurrer of the officer is sustained, and the bill, as to him, is dismissed with costs.

WILLIAM NEAL *versus* ISRAEL WASHBURN, Jr.

To render the indorser of a writ liable for costs recovered, the inability or avoidance of the original plaintiff should be shown by an officer's return thereof on an execution for costs, issued within one year from the time the judgment was rendered.

*Wilson,* for the plaintiff.

*Washburn, pro se,* cited *Ruggles* v. *Ives,* 6 Mass. R. 494, and *Wilson* v. *Chase,* 20 Maine R. 385.

The opinion of the Court was by

SHEPLEY J. — This is a writ of *scire facias* against the defendant as indorser of a writ in favor of R. M. N. Smyth and others against the plaintiff, who recovered a judgment against them for costs, on July 3, 1840. Execution issued thereon September 20, 1840, but it does not appear to have been in the hands of an officer for service. It was returned in no part satisfied, and an alias execution issued on August 3, 1841, on which Smyth was arrested on October 1, 1841; and released upon giving a bond according to the provisions of the statute.

It has been decided, that the party must be considered as guilty of laches, if he does not show, that the return of the officer, upon which he would rely to charge an indorser of a writ, was duly made upon an execution issued within one year after judgment. *Wilson* v. *Chase,* 20 Maine R. 385. The plaintiff in this case fails to establish that fact, and the indorser is discharged.

*Exceptions overruled.*

BENJAMIN G. CAMPBELL *& al. versus* DANIEL L. KNIGHTS.

As the mortgagor in possession is seized as to all persons but the mortgagee, his widow is entitled to be endowed of the equity of redemption; and an assignment of her dower will be valid and effectual against all persons excepting the mortgagee and those claiming under him.

The law will not permit one who has by deed admitted a matter to be true, to allege it to be false; but the estoppel cannot be extended beyond the exact terms of the admission.

When the equity of redemption is purchased by the mortgagee, the general rule is, that the mortgage may be considered as still subsisting, when it is for his interest that it should be, to protect himself against any other charge or incumbrance upon the estate; but whenever it would be inequitable, or contrary to the clear intention of the parties, or conducive to fraud, the mortgage is regarded as extinguished.

IN this case, after the evidence was before the jury, the defendant consented to be defaulted, which default was to be taken off, if upon a report of the evidence the action could not be maintained.

The facts proved are concisely stated at the commencement of the opinion of the Court.

*Hathaway*, for the defendant, contended, that the widow is dowable of an equity of redemption, of which her husband died seized, against all but the mortgagee, or his assignee. *Walker* v. *Griswold*, 6 Pick. 416; *Eaton* v. *Simonds*, 14 Pick. 98.

When the demandants purchased, the value of the widow's dower was deducted from the price of the estate; and the demandants, by taking a deed from the administrator with a reservation of the widow's dower, as assigned, are estopped to deny both that the widow was entitled to dower in the premises, and that it had been lawfully assigned.

When the demandants purchased and became the owners of the equity of redemption, subject to the widow's dower, the mortgage thereby became merged and extinguished. 12 Mass. R. 465; 3 Metc. 55; 13 Mass. R. 227; 13 Mass. R. 525; 15 Mass. R. 278; *Freeman* v. *Paul*, 3 Greenl. 260.

The Court will not permit a mortgage to be upheld in the

hands of the owner of the equity, to be used as an engine of fraud and oppression. *Dana* v. *Coombs*, 6 Greenl. 90.

*Kent & Cutting*, for the demandants, said, that under the circumstances of this case, the widow was not entitled to dower against the demandants, the mortgagees. 4 Mass. R. 566; 9 Mass. R. 9; 4 Mass. R. 121; 11 Mass. R. 507. The assignment of dower by the probate court was entirely void.

The demandants are not estopped from claiming their rights by any thing contained in the deed from the administrator to them. This is a simple reservation, and not a recital, and the assignment being void, has no effect whatever. It is the language of the administrator, and not of the demandants. And the widow is not a party, nor a privy to this deed. 10 Johns. R. 230; *Braintree* v. *Hingham*, 17 Mass. R. 432; *Worcester* v. *Green*, 2 Pick. 425; *Housatonic Bank* v. *Martin*, 1 Metc. 294.

If the widow had been entitled to dower in the equity of redemption, it would have furnished no defence to this action. She should in such case have redeemed the mortgage, and then have had her dower assigned. A right to dower, before a legal assignment thereof, is no defence in an action against the widow. *Sheafe* v. *O'Neil*, 9 Mass. R. 13.

The purchase of the equity of redemption by the mortgagee is no extinguishment of the mortgage, unless it is for his interest that it should be. This is well settled. But if an extinguishment took place, the tenant can have no defence to this action, as her dower has not been assigned since the merger.

The opinion of the Court was drawn up by

Shepley J. — The demandants conveyed the premises, on April 10, 1833, to Samuel Moore, who on the same day reconveyed them in mortgage. The wife of the tenant was then the wife of Moore. She did not become a party to that conveyance and relinquish her right of dower. After the decease of her former husband her dower in the premises was assigned to her by the court of probate, on October 20, 1834. The right in equity of the deceased, was sold by his administrator, on De-

cember 1, 1834, and the demandants became the purchasers, and received a conveyance containing a reservation in these words, "reserving from this conveyance the widow's dower, which has been assigned and set out heretofore." The question presented is, whether the demandants are entitled to recover that portion of the estate, which was thus assigned, and reserved as the widow's dower. If the mortgage had been foreclosed, the husband could not have been considered as seized so as to entitle his widow to be endowed. But the mortgage does not appear to have been foreclosed; nor does it appear, that any entry was made by the mortgagee for that purpose. It is now the settled doctrine, that the mortgagor in possession is seized as to all persons except the mortgagee, and that his widow is entitled to be endowed of the equity of redemption. The assignment of dower was therefore a valid assignment and must be effectual against all persons except the mortgagees and those claiming under them. *Wilkins* v. *French*, 2 App. 111.

It is contended, that the demandants by accepting a conveyance of the right in equity, containing such a reservation, are estopped to deny, that the widow was entitled to dower as against themselves, and that it had been properly assigned to her. The law will not permit one, who has in a solemn manner admitted a matter to be true, to allege it to be false; but the admission cannot be extended beyond its exact terms. Estoppels are mutual, and the demandants cannot be permitted to deny the facts stated in that clause of the deed. They are, that the widow's dower had been assigned and set out to her in the premises, and that it was reserved by the administrator and not conveyed to them. They have not admitted, as it respects themselves as mortgagees, that her husband died seized, or that she was entitled to dower in the premises. They cannot be precluded from establishing a title, which may be good and not inconsistent with their admissions. *Right* v. *Bucknell*, 2 B. & Ad. 278. If their mortgage be therefore, an outstanding and subsisting mortgage upon the estate, they will be entitled to recover, and the widow must redeem it to be

restored to her dower. But if by the union of the two titles in the demandants, the incumbrance on the estate was extinguished, they will not be entitled to recover. The general rule is, that the mortgage may be considered as still subsisting, when it is for the interest of the party that it should be, to protect himself against any other charge or incumbrance upon the estate. When however it would be inequitable, or contrary to the clear intention of the parties, or conducive to fraud, the mortgage is regarded as extinguished.

In this case, as the sale of the equity was made by an administrator, it must be presumed, that he conducted legally, and that he advertised and sold the estate subject to the widow's right of dower in the premises. If others than the mortgagees had purchased, they must have paid off the mortgage to have relieved the estate, and they would then have obtained all, which they purchased, without obtaining an assignment of the mortgage and claiming a contribution from the widow.

The demandants purchased the equity subject to the widow's dower in the estate, and they cannot be considered as equitably entitled to stand in a more favorable position, than other purchasers would have done. It was obviously the intention of the parties at the time of the sale and conveyance, that the widow should be considered as fully entitled to her dower, as it had been assigned; and to consider the mortgage as subsisting for the purpose of defeating that dower would be alike inequitable and contrary to the intentions of the parties. At law the mortgage would be considered as merged. *Eaton* v. *Simonds*, 14 Pick. 104. And there is no equitable ground, on which it can be considered in this case as upheld. The default is to be taken off and a new trial granted.

JOHN BALLARD *versus* THE INHABITANTS OF GREENBUSH.
SAME *versus* SAME.

A bill of exchange, promissory note, or order, made payable to a particular person, which has been paid by one whose duty it was to make the payment, without any right to call upon another party to repay the amount, is no longer a valid contract. It has performed its office, and ceases to have a legal existence.

But this rule does not apply to a bank note, which is not a contract with any particular person, but with any one who may become the bearer or holder of it.

It is only when an assignee has acquired a title through the promisee, that he can insist upon the right to maintain an action in the name of the payee of a paper not negotiable.

Two actions were brought against the town of Greenbush, in the name of John Ballard on town orders, one for the benefit of R. Hutchinson, and the other for the benefit of A. Lang. The orders were of a similar character, and the same principles were involved in the decision in each case. They were therefore treated by the Court as but one.

To support the action, the plaintiff, in one case, read to the jury a town order of which the following is a copy: —

"To Henry Campbell, treasurer of the town of Greenbush, or his successor in that office. Please pay Mr. John Ballard thirty-nine dollars, it being for boarding Mrs. Butler. Greenbush, Sept. 11, 1837.

"Edward Oakes, } Selectmen of
"M. R. Comstock, } Greenbush."

The plaintiff then proved a demand of payment, and refusal.

The defendants then introduced a paper of which a copy follows: — "I, John Ballard of Greenbush, certify, that the two suits in my name in the District Court at Bangor, against the town of Greenbush, were brought without my knowledge; that the orders on which said suits were brought were paid by the town of Greenbush to me, while they were in my possession, and that they are not due to me or to any other person; and that I delivered them into the treasurer's office in said

Greenbush after they had been so paid; and that I direct that said suits be dismissed. May 25, 1842. John Ballard."

The plaintiff then proved, that the order had been again, after having been paid to Ballard, delivered over to another person by direction of the selectmen, in payment of a claim against the town, and came into the hands of the plaintiff in interest for value; and that this suit was instituted by him in the name of Ballard for his own benefit. The facts appear in the opinion.

WHITMAN C. J. presiding at the trial, ruled, that if the testimony was believed, the action could not be maintained; and so instructed the jury. The plaintiff filed exceptions.

*Blake* argued for the plaintiff; and

*A. G. Jewett*, for the defendants.

The opinion of the Court was by

SHEPLEY J. — These suits are upon town orders drawn by the selectmen on the treasurer of the town of Greenbush, and payable to the plaintiff. The defendants introduced a memorandum in writing, subscribed by the plaintiff on May 25, 1842, by which he admits, that payment was made to him, while the orders were in his possession, and directs the suit to be discontinued.

Richard Hutchinson, claiming to be the party plaintiff in interest in the suit upon the order made on November 7, 1836, proved, that it was received from the town treasurer, on May 12, 1840, in part satisfaction of an execution in his favor against the town, by an officer, to whom it had been committed for collection. He also proposed to prove by the treasurer, that the order having been paid, he took it from its place of deposit, by direction of the selectmen, and delivered it to the officer in part satisfaction of that execution. The town order was not made payable to the order of the plaintiff, but his name was indorsed upon it in blank.

A bill of exchange, promissory note, or order, made payable to a particular person, which has been paid by one, whose

duty it was to make the payment, without any right to call upon another party to repay the amount, is no longer a valid contract. It has performed its office, and ceased to have a legal existence. *Beck* v. *Robley*, 1 H. Black. 89, note (a); *Mead* v. *Small*, 2 Greenl. 207; *Bryant* v. *Ritterbush*, 2 N. H. R. 212; *Havens* v. *Huntington*, 1 Cow. 387. This rule does not apply to a bank note, which is not a contract with any particular person, but with any one, who may become the bearer or holder of it.

Alexander Lang, who claims to be the party plaintiff in interest in the suit on the order made on September 11, 1837, proved, that this order with others was received from the town treasurer, on May 27, 1840, in payment of executions in his favor against H. Carney, and against Comstock and others. He also offered to prove by the treasurer, that he purchased the order of H. Cargill, deceased, a few days before it was delivered to the attorney of Lang, and that he having been treasurer till the year 1839, had not paid it, and had no knowledge that it had been paid. This testimony, had it been received, would not have been necessarily in conflict with the statement of the plaintiff, who might have received payment of the order during the years 1839 or 1840, before it came to the possession of Cargill. There was no testimony introduced or offered tending to prove, that Lang, or any other person, acquired title to the order through the plaintiff, who was the payee, by delivery or otherwise. And it is only in such cases, that the assignee can insist upon the right to maintain the action in the name of the payee of paper not negotiable.

*Exceptions overruled.*

## Hiram Hunt *versus* Elias Haskell.

Where a common carrier by sea engages to deliver goods at a place named for a stipulated sum as freight, and the owner is willing to receive his goods before they arrive at the place appointed in the bill of lading, and does receive a part of them, the carrier is entitled to a *pro rata* freight.

A common carrier by sea has by the law merchant a lien on goods carried by him for the payment of their freight; but he has no right to cause a sale to be made thereof, of his own mere motion, for the payment of the freight.

Where goods are illegally sold for the discharge of a lien for the freight thereof, and the owner afterwards obtains the possession of them through one who had made the purchase, he is entitled to recover of the seller, in an action of trover, not the value of the goods sold, but merely whatever damages and loss he sustained in regaining possession of his goods, over and above what was fairly due to the defendant.

Trover for twenty-five boxes containing one hundred and fifty clocks.

This case was opened to the jury, and taken from them by consent of parties, after the evidence was out, and submitted upon the evidence to the decision of the Court. If the action was not maintainable, the plaintiff was to become nonsuit; and if it was, the defendant was to be defaulted, and the damages were to be assessed by the Court upon principles of law.

The facts shown by the evidence appear in the opinion of the Court. The bill of lading referred to was dated Dec. 4, 1841, and recited that there were "shipped in good order and condition by G. H. Chapin, on board the good schooner called the Mirror, whereof Elias Haskell is master for this present voyage, now lying in the port of Boston and bound for Bangor;" the clocks in question and other articles, "to be delivered in like good order and condition at the aforesaid port of Bangor, the danger of the seas only excepted, unto H. Hunt or to assigns, he or they paying freight for said goods at 8 cents per foot and Boston wharfage, without primage or average, and expenses, sixty-seven dollars." This was signed by the defendant.

*Rowe*, for the plaintiff, said that the bill of lading shew, that the goods belonged to the plaintiff, and that the defendant

engaged to deliver the same at Bangor. The case shows, that the articles were not delivered at Bangor, but sold at Frankfort by the defendant. To constitute a defence, he must show, that the freight was due, and that the law gave him the right, by his own authority, to sell the plaintiff's goods at auction for the payment of the freight.

The freight has never been earned, as the goods were never delivered at the place appointed, and no cause appearing to prevent it. If the defendant was under the necessity of carrying them a few miles upon the ice, it was no more than he should have expected, when he made the contract. He is not entitled to have freight *pro rata itineris.* 7 T. R. 381; 10 East, 378 and 526; 2 Campb. 466; 1 Dodson, 217; 1 Peters Adm. R. 123; 9 Johns. R. 186; 6 Cowen, 504; 3 Binn. 437; 7 Cranch, 388; 12 Wheat. 383; 5 Mass. R. 252; 6 Mass. R. 422; 3 Pick. 20.

But if the defendant was entitled to freight, he has no right to sell the property for the payment thereof.

The true measure of damages, it is believed, is the value of the property at the time of the conversion. But if this be not correct, then the plaintiff should be fully compensated for his expenses and trouble in obtaining his goods. *Greenfield Bank* v. *Leavitt*, 17 Pick. 1.

*Hobbs*, for the defendant, contended that the defendant had a lien upon the property for the payment of the freight as a common carrier; and a lien, also, as factor or agent of the plaintiff, for the amount paid for him at Boston. Story's Ag. § 373, 382; Jeremy's Law of Carriers, 74. The defendant therefore should be regarded both as a common carrier, and as a factor or agent.

The defendant had the power to make the sale as a common carrier. The lien clearly exists, and this is not contested. The one adopted by the defendant is the only mode of making the lien of any value, the equity powers of this Court not extending to a case like this, unless, perhaps, going into the admiralty court of the United States, an inconvenient and expensive remedy at best. To deny this right of sale, would be virtually

a denial of any benefit from an acknowledged lien. The necessity of the case is sufficient to sanction this course. *Chandler* v. *Belden*, 18 Johns. R. 157.

He has a power to sell as factor or agent. 14 Peters, 479; 2 Kent, 642.

The defendant is entitled to freight on the goods *pro rata itineris*, for several reasons. The goods were to be carried in a vessel by water to Bangor; and if the plaintiff does not choose to accept the articles at Frankfort, the defendant had until spring to deliver the goods; the plaintiff accepted and received a part of the goods at Frankfort; and the tender made by the plaintiff was an admission of an existing debt, and so a waiver of delivery at Bangor.

If the plaintiff is entitled to damages, the amount should be merely the loss actually sustained. He has received all his goods, and ought not to recover of the defendant, in any view of the case, but the five dollars he paid to his agent who bid them off for him, and the auctioneer's fees. Esp. N. P. 567; 2 Saund. Pl. & Ev. 420.

The opinion of the Court was prepared by

WHITMAN C. J. — The defence, as exhibited, cannot be sustained. The defendant was a packet master; and, as such, undertook to bring, for the plaintiff, certain boxes of merchandize, of which those named in the declaration were a part, in his packet, from Boston to Bangor; and in January, 1842, arrived with them at Frankfort, which, owing to the ice in Penobscot river, was as near as he could convey them, in his vessel, to the port of destination; and there landed them, and demanded his freight, and advances, which he had made on account of them in Boston. The plaintiff, thinking he demanded too much, tendered what he admitted to be due; and demanded his goods. The defendant refused to receive the amount so tendered, and caused the quantity sued for to be sold at auction for the amount claimed by him, and the expenses of sale. The plaintiff thereupon instituted this action of trover to recover the value thereof.

It is very clear that the defendant had no right to cause the sale to be made of his own mere motion, and without the intervention of legal process for the purpose. The law merchant recognizes no such right on the part of carriers by sea, under a common bill of lading, such as the defendant had signed in this instance. If the plaintiff was willing to receive his goods at Frankfort, which by his tender and demand of them there, it seems he was, the defendant might well insist on a *pro rata* freight, and on detaining the goods until it was paid; but a simple detention only, in the first instance, was all that could be insisted on.

It is urged, that the defendant was without a convenient remedy, unless the course he pursued can be sanctioned; that the Courts of this State, having no jurisdiction in equity in such cases, the only resort, if the defendant could not sell as he did in this case, must be to the United States Court of admiralty, which would be extremely inconvenient; and, therefore, that it is highly proper to uphold the proceeding adopted by the defendant. But it is not for Courts to alter an established law. It is the duty of Courts, as has often been remarked, to expound and apply the law, as it may be found established and not to legislate.

But it appears that the plaintiff attended the auction, and, through the intervention of a friend, regained possession of his goods, by paying the auction price, and five dollars more to his friend; and it is not shown that, when so received, they were not in good order. This must be allowed to go in diminution of the damages, which the plaintiff would otherwise be entitled to recover. Whatever damages he sustained, over and above what was fairly due to the defendant, in regaining possession of his goods, he is entitled to have allowed him. The five dollars paid to his friend for bidding off the goods; five dollars and thirty-one cents for auctioneer's fees; five dollars for his own time in endeavoring to regain possession of his goods, and six dollars, being the difference between the freight demanded, and the amount tendered, with interest on these sums, making twenty-two dollars and fifty cents, the plaintiff must have judg-

ment for. *Murray* v. *Burling*, 10 Johns. R. 172; *Bank* v. *Leavitt*, 17 Pick. 1.

He cannot have judgment for the value of the goods; for he was never divested of his property in them. Neither the acts of the defendant, nor the sale at auction, nor being in market overt, there being none such in this country, as there is in England, could effect a change in the right of property. The plaintiff, if his tender was sufficient, might have maintained an action of replevin for his goods, against the defendant, or against a purchaser at the auction sale, as well as trover against the defendant; and the latter action is maintainable only upon the ground, that the defendant had done, in reference to the goods, what was unauthorized by law.

*Defendant defaulted for* $22,50.

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ANDREW SCOTT *versus* WILLIAM D. WILLIAMSON.

The possession of an indorsed promissory note is *prima facie* evidence that it is the property of the holder; but although the legal property may pass to the holder, it is competent to show by parol testimony, that such note was held in trust, to be accounted for in a particular manner.

Where certain notes, payable to the plaintiff, had been indorsed and delivered to the defendant, to be by him appropriated, when collected, in part payment of notes of a much greater amount held by the defendant against the plaintiff, secured by a mortgage of land; and, afterwards, a settlement was made between the parties, wherein these notes were not accounted for by the defendant, he stating that he had never received payment therefor, and he covenanting, on such settlement, that he would not collect any further sum on his notes against the plaintiff, unless disturbed in the quiet enjoyment of the mortgaged estate; *it was held*, that the plaintiff might recover of the defendant, in an action for money had and received, the amount of the notes thus indorsed and delivered to the defendant, on proof that he had received payment thereof before the settlement.

ASSUMPSIT for $1000, money had and received. Specification, $472,92, and interest since Sept. 26, 1837. Writ dated Dec. 15, 1841. To prove the receipt of the money, the plaintiff introduced the deposition of Thomas P. Drowne, who testified that he was cashier of the People's Bank at Bangor,

from July, 1835, to April, 1838; that he kept the books of the bank all that time; that all the entries in said books, (and particularly all relating to the defendant's business at the bank) in his handwriting are true records of actual transactions, made at the time of their occurrence; and that he left the books in the possession of T. S. Dodd.

The plaintiff then called said Dodd, who brought with him said books, and testified that all the entries hereinafter referred to were in the handwriting of said Drowne. He then read and exhibited, in the books containing the records of notes deposited, the entries of which the paper hereunto annexed, marked A is a true copy; and in the journal, under date of Sept. 26, 1837, a credit to the defendant of $472,92, being amount received on these four notes, which were described, and the amount received on each specified, as in paper A; and in the leger the defendant's account with the bank, which showed the sum of $472,92, credited to the defendant, under date of Sept. 26, 1837, and the money drawn out and the account balanced and settled. He testified that he had been cashier of the bank since Drowne, and that the defendant had been a director. All the foregoing evidence was admitted, subject to objections. To prove that the money was received to his use, the plaintiff read articles of agreement executed by these parties, July 5, 1841, which contained a recital of a purchase by the plaintiff, N. Hatch and others, in 1835, of a tract of land of the defendant, for which the purchasers gave their notes to the amount of $16,000 in part payment, secured by a mortgage, and a settlement of all matters growing out of said purchase, and a release to the signers of said notes of all liability thereon; to which instrument was attached a memorandum of the notes as they stood at its date. And called said Hatch, who testified that, in July, 1841, prior to the execution of said agreement, he and the plaintiff had a conversation with the defendant for the purpose of effecting such settlement; that the amount paid to the defendant was then gone into, the indorsements on the notes of said purchasers, were examined, that the defendant then stated, that he had indorsed on those notes all

moneys collected on any notes delivered him by the plaintiff; that at that time, it was supposed that the notes described in paper A had not been collected, and the settlement was made on that supposition; that after the settlement, the plaintiff made search for these notes, and subsequently he and the witness had another interview with the defendant; that at this second interview, the plaintiff exhibited a memorandum of the notes described in paper A, which memorandum the witness held in his hand when testifying, and asked the defendant if he had collected them; the defendant said it was not possible that he had received them; that he had indorsed all that he had received on the notes, and referred to in said agreement; he read the indorsements on those notes, and the plaintiff made the memorandum of them, annexed to said agreement, which was compared by the witness and found to be correct; and that said indorsements did not include the money in controversy.

On cross-examination this witness stated that he is the brother-in-law of the plaintiff; that he and the other purchasers from the defendant had conveyed their respective shares of said land, as matter of convenience to the plaintiff; that the notes described in paper A were received for land purchased by the same company of one Wyatt, and sold in Boston in 1835, which sale, according to his impression, was prior to the defendant's deed; that he did not see Scott make his first payment to the defendant, but the payment was in money or short paper, and he did know that the whole amount of the first payment, $4,000, was paid to the defendant's satisfaction; that the plaintiff did not turn out these notes for his first payment; that the defendant said he had indorsed on notes referred to in said settlement all that he had collected; that all the notes he had received of the plaintiff had been disposed of according to his agreement with him; and after the settlement, said, if the plaintiff would show that he had collected the notes in paper A, he would then indorse the amount; and that the notes referred to in said articles of agreement had not been paid and were worthless. On direct

examination, the witness stated, that the defendant did not pretend that the notes in paper A were received as part of the first payment, but said that all moneys received by him for any notes had been disposed of according to agreement, and indorsed on said purchaser's notes; and that the plaintiff had accounted to his associates for their respective shares of the notes mentioned in paper A. The defendant introduced the notes referred to in said settlement and his mortgage.

On this evidence the defendant consented that a default should be entered which was to be taken off and a nonsuit entered, if on this evidence the action is not maintainable; and if the default stands, judgment was to be rendered for such sum as the plaintiff is entitled to recover. All papers used in the case, and said bank books, were to be referred to by either party.

It appeared from the copy of the bank books marked A, that the four notes, mentioned by the witness, Dodd, had been paid to the defendant as stated by the witness; and that those notes were given by different persons to the plaintiff, of which two had been indorsed by him, and two were without indorsement.

*J. Appleton*, for the defendant, read a written argument, wherein were cited 1 Dane, 386, § 1; 3 Mass. R. 225; 7 Mass. R. 481; Phill. Ev. 118, 119; 1 East, 246; 3 Dane, 186, art. 4, § 1; 4 East, 137; Phill. Ev. 113; Gilb. Ev. 142; 3 Dane, 503, § 2 and 5; 1 Dane, 624, art. 5, § 1; 17 Pick. 182, 500; 16 Pick. 227; 8 Mass. R. 163; 7 T. R. 378; 5 Dane, 469, § 18; 6 T. R. 57; 2 Dane, 71, § 7; 2 Dane, 53, § 2, 5; 17 Mass. R. 396; 7 Pick. 244; 11 Mass. R. 27; 17 Pick. 303; 17 Mass. R. 581; 11 Mass. R. 10; 6 Pick. 206, 432.

*Rowe*, for the plaintiff, referred the Court to 15 Mass. R. 380; 3 Pick. 96; 13 Pick. 465; 18 Pick. 558; 20 Pick. 339.

The opinion of the Court was drawn up by

Shepley J. — The plaintiff claims to recover from the defendant the sum of $472,92, received by him on certain

notes named in paper A, and not accounted for in a settlement made between the parties on July 5, 1841. The testimony introduced from the books of the People's Bank and from those in its employ, leaves no doubt, that the defendant received that amount on those notes. The argument for the defendant denies, that the testimony in the case proves, that the plaintiff was the owner of those notes, or that he has exhibited any equitable title to the amount received. Two of those notes appear to have been indorsed by the plaintiff, and with the other two not indorsed, to have been delivered to the defendant, who would thereby apparently become the legal owner of them. If the legal property passed absolutely to the defendant, he might hold them in trust to account to the plaintiff for the amount received upon them, by indorsing it on notes, which he held against him. And according to the testimony of Hatch, they were thus holden by the defendant. Hatch says, that the defendant stated during a conversation before the settlement, "that he had indorsed on those notes all moneys collected on any notes delivered him by the plaintiff; that at that time it was supposed, that the notes described in paper A, had not been collected; and the settlement was made on that supposition." And that the defendant stated in another conversation, after the settlement, that "if the plaintiff would show, that he had collected the notes in paper A, he would then indorse the amount." It is also insisted, that these notes might have been received in the first payment made by the plaintiff for the lands purchased, or that the amount received on them might have been accounted for in the indorsements made on the other notes, due to the defendant from the plaintiff. But the testimony of Hatch shows, that neither the notes, nor the money, could have been so appropriated. He says, "the plaintiff, did not turn out these notes for his first payment," and "that the defendant did not pretend, that the notes in paper A, were received as part of first payment." He also says, "said indorsements did not include the money in controversy." By the settlement made on July 5, 1841, the defendant was entitled to retain all the money

collected on his notes against the plaintiff; and it is insisted, that if this money were collected on notes deposited as collateral security therefor, it must be considered as paid upon them as soon as collected. Such would be the presumption of law, but the testimony proves the fact to have been otherwise; that the defendant denied, that the notes had been collected; and that the settlement was made upon the belief, that they had not been. It is further insisted, that the plaintiff cannot recover the amount received of the defendant, who holds notes against him to a much larger amount. Those notes have not been filed in set-off; and there does not appear to be any equitable right on his part to retain this money in part payment of them, because he has covenanted not to collect any further sum upon them, unless disturbed in the quiet enjoyment of the lands, for which they were given. It may be, that if the defendant had recollected, that this money had been received, he would not have settled with the plaintiff without retaining it. But it appears, that he did in fact settle upon the belief, that it had not been collected and received; and that settlement under seal must be considered as made for a valuable consideration. If the plaintiff should recover this money, the defendant will be left in as favorable a condition by that settlement, as he expected to be. Will have received as large payments towards that purchase, as he believed that he had, or as he claimed to receive on the settlement. Hatch does not appear to have been interested in the event of this suit. The plaintiff had before accounted with him for his interest in those notes. Nor is his testimony liable to the objection, that it contradicts, varies, or explains, the settlement made in writing between the parties. That does not appear to have related to the disposition of this money, or to the notes, on which it was received.

The defendant must be considered as collecting the money for the plaintiff; and he is not therefore chargeable with interest until called upon to pay it over.

*Judgment on default.*

GORHAM DAVIS *versus* SCHOOL DISTRICT NO. 2, IN BRADFORD.

A school district cannot be considered as promising to pay for unauthorized repairs upon their school house by using it afterwards.

A vote of a school district "to authorize the agent to lay out ten per cent. of the school money belonging to the district this year, and ten per cent. of the next year's school money, or as near as may be, in repairing the school house in said district," does not authorize the agent to expend on account of the district a greater sum than the amount of the ten per cent. for those two years, although it might require more to put the house in good repair.

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

Assumpsit for labor and materials expended by the plaintiff in repairing the school house in District No. 2, in Bradford. The materials and labor were necessary to render the school house fit to keep the school in, then about to commence. Prior to incurring the expenses, a meeting of the school district was held on Oct. 27, 1838. One article in the warrant was, "To see what repairs shall be made on said school house, and when it shall be done." At this meeting the district "voted to authorize the district agent to lay out ten per cent. of the school money belonging to the district this year, and ten per cent. of the next year's school money, or as near as may be, in repairing the school house in said district." The district meeting was legal, and Davis, the plaintiff, was the district school agent. The plaintiff expended, in necessary repairs, $32,60. Ten per cent. on the school money of the district for the two years mentioned in the vote, amount to $15,92, and this last sum was paid by the district to the plaintiff. The repairs were made immediately before the school commenced.

The district Judge ruled, that the action could not be maintained; and a nonsuit was entered, and the plaintiff filed exceptions.

*Blake* argued for the plaintiff; — and

*M' Crillis*, for the defendants.

The opinion of the Court was by

TENNEY J. — By a vote of the district, passed Oct. 27, 1838,

the plaintiff, as agent, was "authorized to lay out ten per cent. of the school money belonging to the district this year, and ten per cent. of next year's school money, or as near as may be, in repairing the school house in said district." The plaintiff expended in the repairs, which the case finds to have been necessary to fit the school house for the school, that was then about to commence, the sum of $32,60, and received the sum of $15,92, which was the full amount of ten per cent. of the money appropriated to the district for the two years; this action is for the recovery of the balance.

By the statute of 1834, c. 129, § 8, inhabitants of school districts are empowered to raise money for the purpose of erecting and repairing school houses. By section 14, the agents of any school district are authorized to expend annually out of the money raised for the support and maintenance of schools therein, a sum not exceeding ten per cent. of the money assigned as the share of said district, for incidental repairs of the school house, out buildings and necessary utensils for the same.

It is manifest from the vote of the district, that they did not intend to make repairs, requiring them to raise money for the purpose, but to confine themselves to the sum in making the repairs at one time, which the agents of two successive years could make at two distinct times. Nothing is said in the vote, that "the necessary repairs" were to be made. The words, "or as near as may be," gave the agent no power to expend a sum, which he might think necessary, for this would take away the entire meaning of the language limiting the expenditure. The whole vote, when taken together, confined the repairs, so that a greater sum than the ten per cent. for the two years could not be laid out, but did not require that the agent should go to the utmost extent of the power, if it would be attended with inconvenience, and produce no benefit to the district.

If the agent is required to provide a suitable place for the school, the statute gives him no authority to build a school house at the expense of the district, or to make repairs, other than those mentioned in the act.

It is insisted, that the district by using the house after the

repairs were made, adopted them, which implies a promise to pay therefor. If the case found, that the house was so used, such a promise cannot be implied against the plain intention of the district as shown by their vote. A district cannot be considered as promising to pay for unauthorized repairs upon their school house by using it afterwards. The principle contended for by the plaintiff would oblige one to pay for repairs made upon his buildings without his request or wishes, or to abandon them entirely.

*Exceptions overruled.*

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JOHN LEATHERS *versus* JOSHUA W. CARR.

Where the plaintiff sets out specially the circumstances of his case in an action of trespass, it may, under the provisions of the st. 1835, c. 178, be regarded as an action of trespass or of the case.

When mutual accounts exist, the balance only can be protected for the benefit of an assignee of one of the parties.

If an officer has cross executions put into his hands, wherein the creditor in one is debtor in the other, and he is requested to set off one against the other, he must make the set-off, if the law allows it, or he will render himself liable.

But if there be reasonable apprehension of danger in proceeding to act, the officer may require an indemnity from the consequences attendant upon making such set-off.

TRESPASS against the late sheriff of this county for the acts of one of his deputies.

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

*J. Appleton*, for the defendant.

*J. Crosby*, for the plaintiff, cited st. 1835, c. 178, § 1, respecting trespass and case; *Bradley* v. *Davis*, 14 Maine R. 44; 6 Bac. Abr. 561.

The opinion of the Court was drawn up by

WHITMAN C. J. — This is an action of trespass, against the defendant as sheriff of this county, for the default of one of

his deputies in not setting off an execution in favor of the plaintiff, against one Clark, in satisfaction of one, which Clark had obtained against him, then in the hands of the deputy. For this injury it is contended that trespass does not lie. The plaintiff, however, has set out the circumstances of his case specially; and our statute has provided, that an action of trespass may be treated as an action of the case and *vice versa.* The special circumstances being set out, therefore, the action may be regarded as of the case, and it becomes unnecessary to determine whether trespass would lie or not.

It is objected, in behalf of the deputy, that the execution in favor of Clark had been assigned to a third person; but it appears that both of the demands had existed between the parties long anterior to the assignment. In such case one demand could not be so assigned as to affect the right of set-off on the part of the creditor in the other. This is an equitable right which the law protects, and will enforce.

It is next objected, that officers cannot be expected to know, when a demand appears to have been assigned, that it is not good against the claim of the debtor to have his cross demand set off against it. It may be that officers may find themselves in some degree of perplexity, occasionally, in reference to the rights of the parties in such cases; but when they do, if their apprehensions of danger from proceeding, shall appear to be reasonable, security may be required to indemnify them from the consequences of their proceeding to act; and if they shall refuse to act upon being so indemnified they must do it at their peril; and so also if they refuse to act without giving notice of such reasonable apprehension of danger to the injury of the creditor. According to the agreement of the parties the defendant must be defaulted.

SAMUEL M. OLIVER *versus* SAMUEL H. BLAKE *& al.*

The liability of an indorser of a writ is incurred at the time the indorsement is made.

If such liability be incurred before the Revised Statutes went into operation, although the writ against the indorser may be sued out afterwards, the provisions of the eighteenth section of chapter one hundred and fourteen of those statutes do not apply.

Under the laws in relation to execution debtors, all that can be required of a plaintiff in *scire facias* against an indorser of a writ, where the indorsement was made before the Revised Statutes had effect, is to show, that within a year after the judgment for costs, an execution issued and was seasonably put into the hands of an officer for service, and that within the time it had to run he has caused to be done whatever was reasonably practicable to obtain payment from the execution debtor.

In a suit against an indorser of a writ, parol evidence is admissible, on the one side, and on the other, to show the ability and inability of the execution debtor, provided the same be not inconsistent with the return of the officer on the execution against him.

THIS was a writ of *scire facias*, dated Feb. 9, 1843, against the defendants as indorsers of a writ in favor of one Gipson against the present plaintiff, sued out Sept. 18, 1837.

At the District Court, June Term, 1844, the parties agreed upon a statement of facts; from which it appeared, that on June 15, 1840, Oliver recovered judgment against Gipson for costs of suit; that execution issued on the judgment; that on Oct. 5, 1840, Gipson was arrested on the execution, and discharged on giving a poor debtor's bond; that the debtor made no disclosure and the bond was forfeited; that a suit was seasonably commenced upon the bond, and judgment recovered June 10, 1841; that an execution was issued upon this judgment, and Gipson and his surety were arrested thereon on Sept. 9, 1841, and discharged from that arrest on the same day by giving a poor debtor's bond. And if admissible on objection made thereto, it was agreed, that Gipson and his surety disclosed, took the poor debtor's oath before two justices of the peace and of the quorum on March 9, 1842, and were discharged by a certificate in due form of law; neither having disclosed any property on the examination. And if admissible, on objection made, it was agreed that the plaintiff could prove,

by parol evidence, that both Gipson and his surety were insolvent from 1838 to the then present time. The Court were authorized to enter a nonsuit or default, as their opinion should be.

*Wilson*, for the plaintiff.

There has been due diligence used to collect the execution. *Ruggles* v. *Ives*, 6 Mass. R. 494; *Wilson* v. *Chase*, 20 Maine R. 385.

And the inability of Gipson, the original plaintiff, is shown in three different modes. By the officer's return on the first execution, showing the arrest and discharge on giving the poor debtor's bond. 20 Maine R. 385. By the disclosure and discharge of Gipson and his surety under the poor debtor act of Rev. Stat. c. 148. The certificate is conclusive. 3 Fairf. 415; 13 Maine R. 239; 17 Maine R. 96; 18 Maine R. 152; 19 Maine R. 111 and 452. And thirdly, by the parol evidence of the inability of both Gipson and his surety.

The action is not barred by the statute of limitations. It is not affected by the Revised Statutes, because the cause of action accrued prior to the time those statutes went into operation, and is expressly excepted. And if those statutes did purport to take away our vested rights, the act would be unconstitutional and void.

*Blake*, for the defendants.

Due diligence has not been used to collect the money of the original plaintiff. This should appear to have been done by the officer's return. And if it does not, parol evidence is inadmissible to supply the omission. *Wilson* v. *Chase*, 20 Maine R. 390. A return on the execution, that the debtor has been arrested and discharged by giving a bond, is not even *prima facie* evidence of inability. *Dillingham* v. *Codman*, 18 Maine R. 74.

But if the plaintiff ever had any cause of action against the defendants, it is barred by the statute of limitations. Rev. Stat. c. 146, § 6. There was time enough to have brought the suit after the cause of action accrued and before the Rev.

Stat. went into operation, and the act is constitutional. *Smith* v. *Morrison*, 22 Pick. 430. The cause of action is preserved by the repealing act, but the remedy is only under the provisions of the Revised Statutes. Statutes of limitation affect the remedy only.

Instead of proceeding against the present defendants, the plaintiff elected to pursue a different remedy, and introduced a new party, the surety on the bond. Such delay and election have exonerated them.

The opinion of the Court was drawn up by

WHITMAN C. J. — The liability of the defendants originated from an indorsement of a writ, sued out in 1837, in favor of one Gipson, against the present plaintiff; and was incurred at that time. *Thomas* v. *Washburn & al.* recently decided in this county, but not yet reported. (*Ante* p. 331.) And such liabilities are expressly excluded from the operation of c. 114, § 18, of the Revised Statutes.

But this *scire facias*, having been sued out since the adoption of those statutes, the defendants contend, that c. 146, § 6, of those statutes, provides a bar against the maintenance of it. The section provides, "that all actions, against an indorser of a writ, must be commenced within one year next after judgment entered in the original action." But it is very clear, that this section cannot apply to this case, because the judgment in the original action had been recovered more than a year before those statutes were in force. If it could be believed to have been the intention of the legislature to extend that provision to such cases it would be a nugatory act, as it would impair, or rather annul, the obligation of a contract. Besides: — the repealing act, forming a part of the Revised Statutes, § 2, expressly saves to parties all rights of action then existing. This right of action, therefore, may be regarded as unquestionably saved from the limitation contended for.

It is further insisted, that it does not appear of record, as it ought, in order to charge the defendants, that, upon the execution issued on the original judgment, the debtor therein

avoided, or was unable to discharge the same. It is not questioned, that such an execution issued, and was duly returned within a year after the rendition of judgment, on which the officer, to whom it had been committed for service, had returned, that, for the want of property, he arrested the body of Gipson, and took bond, as provided by law, that he would cite the creditor, and disclose, &c. within six months. But it is contended, that this does not show, that the debtor avoided, or was unable to pay the amount for which the execution was issued.

In *Ruggles* v. *Ives*, 6 Mass. R. 495, C. J. Parsons held that a *non est inventus returned*, was conclusive upon the question of avoidance; and that a commitment was *prima facie* evidence of inability. The last part of this opinion has been commented upon, and explained in *Harkness* v. *Farley*, 2 Fairf. 491. The provisions of our statutes, since the decision in *Ruggles* v. *Ives*, in reference to debtors arrested on execution have been much varied; so that now it is considered, that a commitment is hardly to be deemed even *prima facie* evidence of inability; for one may, for divers purposes, suffer himself to be committed, when in possession of ample means to pay the debt.

But in the present case, there was no commitment. By statute a debtor, upon being arrested, had a right to give a bond, as was done in this case, and thereby prevent a commitment; and secure a credit of six months further, in which to make payment, or to obtain a discharge. It might follow, then, if an execution be issued within the year, and the debtor be thereupon arrested, that no record evidence of his avoidance or inability to pay the debt, would exist. Hence all that can reasonably be required of a plaintiff in *scire facias*, in such cases, is to show, that, within the year after judgment, an execution issued, and was seasonably put into the hands of an officer for service, and that, within the time it had to run, he had caused to be done, whatever was reasonably practicable, to obtain payment from the execution debtor.

It results, then, that evidence of the inability of such debtor

may be sought for elsewhere, than from what may appear of record in the original action, or on any execution issued on the judgment recovered in it. Accordingly it was held in *Harkness* v. *Farley*, and *Thomas* v. *Washburn & al.* before cited, and in *Pallister* v. *Little*, 6 Greenl. 350, that parol evidence was admissible, on one side, and on the other, to show the ability and inability of the execution debtor, provided the same were not inconsistent with the return of the officer on the execution against him.

In the case before us, after showing the execution issued, and arrest within the year, and the giving of the bond as by law allowed, the plaintiff proved, that the debtor forfeited his bond; and that on due process thereon, and judgment therein obtained, that the debtor and his surety were duly arrested on execution, and gave bond, as the debtor himself had done before; and that, after due proceedings were had for the purpose, they were both discharged, disclosing no property, not exempt by law from attachment, upon taking the poor debtor's oath. And, moreover, the plaintiff offered testimony, which would have established the fact, that both Gipson and his bondsman had been insolvent ever since, and for years before the rendition of the judgment against Gipson. We cannot, therefore, hesitate in coming to the conclusion, that the plaintiff had used due diligence to collect his execution against Gipson; and had failed of success by reason of his inability to pay the amount for which it had been issued. The defendants must, therefore, as agreed, be defaulted.

MOSES WOODARD *versus* HENRY W. HERBERT *& al.*

There is a distinction between a contingent demand, and a contingency whether there will ever be a demand. The former is a demand which might have been proved under the late bankrupt law of the United States, but the latter is not.

The contingent or uncertain demands provided for in the bankrupt act, are those contingent demands, which were in existence as such and in such a condition, that their value might be estimated at the time when the party was decreed to be a bankrupt.

A debtor was arrested on mesne process and gave a bond in common form to procure his release from arrest; the surety in the bond then filed his petition and was decreed to be a bankrupt; next judgment was rendered in the action and the bond became forfeited by the neglect of the principal to perform the condition thereof; and afterwards the bankrupt received his certificate of discharge; such certificate furnishes no defence to a suit upon the bond.

DEBT on a bond, dated Nov. 2, 1841, given by Herbert as principal and French as surety, to procure the release of Herbert from arrest upon a writ in favor of the plaintiff against him.

All the facts appearing in the agreed statement of the parties will be found in the opinion of the Court, and therefore need not be here again stated.

Written arguments were furnished on May 2, 1845, by

*E. G. Rawson*, for the plaintiff: and by

*G. B. Moody*, for French.

Among the grounds of argument in support of the action were these.

The certificate of discharge relieves the debtor only from debts which "are proveable" under the bankrupt act. But this is not a debt susceptible of being proved under the act. In general the proceedings in bankruptcy have relation to the decree of bankruptcy, and not to the petition. *Downer* v. *Brackett*, in re Spear, Law Reporter, 392. At the time of the decree, there was no debt against French, either certain or contingent, which could be proved as a claim in bankruptcy, or affected by the certificate of discharge. There could be no such claim until judgment was rendered against Herbert,

and he had neglected to notify and disclose; which was long after the decree of bankruptcy.

This demand did not, at the time of the decree of bankruptcy, come within the demands permitted to be proved under the fifth section of the bankrupt act. It could not have been estimated at any value, because the law had then fixed no liability upon him. 1 Smith's Leading Cases, 559; Ld. Raym. 1544. It was not the claim of a surety, indorser or bail, seeking to protect himself partially against the bankruptcy of his principal. The plaintiff's claim was then solely against Herbert and he had none, whatever, against French.

For the *defendant*, French, it was said, among other arguments, that the bankrupt act provided, that the certificate should be "deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt as are proveable under this act." The only question then is, whether this claim against French was proveable under the act. Let the act answer. It is provided in section fifth, that "all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, *sureties*, indorsers, *bail*, or *other persons* having *uncertain and contingent demands* against such bankrupt, shall be permitted to come in and prove such debts or claims under this act."

Now if the debt in this case could not be considered as certain for the penalty, truly no ingenuity could construe the condition of the bond as providing for any thing except an *uncertain or contingent* demand. If it were not a certain, it must have been an uncertain demand; if not an absolute, a contingent one; and if either, provided for.

There is as little value to a bottomry or respondentia bond, to a policy of insurance, to the claim of a surety, indorser, or bail, while it remains contingent, whether the ship will arrive in port, whether the goods will be saved, whether the house will stand or burn down, whether the principal will pay, whether the bail will be called upon; as in this case, whether the principal debtor would disclose within fifteen days. The

objection of no value, would apply with equal force to all the other cases referred to in the bankrupt act, as to this case.

The opinion of the Court was drawn up by

SHEPLEY J. — It appears from the agreed statement, that the defendant, Herbert, was arrested on mesne process; and that he, with the defendant, French, as his surety, on November 22, 1841, made the bond, on which this suit was brought, to be liberated from that arrest; that the defendant, French, filed his petition in bankruptcy on February 25, 1842, and was declared to be a bankrupt by a decree of the District Court of the United States on the fifth day of April following. He obtained his certificate of discharge on January 30, 1844. The plaintiff did not recover judgment against Herbert in the original suit until the month of January, 1843. Herbert failed to give notice of his intention to disclose according to the provisions of the statute; and his bond was forfeited.

This suit was commenced on May 6, 1843, and the question presented, is, whether it can be maintained against French.

The fifth section of the act to establish an uniform system of bankruptcy, provided, that "all creditors, whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurances, sureties, indorsers, bail, and other persons having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them." This clause was probably designed to embrace such debts or claims, as the statute, 6 Geo. 4, c. 16, § 51, 53, 56, had authorized to be proved under an English commission. The fifty-sixth section of that act provided, "that if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency, which shall not have happened before the issuing of such commission, the person, with whom such debt has been contracted, may, if he think fit, apply to the commissioners to set a value upon such debt, and the com-

missioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon."

It has been decided, that by the words "any debt payable upon a contingency," it was intended to include actual contingent debts only; and not a mere personal obligation imposing no debt or duty, which can be estimated and valued. *Ex parte Lancaster Canal Company*, 1 Mont. R. 44; *Lyde* v. *Mynn*, 1 Coop. Sel. Ca. 123. In the latter case, the bankrupt had covenanted to charge an annuity upon any property, which might come to him by his wife's death. He became a bankrupt and obtained his certificate. After that, his wife died and left him an annuity. The decision was, that his certificate could not be pleaded in bar to the covenant. Lord Brougham said, "it is impossible to treat this as a contingent debt; it is in truth no debt at all; it is a mere personal obligation to do a certain thing in a most uncertain event." He inquired how it was possible to ascertain the value of it, and remarked, "it is plainly not at all like a debt payable upon a contingency, which forms the subject of that section."

In the act of Congress the word demand is used instead of the word debt. But apparently without any design to enlarge the class of such contingent claims, for the word debt is used as a synonyme in the same clause, when speaking of the right to prove "such debts or claims under this act." The same rule of construction would seem therefore to be applicable to the act of Congress. Had the plaintiff any actual demand of a contingent character against French at the time, when he was decreed to be a bankrupt? The bond was made according to the provisions of the statute, c. 148, § 17, conditioned, that the principal should, within fifteen days after the last day of the term of the Court, at which judgment should be rendered, notify the creditor for the purpose of disclosure and examination. The plaintiff had not then recovered judgment against the principal. It was uncertain, whether he would be able to recover any judgment. And if he did, it was entirely uncertain, whether the principal would not notify him, and

make a disclosure, and thus perform the condition of the bond. It was therefore doubly contingent, whether there ever would be any claim or demand against French upon that bond. And even after a forfeiture the bond secured nothing but the unliquidated and uncertain damages, which the plaintiff could prove, that he had sustained by a breach of it. *Burbank* v. *Berry*, 22 Maine R. 483. It is necessary to distinguish between a contingent demand, and a contingency, whether there ever will be a demand. This distinction may be illustrated by the case of a bond made to liberate a poor debtor from arrest on execution. In such case the existence and amount of the debt has been ascertained by a judgment. The surety on the bond obliges himself to pay it, if the principal does not, or does not surrender himself to the prison keeper, or does not procure his discharge by taking the poor debtor's oath. The obligation is to pay a debt or demand upon these contingencies. The debt is a contingent debt, and can be proved against the bankrupt. Not so in the case of a bond made to release from arrest on mesne process. There is no obligation to pay the debt in any event, if one should be finally established. It only obliges the surety to cause the principal to do a personal act, and in case of failure, to make compensation in damages, wholly unliquidated and incapable of estimation before the effect produced by the failure of performance of the personal act can be perceived. It would seem to have been impossible to fix any value upon such a personal obligation. Upon what principles could a Court direct a valuation of the chances, that the plaintiff would recover judgment, and that the defendant in that suit would neglect to notify and disclose, as the statute required? It could not have been the intention, that the whole amount of a possible liability should be the amount to be proved, and to be liquidated, when the debt or claim should become absolute, for nothing could then be received upon the claim, if it did not become absolute, before the business was closed. The clause in the act providing, that they shall have a right, when their claims become absolute, to have the same allowed them, was designed to have nearly the same effect, as

a similar clause in the act of 6 Geo. 4, c. 16, which provides, that if the value of the contingent debt be not ascertained, before it becomes absolue, then the party shall be entitled to prove it as an absolute claim. But all these proceedings, whether this be the correct construction or not, relate to contingent debts or demands, and not to such obligations, as will not authorize a party to them to claim the performance of any thing by virtue of them except upon the happening of some future and uncertain event.

The cases of *Ex parte Barker*, 9 Ves. 110, and of *Taylor* v. *Young*, 3 B. & A. 521, although they did not arise under the statute of 6 Geo. 4, c. 16, show, that the penal sum of a bond, conditioned to pay or do an act upon the happening of an uncertain event, cannot alone be considered such a contingent debt or demand, as is contemplated in the bankrupt acts.

The contingent or uncertain demands, provided for in the act of Congress, are those contingent demands, which were in existence as such, and in such a condition, that their value could be estimated at the time, when the party was decreed to be a bankrupt.

*A default is to be entered.*

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SAMUEL LARRABEE *versus* WHITCOMB FAIRBANKS.

If a note, payable to a thrid person or *bearer*, has been transferred to the defendant, and he has transferred it to the plaintiff without indorsing it himself, and the plaintiff, *afterwards*, procures the indorsement of the defendant by stating to him, "that it was a mere matter of form, and that by putting his name on it he would not be rendered liable therefor;" testimony of these facts is admissible to show, that the indorsement was made without consideration.

And if the indorsement of the defendant was procured upon such note by false pretences on the part of the plaintiff, parol proof thereof is admissible, and furnishes a complete defence.

ASSUMPSIT upon a note of which the following is a copy. "For value received I promise to Thomas O. Parkman, or

bearer, sixty dollars, to be paid in one year from date with interest. " David Davis.

" Garland, May 6, 1841."

On the back of the note was indorsed, " Thomas O. Parkman" and " Whitcomb Fairbanks with course." A statement of facts was made by the parties by giving the testimony of several witnesses, they agreeing, that the action should " stand for trial, if in the opinion of the Court the testimony was inadmissible, or being admissible, was in law not a sufficient defence ; otherwise a nonsuit to be entered." One statement in the report was thus. " The witness," Davis, " further testified, that his signature to the note was a forgery, but so far as it concerns this action, it was admitted to be genuine."

*Cutting* argued for the plaintiff, citing 6 Peters, 51.

*McCrillis* argued for the defendant.

The opinion of the Court was by

WHITMAN C. J. — The defendant is sued as indorser of a note ; and it is admitted, that he indorsed it ; and that there has been due notice to him of its dishonor. The defence is, that he was inveigled into the indorsement of it without consideration, and by false pretences. The note was payable to Thomas O. Parkman, or bearer, and by him indorsed. The indorsement of it by the defendant was not, therefore, necessary to its transfer to the plaintiff; and the plaintiff had purchased it of the defendant without his indorsement. But afterwards finding there was likely to be some difficulty in recovering it, he applied to the defendant for his indorsement. To this the defendant at first objected. The plaintiff then states to him, that he was about getting the note discounted, and that it was necessary it should be indorsed by him ; that it was a matter of form ; that it was the custom at the bank to have the indorsement upon it, of every person through whose hands it had passed ; and that by putting his name on it he would not be rendered liable therefor. Upon which the defendant indorsed it. There was other evidence tending to

show bad faith on the part of the plaintiff towards the defendant in obtaining his indorsement.

To this defence the plaintiff objected, alleging, that it was not competent to the defendant to avail himself of it, as it tended to vary the legal liability of the defendant created by his indorsement. The cause was submitted in the Court below upon an agreed statement of facts; and a nonsuit was there entered, from which an apeal was taken to this Court.

It is very clear, that this defence does not come within the principle, that a contract in writing shall not be varied by parol testimony. It may be, that, if the defendant had, at the time of negotiating or selling the note to the plaintiff, upon a verbal agreement, that in case of the failure of the maker to make payment, he should not be responsible as indorser, it would be incompetent for him to make such proof in his defence. But here the plaintiff had accepted of the note, which was transferrable by delivery, without the defendant's indorsement. The contract between them was then finished and ended. The indorsement subsequently obtained, was, therefore, without consideration; and this may always be shown, between the immediate parties to a simple contract. The defence therefore was good upon this ground.

And surely any party to a contract, even although it may be a specialty, may give in evidence, to avoid liability under it, deceit and circumvention in obtaining it. In this case it is abundantly manifest that the defendant was led to place his name upon this note as indorser, when he was not bound to have done so, by false pretences on the part of the plaintiff. Upon this ground also the defence was complete.

*Plaintiff nonsuit.*

AARON A. WING *versus* WILLIAM G. CLARK *& al.*

When the terms of sale of personal property are agreed on, and the bargain is struck, and every thing the seller has to do with the goods is complete, the contract of sale becomes absolute, without actual payment or delivery, and the property in the goods is in the buyer; and if they are destroyed by accidental fire, he must bear the loss.

A delivery of an article sold to a person appointed by the vendee to receive it, is a delivery to the vendee.

ASSUMPSIT upon a note. The parties put down the testimony of witnesses, and referred to depositions, letters and an order, as if the same had been introduced in evidence on a trial; and thereupon submitted the case to the decision of the Court. The facts, considered by the Court to be proved by the evidence, appear in the opinion.

The views taken of it by the counsel will be found in the arguments.

*A. Sanborn*, for the defendants.

This action is against the defendants, as joint promisors, not as partners.

1st. Then, as to the contract declared on. It is within the statute of frauds and void, because, "no note or memorandum, in writing, of the bargain, was ever made and signed by the defendants or their agent." Rev. St. c. 136, § 4.

If the letters of Clark, recited in the report, amount, in law, to such note or memorandum, on his part, it is not perceived how they can have such effect as to Jacobs, the other defendant. He did not sign them himself, nor by any other person. His name, William Jacobs, no where appears in the letters. He is spoken of by Clark, in his first letter, as Mr. Jacobs, and, in the second, embraced, undoubtedly, in the term, we; but no case in the books, so far as my researches reach, even tends to sustain the position, that this is sufficient to take the contract out of the statute, as to Jacobs.

A contrary decision, it seems to me, would subvert all previous authorities, nullify the statute and open a wide door to all the evils it was designed to prevent. Nor have the defendants ever accepted the machine "and actually received the

same." Doughty, the teamster, was their agent, for a certain specific purpose, with strictly limited powers. That purpose was to carry the note to Emery, Stetson & Co's., and leave it with them, *if* he *should bring* the machine from them to the defendants. If he did not bring the machine, his orders were positive not to leave the note. Did he bring the machine? No. Did he leave the note? Yes. He, therefore, disobeyed his orders, transcended his authority; and the defendants are not bound by his acts. *Snow* v. *Perry*, 9 Pick. 542.

It may be said, that Doughty concluded to bring the machine before he left the note and took it on to his sled for this purpose, and that this is tantamount to a delivery to, and an actual receipt by the defendants. I reply, that he left the note *without* bringing away the machine, so exceeding his authority and not binding the defendants. No conclusion, no determination of Doughty to bring it, no removal of it from the shop to his sled, and afterwards returning it because he could not bring it, nothing short of actually bringing it away, could authorize his leaving the note, or be considered as a compliance with the orders of the defendants, "not to leave it unless he should bring the machine from Emery, Stetson & Co." Besides, Doughty, after ascertaining by trial that he could not bring it, replaced it in the shop of Muzzy, notified Mr. Emery, of the firm of Emery, Stetson & Co. of the fact, repeated his orders, and demanded the note. All these and the other acts of his relative to this matter must be taken together. So viewed they clearly show the intention of Doughty to be the fulfilment of his instructions. And he was, eventually, only prevented from so doing by the wrongful detention of the note by Mr. Emery, acting, no doubt honestly, under a misapprehension of duty. Nor have the defendants, at any time, ratified Doughty's acts either impliedly or expressly. On the contrary they entirely repudiated them to him on his return, and, as soon as was necessary, to Emery, Stetson & Co. the plaintiff's agents in this behalf, the machine having been so immediately burned, even before it was practicable to communicate with the plaintiff, directly or through that firm. There has been no payment

in part or whole for the machine. For the note having been left with Emery, Stetson & Co. by Doughty, in plain violation of his orders, and withheld wrongfully by Emery, it must be regarded, as has been shown, as *not* left by the defendants, and as never having vested in the plaintiff.

The agreement for the sale and purchase of the machine not having been completed before it was consumed by fire, the loss legally falls upon the plaintiff, and he must bear it. *Thompson* v. *Gould,* 20 Pick. R. 134, and cases there cited.

The machine was out of repair. That the plaintiff was bound to repair it, is proved by his causing it to be repaired at Muzzy's shop. His agreement was to deliver it in good repair, at Emery, Stetson & Co.'s store, when called for. It was repaired, and was suffered to remain at the shop. He ought to have removed it back to the store, and had it ready for delivery there. If it had been in the store it could not have been burned up in the shop. Its burning, then, was the consequence of his own neglect, and to throw the loss upon the defendants would be hard, indeed, and grossly unjust. It is manifest that the plaintiff never had informed the defendants, that he had sent the machine to Muzzy's shop for repairs, and of its being there, and they could not consent to its being there before they employed Doughty to transport it to them, and he called on Emery, Stetson & Co. for it; and his acts, clearly, on every principle, cannot be construed into such consent subsequently. Nor can the plaintiff object that the defendants should have called and taken the machine away earlier, and thus avoided the loss. It does not appear that the machine was repaired and fit for delivery, according to the terms of the contract, sooner. In fact, it was not ready for delivery, as agreed, when called for, on the 2d of March, 1841. And, if it had been, I submit whether the defendants delayed sending for it beyond a reasonable time, so as to make them responsible for its loss, even if the contract were liable to no objection by reason of the statute of frauds, as before urged.

2d. As to the note. If the grounds I have taken in relation to the contract are tenable, it follows, that the note is void, for

want of consideration; and, moreover, whether so or not, that the plaintiff is not entitled to it, does not own it, having got it not only, without, but against the consent and authority of the defendants, and cannot therefore, maintain this action upon it.

*Abbott*, for the plaintiff.

The shearing machine was sold and delivered to the defendants, and the plaintiff is entitled to judgment, either on the note of hand, or on the count for goods sold and delivered. The latter count is not within the statute of frauds. There is a clear distinction between an action for goods sold and delivered, and an action on a contract for the sale of goods. The latter only is within the statute. *Penniman* v. *Hartshorn, & al.* 13 Mass. R. 87. But if this were a case within the statute, the letters of Clark, connected with the evidence in the case showing the joint interest of Jacobs with him, and their signatures to the note of hand, are sufficient to take it out of the statute.

To whom then did the machine belong, when it was consumed by fire? From the whole case it appears, that the plaintiff, being the owner of a shearing machine, agreed to sell it to the defendants on a credit of six months for sixty dollars, and to deliver it at some place in Bangor to be designated by him; and that he afterwards, and soon after the letter of Clark of the 22d July, 1840, gave them notice, that the machine had been placed in the store of Emery, Stetson & Co. That this notice was duly given and received may be inferred from the fact, that the defendants soon after sent for it.

The plaintiff contends, that, the moment information was given the defendants of the place where the machine was delivered, it became their property. This delivery was in law a delivery to them. The terms of the sale had been agreed on, every thing, incumbent on the plaintiff to do, had been performed, and the sale had become absolute. Comyn on Cont. 135; 2 Kent, 492. He says, "when the terms are agreed on and the bargain is struck, and every thing the seller

has to do with the goods is complete, the contract of sale becomes absolute without payment or delivery, and the property and the risk of accident to the goods vest in the buyer." As soon as goods are delivered to a carrier or put on board a vessel by direction of the purchaser, they are at his risk. *Vale* v. *Bayle*, Cowp. 294; *King* v. *Meredeth*, 2 Campb. 639; *Cooke* v. *Ludlow*, 2 New Rep. 119, cited and commented on in Comyn on Cont. 135. And the seller or consignor cannot maintain an action against a third person for an injury done to the goods. *Brown* v. *Hodgson*, 2 Campb. 36. Even if the goods are sold on credit, and nothing is agreed on as to the time of delivery of the goods, the right of possession and property forthwith vest in the vendee. *Bloxam* v. *Sanders*, 4 Barn. & Cresw. 941.

But there was an actual delivery. It seems the teamster, when he called for the machine in the summer, when it was ready to be delivered, declined taking it, because he would not give a receipt to Emery, Stetson & Co. acknowledging that he had received it. On account of this delay, the defendants had fitted up an old machine of their own, and were desirous of giving up the contract. This was declined by the plaintiff, but he consented to extend the time of payment to one year. As appears by the letter of Clark of Nov. 16, he promises to send a note of hand conformable to that proposition and take the machine. The contract, or rather sale, stood as it was, except as to the time of payment. After suffering the machine to remain from the summer of 1840 to March, 1841, the defendants sent again for the machine, with their note in payment. The note was delivered and the machine received on the carrier's sled. Consulting his own convenience and not following the instructions of his employers, he returned the machine into the shop, where it was soon after consumed by fire.

Suppose that the property in the machine had not vested in the defendants, until it was received by the carrier and placed upon his sled. It cannot be denied that this was a delivery to them. The carrier was their agent; they had directed him

to take the machine and bring it to them; and it having been once received into their possession, the property vested in them, and could not be revested in the plaintiff without his consent. In regard to the delivery of the note, the carrier conformed substantially to the instructions of his principals. Suppose he had driven his team two miles out of town and then concluded to leave his machine, would he have returned and demanded his note, and should Emery have delivered it up to him? The two cases are substantially the same.

But it has been shown that the property had, months before, vested in the defendants, and their letter of November, is evidence, that they so considered it. "They felt bound in honor to take it," and they did take it. It is worthy of notice, that when they sent for the machine on the 2d March, 1841, they sent their note bearing date Jan. 1, two months before. Why was this note thus dated, unless the bargain had been completed at that time?

The counsel for the defendants seems to regard Emery, Stetson & Co. as the agents of the plaintiff. This we deny. The plaintiff had nothing to do with the machine after he placed it in their store.

He also states, that the machine was out of repair; and, that the plaintiff was bound to repair it, was to be inferred from his having sent it to Muzzy's shop. This is contradicted by Emery, the witness. He stated, that, "in the mean time," that is between the first and second time of sending for the machine, it "had got injured and we sent it to Muzzy's shop to be repaired." It was their duty to see, that any injury received by the machine, while in their care, should be repaired.

The hardship of the case has nothing to do with the legal question. But it is evident the loss arose from the negligence of the defendants or their agent. Had the teamster given a receipt for the machine, as required, which he ought to have done, no loss would have happened. Then seven months were suffered to elapse before it was again sent for; and this

was gross negligence. On the other hand, it appears the plaintiff performed his duty promptly and without delay.

*A. Sanborn*, for the defendants, replied.

The opinion of the Court was drawn up by

WHITMAN C. J. — By the statement of the evidence agreed upon by the parties, the conclusion, as to the matter of fact, as well as of law, is submitted to the consideration of the Court. By two letters, copied into the statement, it appears, that the defendants, who were clothiers, as early as the sixteenth of November, 1840, had contracted with the plaintiff to buy of him a shearing machine, at the price of sixty dollars, payable in one year; and, by the note of hand sent by them to him, for the consideration, and in suit in this action, that it was to be given therefor payable with interest. The machine was to be delivered at Bangor, when the defendants should find it convenient to send for it. The contract, therefore, seems to be sufficiently evidenced by writing, so as to be unaffected by the statute of frauds.

Independent of any actual delivery of the article, here was a binding contract of sale. And it is laid down in Black. Com, vol. 2, p. 488, that, "as soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods till he tenders the price agreed upon." It is then laid down further, on the same page, that the goods, so under a contract of sale, are at the risk of the vendee till paid for and taken away; and if destroyed by accident, in the mean time, the vendor may recover the price. And in the Institutes, 1, 24, 3, it is said "*cum autem empĭio et venditio contracta sit periculum rei venditæ statim ad emptorem pertinet tametsi ad huc ea res emptori tradita non sit.*" The shearing machine, to recover the price of which, this action was instituted, was in March, next after the contract, accidentally destroyed by fire. Here, then, if the evidence in the case went no further, there would seem to be no reason why the plaintiff should not recover.

But the evidence does go further. In February next after the contract, the defendants, in pursuance of it, made the promissory note declared on, dated the first day of January, 1841; and sent it to the plaintiff by a teamster, who was directed by them to leave it on receiving the machine, and to transport it to them. The teamster proceeded to Bangor, and delivered the note on receiving an order upon one Muzzey, with whom the machine had been deposited in Bangor, to deliver it to him. This teamster, whose testimony is given at length in the case, says, that, upon examination of it, he concluded he could not carry it safely and therefore left it where he found it. Another witness in the case, Moses Sanders, says he was at Muzzey's shop when the teamster came with his order, and that he helped him lade the machine on board of his sled or cart; after which the teamster, thinking that he could not carry it safely, concluded not to carry it, and it was unladed, and left in the shop, which, with the machine, on the night of the fourth of March next following, was burned. Though the teamster does not state, that he got the machine on to his sled or cart, yet he in nowise contradicts Sanders as to this fact, but is merely silent about it. It must be regarded as true, therefore, that the teamster did receive and lade it; and afterwards thought proper, for his own accommodation, to unlade and leave it.

Here, then, there was not only a contract of sale, but a delivery of the article sold. The cases are numerous, which show that, a delivery of an article sold, to a person appointed by the vendee to receive it, is a delivery to the vendee. *Dutton* v. *Solomonson*, 3 B. & P. 582; *Harwood* v. *Lester*, *ib.* 617; *Dawes* v. *Peck*, 3 Esp. 14; *Cooke* v. *Ludlow*, 2 New R. 119; *Huxam* v. *Smith*, 2 Campb. 19. And it has been held even, that the giving of an order, by the vendor, to the vendee, on a person, in whose custody the goods were, to deliver them to the vendee, was a good symbolical delivery. *Searle* v. *Keeves*, 2 Esp. R. 598.

The sale, therefore, in the case at bar, had become complete. The machine had become absolutely the property of

the defendants. The promissory note declared on was properly given, and retained, notwithstanding what was testified to by the teamster, in reference to his orders not to leave the note without he brought the machine. And, if the plaintiff could not recover on the count upon the note, his action would well lie upon his other count.

Judgment for sixty dollars with interest from Jan. 1, 1841.

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NATHAN WESTON, Jr. *versus* GORHAM DAVIS.

When one person performs services for the benefit and with the knowledge and tacit consent of another, the law implies a promise to pay a reasonable compensation for them. Such a promise, however, is implied only, when there does not appear to have been an express agreement or employment.

When two or more persons are jointly interested to have certain services performed, and one of them requests a third person to perform them, he may be presumed to have done so in behalf of all those interested, unless there be something to indicate a different intention.

When one intends to give credit to two or more persons, that intention, to affect them, should be made known, expressly, or by inference from the circumstances attending the transaction.

ASSUMPSIT for professional services as a counsellor at law, rendered in defence of an action, *Morse* v. *the defendant* and one *Williams*, on a six months bond. The amount of services and moneys paid, as agreed upon, was $40. There were other judgment debtors in the execution, upon which Williams was arrested, and upon which said bond was given; and one of them paid $60 toward said bond, leaving a balance of some 6 or $8 due, and it was claimed in that suit, that Morse was entitled to the full amount of the bond for the benefit of the judgment debtor, who paid the $60. The defendant claimed that Morse was entitled to judgment only for said balance; and the defence was successful, and judgment was for the balance only, as claimed by the defendants.

The defendant alone was sued, as Williams had gone into bankruptcy.

The defendant proved that he was only surety on said bond; that the plaintiff was requested by Williams to defend the said action, and that the defendant did not request him to employ the plaintiff, or any one to defend the suit; that Williams stated to the plaintiff, after he had commenced his services in the action, that he intended to pay him for his services. The plaintiff charged his bill to said Williams and the defendant, and about the time he was employed in the action he made inquiry as to the ability of Davis to pay him his fees, and then ascertained, that he was responsible, and that Williams was poor. The plaintiff never had any correspondence or conversation with the defendant, during the pendency of the other suit, and indeed never saw him till the institution of the present suit.

Davis, during the time the six months bond was running, had an obligation given him by Williams' brother, procured by Williams, to save him harmless from all liability arising out of said bond. Said brother is responsible.

Williams also testified, that he told Davis that he had employed the plaintiff to defend the case, and that he, Williams, would clear him, Davis, from the bond; and that said Davis replied, that he had spoken to Mr. Blake to defend the case, if he, Williams, had not employed some one to defend it. The parties agreed to submit the case to the decision of the Court upon the foregoing statement, and a nonsuit or default was to be entered.

*Weston, pro se.*

*S. H. Blake,* for the defendant.

The opinion of the Court was drawn up by

Shepley J. — When one person performs services for the benefit and with the knowledge and tacit consent of another, the law implies a promise to pay a reasonable compensation for them. Such a promise, however, is implied only, when there does not appear to have been an express agreement or employment. When two or more persons are jointly interested to have certain services performed, and one of them requests

another to perform them, he may be presumed to have done it in behalf of all those interested, unless there be something to indicate a different intention. In this case it appears, that the plaintiff was employed by the principal in a poor debtor's bond to defend a suit brought against him and his surety; and that soon after he entered upon the performance of that service, he was informed by the principal, that he intended to pay him. It does not appear, that the plaintiff made known to him any objection to that arrangement. The surety held a contract of indemnity from a brother of the principal, so that it does not appear, that he was beneficially interested to defend the suit. He might well leave the management of that defence to those more immediately interested in it. He was informed, that the plaintiff had been retained to defend it, but was at the same time informed, that he had been retained by the principal, who would save him harmless. He appears to have intended to have employed another attorney to defend the suit, if his principal had not taken the defence upon himself. If all those persons, who may be named as parties defendant or plaintiff, were to be considered as liable to pay for the services of an attorney, nominal or formal parties, having no beneficial interest, would become liable. The plaintiff appears to have intended to rely upon both the defendants for payment of his services and expenses, but does not appear to have made known that intention to either of them. When one intends to give credit to two or more persons, that intention, to affect them, should be made known expressly or by inference from the circumstances attending the transaction. That does not appear to have been done in this case.

*Plaintiff nonsuit.*

JEREMIAH P. FOWLES *versus* THOMAS H. TREADWELL *& al.*

Where an officer attached goods and suffered them to go immediately back into the possession of the debtor, taking the receipt of the latter therefor, he therein engaging to redeliver the same to the officer on demand; and then the officer made a demand of the goods, and failing to obtain them, brought an action upon the receipt; the defendant afterwards filed his petition in bankruptcy, was decreed a bankrupt, obtained his certificate of discharge, and pleaded it in bar of the action; *it was held*, that the action could be no further maintained.

THIS case came before the Court upon an agreed statement of facts, the substance of which appears in the opinion of the Court. A demand for the property had been made; and this suit had been commenced before either of the defendants had filed his petition in bankruptcy. The statement concluded thus: "If such certificates, in the opinion of the Court, operate as a full discharge of the defendants from said receipt, judgment is to be rendered for them; otherwise for the plaintiff."

*A. W. Paine*, for the plaintiff, said that the only question presented was, whether the obligation of the defendants was a fiduciary one, or a trust, within the meaning of the first section of the bankrupt act, and therefore not discharged by the bankrupt certificate. He contended, that the certificates offered in this case were no bar to the action.

A trust is an equitable right, title or interest in property distinct from the legal ownership thereof. 2 Story's Eq. § 964. The receipters are estopped to deny, that they received the goods of the plaintiff. Story on Bailm. § 125; *Bursley* v. *Hamilton*, 15 Pick. 40; *Smith* v. *Cudworth*, 24 Pick. 196. By the attachment the officer acquires a special property in the goods, and becomes, *pro hac vice*, the owner of them. 13 Mass. R. 394; 21 Pick. 318; 6 Johns. R. 195; 2 Saund. 47; Story on Bailm. § 125. He may maintain an action, if his possession is violated. Story on Bailm. § 125. Or he may take the property from the possession of any one, even the debtor, who is permitted by the receipter to have it. 13 Mass. R. 394; 11 Mass. R. 242; 3 Fairf. 328.

The receipter has no interest in the property, other than a bailee or servant, and can maintain no action for it, the possession being still considered to be in the officer. Story on Bailm. § 133; 8 Cowen, 137; 14 Mass. R. 217; 9 Mass. R. 104 and 265; 7 Cowen, 294. And the custody of the goods is in the officer until the attachment is dissolved, whether they are in the hands of the receipter or of the officer. *Carr* v. *Farley*, 3 Fairf. 328; *Woodman* v. *Trafton*, 7 Greenl. 178. Or the officer may be sued in replevin for the goods while in the hands of the receipter. *Small* v. *Hutchins*, 1 Appl. 255. The receipter is regarded in law as the bailee merely of the property. Cases before cited.

As the receipter is a mere bailee of the property, and responsible for the goods in specie, and has had them delivered to him to keep and return specifically, his liability cannot with propriety be called a debt, nor can it be said that he owes a debt. He holds in the same manner as a mechanic does property put into his hands to have labor bestowed upon it, or a carrier, wharfinger, innkeeper,executor, administrator, or guardian. The receipter's holding is in trust, or of a fiduciary character. Bailments are considered in equity as the simplest kind of trusts, although there may not in all cases be a remedy in equity, because a full legal one exists. 2 Story's Eq. § 1041, 1196; 1 Story's Eq. § 464, 534. Trust funds are not assets in bankruptcy, and trust debts cannot be proved in order to take a dividend.

The fact that the principal debtor is receipter, does not change the character of the holding, the property still being in the officer, and subject to his right of revesting the possession in himself at any time.

*J. Godfrey*, for the defendants, said that the only liability of the defendants was by contract, and which was the proper subject of proof as a debt in bankruptcy. The certificates, therefore, are a full defence to the action, and the debtors should be dischaged. The property went back into the possession of the debtors on giving the receipt, the attachment was dissolved, and the property could have been attached and

held by another officer. The defendants were bound to the plaintiff as much as if they had given a note of hand for the amount. When the property went back into the hands of the defendants, it was as if it never had been attached, and the plaintiff had no right in it, or power to control it. This action is assumpsit on the contract, and no action of trover for the property could have been maintained. There is no bailment here, and no trust of any description, but a mere contract. The certificates furnish a complete defence. He cited *Woodman* v. *Trafton*, 7 Greenl. 178; and *Gower* v. *Stevens*, 19 Maine R. 92.

The opinion of the Court was drawn up by

WHITMAN C. J. — By the agreed statement of facts, it appears, that the plaintiff, as deputy sheriff, had in his possession a writ of attachment against the defendants, and in favor of Messrs. Hovey & Pratt; that, by virtue thereof, he attached a quantity of lumber as the property of the defendants; but did not remove it from their possession; that, instead of doing so, he took a receipt, signed by them and others, acknowledging the attachment, and promising safely to keep the lumber, and deliver it to him in as good order as when received, and free from expense to him; that judgment was thereafter recovered in the action, and execution thereon issued against the defendants, and a demand seasonably made of them to restore the lumber, which, not being done, this action was commenced, founded on this breach of their contract.

The defence set up is, that, after the commencement of this suit, the defendants, under the statute of the United States, c. 9, of 1841, became certificated bankrupts; and it is contended, that this discharges them from liability on account of the breach of their said contract.

In reply to this, it is insisted, that, by the provisions of the statute referred to, the case of the defendants is excepted from its operation; that it comes within the description of those acting in a fiduciary capacity; that possession taken of goods attached, upon giving a receipt therefor, constitutes a trust;

that it is like the cases of bailment in various other modes; and of the same class with that of public officers, executors, administrators and guardians, named in the same statute.

What shall constitute a "fiduciary capacity" is not defined in the statute; and cases may undoubtedly occur, in which it may not be easy to determine when such capacity exists. If the defendants were not the original debtors, as well as defendants in this suit, but were strangers to the former suit, and had merely entered into an engagement for the safe custody and restoration of the property upon demand, perhaps we should find no difficulty in coming to the conclusion, that their undertaking was of a fiduciary character. Such receipters would have no right of property in the goods; they would be bound only as faithful servants to keep the goods safely, and have them forthcoming when called for. If they were to fail in doing either they might be liable in an action sounding in tort.

But the situation of the defendants was different. They were the general owners of the property attached; and the plaintiff, if he can be regarded as having actually attached it, left it undisturbed in their possession, and under their control. According to the authority cited by their counsel, (*Gower* v. *Stevens*, 19 Maine R. 92,) such an attachment was nugatory. It is there said, "It has never been understood, that he (the officer) could, consistently with preservation of the lien, constitute the debtor his agent to keep the chattels attached." And *Woodman* v. *Trafton & al.* 7 Greenl. 178; and *Bruce* v. *Holden*, 21 Pick. 187, are cited as "strong authorities to show, that an attachment is dissolved by leaving the property in the hands of the debtor." There is an exception by our statute, in reference to this rule; but the case before us does not come within it. The plaintiff, therefore, was divested of any special property in the lumber attached, if any he ever had; and could not maintain any action therefor, sounding in tort, against the defendants. His claim, therefore, if any he has against them, must be grounded upon the contract.

How far the contract between the plaintiff and defendants, under such circumstances, was obligatory in its origin, we are

not called upon to inquire. The simple proposition stated for the determination of the Court is, whether the discharge in bankruptcy annulled the liability of the defendants.

The language of the bankrupt act, being the statute before cited, c. 9, of 1841, § 1, is, that all persons owing "debts" may take the benefit of the act, by declaring, among other things, that they are "unable to meet their *debts* and engagements;" and in § 4, that, having conformed to the requirements of the statute, the bankrupt "shall be entitled to a full discharge from all his debts;" and, in the same section, that his discharge and certificate, "when duly obtained, shall in all courts of justice, be deemed a full and complete discharge of all the debts, contracts and other engagements of such bankrupt, which are proveable under this act." And in § 5, "that all creditors, whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, indorsers, bail, or other persons, having *uncertain or contingent* demands against such bankrupt, shall be permitted to come in, and prove such *debts* or *claims*."

The question remaining is, was this claim a "debt" from which the defendants were discharged, within the meaning of the clauses cited. They are all to be taken together; and it is often indispensable that we should look to every part of a statute in order to determine its import in reference to any particular point. By doing so it will become manifest that the word "debts" used in the first and fourth sections, from which the bankrupt is to be discharged, has a more extended signification, than, from its ordinary literal import would seem to be implied; for in the latter part of the fourth section the bankrupt is to be discharged from all his debts, contracts and other engagements, which are proveable under the act; and the fifth section particularizes the different kinds of demands, which shall be proveable against the bankrupt. Uncertain and contingent demands, are among those there named. The word "debt," then, which entitled a debtor to go into bankruptcy, included such demands. The demand in this case,

however, could not at the time of the commencement of this action, and before the defendants went into bankruptcy, be considered as contingent; and the amount recoverable only was uncertain. The engagement of the defendants, under the circumstances of this case, was simply to keep a certain quantity of their own lumber, and deliver it to the plaintiff on demand; and this engagement had been broken; so that nothing remained but an ascertainment of the damages for the breach. It was in this view of the case, not materially distinguishable from the common case of a person, who may for value received, have engaged to deliver goods on demand. On the breach of such a contract, the value of the goods would be recoverable; and if judgment were recovered therefor it would become a debt; and before judgment it would be a demand; and uncertain in amount, and within the purview of the bankrupt act.

The only species of action, which the plaintiff could maintain against the defendants, is assumpsit on the contract; and he has accordingly so declared. If he can recover, it will remain only to ascertain his damages, which, as the case stands, would be the value of the lumber receipted for. It was then a debt or demand within the purview of the statute. We are therefore brought to the conclusion, that the certificates of the defendants must be admitted as a bar to the plaintiff's claim.

*Plaintiff nonsuit.*

JOHN HEATH *& al. versus* RANDALL WHIDDEN.

It is in the election of a subsequent grantee of a mortgagor, with covenants against incumbrances and for quiet enjoyment, to elect to redeem as under the former, or to suffer an eviction as under the latter. If he redeems, his right of action will commence from the time of such redemption; but if he waits for an eviction, his right of action will then take place.

The covenant for quiet enjoyment runs with the land, and descends to heirs; but that against incumbrances does not.

If twenty years had elapsed from the time the cause of action arose for breach of the covenants for quiet enjoyment, without any explanation, satisfaction would be presumed; but no period short of that, without other circumstances tending to raise the presumption, would be sufficient.

In a special action on the covenants of a deed of warranty containing the usual covenants, setting out all the facts, and alleging a breach of the covenant against incumbrances, it is competent for the Court to permit an amendment by alleging a breach of the covenant for quiet enjoyment.

COVENANT broken. The plaintiffs in their declaration set out a warranty deed, with the usual covenants, made by the defendant to Nathaniel Herrick, the father of the demandants, dated Oct. 17, 1818, and conclude as follows. "The said Sanger, by virtue of his mortgage aforesaid, entered upon the said lot of land, or farm, and evicted the said plaintiffs of the said lot of land, or farm, and have held them out to the time of the date of this writ. And so the said Whidden, his covenants against incumbrances aforesaid, hath not kept, but hath broken the same." The writ was dated Feb. 17, 1841.

On Feb. 6, 1816, the defendant mortgaged the premises to Calvin Sanger, to secure the payment of a sum of money. On Oct. 17, 1818, he conveyed the same premises to Nathaniel Herrick by deed of warranty. On Jan. 5, 1821, Herrick died, and the plaintiffs are his children and heirs; and in September, 1826, Sanger entered into the premises under his mortgage, "and evicted the plaintiffs." The plaintiffs at that time were all minors. The case does not show, whether the mortgage had, or had not been foreclosed.

It was agreed that this case should be argued in writing, but no argument was furnished to the Court on the part of the plaintiffs.

*J. Appleton* and *J. B. Hill*, for the plaintiffs.

*Blake*, in his argument for the defendant, took these objections.

The covenants against incumbrances and of seizin are *in presenti;* and if not true, are broken the moment they are made; and then the statute of limitations commences running, for then the cause of action accrues. *Prescott* v. *Trueman*, 4 Mass. R. 630; *Bean* v. *Mayo*, 5 Greenl. 95; *Clark* v. *Swift*, 3 Metc. 392.

More than twenty years having elapsed after the covenant was made before the suit was commenced, it is thereby barred. Although the plaintiffs were minors when their father died, the limitation, having once commenced running, continued on notwithstanding the minority. *Dow* v. *Warren*, 6 Mass. R. 328.

The covenant against incumbrances does not run with the land; is but a chose in action; and does not descend to heirs, but goes to the executor or administrator. *Mitchell* v. *Warner*, 5 Conn. R. 497; 4 Kent, 471. The action, then, cannot be sustained in the name of the present plaintiffs.

The opinion of the Court was by

WHITMAN C. J. — The ancestor to the plaintiffs purchased of the defendant, by deed of general warranty, a farm in Sangerville, in this State, which the defendant had before mortgaged to one Sanger. The ancestor of the plaintiffs died in 1821, leaving the plaintiffs, his children and heirs, who entered into and became seized and possessed of the farm; and, in 1826, were evicted therefrom, by reason of the elder and better title thereto, held under said mortgage. The plaintiffs, in their writ and declaration, have set forth specially the elder and better title by which they have been ousted; at the same time calling it an incumbrance. This is at variance with the ordinary mode of declaring in case of an eviction; and we are unable to conclude that the declaration upon that ground is sufficient. If it were the plaintiffs might recover.

A mortgage is an incumbrance, and, at the same time, an outstanding title, defeasible upon the performance of certain

conditions. It is in the election of the subsequent grantee of the mortgagor, with covenants against incumbrances, and for quiet enjoyment, to elect to redeem, as under the former, or to suffer an eviction, as under the latter. If he redeems his right of action will commence from the time of such redemption. If he waits for an eviction his right of action will then take place. The covenant for quiet enjoyment, running with the land, descends to his heirs. The plaintiffs, therefore, being heirs of the subsequent grantee of the mortgagor, the defendant, and having been evicted in 1826, a right of action then accrued to them, against him upon his covenant for quiet enjoyment. The defendant, under such circumstances, may show satisfaction in defence. This might be presumed from lapse of time, although the statute has provided no particular period for the purpose. If twenty years had elapsed from the time the cause of action arose, without any explanation, satisfaction would be presumed; but no period short of that, without other circumstances tending to raise the presumption, would be sufficient. In this case but about fifteen years had elapsed since the eviction, and without evidence tending to raise a presumption of satisfaction, before the action was commenced. We do not therefore think proper to order a nonsuit; but in order that the plaintiffs may obtain liberty to amend, so as to make the declaration what it should be, viz. a declaration for an eviction, we discharge the agreement and leave the cause open for further proceedings.

GEORGE W. WALLINGFORD *versus* BENJAMIN FISKE *& al.*

The rules prescribed in Mass. St. Feb. 2, 1819, for the sale of certain non-resident, unimproved lands by the sheriff for the payment of taxes thereon, while in force, must have been complied with, or the proceedings are void, and the deed of the sheriff passes no title to the purchaser.

Where the taxes upon such non-resident and unimproved lands were set to different persons, or upon different and distinct rights, numbers of lots, or divisions, the sheriff could not legally advertise and sell the whole of a township, including the several interests distinctly and separately taxed, or so much thereof as should be necessary to pay all the taxes; but each interest should be separately advertised and sold for the payment of the tax for which the same was liable, or the sale will be void.

And if a sale of such land be made for one entire sum, upon one bid, to pay the whole amount of the taxes thereon for five years, and the mode adopted in reference to the sale of the land for the payment of the taxes thereon for four of the five years was illegal, the sale is invalid, although it might have been legal, if made in the same manner to pay the taxes for the other year only. The sale must be valid for the whole, or the title entirely fails.

Such a deed is as ineffectual to give a seizin, as to convey a title.

As a widow is not entitled to dower in a tract of unimproved wild land, she is a competent witness for the heirs of her deceased husband in relation to such land.

AT the trial, before WHITMAN C. J. the demandant, to support his writ of entry, read a deed of the demanded premises from Frederick French to the late George W. Wallingford of Kennebunk, dated March 12, 1804, and proved that he was a son of the deceased, and produced conveyances from the other heirs of their shares. The land had never been improved, but remained in the original wild state. The tenants claimed under a tax title, by deed dated August 31, 1819.

After the evidence had all been introduced, the case was taken from the jury by consent of parties, and submitted to the decision of the Court, with an agreement, that the Court should enter such judgment, by nonsuit or default, as upon the evidence should be adjudged to be in conformity to law.

The view taken of the evidence by the Court appears in the opinion.

The case was elaborately argued by

*Rowe* and *D. T. Jewett*, for the demandant: — and by

*F. Allen* and *M. L. Appleton*, for the tenants.

In the argument for the demandant were cited *Hayden* v. *Foster*, 13 Pick. 492; *Williams* v. *Gray*, 3 Greenl. 207; *Little* v. *Megquier*, 2 Greenl. 176; 20 Pick. 418; 14 Pick. 224; 12 Pick. 534; *Williams* v. *Ingell*, 21 Pick. 288, and same parties, 2 Metc. 83; *Stone* v. *Clark*, 1 Metc. 378; *Dunn* v. *Hayes*, 8 Shepl. 76; *Moody* v. *Nichols*, 4 Shepl. 23; *Adams* v. *Frothingham*, 3 Mass. R. 360; *Davis* v. *Mason*, 4 Pick. 156.

For the tenants were cited *Colman* v. *Anderson*, 10 Mass. R. 105; *Ken. Pur.* v. *Laboree*, 2 Greenl. 75; *Crosby* v. *Parker*, 4 Mass. R. 110; *Stone* v. *Clark*, 1 Metc. 378; *Thayer* v. *Stearns*, 1 Pick. 482; *Slater* v. *Nason*, 15 Pick. 345; *Boston* v. *Otis*, 20 Pick. 38.

The opinion of the Court was drawn up by

Tenney J. — Frederick French, who derived his title from the original proprietors of the south half of the township, which is now Milford, conveyed to George W. Wallingford, 825 acres thereof, by deed dated March 12, 1804. Wallingford died in 1824, leaving four children, his only heirs; the demandant being one, received conveyances from the others of their interest in the same land which was wild. The tenants claim under a sale of the whole township to them, made for the non-payment of county taxes, by George Watson, sheriff of the county of Hancock, on the 31st August, 1819, by virtue of a warrant to him from the treasurer of that county. The warrant purports upon its face to be issued by the authority of the statute of Massachusetts, passed February 2, 1819, entitled "an act to ascertain and establish a part of the west line of the county of Somerset, and for other purposes." That statute empowered the treasurers of the counties of Hancock and others to issue their warrants to the sheriffs of their respective counties, to collect the county taxes within each re-

spectively, which had been assessed upon the several towns, and unincorporated plantations, and other tracts of unimproved land, since the year 1812; but upon which townships, and other tracts of unimproved land, there was not at the settlement of the last valuation preceding, any person residing thereon, or assessors chosen, to whom the county treasurers could issue their warrants for the assessing thereof. All which sums were required by the act to be collected in the same manner as collectors or constables were directed to proceed in the collecting of taxes on non-resident proprietors of unimproved lands.

In 1813, a tax was apportioned to township No. 3, which has since been incorporated into the town of Milford, in these words: — "Township No. three, east side of Penobscot river, granted to B. Eppes, A. Forbes and I. Southgate, $2,19." For the year 1812 the taxes were apportioned as follows: — "Part of township No. 3, east side of Penobscot river, granted to B. Eppes, &c. ,17. Part of township No. 3, east side of Penobscot river, granted to I. Southgate, $2,39. Part of township No. 3, east side of Penobscot river, granted to A. Forbes, ,17." For the years 1814, 1815 and 1816, the apportionment is made in the same manner, the amount of taxes on the several parts differing each year.

The warrant from the treasurer to the sheriff does not specify the taxes upon each part, or for each year, but states only the gross amount of all the taxes upon the *township*, of those years, and directs the sheriff to proceed as is required by the act therein referred to. The sheriff made his return of that warrant, and after stating the mode of advertising, says, "I proceeded to sell at public vendue so much of the land in the said township No. three, as would be necessary to pay said taxes and charges, and the said township No. three was struck off to Abner Taylor, Benjamin Fiske and Wm. S. Bridge, they being the only bidders, for the sum of sixty-eight dollars and fifty-three cents."

By the statute of Massachusetts, passed March 16, 1785, § 7, when no person appears to discharge the taxes on unimprov-

ed lands of non-resident proprietors, to the collector thereof, he shall advertise the names of all such proprietors, whenever they are by him known, with the sum of the tax assessed on their lands respectively, and whenever they are not known, he shall in the same manner publish the sum of the taxes on the several rights, numbers of lots or divisions;" "and if no person shall appear thereupon to discharge the said taxes, and all necessary intervening charges, then the collector aforesaid shall proceed to sell at public auction to the highest bidder, (after waiting two hours from the time appointed for said sale,) so much only of said lands, as shall be sufficient to discharge said taxes, and the necessary intervening charges."

It is insisted by the demandant, that the proceedings on which the tenants found their title were so defective and unauthorized by law, that they have acquired no rights thereby.

The statute of Feb. 16, 1786, § 7, and that of Feb. 25, 1800, § 1 and 2, have no application to the present inquiry, as they relate to cases, where the inhabitants of any town, district, or plantation neglect to assess taxes required to be paid by such town, district, or plantation; whereas the statute of Feb. 2, 1819, applies to those townships and *unincorporated tracts of lands*, on which at the time of the next preceding valuation, there were no persons residing, or no assessors chosen. The mode of obtaining payment of the taxes under the two former statutes are entirely different from that prescribed under the latter. The statute of 1819 was intended to embrace those tracts of uncultivated land, where there had been no previous organization of any kind, whether they were townships as they were usually located, or other quantities of wild lands, of greater or less extent than ordinary townships.

The steps to be pursued in advertising and in making sale of such lands were specifically and minutely pointed out in the statute prescribing the manner in which collectors were to proceed in collecting taxes upon unimproved lands of non-resident proprietors. The rules there given could not be disregarded, without rendering void, the whole proceedings, so that a sale and a deed from the sheriff would pass no title to the

purchaser. The legislature were careful, that, so far as it could be done, each parcel of land should be exclusively holden for the tax with which it was charged; that no unnecessary inconvenience should arise from advertising and selling in gross different parcels of estate in which different interests might exist; that on a redemption of the title conveyed upon such a sale, each individual might obtain his own land by the payment of the tax thereon, and the expense arising from the sale, thereby avoiding the disputes which would grow out of claims for contribution, where one tract was burdened with the taxes upon itself and others also. In *Hayden* v. *Foster*, 13 Pick. 492, it was decided that where separate and distinct real estates belong to the same owner, they are to be considered as distinct subjects of taxation, and must be separately valued and assessed, and each estate is subject to a lien for the payment of that portion only of the owner's tax which shall be assessed upon such particular estate.

When the taxes are set to different persons, or upon different and distinct rights, numbers of lots, or divisions, there can be no propriety in advertising and selling so much of the whole township where they are situated, as is necessary for the payment of the sum of all the taxes upon all the distinct rights, numbers of lots, and divisions. The statute authorizes no such course, and is totally inconsistent therewith. Could a collector of taxes in a town, where there were many lots of unimproved lands, belonging to non-resident proprietors, be legally justified in advertising and selling so much of the whole of such lands as would be sufficient to pay the whole amount of all the taxes thereon, and the necessary expenses, unless payment thereof should be made before the time appointed for the sale? Each right, number of lot, or division, must be advertised; and so far as the charge upon each is not removed before the time for the sale, they are separately to be sold at public auction.

In a sale under a county treasurer's warrant, the sheriff could have no right to sell a whole township, where the tax was apportioned to separate and distinct parts, higher than that possessed by the collector of a town to make a general

sale of non-resident lands for the same purpose. The rule of the statute in one case is the rule in the other; and a departure therefrom is equally fatal in both.

The sale under which the tenants claim to hold the land in controversy cannot be upheld. The taxes were apportioned by the court of sessions for the County of Hancock, for four out of the five years, to separate and distinct parts of township No. three. The parts were of unequal value, as the tax upon one is much larger than those upon each of the other two. These parts were indicated by the names of the persons to whom they were severally granted. The township at the time, when the taxes were apportioned, had been still more minutely divided, and the deeds conveying different interests were upon record in the county of Hancock. The third and fourth quarters of the township, which have sometimes been denominated the south half thereof, were owned in common and undivided, by several proprietors, who as early as 1802, formed themselves into a proprietary, and continued to act as such, till most if not all their lands were divided and held in severalty, as appears by their records, which are a part of this case. The county treasurer made his warrant from records, showing, that the tax for the four years was apportioned not to the township, but to the parts. The same record could have been examined by the sheriff, who made the sale. There was a neglect of duty in one or the other, and a failure to proceed as the statute required.

As the sale was made for one entire sum and upon one offer only, to raise the money due for the taxes of five years, it cannot be effectual for that of 1813, even on the supposition, that the sale would have been legal, if made for the tax of that year, which was upon the whole township and not upon the parts. The sale was good or it was not; and as long as any part was illegal, it must radically affect the whole.

The sale and the deed being unauthorized and void, they could give no rights whatever to the tenants; they were as ineffectual to give a seizin, as they were to convey a title. There is no evidence in the case, which shows that the tenants

have had such an occupation, as to impair in any degree the title, which from the evidence was perfect in the demandant.

The case finds, that the land in controversy was wild; consequently, the widow of George W. Wallingford is not entitled to dower therein. *Conner* v. *Shepherd*, 15 Mass. R. 164. The objection made to her deposition on the ground of interest for this cause is without foundation.

It is denied by the tenants, that the demandant has a right to recover the whole of the tract of land, which is described in the writ. From the records of the proprietary of the south half of the township, it appears, that at a meeting on the 16th December, 1802, a plan of the front lots, made by one Turner, was adopted, and it was voted that the three eleventh parts of the lands lying east of the front lots, and 500 acres, should be set off to Frederick French, the grantor of the demandant's ancestor, on the south part of the land lying east of the front lots, and the north line of the premises to be parallel with the south line of the town. At this time it does not appear that any survey or plan of the lands east of the front lots had been made. At a meeting held February 8, 1805, it was voted to send Solomon Osgood, a surveyor, to examine a plan made by Philip F. Cowdin of their lands, and thereupon adjourned to the next day. At the adjourned meeting it was voted to accept the plan made by Cowdin, and also voted to Frederick French lots 8, 9, 23 and 34, as marked on Cowdin's plan, to rectify a mistake made by said Cowdin in setting off said French's land, which was to have been according to his deed, and that he and his heirs and assigns hold the same in severalty.

There can be no doubt of the intention of the proprietors in these several votes in relation to the lands to be held in severalty by French. The vote of Dec. 16, 1802, required nothing but the application of known rules to render it certain where the line should be, which should separate his lands from the residue of the tract. Three lines were fixed and certain; the fourth was to be parallel with the south line of the town, and so far therefrom as would embrace the three eleventh parts and the 500 acres. *Id certum est, quod cer-*

*tum reddi potest.* It was not the intention of the proprietary to bound French by the line on Cowdin's plan laid down as his north line. Although the plan was accepted, yet that line thereon was never adopted, for at the same meeting when the plan was accepted, it was known that that line was erroneously laid down, and the error was corrected by giving him all the lots lying next to that line on the north, excepting the one numbered 22. There never was any other line limiting the tract of French on the north, excepting the one, which included lots numbered 8, 9, 23 and 34. It was a different line from the one contemplated by the vote of Dec. 16, 1802, (which was never run,) but it was acquiesced in by the parties by the subsequent vote.

The conveyances to Baldwin and Wallingford, by French, were after the vote of 1802, and before that of 1805. There can be no controversy as to the location of the land described in the former deed. It is evidently the intention of the parties to the other, that the land conveyed was to be bounded on the south by Baldwin, on the east by the east line of the town, and on the north by the line, which should be run as the north line of French's land, and on the west by a line which would separate 825 acres. For the deed describes the land as bounded by the north line of French's land on the north, and on the west by a line parallel with the east line of the town, and so far distant therefrom as to give the quantity required. French so understood it, when he conveyed to Davenport in 1807. He had previously conveyed to Baldwin a tract lying 800 rods on the south line of the town and extending north 160 rods; and to Thomas French a tract lying directly west of that conveyed to Baldwin, and extending from the south line of the town, northerly 244 rods. The 825 acres sold to Wallingford, if made to extend to the north line of lot numbered thirty-four on Cowdin's plan, will be bounded on the west by a line which will strike the land of Baldwin at the distance of 333 rods from the east line of the land conveyed to Thomas French, which is the precise length of that line mentioned in the deed from French to Davenport; whereas if the land conveyed to

Wallingford was understood to be limited on the north by the south line of 34, it must have extended farther west, than a distance of 333 rods from Thomas French's east line, to contain the quantity of 825 acres. The fifth line of the description in the deed to Davenport is not inconsistent with this view. It is in these words, "thence east by the northerly line of land set off to said French, as marked on said plan, till it comes to land said French sold to George W. Wallingford." The grantor was careful to say, it was the northerly line of land set off to him *as marked on the plan*, and not the line of the land *actually* set off to him; for this line was regarded by the proprietors as an erroneous line from the time the plan was accepted by them, so far as it related to French's land. The land voted to French in 1802, was located as it was contemplated at that time, as near as it could be without discarding the plan which had been made upon an actual survey. According to the agreement of the parties

*The tenants must be defaulted.*

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

## COUNTIES OF WASHINGTON AND AROOSTOOK.

ARGUED AT JULY TERM, 1844.

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### MOSES TUTTLE *versus* SALMON GATES.

When a case is presented on a motion or petition for a new trial, or for a review, for any cause not arising out of an illegal or erroneous act of the Court, a new trial cannot be claimed as a matter of right; but may be granted or refused by the Court in the exercise of its legal discretion. And in such case, it may be granted on such terms and conditions, as the Court may consider reasonable.

But when a case has been reserved on the report of the presiding Judge, or presented on a bill of exceptions, and it has been ascertained that the instructions to the jury were erroneous, or that illegal testimony was admitted, or that legal evidence, material to the issue, was excluded, the party, if aggrieved, would seem to be entitled to a new trial as a matter of right; the Court can impose no conditions, unless it has acquired some authority from his consent; and if a new trial is granted, the whole case should be opened for trial.

The Lord's day is not to be reckoned as one of the four days during which an officer must keep goods after seizure on execution before the sale.

A sale of goods, made by an officer on execution, must be regarded as a legal transfer of the property, although he may not have conformed to the requirements of the statute in making the sale.

But this principle may not apply to the sale by an officer of any description of personal property, not tangible, and represented only by documentary evidence of title.

Any person injured by any such irregular proceedings of an officer may, by an action against him, obtain redress.

TROVER for a dwellinghouse. The case had been once tried, and the verdict had been set aside and a new trial granted. The order for a new trial was sent from the county of

Cumberland; and under the name of the action in the county of Washington was entered, "verdict set aside and new trial granted." The entry of the clerk upon his docket was in the words of the order. The house had been put upon land of a person other than the one who erected it, with the consent of the owner of the land. Both parties claimed the house, as personal property, under the same person; the defendant, under a sheriff's sale on execution, and the plaintiff, under a bill of sale from the debtor. The facts sufficiently appear in the opinion of the Court.

*J. Granger*, in his argument for the plaintiff, on the point that the presiding Judge erred in ruling that the whole case was open for trial, cited *Robbins* v. *Townsend*, 20 Pick. 345; *Winn* v. *The Columbian Ins. Co.* 12 Pick. 288; *Williams* v. *Henshaw*, 12 Pick. 378.

On the point, that the title under which the defendant claims failed, because the officer had kept the property but three legal days before the sale, as to make out the four days he must include the Lord's day, which the law does not permit; he cited *Windsor* v. *China*, 4 Greenl. 304; *Brown* v. *Maine Bank*, 11 Mass. R. 153; *Hale* v. *Owen*, 2 Salk. 225; *Daveis* v. *Salter*, 2 Salk. 627; *Lee* v. *Carlton*, 3 T. R. 642; *Soloman* v. *Freeman*, 4 T. R. 555; *Thayer* v. *Felt*, 4 Pick. 354. That the officer had no right to adjourn the sale in the manner he did. 7 Greenl. 376; 5 Pick. 186.

*Fuller* argued for the defendant; and on the point, that setting aside a verdict necessarily opened the whole case, cited *Sawyer* v. *Merrill*, 10 Pick. 16, and cases there cited; Howe's Prac. 519.

On the point that the defendant acquired a valid title to the property under the sheriff's sale on execution, he cited *Richards* v. *Russell*, 2 Fairf. 371; Stat. 1821, c. 60, § 5; *Caldwell* v. *Eaton*, 5 Mass. R. 404.

*Preble*, for the plaintiff, replied.

The opinion of the Court was drawn up by

Shepley J. — A verdict was found on a former trial of

this case for the plaintiff. Upon a case reserved the opinion of the Court stated in substance, that the verdict was to be set aside, only for the purpose of having the jury find whether the administrator of John R. Tuttle had become the owner of the house. The entry made upon the clerk's record was "verdict set aside and new trial granted." When the case was presented for a second trial, the presiding Judge considered the former verdict as entirely set aside, and the case as open for trial, *de novo*. When a case is presented on a motion or petition for a new trial, or for a review, for any cause not arising out of an illegal or erroneous act of the Court, a new trial may be granted or refused by the Court in the exercise of its legal discretion. It cannot be claimed as a matter of right. And in such cases, it may be done upon such terms or conditions imposed, as the Court may consider reasonable. And such appears to have been the practice. *Hutchinson* v. *Piper*, 4 Taunt. 555; *Thwaites* v. *Sainsbury*; 7 Bing. 437; *Winn* v. *Columbian Ins. Co.* 12 Pick. 288. In the latter case the verdict appears to have been set aside only for the purpose of assessing damages upon a partial loss, "the plaintiffs consenting, that a verdict shall be entered for a partial loss, and the inquiry before the jury be confined to the question of amount." When a case has been reserved on a report of the presiding Judge, or presented by a bill of exceptions, and it has been ascertained, that the instructions of the jury were erroneous, or that illegal testimony was admitted, or that legal testimony material to the issue was excluded, the party, if aggrieved, would seem to be entitiled to a new trial as a matter of right; and the Court can impose no conditions, unless it has acquired some authority from his consent to dispose of the case otherwise. If the Court may in this class of cases open a case again for the trial of a particular point without disturbing the general verdict, it should possess the power to form a new issue without the consent or action of the parties. Or, if the verdict be entirely set aside, a right to limit the inquiry to a particular point, although other points vitally affecting the merits, and presented as issues to be tried by the plead-

ings, might be insisted upon. Such a power would scarcely be claimed by a Court governed solely by the rules of the common law. The case of *Robbins* v. *Townsend*, 20 Pick. 345, might seem to claim for the Court some such authority. From the language used, it does not appear to be certain, whether it was intended, that the verdict should be set aside, and the parties be restrained from the exhibition of testimony except to one point, or that the general verdict should remain undisturbed, and a new issue be formed for the trial of that point. This Court does not feel authorized to assume the exercise of such a power. And if it had the power to limit the inquiry to a particular point, it does not appear to have exercised it in such a manner, that the parties would be bound by it. The verdict appeared to have been set aside by the whole Court without any limitation or condition, exhibited by the record; and the presiding Judge could not properly be guided by any thing but the record.

On coming to a consideration of the merits, the counsel for the plaintiff insist upon only one of the objections taken at the trial. That is, that the sale of the house, made by the sheriff on the execution, did not transfer the property to the purchaser. The principal objection to the sale is, that the property was not kept four days after seizure before it was offered for sale, because one of those days was the Lord's day. To consider that day as liable to be reckoned as one of the four is attended with serious difficulty, as intimated in the case of *Thayer* v. *Felt*, 4 Pick. 354. The day of seizure is not to be reckoned as one of the four, and the sale cannot be legally made after the fourth day. *Windsor* v. *China*, 4 Greenl. 304; *Caldwell* v. *Eaton*, 5 Mass. R. 404. As the goods cannot be legally sold on the Lord's day, if that day be not excluded in the enumeration of the four days, the property of the debtor cannot be effectually seized on Wednesday. And it is difficult to perceive, that the adjournment of the sale could be legally made before the fourth day. If the Court must come to these conclusions, it will not necessarily follow, that the plaintiff will be entitled to recover. The purchaser

may, in certain cases, acquire a title to the property sold, although the proceedings of the officer, in making the sale, may not have been in strict conformity to the requirements of the statute. It will be difficult to reconcile all the *dicta* respecting this matter found in different opinions. In the case of *Titcomb* v. *Union Marine & Fire Insurance Company*, 8 Mass. R. 335, it is asserted by Sewall J., that the purchaser's title to tangible property, capable of visible possession and delivery, would be good against the debtor notwithstanding any irregularities in the proceedings of the officer in making the sale. So in the case of *Howe* v. *Starkweather*, 17 Mass. R. 243, Parker J. appears to admit the general rule to be as above stated, and he enforces it by saying, "purchases would not be made, and the intesest of both debtor and creditor would suffer, if sales made by one having lawful authority, and appearing to have exercised it lawfully, should be avoided on account of some irregularity, which could not be known at the time." But he adds, "even in such cases however the return of the officer ought to shew a compliance with the law, or the purchaser would be unable to maintain his property." He had in like manner before stated in the case of *Hammatt* v. *Wyman*, 9 Mass. R. 141, while speaking of the purchaser, "but he cannot make title to the goods without shewing by the return of the execution, that the directions of the law have been observed in the sale."

It cannot however be admitted, that the title of the purchaser, as against the debtor, will depend upon the return of the officer showing, that the directions of the law have been observed in the sale of goods capable of a visible possession and delivery. The judgment against the debtor is considered as satisfied, after the sheriff has taken sufficient personal property of the debtor to pay it. *Mountney* v. *Andrews*, Cro. Eliz. 237. And the sheriff may sell the property after the decease of the debtor. *Clerk* v. *Withers*, 2 Ld. Raymond. 1072. This doctrine is also stated by Parsons C. J. in the case of *Ladd* v. *Blunt*, 4 Mass. R. 403, who observes, "where goods sufficient to satisfy the judgment are seized on a *fieri*

*facias*, the debtor is discharged, even if the sheriff waste the goods, or misapply the money arising from the sale, or does not return his execution. For by a lawful seizure the debtor has lost his property in the goods." The last remark, that the debtor has lost his property in the goods by such a seizure of them, may be considered to be incorrect, according to the case of *Giles* v. *Grover*, 6 Bligh's R. 279. But it will still remain as the unimpeached doctrine of the law, that if the goods be wasted, the debtor will be discharged.

In the case of *Clark* v. *Foxcroft*, 6 Greenl. 96, it was decided, that the sheriff could justify the seizure of goods on final process without showing a return of it; "and that the title of a purchaser under a sheriff's sale on execution might be good, although the execution might not be returned." So in the case of *Bealls* v. *Guernsey*, 8 Johns. R. 54, in an action brought by a purchaser from the debtor, it was decided, that the sheriff might justify the taking of the property on an execution against the debtor, without showing a return of the execution, or any return indorsed upon it. If the sheriff can justify the taking of the property of the debtor on execution, as against a purchaser from him, without proof of any legal disposition of it, a purchaser under his sale by showing only, that he had acquired possession of it through him, might well be permitted also to justify the taking by the sheriff, without exhibiting any legal proof of a sale. The rights of all parties may be fully protected, if a sale of goods, made by the sheriff on execution, be regarded as a legal transfer of the property, although he may not have conformed to the requirements of the statute in making the sale. Any person injured by such proceedings may, by an action against him, obtain ample redress. If the property be not considered as transferred by such a sale, the debtor may receive the benefit of the sale by having the proceeds applied to satisfy his debt, and may then, by his own sale, obtain the value of the goods a second time. While the sheriff may be compelled to pay their full value to the purchaser without the hope of remuneration, although the debtor may have suffered little or no injury from his irregular

proceedings in making the sale. In the case of *Daggett* v. *Adams*, 1 Greenl. 201, this Court held, that "if it should appear, that the property has been fairly sold and the proceeds applied in payment of the execution, on which they were sold, nominal damages only could be recovered" by the debtor against the officer for conducting the sale in an irregular manner. Such a right to recover damages for a wrong done to him, the debtor, cannot transfer to another person by any attempted sale of the property.

The case of *Sanford* v. *Durfee*, 19 Pick. 485, states that a sale of personal property on execution, was held to be valid without a return of the proceedings of the officer upon the execution.

In this case the sale was made by the sheriff on August 6, 1830, and he returned the execution, on which it was made, satisfied in part by the proceeds of that sale. The debtor received the benefit of that sale by a satisfaction of so much of the judgment, on which the execution issued. Although the house appears to have been sold for a small sum of money, the sheriff must be presumed to have obtained the full value; and if he did not, through any misconduct, he would be liable to make full compensation to the party injured. The plaintiff's title to the house is derived from a subsequent sale by the debtor, made on December 3, 1830; and he presents himself as a purchaser from the debtor after the property had been seized, advertised, and sold on execution and the proceeds of the sale applied in discharge of the debt. He cannot therefore justly claim to assert any other, or greater rights to the property, than the debtor, from whom he derived his title, could have done. And does not therefore exhibit a title superior to that of the purchaser at the sheriff's sale, if that sale be considered as irregularly made. These remarks are not intended to apply to the sale of any description of personal property not tangible, and represented only by documentary evidence of title.

*Judgment on the verdict.*

*Note by the Reporter.*— The reasons for setting aside the former verdict were as follows.

EMERY J.— There appears to be a sufficiency of fraud offered to be proved between Ebenezer Tuttle and Rummery on one part, and John R. Tuttle on the other, but the evidence was rejected. The ground on which it was rejected, probably was, that its introduction was not necessary to the decision of the merits of the case. For if the sale were good, by the sheriff to Stephen Emerson, as the property of Ebenezer Tuttle, all other questions are of secondary importance. The strong justice of the case would seem to be, that if the property was never fairly alienated by Ebenezer to John R. Tuttle, some effort might well be justified to bring about a happy retributive justice, so that the creditors of Ebenezer, who were intended to be defrauded, should make the property available to their use.

The conversion by the defendant of the dwellinghouse, for which the action is brought, is abundantly proved. But the contest now seems to be between the creditors of John R. Tuttle, whose estate is represented insolvent, and the creditors of Ebenezer Tuttle, who has administered on John R. Tuttle's estate.

It is somewhat remarkable that there should be so much difficulty in obtaining purchasers of this property, that is now represented to be of the value of $300, and when it was sold, it should bring no more than $27. How far apprehension or conjecture as to the frailty of previous proceedings had influence, it is impossible for us to say. If we can trace out the legal rights of all concerned we shall be satisfied.

The property of one man ought not to be taken to pay the debt of another, without the consent of the true owner, express or implied.

The rights of persons sustaining a representative character, sometimes seem to enable them to commute their and their sureties' responsibility, on their bonds for administering an estate, for a title to the previous estate of the deceased. The executor or administrator may sell the goods for less than the value, or more than the inventoried value, becoming answerable for that amount.

At law the personal property becomes the property of the administrator, and in certain cases, liable for his debts, though not in equity.

The Court consider it important to have the fact ascertained, whether *the administrator himself actually had converted this property to his own use*, and as this does not distinctly appear in the report, they set aside the verdict and grant a new trial for the sole purpose of trying that matter. *Farr* v. *Newman* and note, *Whate* v. *Booth*, 4 T. R. 621 ; *Quick* v. *Staines*, 1 B. & P. 293.

STEPHEN FROTHINGHAM *& al. versus* LEVI E. MCKUSICK.

The mortgagee of timber lands may maintain trespass or trover against any one who shall cut and carry away the timber, or afterwards convert it to his own use, without authority from such mortgagee, although under a license from the mortgagor given after the mortgage.

And if the mortgagee, after his right of action against the defendant has accrued, takes from the mortgagor an assignment of his rights arising under the contract by which the license was obtained, without waiving or agreeing to relinquish any rights as mortgagee, but wholly fails of obtaining any benefit therefrom, the original cause of action remains unaffected.

TROVER for a quantity of board logs, and also for a quantity of boards, with counts in trespass *de bonis asportatis* for the same. The case came before the Court on a motion for a new trial, because, as was alleged, the verdict was against law, against evidence, and against the weight of evidence; and also on a report of the case by the Judge presiding at the trial. If the rulings or instructions of the Judge were erroneous, the verdict for the defendant was to be set aside; otherwise judgment was to be rendered on the verdict, unless it should be set aside, on the motion, as against evidence.

The testimony is all given in the report. It seemed to be admitted on all sides, that the land had been mortgaged; that the plaintiffs were assignees of the mortgage; that the timber was cut under a contract with the mortgagees, made after the mortgage, under certain conditions; that the mortgagees claimed and demanded the timber and boards; and that they afterwards took from the mortgagors an assignment of their contract relative to the cutting of the timber, not relinquishing any rights of their own as mortgagees, but did not obtain any thing from it. The evidence reported is quite voluminous, and relates chiefly to matters having but little bearing on the facts on which the decision of the case was based.

The case was ably argued in writing, but mainly on grounds not taken into consideration in the opinion given by the Court.

*J. Granger* and *B. Bradbury*, for the plaintiffs.

*Bridges* and *Fuller*, for the defendant.

The opinion of the Court was drawn up by

WHITMAN C. J. — It does not seem to be controverted, that the plaintiffs were, at the time the timber in question was felled, the mortgagees of the land on which it had been standing and growing. And, as the law is settled in this State, (*Smith* v. *Goodwin*, 2 Greenl. 173) whoever cut and carried it way, without authority from them, was a trespasser; and could thereby acquire no property in it. The property in the timber would still remain in the mortgagees, who might pursue and recover it, or its value, of any one who might become possessed of it; or undertake to convert it to his own use. The two McKusicks, who cut and hauled it, were liable to an action *quare clausum*, &c. and might be declared against, after having taken it away, in trespass *de bonis asportatis*, or trover; as might also any person concerned in aiding them in their tortious acts.

The defendant, as he proved by his witness, Royal McKusick, and, as he admitted, sawed and manufactured into boards six hundred and fifty thousand feet of the timber. He would, however, excuse himself upon the ground, that he did so upon being hired as the servant of one of those who cut it. But it appeared further, by the testimony of the witness introduced by him, that he furnished supplies, and aided by paying the workmen, under his employer, in cutting and hauling the timber, until his claim therefor, and for sawing, amounted to $3000, for which he was reimbursed nearly to the whole amount from the proceeds of the timber, one hundred thousand feet of which at least he sold himself. He then stands responsible to the plaintiffs, in this action, if not exonerated by the matter set up in defence; as to which the burthen of proof rests upon him.

The defence set up is, that the person, under whom he acted, was licensed by the mortgagors to cut the timber, and to manufacture it into boards, upon certain terms and conditions; and the evidence, if properly admissible, tended to show, that such was the fact. But the license was granted long after the conveyance in mortgage to the plaintiffs; and so, in strict-

ness, was void. But the defendant goes further, and proves, that the plaintiffs took an assignment of the rights of the mortgagors, arising under the license. This, however, was not done until the timber in question had been cut, hauled and nearly all manufactured and disposed of by the defendant, and the person under whom he pretended to act. The right of action against the defendant as a *tort feasor*, had long before become fixed in the plaintiffs; and could not be removed but by a release or accord and satisfaction.

The defendant, nevertheless, contends, that the taking of the assignment was a ratification of the authority of the mortgagors to grant the permit, and a waiver of the rights of the plaintiffs under their mortgage. If it was so it must have been by implication. There is no proof of any express agreement to that effect. And it is difficult to perceive how the rights of the mortgagees, which had become fixed long prior to the assignment, could thereby, without an express agreement for the purpose, become annulled.

There was, besides, plenary evidence in the case, that the plaintiffs continually asserted these rights; and that the agent of the mortgagors, at the instigation of the person to whom the permit had been granted, became extremely solicitous, that the mortgagees should accept the timber share, that is, the value of the timber when standing, according to the terms of the permit; and it is rendered highly probable, by the evidence in the cause, that they finally consented to avail themselves of a remedy, if practicable, in that mode; and to be content upon receiving the timber share according to the terms of the permit; and, if they had succeeded, it would have amounted to an accord with satisfaction. But the expedient proved wholly fruitless; and hence their original cause of action remained unaffected. They were but in the condition of one who takes additional or collateral security for a debt due to him. The one failing he might resort to the other.

It is therefore, perfectly clear on the one hand, that the plaintiffs made out a good case; and on the other, that the defendants' defence utterly failed; and a new trial must be granted.

The view, which we have thus taken of the case, renders it unnecessary that we should go into a consideration of the exceptions, ingeniously taken and argued, in reference to the rulings of the presiding Judge, and his instructions to the jury.

*New trial granted.*

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REUBEN WHITNEY, *in error, versus* JAMES M. BALKAM.

Parol evidence is inadmissible to prove, that a militia company had been without any commissioned officer for the term of three months, for the purpose of showing the authority of the commander of the regiment, under the provisions of the Stat. 1837, c. 276, to detail an officer to train and discipline the company; a copy of the record of the proceedings of the commander-in-chief in relation to the officers of such company being better evidence.

THIS was a writ of error brought by Whitney to reverse a judgment of a justice of the peace, rendered against him in a suit brought by Balkam, as adjutant of the regiment, detailed by the commander thereof to train and discipline a company of militia, which was alleged to have been without any commissioned officer for the term of three months, to recover a penalty for the non-appearance of Whitney at a company training.

Several causes of error were assigned but no statement of them is necessary, as the ground of the reversal of the judgment is seen in the opinion of this Court.

*Fuller*, for the plaintiff in error, remarked that as no counsel appeared in behalf of the original plaintiff, he should submit the case without argument on his part.

The opinion of the Court was by

SHEPLEY J. — By the act of March 28, 1837, c. 276, the commanding officer of the regiment was authorized to detail an officer to train and discipline any company of militia, that should have remained without any commissioned officer for the term of three months. The plaintiff was detailed to train and discipline the Milltown company of infantry in Calais.

The only evidence introduced to prove, that the company had been without commissioned officers for that term of time, was the testimony of one, who had been clerk of the company, that Bradbury was the last commissioned officer, and that he was discharged in 1833. The defendant contended, that the authority of the commander of the regiment to detail an officer for that purpose could not be established by such testimony.

A private of a company may know the fact, that there is no person acting as a commissioned officer of the conpany; but he can have no certain knowledge, whether an officer has been duly commissioned or legally discharged. These are matters to be determined with certainty only by the record of the proceedings of the commander-in-chief. A copy of that record might have been obtained, and it would have been better evidence of the fact, than the testimony of a private of the company. As the plaintiff did not introduce legal proof, that the commanding officer of the regiment was authorized by law to detail him for the performance of those duties, the judgment of the justice is reversed.

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JOHN MARKS *versus* CHARLES HAPGOOD.

If the contract of sale of logs be illegal, as contravening the provisions of the St. 1824, c. 271, but a full consideration is paid and the logs are delivered, the seller can neither reclaim the logs, nor recover their value, by an action therefor.

And if, after the sale, the logs are attached as the property of the seller, the officer has no claims thereto superior to those of the debtor.

REPLEVIN for sixty pine mill logs. General issue pleaded, with a brief statement, traversing the title of the plaintiff, and alleging, that the logs were the property of Greenlaw, and that he, as a deputy sheriff, attached them on a writ in favor of Munson against Greenlaw.

At the trial, before SHEPLEY J. a verdict was rendered in favor of the plaintiff, and no objection appears to have been

made by exceptions, or by the report of the Judge, to the rulings or instructions. A motion, however, signed by the counsel for the defendants, was made and filed in these words. "And now, after verdict and before judgment, the defendant moves the Court here to set aside the verdict and grant a new trial: —

1. Because the verdict is against law and the direction of the Court.

2. Because it is against evidence and the weight of evidence."

The evidence was reported by the presiding Judge, but his rulings, or directions to the jury, do not in any way appear.

On Sept. 1, 1840, Kimball, then Indian agent for the Passamaquoddy tribe, gave a permit to Cross to cut certain timber on the Indian township; Cross assigned the permit to Greenlaw; on Nov. 30, 1840, Greenlaw and Marks entered into an agreement by which Greenlaw was to cut and haul the logs to Marks at a certain price, and Marks was to furnish supplies and means to enable Greenlaw to get the timber to the mills; after the timber was in the boom at Calais, on March 6, 1841, Marks paid to Greenlaw the balance due, and took a bill of sale of the logs; after this Hapgood attached the logs, as the property of Greenlaw, and took them into his possession; and then Marks brought this suit.

Cross and Greenlaw were inhabitants of this State, and Marks an inhabitant of the British Province of New Brunswick.

*T. J. D. Fuller*, for the defendant, contended that the sale from Greenlaw to Marks was illegal, and gave him no property. The logs still remain the property of Greenlaw, and subject to attachment by his creditors. A contract forbidden by law cannot be enforced; nor can a foreigner come into our State, and call into action our laws for the purpose of defeating the operation of our own statutes. Stat. 1824, c. 271; Stat. 1839, c. 388; 1 Johns. R. 433; 3 T. R. 455; 4 T. R. 406; *Wheeler* v. *Russell*, 17 Mass. R. 258; *Boies* v. *Blake*. 1 Shepl. 381.

*J. Granger*, in his argument for the plaintiff, among other grounds, contended, that possession alone was sufficient to enable the plaintiff to maintain this action, unless the defendant could show title in Greenlaw, as whose property he attached them. Now the case shows, that Greenlaw had sold and delivered the logs to the plaintiff before the attachment. Greenlaw, therefore, could set up no title against the plaintiff, and where there is no fraud, and none is pretended here, an attaching officer, or creditor, can stand in no better situation. As Greenlaw did not own the property, the officer, by his attachment, acquired no right to take the logs from the possession of the plaintiff. A third person who has obtained possession of property, which another acquired through an illegal contract, cannot set up such illegality to screen himself from accounting for the property. 2 Kent, 467; 1 Bos. & P. 3; 2 B. & P. 466; Chitty on Con. 232; 5 Day, 459; 13 Mass. R. 39. He also contended that the statutes cited on the other side were unconstitutional and void.

The opinion of the Court was by

SHEPLEY J. — This is an action of replevin brought by the plaintiff, a citizen of the Province of New Brunswick, against the defendant, a deputy sheriff, who had attached the logs replevied as the property of George C. Greenlaw. Most of these logs appear to have been cut by Greenlaw, upon the township of land reserved for the Passamaquoddy Indians, by virtue of a license granted by the Indian agent to Amos K. Cross, and assigned to Greenlaw, who entered into a written contract with the plaintiff to cut, haul and float the logs for him upon certain terms therein stated. To prove, that he owned the logs, the plaintiff introduced testimony tending to show, that he had purchased them of Greenlaw, and that they had been paid for and delivered, before they were attached by the defendant. And he obtained a verdict in his favor. The defendant now moves to set it aside upon testimony introduced by himself, that the plaintiff obtained his title by a violation of the provisions of the act of February 23, 1824, c. 271. If

the contract made on November 30, 1840, between the plaintiff and Greenlaw be regarded as illegal, when considered in connexion with the other testimony, the question arises, whether the defendant can impeach the title of the plaintiff by proving, that he acquired it by a violation of the provisions of the statute. Is the maxim *ex dolo malo non oritur actio*, applicable to this case? The action is not founded upon any illegal contract, or act of the plaintiff. Nor does he insist upon the execution of any such contract. That contract had been already executed. The Court is not called upon to carry it into effect, or to consider, that it ever was a subsisting and binding contract for the purpose of sustaining this action. If Greenlaw had sought to have the logs restored to him, because the plaintiff obtained them by a violation of the statute; he would have been met by the maxim *potior est conditio defendentis*, and must have failed. After he had received a valuable consideration for them, without any intention to defraud his creditors, it would seem, that they could not have any superior rights; and that they could not effect that through the intervention of an officer, which he could not himself accomplish. If the plaintiff had sold the logs to the defendant, he could not have avoided payment by showing, that the plaintiff had obtained them by a violation of law, unless his own title had been thereby impaired, or destroyed. The consideration of such a contract would not be illegal, nor would it be designed to accomplish an illegal purpose. It would be a new contract, not arising out of or connected with the original unlawful transaction. If a mere wrongdoer, who had taken the logs from the possession of the plaintiff, could successfully defend an action of replevin by showing, that the plaintiff had violated the provisions of a statute in obtaining them, any person, who could without violence, obtain possession of the goods of a merchant, might successfully resist his title to them by the like proof. If the plaintiff has been guilty of a violation of the provisions of that act in obtaining the logs, this action is not founded upon any such illegal act or contract, but simply upon his right of property and the wrong-

ful act of the defendant. It may be true, that an illegal act had before been connected with these logs, but they were not thereby so infected, that they could no longer be the subject of legal property. It would be subversive of the ordinary business of life to hold, that one could not maintain his title to property so situated.

In the case of *Boies* v. *Blake*, 13 Maine R. 381, the plaintiff had lawfully cut and stacked the hay under a license from the Indian agent. The defendant could claim title only by the same license, which declared him to be a trespasser. In this case the plaintiff was under no such necessity; and did not in fact rest his title upon the contract or license. They were introduced to defeat his title by the defendant, who had neither possession of the property, nor a right to take it, except as the property of Greenlaw, who had before parted with all his rights.

*Judgment on the verdict.*

EDWARD A. BARNARD *& al. versus* SAMUEL WHEELER *& al.*

AND

SAMUEL WHEELER *& al. versus* EDWARD A. BARNARD *& al.*

If the master of a vessel in his bill of lading for goods received on freight inserts a price for the transportation, and in so doing acts under a clear mistake, in supposing that price had been agreed on with the owners, when the fact was otherwise, it will not be obligatory on the owners; especially if the mistake was occasioned by the mismanagement of the party insisting upon taking advantage of it.

If the shipper of goods on freight contracts for the price thereof with the general agent of the owner of the vessel, having reason to know, that although his agency might be general, yet that his authority was restricted in that particular instance, the shipper cannot claim to have the terms of the contract fulfilled as against the principal of such agent.

Nor will such contract of the agent be ratified by the principal by an omission to give notice of his disaffirmance of it, until after he can possess himself of complete knowledge as to how the contract came to be made, and how it would affect his interests.

If the owner of a vessel detains goods transported in her for their freight, and they are wrongfully taken out of his possession by a writ of replevin, an action of assumpsit, commenced during the pendency of the action of replevin, may be supported against the owner of the goods for their freight.

Should a tender of the freight money, alleged to be due, be made to a mere servant of the owner of the vessel in whose custody the goods were placed for safe keeping only, such servant has no power to waive any rights of his employer in relation thereto.

When goods detained by the owner of a vessel for the payment of the freight, have been wrongfully taken from him by the owner of the goods by means of a writ of replevin, if the owner of the vessel brings an action of assumpsit for the freight, and attaches other goods to secure the demand, the lien upon the goods for the freight is not thereby discharged.

THESE cases were both opened to the jury as one, and after the evidence on the one side and on the other had been introduced or offered, the parties agreed, that the case should be taken from the jury, and submitted to the decision of the Court, upon a report of the evidence by the presiding Judge; with power to make such inferences as a jury might properly make upon the proof, or upon so much thereof as should be legal evidence in the case. And the Court were to enter a default or nonsuit in each of the cases, and judgment according to the rights of the parties.

The facts, considered by the Court to be proved by the evidence, are stated in the opinion.

These cases, both as to the facts and the law arising thereupon, were argued by

*J. Granger*, for Barnard & Pike; and by

*Hayden*, for Wheeler & Sons.

*Granger*, in his argument, in support of his position, that if Wheeler & Sons had a lien on the goods of Barnard & Pike for the freight, it was discharged by the tender, cited 5 T. R. 409. That the Master's contract for freight, evidenced by the bill of lading signed by him, was binding upon the owners. Abbott on Shipping, 92; 4 Campb. 298; 8 Maine R. 356; 14 Maine R. 183; 17 Maine R. 153; 11 Mass. R. 91; 6 Cowen, 173. And the same authorities show, that the contract of W. P. Wheeler, the agent of the owners, was binding upon them. The letter of Wheeler & Sons to W. T. Wheeler was a mere letter of information, and not a binding contract, or even a restriction of the authority of the agent. A mere *ex parte* offer, not accepted, can bind no one. 16 Maine R. 458. The owners of the vessel had no right to call on Barnard & Pike for freight of Curtis' goods, and certainly no lien on their goods for the payment thereof. Abbott on Shipping, 247; Montagu on Lien, 55. Whether the tender was sufficient or not in amount is immaterial, as it was refused, on the ground, that the money would not be received, unless a receipt given, was produced; a condition he had no right to require. 4 Mass. R. 91; 15 East, 547. If the owners of the vessel had a lien, and if it had not otherwise ceased to exist, it was discharged by the bringing of their action for the freight, and attaching the goods of Barnard & Pike to secure the whole amount. 5 Pick. 178; 12 Petrsd. Abr. 206 and cases there cited; 2 Harrison's Dig. 1452. In the suit in favor of Wheeler & Sons against Barnard & Pike, the defendants offered to be defaulted for $200, and the interest. Therefore, whether the tender was good or not, the action cannot be maintained for a greater sum, if the contract made by the

agent of the owners, and sanctioned and adopted by the master, and even adopted by the owners, by their neglecting to give seasonable notice of their disaffirmance of the acts of their agents, is binding.

*Hayden*, in his argument, cited in support of his position, that as this was not a general ship, the master has no right to make a contract for freight, and cannot bind the owners thereby. Abbott on Shipping, 92, 95, 98; 4 Greenl. 407; 19 Johns. R. 235; 11 Mass. R. 99; Story on Agency, 37. If the owners have made a special contract, the master has no power to alter it. Abbott, 99. If the master had authority, it was personal to himself, and he could not delegate it to another. Story on Agency, 14, 15, 38, 39. If W. T. Wheeler was the general agent of Wheeler & Sons, he had no right to vary from special instructions; and inasmuch as Barnard knew what those instructions were, he had notice sufficient to put him on his guard. Barnard having seen one of the firm but two days before he made the bargain with W. T. Wheeler, had notice that such one would not be approved by the owners; and therefore Barnard should not have induced W. T. Wheeler to make it, and cannot hold the owners to it. The contract cannot bind the owners, because he was guilty of misrepresentation, and had he made known the facts, W. T. Wheeler would never have made such bargain. The plaintiffs cannot now say, that they tendered as much as the freight of their own goods came to, for their tender was as per bill of lading; and if accepted, would have authorized them to receive to their own use the freight from Curtis. 2 Metc. 283; 18 Pick. 414; 8 Mass. R. 365. The tender, too, was conditional, and so not good. 12 Mass. R. 450.

The opinion of the Court was drawn up by

Whitman C. J. — The first of these actions is replevin for sixty-seven barrels of flour; and the other is assumpsit for the freight of a cargo of flour, corn, &c. of which the sixty-seven barrels were a part. The first was commenced by the general owner of the cargo, against the defendants, as owners of the

vessel, in which the cargo was imported; who claimed a right to detain the sixty-seven barrels till the freight demanded by them was paid. Barnard & Pike, the plaintiffs, having tendered the amount alleged by them to be due, but not the amount claimed by Wheeler & Sons, the defendants, and for that reason not accepted by them, and, thereupon, having demanded the sixty-seven barrels of Wheeler & Sons, and the same not being delivered, this suit was instituted.

The flour detained, having been taken from the possession of the master of the vessel, in which the same was imported, by the action of replevin, Wheeler & Sons instituted their action of assumpsit to recover the amount of the freight supposed by them to be due.

The evidence in both suits being nearly or quite identical, they were opened together to the same jury; but, upon a development of the evidence, the causes were taken from the jury; and the parties agreed, that the Judge presiding should report the evidence for the consideration of the whole Court; and that such inferences might be made by the Court, as a jury might make from the facts proved; and thereupon such adjudication should be made as might be in conformity to the legal rights of the parties, upon nonsuit or default.

It appears that Wheeler & Sons, on or about the first of September, 1840, had despatched the vessel, called the Sultan, with a cargo of plaster, &c. to Wilmington, (Del.) and on that day Barnard, one of the firm of Barnard & Pike, took from Wheeler & Sons an open letter, addressed to W. T. Wheeler, then residing and doing business at Wilmington, in which it was stated by Wheeler & Sons, that they had agreed with Barnard & Pike to take, in the Sultan, what corn and flour they might wish; they to fill her up, if desired, at twenty-five cents per barrel for flour, and five cents per pushel for corn; and to load at Philadelphia, if desired, to be delivered at Calais, Maine; provided Barnard should arrive in time to meet the vessel on her arrival out. Barnard arrived in Philadelphia, and also at Wilmington, before the Sultan reached the latter place. At Philadelphia he shew his open letter to the corres-

pondents of Wheeler & Sons; and also met there one of the firm of Wheeler & Sons, with whom he had various conversations, in which he made repeated endeavors to induce him to agree to a reduction of the terms for freight, contained in their letter to W. T. Wheeler; but such alteration was peremptorily refused. Afterwards, and before the Sultan had arrived, this member of the firm left Philadelphia; and Barnard, thereupon, proceeded to Wilmington; and there delivered the open letter, and insisted, that there had been no agreement as to the freight; and made no communication of his interviews with, and endeavors to induce one of the firm of Wheeler & Sons to reduce the price of the transportation of the flour and corn, and thereupon induced W. T. Wheeler, who had been the correspondent, and consignee generally, of Wheeler & Sons, at Wilmington, and was the son of one, and the brother of the others of them, to sign a written agreement, that the whole vessel should be let to Barnard & Pike, to transport corn, flour and coal from Philadelphia to Calais, for two hundred dollars, unless they should prefer to pay twenty-five cents per barrel for flour, and five cents per bushel for corn, and one dollar and seventy-five cents per ton for coal, in lieu of the two hundred dollars, payable at Calais on delivery of the cargo.

On the arrival of the Sultan at Philadelphia she was fully laden by Barnard with corn, flour, bread, cigars, tobacco, yarn, coffee, shot, apples and oakum; and the captain, as must be presumed, supposing the agreement with W. T. Wheeler to be obligatory, signed bills of lading in conformity to it. The cargo arrived at Calais, and was there delivered, with the exception of the sixty-seven barrels of flour, which were detained to secure the payment of a reasonable freight for the items of the cargo imported, amounting, as was claimed, to a considerable amount beyond the $200, tendered; and it does not seem to have been questioned, that a reasonable freight would have exceeded the amount tendered; for the defence was based wholly upon the supposed obligatory effect of the agreement with W. T. Wheeler. If the two hundred dollars would have been adequate to a reasonable freight, it is not

conceivable, that such ground would not also have been insisted on.

That Wheeler & Sons might cause the flour to be detained till such freight, as was actually due, was advanced or tendered is undeniably true; and that two hundred dollars was in fact tendered for it seems to have been placed beyond a doubt; and if no more was due for it the action of replevin is sustained. And this depends on whether the contract with W. T. Wheeler was obligatory upon Wheeler & Sons. If it was not, then there was no other contract concerning the price of transportation, than what can be gathered from the letter, borne by Barnard to W. T. Wheeler, and the conversation between Barnard, and one of the firm of Wheeler & Sons, in Philadelphia, and the ordinary price of such transportation. If the agreement signed by W. T. Wheeler was not valid, as against Wheeler & Sons, aside from the bills of lading signed by the master, it cannot be regarded as confirmed by them. For they were evidently made under the apprehension, on the part of the master, that it was imperative upon him, as to the amount of freight to be exacted. For the delivery of the cargo, as described in the bills of lading, his undertaking was absolute; but, in reference to the freight to be paid, which is a matter regulated more frequently by the owners of the vessel and of the cargo, and which they may always control, if he has reason to suppose they have done it, he may, as was done in this case, refer to what he may suppose they have done to regulate it. If clearly under a mistake in so doing, it would not be obligatory upon the owners; especially if the mistake should appear to be owing to the mismanagement of the party insisting upon taking the advantage of it.

It becomes important now to inquire, whether W. T. Wheeler, in making the agreement signed by him, had authority, under the particular circumstances of the case, to bind Wheeler & Sons to the performance of its stipulations. That W. T. Wheeler had authority generally to act as agent for them, in reference to the employment of vessels sent or consigned by them to him, when not restricted by particular orders, his tes-

timony renders it at least presumable. If Barnard had gone to him, without being the bearer of the letter, which he delivered to him, and without having had conversation with Wheeler & Sons, or either of them, such an agreement might have been conclusive upon them. But the case here is different. From the terms of the letter he must have known what Wheeler & Sons understood to be agreed upon as to the rate of freight to be exacted; and W. T. Wheeler would doubtless have so understood it, but for the affirmation of Barnard to him, that no terms had been agreed upon as to freight. And Barnard, at the same time, concealed from him the explicit refusal of one of the firm of Wheeler & Sons, a few days before, in Philadelphia, to vary the terms contained in the letter. Barnard, therefore, could but have known, that, whatever W. T. Wheeler's general power as an agent might be, in this particular, it was not the intention of Wheeler & Sons to have the question of the freight of the Sultan, as between Barnard & Pike, and themselves, referred to him. And obtaining such an agreement under such circumstances cannot be regarded as ingenuous and fair dealing between mercantile men. If Barnard had not only delivered the letter to W. T. Wheeler, but had stated to him what had passed between himself and one of the firm of Wheeler & Sons, in Philadelphia, taking that in connexion with the contents of the letter, it may well be doubted if W. T. Wheeler would ever have assented to such an agreement; and it may well be apprehended that such was the impression on the part of Barnard; and that it was, therefore, purposely withheld. But, whether there were *mala fides* on the part of Barnard or not, if he contracted with W. T. Wheeler, having reason to know that, although his agency might be general, yet that his authority was restricted in this particular instance, he cannot claim to have the terms of the contract fulfilled as against his principals. Abbott by Story, 134. We think, therefore, that the contract entered into between Barnard & Pike and W. T. Wheeler, was not obligatory upon Wheeler & Sons; and that the bills of lading made under such circumstances should not be conclusive upon

them, as to the amount of freight to be exacted; and that a reasonable freight was due to them. And, it being reasonable to conclude that such freight would have exceeded the sum of two hundred dollars, the right of detention by Wheeler & Sons, or by their agent, the master of the Sultan, at the time the action of replevin was commenced, had not ceased, and therefore, that, that action is not sustainable. The plaintiffs in it must become nonsuit.

But it appears that Wheeler & Sons, after the flour detained had been wrongfully taken out of their possession, by the replevin suit, commenced their action of assumpsit for the freight, in which a default must be entered; and judgment be entered for the amount, which may appear to be due. In such case it would not be reasonable to order a return of the property replevied, till it shall be ascertained that the remedy in assumpsit, on execution, shall fail of being complete. The action of replevin, under a nonsuit, may, therefore, be continued to await the further order of Court in reference to an order of return.

Several points, however, were insisted upon at the argument, which it may be expected that we should notice. One was, that Wheeler & Sons must be regarded as having ratified the contract, made by W. T. Wheeler, by not giving notice of a repudiation of it before the Sultan arrived at Calais. It appears that they must have received notice by letter from W. T. Wheeler, that such a contract had been made, some week or two previous to the arrival of the Sultan. It does not appear, however, that they had any notice of what Barnard & Pike had put on board of her anterior to her arrival; nor, until such arrival, and an interview with the master, could they become fully aware of all the circumstances under which the shipment had been made. Knowing, as may be believed, that the contract had been entered into directly at variance with what had been expressly in contemplation, and well understood by the parties in personal interviews between themselves, they might well be allowed to wait till they could possess themselves of complete knowledge, as to how the contract came to be

made, and how it would affect their interests, before coming to a conclusion to renounce it. In such case the renunciation would seem to have been in season.

Another ground insisted upon was, that a tender of two hundred dollars, made to one Greene, with whom the sixty-seven barrels of flour had been deposited for safe custody, who did not object to delivering it because the tender was not sufficient, was effectual to destroy the right of lien in Wheeler & Sons, or in the master as their agent. But it does not appear that Greene had any authority to receive the freight. The flour was with him for safe custody only. He was but a servant employed for a particular purpose. The tender should have been made to the master, or to Wheeler & Sons. Whatever may have been the manner of Greene's refusal to receive the two hundred dollars, it could in nowise affect the rights of Wheeler & Sons. That such storage was proper in such case is fully established by authority. Abbot by Story, 282.

Again, it was insisted, that Wheeler & Sons, by bringing an action of assumpsit for the freight, have waived their right of lien; and authorities were cited in support of that position; but they cannot be considered as maintaining it. If Wheeler & Sons had caused the identical flour to be attached, it might have been otherwise. In Story on Agency, 393, it is laid down, that an agent, having a lien upon property belonging to another person, has his remedy as well *in personam* as against the property; and that he trusts both to the fund, and to the person of his principal. If, however, the lien be in the nature of a pledge for a debt, according to some authorities, (*Corlies* v. *Cummings*, 6 Cowen, 181,) it may be that the fund should first be exhausted, before a resort should be had to the person of the pledgor. But if the general owner of property, so situated, should by replevin, or otherwise, deprive the lien holder of his rightful possession, he would unquestionably subject himself to an action for the amount due, without regard to the property pledged. Mr. C. J. Shaw, however, in delivering the opinion of the Court, in *Beckwith* v. *Sibley & al.* 11 Pick. 482, says, the creditor, "notwithstanding the

pledge, or collateral security, may look to the general credit of his debtor, and have his action, unless there is some agreement or contract, express or implied, to give time, or to look to a particular fund." It would follow much more conclusively, where a mere detention was authorized, as in case of a simple lien, in which no right of sale exists, that a right of action exists simultaneously with the detention. And most clearly such right of action, without impairing the right of lien, must exist when the general owner, who is the debtor, has unjustifiably deprived a simple lien holder of the custody of the property detained.

It was further urged, that Wheeler & Sons had no right to detain the property of Barnard & Pike, for the freight of goods shipped on board the Sultan for one Curtis; and that, deducting the freight due for the transportation of his goods, the tender of two hundred dollars would have been to the full amount of the residue of the cargo, whether calculated upon the principle of a reasonable freight or otherwise; and it may be that such would have been the case. But, on looking at the bill of lading of the goods shipped to Curtis, we find, that the freight of those goods was made payable, not to the master, nor to Wheeler & Sons, but to Barnard & Pike. And, on looking into the evidence, we find, that the freight of those goods was claimed and received by Barnard & Pike. We cannot doubt, therefore, but that the bill of lading of those goods was so filled up and signed by the master at the instigation of Barnard, at Philadelphia, under the impression, on his part, and on the part of the captain, that the whole vessel, by the run, was let to Barnard & Pike. They, therefore, must be regarded as having undertaken for the carriage of these goods; and, therefore, in effect, as the shippers of them to Curtis, and, after having exacted and received the freight therefor, of him, it is too late for them to insist that they are not responsible to Wheeler & Sons for the freight of the whole cargo.

WILLIAM H. JEPSON *versus* JOHN F. H. HALL *& al.*

Where a bond was given to the plaintiff by the defendants, with a condition that it should be void, if the defendants should pay the plaintiff's part of all debts due from a company consisting of the plaintiff and one of the defendants, and save and keep him harmless and indemnified from all his liabilities for the company, "as is named in a certain agreement," described, between the partners; and after the making of the agreement and prior to the execution of the bond, the defendants, as principals, and the plaintiff as their surety, had given their note for one of the demands named in the agreement, which note was afterwards paid in part by the plaintiff; *it was held*, in a suit upon the bond, that the defendants were liable for the amount paid on the note by the plaintiff.

THE facts in the case are stated in the opinion more fully than they are to be found in the other papers which have come into the hands of the Reporter.

*B. Bradbury* argued for the plaintiff: — and

*Fuller*, for the defendants, citing *Newall* v. *Hussey*, 18 Maine R. 249, and *Abbott* v. *Upton*, 19 Pick. 434.

The opinion of the Court was drawn up by

WHITMAN C. J. — This is an action of debt upon a bond, bearing date the sixth day of July, 1840, to which a condition is subjoined, that, if the defendants shall pay the plaintiff's part of all debts due from Jepson & Co. and save and keep him harmless and indemnified from all his liabilities therefor, "as is named and specified in a certain agreement between the said Jepson and the said Webb, bearing date the twenty-eighth day of February, 1840," then the bond to be void, &c. The terms of the agreement were the same as those in the bond. At the time it was entered into, Jepson & Co. the plaintiff being one of them, were owing Messrs. Hill & Huckins $1348 on account; and, afterwards, and before the execution of the bond, the defendants, Webb & Hall, gave their note for the same debt, to which Jepson added his name as their surety. On this note a suit was commenced, and judgment therein obtained for $1069,42, debt and costs, a portion of the note having been previously paid. Execution being issued on said judgment, the defendants, Webb & Hall, paid $685,47 in part

satisfaction thereof. The balance, $384,10, including the cost of the execution, was paid by the plaintiff. And now he insists that, by the terms of the agreement and bond, the defendants are bound to refund to him the amount of the balance so by him paid.

The defendants deny their liability upon the ground, that, at the time of the execution of the bond, the debt in question had ceased to be a debt due from Jepson & Co. and had become the proper debt of Webb & Hall, for which the plaintiff had become surety; and, although this was for a debt originally provided for in the agreement, yet, that the substitution of said note therefor was, according to the decisions in Massachusetts and Maine, a payment of the debt before due to Messrs. Hill & Huckins.

That the substitution of a negotiable note, which the one in question may be presumed to have been, for a simple contract debt, is *prima facie* to be deemed a discharge of the former liability, is not to be denied. Hill & Huckins, the holders of the note, could not probably have maintained an action, after accepting it, upon their original demand. And, if the condition of the bond had reference only to demands as existing at the time of its execution against Jepson & Co., the argument might be admitted to have much force. But the indemnity mentioned in the bond is not so limited. It has reference to the terms of the agreement, before entered into between the plaintiff and Webb. It extends to all the liabilities "named and specified in the agreement." And this demand was originally one of those. Is it now so transformed as to cease to be one of that character.

Suppose Webb were sued upon his agreement, and it had appeared, that the note had been given, as it in fact was; would he be thereby exonerated from his liability under it? Clearly not. The plaintiff's liability for the debt would have remained uninterrupted. Suppose a note had been given, after the agreement, for the balance of the account, and before the making of the bond, by Jepson & Co., this, in common parlance, would have been a payment of the account by note;

but in truth would have been merely a substitution of a different species of evidence for the same debt. It could not, in such case, be said that the agreement no longer embraced it; for it would be but the continuance of the original liability of the plaintiff. And supposing the same had been done with the addition of some one as surety on the note, it could have made no difference. The continued liability of the plaintiff for the debt of the firm would have still remained unaffected.

It has always been held in case of a mortgage, intended as collateral security for the payment of a debt due by note of hand, that the substitution of new or additional security for the payment of the same debt, was no discharge of the mortgage; and that the mortgage, in the absence of any release or discharge thereof, or of the debt due, remained in force till the actual payment of the debt, whatever form the evidence of the existence of it might have assumed.

The giving of the note to Messrs. Hill & Huckins for the balance of their account against Jepson & Co. with Jepson's name as surety, was no interruption of his liability for the debt of the firm. It was but a modification of such liability, with further security by the addition of Hall's name, to avoid a reliance entirely upon the agreement. Jepson would not be saved harmless and indemnified, according to the express terms of the agreement, from his liability for the debts of the firm, if ultimately compelled to pay this debt. And, having been compelled finally to pay it, we think he is entitled to be reimbursed for it. Judgment must, therefore, be entered for the penal sum of the bond; and execution is to issue for the amount due in equity and good conscience, being $521,54.

PETER GOODENOW *versus* DANIEL KILBY.

Where the demandant entered under a levy, and thereupon became seized, and gave a bond to the tenant, conditioned to convey the same premises to him by deed of warranty on payment of a certain sum, and the tenant entered into possession thereof under the demandant, and continued in possession until the commencement of the suit, without having paid the sum agreed upon, he cannot set up any defects in the levy in defence, showing no title in himself, or submission on his part to the title of any one else.

WRIT OF ENTRY. A statement of facts was agreed, referring the case to the decision of the Court thereon. Such of the facts as are material, are found in the opinion.

*D. T. Granger*, for the demandant, said that the tenant did not now set up any claim of title in himself, nor does he claim to hold under any one else. He attempts to defend by a mere naked denial of the demandant's title.

The levy of the demandant and entry under it, gave him the seizin, and that is enough to maintain this action against any one, who enters without title. 7 Pick. 169; 3 Metc. 175.

But the tenant entered into the premises under a bond from the demandant, and has acquired no other title. He cannot be permitted to deny the title of the demandant. 1 Fairf. 383; 19 Maine R. 66; 12 Mass. R. 325; 4 Metc. 224; 14 Mass. R. 93; 5 Pick. 124; 2 Dane, 443; 3 Fairf. 478.

*S. S. Rawson*, for the tenant, contended that at the time of the levy, the title to the premises was not in the debtor, and that therefore the demandant acquired neither title nor seizin by the levy. 3 Mass. R. 523; 9 Mass. R. 96; 11 Mass. R. 163.

As the demandant had no title to the land he covenanted to convey, the notes given to him by the tenant for the purchase money, and the bond, are without consideration.

The tenant is not estopped by the bond to deny the title of the demandant. Co. Lit. 47 (a); *Ham* v. *Ham*, 14 Maine R. 351; *Fox* v. *Widgery*, 4 Greenl. 214.

The opinion of the Court was drawn up by

WHITMAN C. J. — By the statement of facts, agreed upon by the parties, it appears that the plaintiff, having obtained an execution against Seward Bucknam & al. on the twenty-sixth of August, 1840, caused it to be satisfied by a levy on the demanded premises; and, subsequently, on the fifteenth day of January, 1841, agreed with the defendant, on certain terms and conditions, to convey the same to him; and in pursuance thereof, gave him a bond, conditioned, that, if the defendant should pay the plaintiff certain sums of money, within certain periods, and then, the plaintiff should, thereafter, upon request being made by the defendant, make, execute and deliver to him, his heirs or assigns, a good and sufficient deed of conveyance of the demanded premises, with covenants of general warranty; and, in the meantime, should suffer the defendant to hold, occupy and enjoy the same, then and in such case, the bond should be void, &c.

No question is made, but that the defendant, upon taking said bond, entered upon, and has since enjoyed the use of the premises, without interruption from any one, until said several sums had become payable; and so continued until the commencement of this suit; and it is not pretended that said sums, or any portion of them, had ever been paid. Yet the defendant claims a right to withhold the premises from the plaintiff, under pretence, that his title thereto was defective; and this without setting up any claim of title in himself; or even any submission on his part to the title of any one else. Surely, under such circumstances, he cannot be justified in continuing to hold adversely to the plaintiff. The authorities cited by his counsel do not apply to a state of facts such as this case exhibits. There is here no claim of rent, by a landlord of his tenant, either by virtue of a deed poll or indenture; and, if there were, there could be no pretence, on the part of the lessee of a holding, by or in submission to a title paramount to that of the lessor.

The ground taken by the counsel for the defendant, that the bond was void for want of consideration, and therefore that

the plaintiff has no right to recover, to say the least of it, is a novelty, coming as it does from the obligee, and not from the obligor; and being in reference to an instrument under seal.

Whether there are any defects in the plaintiff's title we have not thought it necessary to inquire. It is sufficient for him, that he entered under a levy, and thereupon became seized; whether by right or by wrong, it is unnecessary to inquire; and that the defendant has for several years, and for aught that appears until the present time, enjoyed the possession of the premises under the plaintiff. And we think it very clear that he ought to withhold them from him no longer.

As agreed by the parties the defendant must be defaulted.

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ISAAC H. HOLDEN *versus* ASA PIKE *& al.*

If funds be put into the hands of a person by one of several interested in procuring the discharge of a mortgage, to be applied for that purpose, and he agrees so to apply the same, the others agreeing to furnish him with the remainder of the necessary funds, but failing so to do; those failing to perform on their part, cannot, by bill in equity, compel such person to apply the funds belonging to others to the discharge of such mortgage.

If the mortgagor, for an adequate consideration, conveys a part of the mortgaged premises, and afterwards conveys the remainder to another person, the estate last conveyed, if sufficient for that purpose, it would seem, in equity, is charged with the redemption of the mortgage.

The general rule is, that if it be for the interest of the assignee of a mortgage, that it should be upheld, it will, in a court of equity, be considered as still subsisting.

THIS was a bill in equity in favor of Isaac H. Holden against Asa Pike and Jonathan Pike, and was heard on bill, answer and proof.

The parties and witnesses all lived in the State of Rhode Island. The controversy grew out of the purchase of land in the county of Aroostook in this State. What of law there is in the case, will be understood sufficiently from the facts stated in the opinion of the Court.

The case was argued by

*A. G. Jewett*, for the plaintiff; — and by

*Hobbs*, for the defendants.

The opinion of the Court was drawn up by

TENNEY J. — On February 23, 1835, the State conveyed to Randal Whidden several lots of land in the town of Amity, amounting in the whole to about 17,500 acres, in fee simple, on condition that the grantee should pay, when payable, his four notes of hand for the sum of $2577,25, each, (which came to maturity in one, two, three and four years from their dates) and should cause twenty of the lots to be settled within five years from the time of the conveyance. On the 5th of August, 1835, Whidden conveyed by several deeds in fee with covenants of warranty, five-eighths of the land to Lucius Doolittle, and three-eighths to Christopher V. Spencer, subject to the condition of causing twenty of the lots to be settled as mentioned in the deed from the State to Whidden, taking their joint bond, that they should pay his notes to the State in the proportion of five-eighths by Doolittle and three-eighths by Spencer, according to their tenor, secured by a mortgage from each, of the part sold to them respectively. On October 15, 1835, Doolittle conveyed by deeds with warranty, one-eighth of the land to the complainant, and one-eighth to one Turner, subject to the condition of causing twenty lots to be settled, receiving at the time the full consideration therefor; and on the 10th of November, 1835, conveyed the remaining three-eighths belonging to him, to Daniel Wood, Brayton Gardner, and Whipple Phillips, one-eighth to each, subject to the condition last before named, and in consideration, took their joint bond, to take up five-eighths of Whidden's notes to the State. On November 21, 1835, Spencer conveyed to the defendants by deed with covenants of warranty, subject to the condition of settling twenty lots, one-eighth of the land, and received the full consideration. Subsequent to this, Spencer sold one-sixteenth to Nathaniel Perkins, and purchased of Phillips the part sold to him by Doolittle, agreeing to assume Phillips'

liability upon the bond given by him, Wood and Gardner to Doolittle. In March, 1838, only one of Whidden's notes to the State had been cancelled, and the interest of one year only had been paid upon the others. On the 17th day of March, 1838, Spencer, Wood, and Gardner entered into a sealed contract with the defendants for the purpose of raising a fund, with which to discharge the liabilities, which then existed on account of the land, and to obtain a valid title thereto; at the same time Spencer delivered to the defendants his notes, amounting to $4000, and executed and delivered a deed, with covenants of warranty, to the defendants, of ten thirty-second parts of said land in pursuance of the contract. The notes were not made use of. Wood and Gardner afterwards furnished certain sums of money and put into the hands of the defendants, or paid it upon Whidden's notes to the State. On the 15th January, 1839, the defendants paid up the balance due upon those notes of Whidden, and took an assignment of Doolittle and Spencer's bond and mortgages to him, running to them, their heirs and assigns, having at the same time, and previously, paid to Whidden certain sums for damages, taxes, interest, services and expenses incurred by him to prevent a forfeiture of the land to the State. On January 13, 1840, the defendants took from Perkins a quitclaim deed of one-sixteenth of the land, and on the 14th May, 1841, a quitclaim of two-eighths from Daniel Wood, who had previous thereto, purchased one-eighth of Gardner. Spencer has paid nothing upon the bond given by him and Doolittle. Wood and Gardner have not paid the whole of their respective portions of the sum, which they undertook by their bond to Doolittle to pay, and the additional sum paid the defendants to Whidden for taxes, services, expenses and interest. The bill seeks for a release from the defendants of all claim to the one-eighth conveyed by Doolittle to the complainant, who insists, that the mortgages given by Doolittle and Spencer to Whidden have been extinguished, and that in equity his interest in the land is free from any charge arising from those mortgages, on the ground, that by the written contract of

March 17, 1838, before mentioned, the defendants, upon the terms and conditions therein mentioned, agreed, that they would take charge of certain funds placed in their hands, and furnish money, if necessary, and faithfully apply the whole of the funds so furnished to the payment and discharge of the notes of Whidden to the State, and that they in pursuance of the agreement, did pay said notes, and thereby extinguish the mortgage to Whidden; and also on the ground, that by virtue of an agreement between the complainant and the defendants in consideration, that the former was active in causing the written contract between Wood, Gardner and Spencer to be executed with the defendants, the latter paid the notes of Whidden to the State and thereby extinguished the mortgage.

The defendants in their answer, admit that the several notes, bonds, conveyances, mortgages and assignments were made and given as before mentioned, but deny, "that they became parties to a contract as recited in the bill, or received funds sufficient to extinguish the mortgage held by said Whidden, or applied the same in extinguishing the same, or were bound by any contract, or that it was their duty so to do." That when only one of Whidden's notes to the State had been paid, and two others were overdue and unpaid and the interest upon all of them was unpaid, Spencer declared himself unable to meet his engagements, and requested the assistance of the defendants in obtaining the means for relieving the land from the incumbrance, and prevent a forfeiture thereof, and by an arrangement for that purpose, Spencer agreed to furnish about two thousand dollars in money, on receipt of which the defendants were to indorse, and Spencer was to negotiate these notes of Spencer for the sum of four thousand dollars, and apply the proceeds thereof, and the two thousand dollars to be furnished by Spencer, to the discharge of Whidden's notes. But Spencer neglected to furnish the sum of $2000, and the defendants did not indorse and Spencer did not negotiate the notes, but the defendants now hold them ready to deliver to Spencer on his giving up the receipt taken by him therefor from them. And the defendants say, in their answer, that of

the land conveyed to them by Spencer, March 17, 1838, they hold two-eighths thereof in trust for him, his heirs and assigns, subject to the repayment to them of his proportion of the large sums, which they have been compelled to pay to save the said estate from forfeiture and to redeem the same from taxes for which it had been sold, and for all the expenses attending the management thereof, and a just compensation for the defendants' services therein. And that the other two thirty-two parts conveyed to them in the same deed, for the benefit of the defendants and Daniel Wood, were for and on account of expenses and inconveniences arising from his neglect in fulfilling his agreement with Whidden. And they further allege in their answer, that they took the assignment of the bond and mortgages for their security for the money paid and advanced by them beyond their proportionate interest in the land, and claim to have the same upheld.

It is insisted for the complainant, that the mortgage was discharged from the funds, which Spencer, Wood and Gardner furnished for that purpose, and that this appears from the contract of March 17, 1838. By that it is obvious, that with a view to obtain means to prevent a forfeiture to the State, and to cause a discharge of the mortgage to Whidden, Spencer contracted with the defendants to convey two-eighths of the land then in his hands, as security for their indorsement or guaranty of his paper for a sum not exceeding $4000, and thereby enabling him to raise money. Spencer, Wood and Gardner contracted, that they would each severally furnish with the proceeds of the notes, to be signed by Spencer, and indorsed or guarantied by the defendants, and *otherwise* their respective proportions of a sum sufficient to pay and take up all demands in favor of the State against the land, whether due or not, and the probable expense of making the payment; and the defendants, or either of them, were empowered to redeem the forfeiture, if the lands had been forfeited to the State, Whidden or others, or return with the funds, in their discretion; and they also engaged to make good to the defendants any amount, which they might expend by reason of the neg-

lect of the other parties, to take up the demands, when they became payable, as they were bound to do. The defendants agreed to take charge of the funds "as aforesaid," and to truly apply them or cause them to be applied as they were authorized to do by the instrument. Spencer furnished the paper to be indorsed and conveyed the ten thirty-two parts of the land according to the contract; but provided otherwise no portion of the fund, which the agreement obliged him to do.

The answer states, that the proportion to be paid by him was about $2000, and the account annexed to the deposition of Burr, put in by the complainant, shows that it was not far below that amount. The notes were not indorsed by the defendants, but remain in their hands, which they offer in their answer to surrender on obtaining their receipt therefor.

The whole fund necessary to extinguish the mortgage was intended to be provided; this was to be done by Spencer, Wood and Gardner, by the assistance of the defendants, which they supposed they had obtained. The defendants were not bound by the written agreement to provide the fund, any further than their indorsement of Spencer's paper might produce it; but the other parties to the contract were obliged to furnish all which might be necessary beyond the proceeds of those notes, which could not exceed $4000, and would probably fall short; by making up this balance, they were doing only what their previous engagements and covenants required of them; and the acts to be performed by them were entire; a failure in any respect would be a violation on their part of the contract; from the nature of the subject matter, the obligations of the two parties were not independent; the defendants took upon themselves the agency to apply the funds; they could not enter upon that agency unless they were supplied; there was no agreement, that they would act in the application of a part only of the funds; the partial payment would be productive of no advantage; the two-eighths of the land conveyed at the time by Spencer was no part of the fund, but security to the defendants for a liability, which they were to assume, and when the liability should be discharged, they were

bound to re-convey, or to restore in some manner the value of the land; this security had no reference whatever to the portion to be paid by Spencer, Wood and Gardner, as a part of the fund. It is not pretended that the fund failed to be produced, by the omission of the defendants to indorse the paper; the correspondence between them and Spencer immediately after shows manifestly, that Spencer was unable to provide the balance. The contract was not carried into effect, and the failure cannot be imputed to any neglect of the defendants, to fulfil their part of the duties; they were free and at liberty, notwithstanding the agreement, to take any proper measures to protect their interest in the land, in the same manner they could have done, had it not been executed.

It is again contended that it is clearly proved by Spencer's deposition, that the defendants expressly contracted with him to make up the balance of his part of the money, after the agreement of March 17, 1838; that this deposition is sustained by the conduct of the defendants, before January 15, 1839, by the depositions of Carpenter and Gardner, and by the account annexed to Burr's deposition.

The bill charges no other contract, between Spencer and the defendants, than the one under hand and seal, dated March 17, 1838. The answer denies any agreement, requiring of the defendants to advance for Spencer or others this part of the fund. No proof of such an agreement is found in the depositions of Carpenter and Gardner; these refer to the written contract and the negotiation which resulted therein. It is not perceived that the conduct of the defendants will admit of such a deduction as is contended for, so far as it is disclosed in the bill, answer and proof. The account annexed to Burr's deposition, is evidently made out, after the assignment of the mortgage, and refers to the amount belonging to Wood, Gardner and Spencer, each to pay, by virtue of their previous contracts with Doolittle and Whidden, and not of those with the defendants, excepting for the expenses, interest and taxes, paid to Whidden, and the defendants' own expenses. The deposition of Spencer, standing alone, would perhaps indi-

cate, that there was a verbal agreement between him and the defendants, that they were to make up the deficiency after receiving the proceeds of the notes to be indorsed by them, but is sustained by no other fact in the case, is inconsistent with the complainant's other proof, and repugnant to the letters written by Spencer after the agreement, which he refers to, must have been made.

It is insisted for the complainant, that a contract between the parties to this bill, that the defendants should extinguish the mortgage, is distinctly charged, evaded and not denied in the answer, and proved by the depositions of Carpenter and Gardner, and rendered almost certain by the written agreement of the 17th March, 1838. Such a contract is charged in the bill; but the answer denies, "that the defendants became parties to a contract as recited in the bill, or received funds to extinguish the mortgage held by said Whidden, or applied the same in extinguishing the same, *or were bound by any contract, or that it was their duty so to do.*" Gardner was interested to free the land from exposure to forfeiture, to prevent a foreclosure of the mortgage, and was one, who was bound to provide the means, and was a party to the written contract of the 17th March, 1838. Carpenter was the counsel of all who were interested, was consulted by them, and fully advised them touching the matter. Nothing is found in their depositions, which we are able to construe into proof of any contract between the complainant and the defendants. Besides, the written contract was sufficient, if all the stipulations had been carried into effect, to have extinguished the mortgage, and have prevented a forfeiture of the land. This contract was brought into existence, partly by the activity of the complainant; he executed it in behalf of one of the parties and knew its terms; he was interested to have its object accomplished, as it would give a perfect title to him of his part of the land; but he paid no consideration, that it should be made, and took upon himself no liability under it, or otherwise. There was no good reason for his desire, that the defendants should bind themselves by a promise to him, to extinguish the

mortgage, upon the consideration only of his activity in causing the written contract, when that was of itself sufficient for the whole purpose, and rendered every other unnecessary, if this had been carried into operation. If it failed through the fault of the defendants, they would have been liable for all the damages; if through the neglect of the other contracting party, the defendants would have been relieved from their obligations therein assumed; and the activity of the complainant in causing a contract, which in such a case would prove abortive, could not be a very strong inducement for them to promise the complainant to pay large sums of money, which were necessary in order to obtain a title.

The complainant again contends, that as between the parties to this bill, the defendants were bound after the contract of the 17th March, 1838, either to have extinguished the mortgage, or to have given him notice that it was not done, in order that he might have been in the situation in which he was, before that contract. There was no contract between these parties, and the defendants could not be bound to give the complainant notice of the failure of one to which he was a stranger. The assignment of the mortgage has not operated to his prejudice; he is now admitted by the answer, and otherwise proved to be a tenant in common with the defendants and others, and holds the same rights in reference to the mortgage in their hands, which he did when in the hands of the mortgagee before the assignment.

At the time of the assignment of the mortgage to the defendants, they were under no contract to extinguish it; they were the owners of three-sixteenths only of the land, which they held under warranty deeds from Spencer; and the mortgage cannot be considered as having been extinguished by the payments then made.

It is finally contended, that as the defendants received quitclaim deeds of two-eighths of the land from Daniel Wood, and one-sixteenth from Nathaniel Perkins, and also received from Spencer a conveyance of one-sixteenth, besides the two-eighths which were for the security of indorsing the notes of $4000,

and that these three-eighths are the part, which was conveyed by Doolittle to Wood, Gardner and Phillips, by deeds subsequent to that, to the complainant, the interest of the latter stands disincumbered of the charge by virtue of the mortgage to Whidden.

It may be true, that when the mortgagor sells a part of the mortgaged premises for a valuable consideration, the mortgage should be satisfied from that which remains in the mortgagor, if sufficient; and if the mortgagor sells the last portion subsequently to the former, the last grantee having notice, actual or constructive, of the mortgage, and the first conveyance of the mortgagor, the equities of the two grantees of the mortgagor are not equal; and they are not bound to contribute rateably to discharge the incumbrance, but the part last sold must be exhausted before resort can be made to the other. *Gill* v. *Lyon*, 1 Johns. Ch. R. 447; *Clowes* v. *Dickinson & al.* 4 Johns. Ch. R. 235. But the doctrine involved cannot apply to this case as it now stands. The bill does not allege, that the part of the land held by the defendants, which it is insisted should be charged with the whole incumbrance, was of sufficient value for that purpose at the time of the assignment. It does allege, that prior to the making of the contract of the 17th March, 1838, it was the duty of the parties thereto, to pay the notes of Whidden to the State, and remove the incumbrance as a part of the consideration to be paid by them for their interest in the lands, the parties being the sole owners of the remaining six undivided eighth parts of the same; and that the lands were considered of greater value than the amount of said incumbrance. The defendants do not admit or deny this allegation, in their answer; the proof does not show the value of the lands held by the defendants, at the time of the assignment of the mortgage, nor does it disclose the value of them, before the execution of the contract referred to; the relief sought by the bill is therein put upon other and distinct grounds. We have seen, that when the defendants paid the mortgage debt, the charge was not intended to be extinguished, but to be kept on foot. The subsequent releases

of Perkins and Wood to them, could not of themselves defeat that intention. They stand in the place of the mortgagee, before the assignment, and the charge is upon the whole premises mortgaged. They have not assumed the personal obligations of those to whom Doolittle last conveyed. It is for the interest of the defendants, that the mortgage should be upheld, and they are entitled to have it done. *Gibson* v. *Crehore*, 3 Pick. 475; *Hatch* v. *Kimball*, 14 Maine R. 9.

The complainant will be entitled to a release from the defendants of the part of the land belonging to him, on payment of such a sum as may be justly due; but that remedy he has not sought in his bill; he has simply demanded of the defendants a release, which has been refused; he has neither paid, nor tendered the money due for that purpose; neither has he offered evidence on any ground, that nothing was due; he did not, before the commencement of the suit, request the defendants to render a true account of the sum due, nor offered to pay such sum in his bill, as he was required to do in order to entitle himself to a decree. Rev. Stat. c. 125, § 16 and 17.

*Bill dismissed with costs for the defendants.*

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GEORGE W. SIMPSON *versus* FREDERICK A. WILSON.

Exceptions to the rulings of a justice of the peace, on the trial of an action before him, to recover a fine alleged to have been incurred by a soldier for non-appearance at a company training, are only authorized by what may be deemed to be the common law in this country, originating under the statute of Westminster 2, 13 Edw. 1, c. 31.

The justice should certify, that such exceptions were allowed and were in conformity to the truth, and should affix his signature and seal thereto.

On such exceptions this Court can only affirm or reverse the judgment.

In proceedings in error, there should be a strict adherence to the rules of law.

In order to obtain the reversal of the judgment of the justice, by a writ of error, sufficient cause for the reversal should appear, either upon the record, or upon legal exceptions.

WRIT of error, brought to reverse a judgment before a justice of the peace, rendered in an action in favor of Wilson,

as clerk of a company of militia, against Simpson to recover a fine for neglecting to appear at a company training.

The questions, whether the original suit could be maintained under the circumstances stated in the papers before the Court, were argued in writing by

*J. C. Talbot, Jr.*, for the plaintiff in error: — and by

*J. E. F. Dunn*, for the original plaintiff.

The case was disposed of without considering the questions argued by the counsel.

The opinion of the Court was drawn up by

WHITMAN C. J. — This writ of error has been sued out to reverse the judgment of a justice of the peace. The original action was debt, instituted to recover certain forfeitures, incurred by the plaintiff in error for non-appearance at the trainings of a company of militia, of which he was alleged to be a member. The judgment of the justice being against him he took exceptions to his rulings in the admission of evidence, and reduced his exceptions to writing. The justice appears to have affixed his signature thereto, without his seal, and without certifying, that the same were allowed, or that they were in conformity to the truth. The allowing of exceptions could only have been authorized, in such case, by what may be deemed to be the common law in this country, originating under the statute of Westm. 2, 13 Ed. 1, 31. The plaintiff, nevertheless, relies upon his exceptions, thus taken and authenticated, to establish the supposed errors.

But the errors, not appearing of record, should be made apparent by a bill of exceptions, authenticated in conformity to the statute of Westminster. Such exceptions are not like those which, under certain statutory provisions, may be summarily filed, and in which the Court, in case exceptions are sustained, may proceed to a decision as if the cases, in which they may be filed, had originated therein. The bill of exceptions in the case before us, if duly authenticated, would only authorize an affirmance or reversal of the judgment in ques-

tion, as is fully elucidated in *Champion* v. *Brooks*, 9 Mass. R. 228.

Again — whether any issue has ever been joined between the parties, so as to bring the questions, intended to be raised, properly before the Court, is not apparent from any document with which we are furnished. The arguments of the counsel are, however, in writing, and we may infer from them, that they consider the case the same as if *in nullo est erratum* were pleaded. This, however, would not cure the defect, if it exists. In proceedings in error there should be a strict adherence to the rules of law, as they do, at least sometimes, tend to the perversion of substantial justice, and have, not unfrequently, more to do with matters of mere form, than with the real merits of the case.

On the whole, the plaintiff can take nothing by his writ of error; and the defendant must recover his costs.

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NATHANIEL LORD *versus* NATHANIEL JONES.

In this State no person can lawfully assume to be an innkeeper, without first obtaining a license therefor according to the provisions of Rev. Stat. c. 36, whether such person lives in a city, town or plantation, or in an unincorporated place where there are no such officers as the law requires to give a license.

If a lame horse be left with a person to be kept and cured, such person has a lien in the character of a farrier upon the horse for his cure and keeping.

And if one who was not the owner of the horse and had no authority from him, assumes to be the owner, and as such sells the horse to the person who had kept and cured it, allowing his bill for those services in part payment, this does not destroy the lien.

REPLEVIN for a horse. With the general issue the defendant, by brief statement, alleged that he had a legal claim or lien upon the horse for the keeping, care of and medicine for him.

H. Pond once owned the horse, and in September, 1841, contracted to sell him to Jefferds, then and still insolvent. It was then agreed that the plaintiff should indorse a note from Jefferds to Pond, that Pond should convey the horse to Lord

for his security, and that Lord should convey the horse to Jefferds, when the note was paid. This was done, and Jefferds took the horse into his possession. Lord was obliged to pay the note, and he has never been repaid by Jefferds. The horse was taken to Houlton by Jefferds and left there. He employed a man to take the horse, then lame, to Bangor, who set out for that purpose, and after proceeding about a dozen miles, found the horse too lame to go further. After some objection, the defendant, then keeping a public house at Mattawamkeag Forks, an unincorporated place, and having no license, consented to take the horse, and kept him in his possession, until he was taken by the plaintiff by this writ of replevin, in December, 1842. The horse continued lame for a long time, and the defendant took care of him, and doctored him, and furnished the medicine. The person who brought the horse to Jones, stated to him, that it was the property of Jefferds. In March, 1842, Jefferds saw the defendant, and sold the horse to him fo $70, allowing $35, for the care and keeping of the horse, and receiving payment for the balance. Jefferds did not inform Jones, that the horse belonged to the plaintiff. A witness testified, that at the time they went to replevin the horse, Jones said he had sold it to his brother. He had made no such sale, as stated by the brother, and the horse had been in his possession from the time it was left, until it was replevied.

At the trial, before Shepley J. the plaintiff objected to the testimony in the depositions to show, that the defendant was an innkeeper, and contended that he was not entitled to a lien as such, and requested the Judge so to instruct the jury. The report states, that the jury were instructed on various points arising in the case, which are not the subject of complaint. The presiding Judge instructed the jury, that they might consider the defendant, under the facts proved in the case, if they believed the testimony, as entitled to a lien upon the horse for his keeping and cure, while lame at the defendant's stable. If these instructions were incorrect, the verdict for the defendant was to be set aside, and a new trial granted.

*T. J. D. Fuller*, for the plaintiff, said that the plaintiff was the owner of the horse, and therefore was entitled to the possession of him, unless the defendant could retain him against the owner by some right of lien. He contended, that the instruction of the Judge on this point was erroneous.

There cannot be an innkeeper in this State without a license. Rev. Stat. c. 36, § 17. This statute extends over the whole State, and there are no exceptions. If there be no such board of officers as can grant a license in an unincorporated place, it cannot change the law, and merely shows, that the defendant was not an innkeeper. 14 Johns. R. 231; 2 Kent, 596.

And if the defendant had been an innkeeper, there could have been no lien in this case, as the horse was merely left to be kept, without the owner, or person having it in custody, going there as a guest at any time. *Grinnell* v. *Cook*, 3 Hill, 485.

The defendant was not a farrier, or horse doctor, and did not pretend to be such. It is therefore unnecessary to inquire, whether he could be entitled to a lien as such. But the authorities are opposed to any such lien.

But had any lien once existed, it was destroyed, when he adjusted his bill with Jefferds, and took pay for it in the purchase of the horse. He did not pretend to hold under his lien after that. And the sale of the horse by him to his brother would have had the same effect, had any lien remained. Story on Agency, § 366; *Jacobs* v. *Latour*, 5 Bingh. 130; *Legg* v. *Willard*, 17 Pick. 140.

*Hobbs*, for the defendant, contended, that he had a lien upon the horse, for its keeping, as an innkeeper. An innkeeper may be defined to be the keeper of a common inn for the lodging and entertainment of travellers and passengers, their horses and attendants, for a reasonable compensation. It is sufficient, that the defendant kept an inn in fact. Story's Bailments, 310; Bac. Abr. Inn & Innkeeper. If a traveller leaves his horse at an inn, he is to be deemed a guest. Story's Bailm. 311.

The defendant lived in an unincorporated place, where no license could be procured; and assuming the business of an innkeeper, he was bound to discharge the duties of one. By placing the horse in the custody of the defendant, it was subject to a lien for its keeping. Whitaker on Lien, 117; 1 Salk. 388; 2 Ld. Raym. 860. The want of title in Jefferds does not deprive the defendant of his lien. Whitaker, 117; 9 Pick. 285.

The defendant was an innkeeper at common law, and as such had a lien. Story's Bailm. 306; 2 Kent, 591; *Mason* v. *Thompson*, 9 Pick. 285; Jeremy's Law of Carriers, 139. No license was necessary. 2 Roll. 84, 345, 348; Cole's case, 8 Co. R. 63; 1 Smith's Leading Cases, 46. The statute is but in affirmance of the common law, and never could have been intended to apply to those living where no licenses could be obtained.

But if the defendant had not a lien as innkeeper, he had one as an agister. Story's Bailm. 289. And if not, he had a lien upon the horse for its cure and keeping, as a farrier. 2 Kent, 634; Story's Ag. § 354, note 2. The right of lien has been much enlarged and extended of late years. Story's Ag. § 354.

The opinion of the Court was drawn up by

Shepley J. — The instructions in this case authorized the jury to find, that the defendant was entitled to a lien upon the horse for his keep and cure. It is insisted for the plaintiff, that they were erroneous. For the defendant, it is contended, that they may be sustained on the ground, that he was an innkeeper; and the facts proved would be sufficient to entitle him to be so considered by the rules of the common law. In this State no person can lawfully assume that character without first obtaining a license therefor according to the provisions of the statute, c. 36. The seventeenth section of that statute provides, that no person shall be a common innholder, except such person be duly authorized therefor. It is said, that the provisions of this statute should be considered as limited to

cities, towns and plantations, in which alone licenses can be obtained. That a construction, which would include the unincorporated places in our new settlements, would prevent their legal existence there. Such may be the result, and it may be desirable, that the law should be otherwise; but that would not authorize the Court to except all those parts of the State, when the language is general, and operative over every part of it, without finding any such exception in the statute. If the defendant could be considered as an innkeeper, it is doubtful, whether he would be entitled in that character to a lien in this case. Neither the owner of the horse nor the person, to whom he was entrusted, was entertained at the inn, when the horse was left with him; and the decided cases are at variance, whether a lien exists under such circumstances. The case of *Mason* v. *Thompson*, 9 Pick. 280, would be favorable; and the case of *Grinnell* v. *Cook*, 3 Hill, 485, opposed to it. The defendant may, however, sustain the lien in the character of a farrier, or person having the horse entrusted to him to be kept and cured. The testimony shows, that the horse was left with him for that purpose, and that he caused him to be kept and cured. Some difference of opinion will be found in the earlier cases, whether he would, under such circumstances, be entitled to a lien. 21 Hen. 6, 55; Keil. 50; *Benan* v. *Currint*, Sayer, 224; *Ex parte Deeye*, 1 Atk. 228; *Ex parte Ockenden*, *idem* 236. In more modern times the Courts have been favorable to the existence of particular, and less so to general liens. In the case of *Savill* v. *Burchard*, 4 Esp. R. 55, Lord Kenyon said, the courts of law, and the understandings of people in general, had gone much in favor of these liens. In *Jacobs* v. *Latour*, 5 Bing. 130, Best C. J. observed, that as between debtor and creditor, the doctrine of lien was so equitable, that it could not be favored too much. That spirit is found pervading the latter treatises and decisions. Kent states, that "the law has given this privilege to persons concerned in certain trades and occupations, which are necessary for the accommodation of the people. Upon this ground common carriers, innkeepers, and farriers,

had a particular lien by the common law." And that "the same right applies to a miller, printer, tailor, wharfinger, or whoever takes property in the way of his trade or occupation to bestow labor or expense upon it." 2 Kent. 634.

Story also states, that a bailee, for work on a thing, has a lien upon it for the amount of his compensation. Story on Bailm. § 440. And that salvors, innkeepers, common carriers, farriers, blacksmiths, tailors, shipwrights, and other artisans, have such a lien. Story on Agency, § 355. That a printer had a lien on the printed sheets for compensation for printing them was decided in the case of *Blake* v. *Nicholson*, 3 M. & S. 167. That a miller had upon the meal, which he had ground, in the case of *Chase* v. *Westmore*, 5 M. & S. 180. And that a stable keeper had upon a horse sent to him to be kept and trained for the race course, in *Benan* v. *Waters*, 3 C. & P. 520. The cure of a lameness or disease to which the horse was subject, would seem to be a service quite as meritorious, and as much deserving the favor of the law, as the training him for a race course. Best C. J. did not however found his opinion upon the particular merit of that service but upon the doctrines of the common law. "For I take it (he says) to be a common law principle, that if a man has an article delivered to him, on the improvement of which he has to bestow trouble and expense, he has a right to detain it until his demand is paid." These authorities would authorize the instructions in this case, unless the testimony shows, that the defendant, by some act of his own, had waived or destroyed his lien. He cannot properly be considered as having waived, or as intending to waive it, by his contract with Jefferds to receive the horse in payment of the amount due to him, paying the difference in value, when he obtained no title by that contract, because Jefferds had no authority to make it. By that want of authority the contract became ineffectual and inoperative for any purpose. And if, as some of the witnesses state, the defendant said, he had sold the horse to his brother, while he supposed his own title to be perfect, that would not show any intention to waive his lien. It might

have defeated it, if there had been proof of an actual sale and delivery. That his brother could have obtained no title by any such attempted sale is apparent, for the defendant could not sell that, which he did not own. The defendant, without any fault on his part, having been led into these inoperative proceedings by the deceit of Jefferds, should not be prejudiced by them. His compensation for the keep and cure of the horse still remained unpaid, and the horse still remained in his possession. *Judgment on the verdict.*

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STEPHEN EMERSON *versus* WASHINGTON COUNTY BANK.

The directors of the Washington County Bank, appointed by the Governor and Council, under the act of 1841, accepting the surrender of the charter, had power to enter into a reference of all demands between the bank and a person claiming to be a creditor thereof.

The provision in that act that the assets of the bank should be distributed among all the creditors *pro rata*, did not prevent a creditor from bringing a suit to ascertain the amount due upon a disputed claim; but no execution should be issued on the judgment recovered.

THIS case arose out of a report of referees on a submission under the statute, signed by Harrison Tweed, William Pike and Bion Bradbury, as directors of the bank, appointed by the Governor on the surrender of the charter.

The defendants objected to the acceptance of the report for the following reasons.

1st. That the persons signing the submission were not duly and legally empowered to do so, or to acknowledge the same, in behalf of the defendants, or to bind the corporation by such submission; the charter of said bank having been surrendered, and the said directors being appointed for special and particular purposes, and no others.

2d. Because all demands between the parties were not in fact submitted to the referees, but certain demands were expressly excluded from consideration by the referees, at the hearing before them, at the request of the said Emerson and his attorney.

3d. Because there were no particular demands made out by either of the parties, one against the other, and signed, as by law required, where only particular demands are submitted.

4th. Because, if this report is accepted, and judgment rendered, and execution issue, this would operate an unequal distribution of the assets of the bank, as the execution might be levied and satisfied in full out of the property of the bank; and this in consequence of the act of the directors, while the statute requires the directors to pay out the proceeds of the assets of the bank to the creditors *pro rata.*

It was admitted, that at the hearing before the referees, they expressly excluded from their consideration a claim of said Emerson against said bank, as indorser of a check, "drawn by the cashier of said bank on the Globe bank, Boston, for about $400, now held by one Ordway, on which said Ordway has a suit now pending against said Emerson, and as security for which claim against him, said Emerson holds property of the bank. The submission was of "all demands between the parties."

ALLEN, District Judge, overruled all the objections of the defendants, and ordered that the report be accepted; to which ruling and opinion the defendants excepted.

*Downes,* for the defendants, argued in support of the reasons given in the District Court, why the report should not be accepted.

*J. Granger,* for the plaintiff.

The opinion of the Court was drawn up by

TENNEY J. — Certain objections were made to the report of referees, in the District Court, which objections being overruled, the report was accepted; and to that acceptance exceptions were taken.

The first objection is founded upon the supposed want of power in the directors, who were appointed by the Governor and Council, to enter into the submission. By the second section of the act of 1841, entitled "an act, accepting the surrender of the charter of the Washington County Bank, and

for other purposes," it is provided that the bank shall continue in its corporate capacity for and during the term of two years for the purpose, among other things, of "doing all those acts, which may be necessary in properly closing the affairs of said corporation." In the third section of the same act, the directors to be appointed by the executive, "shall be fully authorized" "to do all and every act and thing, which may be necessary in properly closing the affairs of said corporation." Thus the whole power of settling the affairs of the bank was conferred upon the directors, who became party to the submission. They had the power to make contracts in order to secure the rights of the bank, and to make releases in discharge of contracts before made, for the same purpose. Those having such powers can make a submission. Kyd on Awards, 35.

The second objection is, that all demands were not submitted to the referees, "but certain demands were expressly excluded from consideration by the referees at the hearing before them, at the request of said Emerson and his attorney." The *facts* exhibited by the exceptions do not sustain this objection. The case finds, "that at the hearing before the referees, they expressly excluded from their consideration a claim of said Emerson against said bank, as indorser of a check drawn by the cashier of said bank on the Globe Bank, Boston, for about $400, now held by one Ordway, on which said Ordway has a suit now pending in the S. J. Court of this county against said Emerson, and which stands continued to be defaulted at next term, and as security for which claim against him, said Emerson holds property of the bank." And there is nothing, which shows that the demand was excluded by the request of said Emerson or his attorney. The question, whether the referees excluded this claim improperly or not, is not before us. The whole matter was for their consideration, and no objection was raised in reference to any action of theirs in that particular.

Another objection is, that no demand was made out and signed by one party against the other, and annexed to the submission. It is not insisted, that this is necessary, in a submis-

sion of all demands; this was of such a character and the objection fails.

A fourth objection is, that if the report be finally accepted, execution must issue, which can be satisfied out of the property of the bank, and thereby operate to prevent an equal distribution of the assets. The object of the act referred to, was that all the affairs of the bank should be closed, and that the assets should be equally distributed among all the creditors of the bank, in proportion to their respective claims. It was important that all those claims should be ascertained, and all questions touching their validity or amount should be settled. The plaintiff, in the case before us, would not be entitled to a proportion of the assets until he had established his debt against the bank. It was a disputed claim, submitted to a tribunal of the parties' selection, and could not properly be regarded as valid, until a judgment should be rendered upon the referees' report. But after judgment, it is the duty of the Court to prevent any diversion of the assets by a stay of the execution, which cannot with propriety be enforced.

*Exceptions overruled. — Judgment must be entered as evidencing the plaintiff's claim. — No execution to issue.*

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JEREMIAH FOSTER *& al. versus* FRANCIS LIBBY *& Trustees.*

Under the statute of April 1, 1836, concerning assignments, where there was an exception, in the assignment, of property not exempted by law from attachment, such assignment was utterly void.

If money comes into the hands of a person wrongfully, as the consideration of real estate supposed to have been conveyed by him to another, when no title passed, he cannot for that cause be chargeable as the trustee of one who had deeded the same estate to him, without consideration, and without passing the title.

Nor would a person be charged as trustee, who had received a deed of real estate without consideration, and who, with the assent of his grantor, had so conveyed it that the title passed to a third person, but being sold upon a credit, no part of the proceeds of the sale had been realized by him at the time of the service upon him.

THE publication of the very voluminous papers in this case,

or of any abstract that could well be made of them, it is believed, would have little tendency to give any better understanding of the points decided.

*J. A. Lowell* argued for the plaintiffs: — and

*Preble* and *Porter*, for the trustees.

The opinion of the Court was drawn up by

WHITMAN C. J. — This action was originated in the District Court, in which the supposed trustees were held chargeable; and the case is now before us upon exceptions taken to that decision.

It appears that Libby, the defendant, on the third day of September, 1839, made to the supposed trustees, for the benefit of his creditors, an assignment of all his property, with the exception of "his household furniture and stoves; and excepting also two cows, one horse, and ten sheep, with sufficient to keep them the ensuing fall and winter, one wagon and harness, one sleigh, one saddle, one pew in the Centre Street Church (Machias,) and all the crop of grain, potatoes, and other vegetables now growing or standing on the lands" assigned.

By the statute, passed April 1, 1836, it is provided, "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," &c. with the single exception of property exempted by law from attachment; and that no assignment, thereafter made, by any debtor in this State, for the benefit of his creditors, shall be valid, unless the provisions of the act be complied with. These terms are explicit and peremptory, and perfectly intelligible. The exception made, of property exempt by law from attachment, shows that no other exception whatever is admissible. The articles, excepted out of the assignment, are not all so exempted. We cannot therefore hesitate to pronounce, in obedience to the express language of the law, the assignment relied upon to be utterly void.

We are aware that the statute above referred to has been repealed, by a statute passed in 1844, c. 112, but with the proviso, "that this repeal shall not affect assignments already made."

What effect this decision is to have, in reference to this case, we are not yet prepared to determine. We find by the disclosure of the supposed trustees, that, seemingly, a large proportion of the property, intended to have been conveyed, consisted of real estate, the title to which must be deemed to be unaffected by any conveyance, purporting to have been made under the authority of the assignment. Of course, whatever funds are in their hands, which may be ascertained to have been derived from any such source, without any co-operating conveyance directly from the assignor of the same, must be deemed to be improperly obtained, and cannot be considered as goods, effects and credits belonging to him. And if the same real estate was conveyed by him, or by him in conjunction with the assignees, so that the title would pass to the vendee, and the proceeds thereof, at the time of the service of this writ upon the supposed trustees, had not been realized by them, they are not liable therefor in this suit. But if such proceeds had fallen into their hands before that time, it would be otherwise.

For the net amount of what they have realized from the personal estate, if any there be, they must stand chargeable.

The disclosure not having been made with reference to these principles, we cannot determine whether they are chargeable or not. A further disclosure, therefore, will be indispensable, which must contain a full, distinct and clear discrimination of the amount realized, if any there be, from the sales of real estate, before the service of the writ upon them, made by or in direct co-operation with the assignor, Libby, and that realized without such conveyance directly by him; and setting forth distinctly the net amount in their hands, at said time, arising from the personal estate exclusively, including any dividend which may have been declared, and then remaining unpaid;

and also the amount of any sums of money due from Libby to either of said supposed trustees.

*Exceptions sustained.*

*Trustees to answer further.*

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SAMUEL L. HOVEY, *Adm'r, versus* JEREMIAH HAMILTON *& al.*

If one of the alternatives of a poor debtor's bond be, that the debtor should cite the creditor, named in the execution, before two justices of the peace, *quorum unus*, and submit himself, &c. instead of before "*two justices of the peace and of the quorum*," as required by Rev. Stat. c. 148, § 20, such bond can be good only at common law."

If but one justice of the peace and of the quorum appears at the time and place fixed in the notice from the debtor to the creditor, he has no power under the statute to adjourn to a subsequent time.

If the justices who administered the oath to the debtor, are not authorized, in conformity with the provisions of the statute, to act in the matter, their certificate of discharge has no validity whatever.

DEBT upon a bond, given by Hamilton, as principal, with the other defendants as his sureties, to procure his release from arrest on an execution in favor of the plaintiff against him.

*D. T. Granger* argued for the defendants, citing *Moore* v. *Bond*, 18 Maine R. 142; *Pease* v. *Norton*, 6 Greenl. 229; Rev. Stat. c. 148, § 46; 4 Cowen, 39; *Goodwin* v. *Huntington*, 17 Maine R. 74; *Hathaway* v. *Crosby*, *ib.* 448; *Hill* v. *Knowlton*, 19 Maine R. 449.

*G. F.* and *J. C. Talbot, jr.* argued for the plaintiff, citing *Hathaway* v. *Crosby*, 17 Maine R. 448; *Barnard* v. *Bryant*, 21 Maine R. 206; *Harding* v. *Butler*, *ib.* 191; Rev. Stat. c. 148, § 20.

The opinion of the Court was drawn up by

WHITMAN C. J. — The bond declared on was upon the condition, that, if the defendant, Hamilton, who had been arrested on execution, should, in six months from the date of the bond, cite the creditor, named in the execution, before two

justices of the peace, *quorum unus*, and submit himself to examination, and take the oath or affirmation prescribed by law, or pay the debt, &c. or deliver himself into the custody of the jailer within six months, then, &c.

This condition is not in conformity to the requirement of the statute, c. 148, § 20. Instead of the words, "two justices of the peace, *quorum unus*," it should have contained the words, "two justices of the peace and of the quorum." The bond, therefore, is good only at common law.

The debtor, however, cited the creditor, in due form, within the stipulated time, to attend before two justices of the peace and of the quorum, on a day certain, when and where he proposed to be examined, and to take the oath prescribed in such cases. But it happened, on the day so designated, that but one justice attended, who adjourned until the next day, and from thence to the third day, when, another justice attending, they took the debtor's examination, administered the oath prescribed by law, and issued a certificate accordingly. The creditor having had no notice of their organization did not attend before them.

The statute makes no provision for an adjournment by one justice, on the day first appointed. If two had appeared on that day, the statute (§ 6 and 24) provides, that they may adjourn from day to day, and if they should do so, and but one should attend at the adjournment, he may again adjourn.

The doings of such a tribunal, established by statute for a special purpose, must be in strict conformity to its provisions.

Not having been so in this instance, we must adjudge the certificate of discharge, issued by it to the debtor, as of no validity; and therefore that performance of the condition of the bond is not made out; and a default, in pursuance of the agreement of the parties, must be entered. But, there being nothing in the agreement, which prescribes the manner in which the damages for the breaches of the condition of the bond shall be ascertained, nor as to the amount thereof, the Court may ascertain them on a hearing in equity.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF HANCOCK.

ARGUED AT JULY TERM, 1844.

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## MARTHA GREEN *versus* BILLINGS P. HARDY.

Where the Judge of Probate, in 1795, issued a warrant to three freeholders, directing them first to set off the widow's dower in the real estate of an intestate, then to make an appraisement of the remaining two-thirds, and to distribute the same among the heirs, if it could be done without prejudice to or spoiling the whole; and the commissioners performed the duty, returning that they had appraised the remaining two-thirds of the estate at a certain sum, and that the same could not be divided without prejudice to or spoiling the whole; and the Judge of Probate assigned "the real estate whereof the intestate died seized and possessed," and "which remains to be distributed or divided to and among his heirs or legal representatives," "an appraisement having been made thereof, and the return having been accepted," to one of several heirs, he paying to the others their respective shares of the sum at which the two-thirds were appraised; *it was held*, that if the Judge of Probate had power to assign the whole, he did not in fact make an assignment of but two-thirds.

WRIT OF ENTRY demanding four-sevenths of a certain tract of land in Deer Isle, the same assigned to the widow of John Scott, for dower in his estate. The demandant claimed one-seventh as an heir of John Scott, and three-sevenths by purchase from other heirs. The tenant claimed the whole, as having been assigned to John Scott, under whom he claimed, by the Judge of Probate, he paying out the appraised value to

the other heirs, because the estate could not be divided without prejudice to or spoiling the whole. The material facts are stated in the opinion.

*C. J. Abbott*, for the demandant, contended, in the first place, that there was no assignment of the reversion of the land assigned to the widow, as her dower, by the terms of the assignment. The whole must be examined and taken together to obtain the true meaning.

And, secondly, that the Judge of Probate had no power to make an assignment to one heir of the reversion of the widow's dower, while the tenancy in dower remained. *Hunt* v. *Hapgood*, 4 Mass. R. 120; *Sumner* v. *Parker*, 7 Mass. R. 79; *Wainwright* v. *Dorr*, 13 Pick. 333.

*Hathaway*, for the tenant, contended that the whole of the estate, including the reversion, was assigned to John Scott, by the Judge of Probate, by the terms of the assignment; that the Judge of Probate had power to assign the whole; and that his assignment was conclusive and final between the heirs, and those claiming under John Scott. *Rice* v. *Smith*, 14 Mass. R. 431; *Loring* v. *Steineman*, 1 Metc. 204.

The opinion of the Court, WHITMAN C. J. holding the jury term in Washington at the time of the argument, and taking no part in the decision, was drawn up by

TENNEY J. — The demanded premises are a part of that portion of the real estate of Nathaniel Scott, the demandant's father, which was assigned to his widow in 1795. He died intestate in 1794; and his widow died in 1824. The demandant, on the death of her father, became entitled by descent cast on her, to a portion of the land assigned to the widow. After the assignment of the dower, she was seized of the same portion of the reversion when the particular estate had terminated. The tenant admits the title in her, unless he establishes a claim to the same in John Scott, by virtue of a decree of assignment made by the Judge of Probate in 1796, and a transfer of the same title to himself, through several conveyances.

By the probate records in this county, it appears that a warrant, dated Sept. 16, 1795, was issued by the Judge of Probate to three freeholders of this county, directing them to divide and set off by metes and bounds, the widow's dower in the real estate of Nathaniel Scott, deceased; and then to make a just and true appraisement of the remaining two-thirds of said real estate, take a careful view of the same, and see whether it will admit of a division to and among the children and heirs of said deceased, without prejudice to or spoiling the whole; if so, divide it into as many parts as it will bear, not exceeding seven, &c. The committee, on the 27th of October, 1795, made return on said warrant, that they had set off the widow's dower as directed, and also, after a careful review, they found the remainder would not admit of a division and they appraised the two-thirds, remaining after setting off the widow's dower, at the sum of one hundred and seventy-one pounds and twelve shillings. The decree of assignment, under which the tenant claims, contains the following language. "Whereas it hath been made to appear unto me, that the real estate whereof Nathaniel Scott, late of Deer Isle, in the county aforesaid, yeoman, deceased, intestate, died seized and possessed, and which remains to be distributed or divided to and among his heirs or legal representatives, will not admit of a division and distribution to and among the said heirs or legal representatives, in proportion to their respective shares or interest therein, without great prejudice to said estate; and is convenient for one settlement only; and an appraisement having been made thereof, and the return of said appraisement having been accepted by me, and ordered to be recorded in the registry of probate for the aforesaid county; and John Scott, the eldest son of said intestate, desiring said estate may be settled on him; and having given sufficient security to the other heirs or legal representatives of said intestate for their rateable parts or proportion of said estate," &c. The proportions secured to the other heirs were their respective shares of the said sum of £171,12. Then follows the order and assignment

to John Scott, of "all the right, title and interest of the said intestate in the estate aforesaid."

The tenant contends that the decree of assignment embraces the whole of the real estate of which Nathaniel Scott died seized, including the part assigned as dower to his widow.

The Judge of Probate derived all the powers, which he possessed, from the statute in force at the time of the decree. And the authority to assign the whole of the intestate's real estate, which had not already been distributed, to one of the heirs to the exclusion of the others, was by virtue of c. 36, § 5, of the statutes of 1793. This section is a revision of the statutes of the 4 Wil. & Mar. c. 2; and of the 6 Geo. 2, c. 3, and 33 Geo. 2, c. 2, with some alterations. But so far as they apply to the question before us, the three statutes last named are similar to the former. The statute of 1793 was examined in *Sumner* v. *Parker*, 7 Mass. R. 79, and the power of the Judge of Probate to make such a decree, as would embrace the reversion of the widow's dower was denied; and the exercise thereof was held absolutely void.

We are not to suppose, however, that the Judge of Probate in the case at bar exceeded his powers, unless the language used in the assignment will admit of no other reasonable construction; and we think when the whole is examined, he did not intend that the assignment should extend beyond the two third parts remaining after the dower was set off. The assignment refers to an appraisement, made, returned and recorded, as the basis of the decree; and a distribution is made to six of the heirs of their rateable portion of the value of the two-thirds, as returned by the committee. The warrant to them authorized an appraisement of two-thirds only; and their return shows that the authority was strictly regarded. No other warrant was issued or appraisement was made. All these documents, now matters of record, must be taken as material parts of the decree of assignment.

But we do not think the language used in the assignment itself will necessarily embrace the land in dispute. The de-

scription consists of two clauses: — 1st, "the real estate whereof Nathaniel Scott died seized and possessed," and 2d, "and which remains to be distributed or divided to and among his heirs or legal representatives." The two clauses must be taken together, and the second controls the first, so far that the land intended, is that to which both will apply. And the construction will be, that it was such land of which Nathaniel Scott died seized, as remained to be distributed among his heirs, after the assignment of the widow's dower.

*Defendant to be defaulted, and judgment for four-seventh parts of the demanded premises, and costs.*

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF WALDO.

ARGUED AT JULY TERM, 1844.

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## ELISHA CHICK, JR. & *al. versus* JOHN H. PILLSBURY.

It is sufficiently early to charge the indorser of a promissory note, living in a different State, if a notice of the dishonor, directed to him, be put into the mail within a convenient time after the commencement of business hours of the day succeeding that of the dishonor.

ASSUMPSIT against the defendant, as indorser of a note, of which a copy follows: —

"$500. New York, Nov. 26, 1836.

"Three years after date I promise to pay to the order of John H. Pillsbury, at my counting room in New York, five hundred dollars, value received, with interest at six per cent.

"Tunis Van Pelt."

The note was indorsed by the defendant, and the defence set up was, that no legal and sufficient notice was given of the non-payment of the note by the maker, to make the defendant liable as indorser.

From depositions in the case it appears, that the note was protested for non-payment by the maker in the city of New York, on Nov. 29, 1839; that the notary made out a notice to the defendant of the non-payment on the same day, and

handed it to the agent of the plaintiffs; that on the next day, Nov. 30, 1839, the notice, directed to the defendant at his residence, Bangor, Maine, was put into the postoffice in the city of New York, "between twelve o'clock at noon and eight o'clock at night;" that at that time there was but one mail each day from the city of New York, by which letters would go to Bangor; and that this mail went out at seven o'clock in the morning of each day, no letters being carried by it which were put into the office after six o'clock on the same morning. It did not appear at what time of the day the demand was made upon the maker.

*W. G. Crosby*, for the plaintiffs, contended, that the principle to be deduced from all the authorities was, that notice to the indorser, if not sent on the day of protest, should be by the first practicable or convenient mail of the next day. *Whitwell* v. *Johnson*, 17 Mass. R. 449; 3 Kent, 106, and notes and cases cited; Story on Bills, § 290, and note and cases cited.

In this case the mail which left on the thirtieth of November, closed at six o'clock in the morning, and was indeed the mail of the twenty-ninth. But the plaintiffs were under no necessity to send by the mail going out at seven, as they could not prepare their notice and send it out at that unseasonable hour.

*A. G. Jewett*, for the defendant, contended that the defendant was not liable, as the notice was not put into the mail, to go out until the second day, although there was a mail every day. This is not enough. The notice must be put into the postoffice in season to go by the mail of the next day, however early it may set out. 2 Wheat. 373; 1 Mason, 180; 17 Maine R. 383; 1 Pick. 405; 12 Mass. R. 403; Chitty on Bills, 289 and 365; 3 Campb. 193; 1 T. R. 168; 6 East, 12; 3 C. & P. 250; 18 Maine R. 294; 20 Johns. R. 381; 9 Peters, 33; 10 Johns. R. 492; 15 Maine R. 70 & 263; 2 Peters, 106; 6 Wheat, 102; 8 Pick. 54; 4 Wash. C. C. R. 468.

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

WHITMAN C. J. — This is an action against an indorser of a promissory note, who contends, that he has not been seasonably notified of its having been dishonored by the maker. The note became due in the city of New York, on the twenty-ninth day of November. The mail closed there, daily, at six o'clock in the morning for Bangor, the residence of the defendant. According to the evidence, it seems, that the notice of the dishonor of the note was not put into the postoffice at New York until the latter part of the next day, being the 30th of November; and therefore not in season to go before the morning of the first of December. The question is, was this reasonable notice. It is not a little singular, that a question of this kind should, to this day, have remained in doubt.

It was said in the books, formerly, that where the parties lived in different towns, between which a regular post was established, the notice of dishonor should be despatched by the next post. It was next held that it should be sent by the next practicable mail; and, subsequently, as early as by the mail of the next day; and this has been supposed by some, to mean by such mail, however early in the morning it might start. In *Goodman* v. *Norton*, 17 Maine R. 381, it was held that the notice of dishonor must be put into the postoffice on the day of the demand upon the maker; or in season to be sent by the first mail of the succeeding day. The circumstances in that case were almost, if not quite, identical with those in the case before us. The mail in that case left New York, daily, at six o'clock in the morning. On the 27th of November a note fell due, and was dishonored. Notice of the non-payment was not put into the postoffice till the next day, and after the morning's mail left. Although there was testimony in that case, that notice, so given, was according to the usage of the banks in that city; yet the indorser was held to be discharged. And in *Beckwith* v. *Smith*, 22 Maine R. 125, Mr. Justice Shepley, in delivering the opinion of the Court, recognized the same principle as the rule of law. These

decisions we are now called upon to revise; and, although supported by numerous dicta to be found in elementary treatises and reports, yet, if erroneous, we cannot hesitate to do so; especially in reference to a point of such extensive application.

It must be admitted to be of infinite importance, in this commercial age, that decisions, in reference to what constitutes due notice of the dishonor of bills of exchange, and promissory notes, should be the same throughout communities, which are in the habit of circulating and interchanging such paper; so intimately connected as it is with extended negotiations in trade. All laws affecting commercial pursuits should, as near as may be practicable, partake of the character of international law. Between the United States and Great Britain, a uniformity of usage, in whatever concerns negotiable paper, is highly important. In both countries the principles of the law merchant are derived from one and the same source. In the United States, in an especial manner, it is all important, that there should be the same rule prescribing what shall be legal notice in the case of dishonored paper. If the decision of this Court has failed of conforming to what, in the other States, would meet with sanction in their judicial tribunals, it will be highly proper that we should take the earliest opportunity to consider further of the subject. It is evident that the tendency has been, of late, so to extend the time for giving notice, that some approximation, at least, may be made to the establishment of a rule in such cases, which shall be readily understood, and easily applied; and as nearly applicable to all cases as possible.

In *Whitwell & al.* v. *Johnson*, 17 Mass. R. 449, Mr. C. J. Parker says, "After some doubts, and looking into authorities, we are satisfied, that it was not necessary for the plaintiff to show, that notice to the indorser was put into the mail on the same day the note became due." And, again, he says, in the same case, "the next day is early enough. And if there should be two mails a day, whether the notice goes by the first or the second of those mails, we think is immaterial, provided it was put into the postoffice early enough to go by a

mail of that day." Hence, if the notice need not be put into the postoffice till the next day, it could not, it would seem, be required to put it in at an unseasonable hour of that day. Six o'clock in the morning of the thirtieth of November would be by break of day, and earlier than it could be expected, of men of business, in our commercial seaports, to be stirring, and therefore at an unseasonable hour. In the *Bank of Alexandria* v. *Swan*, 9 Peters, 33, the notice of dishonor was put into the postoffice at Alexandria on the day succeeding that of the dishonor. The mail left there some time in the night, and generally between twelve and two o'clock for Washington, to which place the notice was despatched, in time to be delivered at eight o'clock in the morning. In strictness the mail, which left in the night after the dishonor, was the mail of the next day; but the Court held the notice was forwarded in due season. In *Geill* v. *Jeremy & al.* Moody & Malkin, 61, Lord Tenterden said, "In these cases it is important to have a fixed rule, and not to resort to nice questions of the sufficiency, in each particular case, of a certain number of hours or minutes. The general rule is, that the party need not *write on the very day* that he receives the notice. If there be no post on the following day, it makes no difference. The next post after the day, on which he receives the notice, is soon enough." In *Firth* v. *Thrush*, 8 Barn. & Cres. 387, the attorney of the holder could not, at first, find out the residence of the party to be notified. At length, ascertaining it, he took one day to consult his client; and on the third day despatched notice, and it was held sufficient, upon the ground that he might be regarded in the light of a bank, holding a bill for collection. In which case it had been held, that the bank need not notify the owner till the day after the dishonor; and that the owner was entitled to still another day to despatch his notification to his indorsers. In *Wright* v. *Shawcross*, 2 B. & Ald. 501, it was held that a person, receiving notice on Sunday, was not bound to open it till Monday, and that notice by the post of the following Tuesday evening, instead of that of Monday evening, was

sufficient. In *Hawkes* v. *Salter*, 4 Bing. 715, Mr. C. J. Best, in reference to notice of the dishonor of a bill, which took place on Saturday, at a place at which the mail left at half-past nine o'clock in the morning of each day, expresses himself to be decidedly of opinion, that notice by the mail of the following Tuesday morning would be seasonable. This must have been upon the ground that Sunday, being no day of business, the next business day was Monday; and that it was not reasonable to require notice to be despatched by the mail, which left at half-past nine o'clock on Monday morning. *A fortiori* if it had closed at six o'clock in the morning, as in the case at bar, it would have been unreasonable to have required notice to have been despatched by it. In *Freeman's Bank* v. *Perkins*, 18 Maine R. 292, Mr. C. J. Weston says, "on the day of the maturity of the bill he, (the holder for collection,) caused it to be protested for non-payment, and notices to be forwarded to the drawer, indorser and acceptor, *which were mailed the next day;* and this was using all the diligence, which the law requires." If it was sufficient that the notices should be *mailed* the next day, it would seem to follow, that it could not be required to be done at an unseasonable hour of that day, and by break of day in the morning or before. But the case, most directly and explicitly in point to show, that notice need not be put into the postoffice till the next day after dishonor, nor then until after the commencement of business hours, is to be found in the first of Hill's New York Reports, p. 263, *Howard* v. *Ives*. Mr. Justice Cowen, in delivering the opinion of the Court in that case, says, "the holder is never required to *mail notice* to his indorser the very day on which default is made in payment." "Here the protest being on Saturday the notice was properly mailed on the next Monday." "Mailing in season for either of the two mails on Monday was sufficient." "It is not necessary to say, that, in all cases where there are several mails on the same day, the party may elect by which he will send. Clearly he comes to the mark, when he selects that post which leaves

next after the hours of business commence for the day. This is the next practicable or convenient post."

In Kent's Commentaries, (vol. 3, p. 106,) the author lays down the law to be, "That if the third day of grace be on Thursday, and the drawer and indorser reside out of town, the notice may indeed be sent on Thursday, but must be put into the postoffice on Friday, so as to be forwarded as soon as possible thereafter." And again, (same page) "It seems to be now settled, that each party, into whose hands a dishonored bill may pass, shall be allowed one entire day for the purpose of giving notice." And it was so held in *Bray & al.* v. *Hadwin*, 5 M. & S. 68. In a note in Kent's Commentaries, (vol. 3, p. 107, 4th Ed.) the author says, "The rule in *Lenox* v. *Roberts*, 2 Wheat, 373, was laid down too strictly, when it stated that the demand of payment should be made upon the last day of grace, and notice of the default be put into the postoffice early enough to be sent by the mail of the succeeding day." And, although this decision was spoken of with approbation in the *Bank of Alexandria* v. *Swan*, 9 Peters, 33; yet "that the decision only is, that notice need not be put into the postoffice on the day of the default." And again, (same page) "That this principle will sustain the rule as now generally, and best understood in England, and the commercial part of the United States, that notice put into the postoffice on the next day, *at any time of the day*, so as to be ready for the first mail that goes thereafter, is due notice."

In Story on Bills, § 288, it is laid down, "That if the post or mail leaves the next day after the dishonor, the notice should be sent by that post or mail, if the time of its closing or departure is not at *too early an hour* to disable the holders from a reasonable performance of the duty." And again, (§ 290) "He, the holder, is always allowed by law a whole day for this purpose." Under this last section, in a note, he makes a long extract from Chitty on Bills, in which this passage occurs. "Another reason is, that the holder ought not to be required, *omissis omnibus aliis negotiis*, to occupy himself immediately in forwarding notice to the prior parties, when by

delaying that step till the next morning, he would, after the pressure of other business had subsided, have in the evening, or *early the next morning*, before the general business commences, time to look into his accounts with the other parties." This author is again quoted in the note as saying, in another part of his work, that notice must be sent off by the post of the next day, whether it goes early or late. Upon this passage Judge Story remarks, "It appears to me the rule is not so strict as it is laid down in this last passage of Mr. Chitty, and that it would be more correct to say that the holder is entitled to one whole day to prepare his notice, and that therefore it will be sufficient if he sends it by the next post, that goes after twenty-four hours from the time of the dishonor." This shows what this learned author understands by one whole day, so often repeated, in the cases upon this point. And it may be difficult to affix any other understanding or meaning to that phraseology. Judge Story, however, admits that in this he is supported by the authority of no adjudged case directly; but thinks it results from the authorities on the subject. That Mr. Chitty's last quoted sentence is liable to exception, is manifest from the preceding quotation from his work; for the latter cannot be reconciled with the former, or with the adjudged cases.

The authorities, cited on the part of the counsel for the defendant, are numerous, tending to show that the notice to drawers and indorsers, not resident in the places where the holder of their dishonored paper may live, should be given as early as by the mail of the next day, and some of them, such as the *dictum* in the last extracts from Chitty, and the cases of *Goodman* v. *Norton*, and *Beckwith* v. *Smith*, seem to go the length of holding that notice should be given by the mail of the next day, however early it might start. But the question pending in the reported cases, generally, was whether the notice should be sent the same day, or by a mail of the succeeding day, and did not present the question whether it should be sent by the mail of the next day, however early it might start, or by a later mail, or a reasonably practicable mail,

In a late case, *Chouteau* v. *Webster*, 6 Metc. 1, it appears a note was protested in New York, at 3 o'clock, on the afternoon of one day; and that the notice of dishonor was despatched to the indorser, by being put into the postoffice in New York for him on the next day. Mr. C. J. Shaw, in delivering the opinion of the Court in that case, says, it is admitted, "that notice thereof (of the dishonor) in due form was seasonably prepared by the proper officer, and put into the postoffice." Nothing is said in the case as to the hour of the day when the mail was made up to convey the notice to the defendant, nor of the precise time of the day when the notice was put into the postoffice. If either had been deemed material, surely it would have been alluded to, either in the statement of the case, or in the arguments of counsel. It could not well have escaped the notice of the counsel for the defendant, aided as he must be believed to have been, by the superior legal knowledge of the latter.

A majority of the Court is, therefore, brought to the conclusion, that the weight of the more modern authorities, both in England and America, is decidedly in favor of a rule of a more convenient and reasonable operation. It may not go to the extent of allowing at least twenty-four hours for the purpose of despatching notice, though it might tend to certainty and precision if such were the case. It seems to be without question, that it extends to the allowance of a convenient time after business hours of the next day after the dishonor, shall have commenced, to prepare and despatch notice. To the decision of this cause it is not necessary to consider whether the rule should extend further or not. The notice was mailed in season to go by the next mail, which left after the business hours of the day, succeeding that of the dishonor, had commenced.

The action, therefore, as agreed by the parties, must stand for trial upon other grounds.

The following reasons for his dissent were given by

Shepley J. — It is without doubt desirable, that there should be an uniformity in the decisions of judicial tribunals

in different commercial countries and states, respecting the duties and liabilities of holders and parties to dishonored paper. It is also of the first importance in a commercial community, that notices to the parties liable on such paper should be communicated as early, as they reasonably can be; that such parties may be enabled to obtain security from those liable to them, and that they may not be called upon to pay such paper, after they have had reason to conclude, that the party first liable has paid it, and have therefore employed their funds in other business. When the party to be notified does not reside in the same place, the holder, if he does not send notice by the post, should despatch it as early as during some hour of the day following the day of its dishonor. He cannot permit that first day after its dishonor to pass, before he does it, without being guilty of laches, and thereby forfeiting his right to call upon him. He cannot therefore merely prepare the notice on that day, and put it into the hands of an express, and allow that express to remain without moving until the second day after the dishonor. The law permits him to make use of the post for the conveyance of that notice. But he must not claim thereby to extend or prolong the time allowed him to put the notice in motion. And there is no more reason for allowing him to put his notice into the post on the day following that of the dishonor, after the latest post of that day has departed, where it must remain until the second day, than there would be to allow him so to conduct with it, if he forwarded it by an express. And if there be an inconvenience occasioned by the departure of the post early in the morning, it is more reasonable and just, that he should be subjected to it, than that the rule should be violated requiring the notice to be despatched during the day following that of the dishonor of the bill, to the delay and injury of the other party. This rule does not require any thing unreasonable of the holder. He may cause the paper to be presented, as early as he pleases during the business hours of the day, on which it becomes due; and if the post should leave on the following day, before business hours, there is surely sufficient time after the presentment for

him or his notary to make out the notice or notices, and place them in the postoffice in season for that post. A Judge, perceiving that the holder, if such strict conformity to rule be required of him, is likely, in some one case, to lose his money, may be tempted to extend the rule to embrace the case. But to yield to the pressure of circumstances would never be either creditable to the judicial tribunal, or useful to the community. The general mischief is ever greater, than the particular benefit.

Mr Justice Bayley, in his treatise, states the rule to be, that "to such of the parties, as reside in the place, where the presentment was made, the notice must be given at the farthest, by the expiration of the day following the refusal; to those, who reside elsewhere, by the post of that or the next post day." Bayley on Bills, 2d Am. Ed. 262. Mr. Chitty, in his treatise, says, "the rule is now well settled, that the holder must, in order to subject all the parties to actions at his suit, give or forward all his notices to every one of the indorsers and to the drawer, whose residence he can ascertain, on the day after the bill or note was dishonored." Chitty on Bills, 8th Am. Ed. 514. And on page 516 he says, "when the parties do not reside in the same place, and the notice is to be sent by the general post, then the holder, or party to give the notice, must take care to forward notice by the post of the next day after the dishonor, or after he received notice of such dishonor, whether that post sets off from the place, where he is, early or late." These are the two most approved treatises on the subject. They are the hand books of the merchants, the bankers, and the notaries of Great Britain and of the United States; and being their guides, they shew the actual and accustomed course pursued in both countries. These persons cannot be expected to obtain their information from the numerous judicial decisions, which are the sources of information for professional men. And that course must be expected to be pursued, although there may be found opinions not in accordance with those rules. It would be a little remarkable, if the two treatises most approved and generally used by the mercantile community should be found to agree in

stating the law erroneously, thereby leading that community into dangers and difficulties instead of guiding it safely. A conclusion, that they are justly chargeable with such results, should be formed with reluctance; for its tendency would be little suited to promote uniformity either of rule or of practice. To determine this matter it will be necessary to examine the cases supposed to be in conflict with the rule stated by them; and some of the leading cases from which it was derived. In the case of *Tindal* v. *Brown*, 1 T. R. 167, the rule was stated to be, "the holder must write by the next post after the bill is dishonored." In the case of *Darbishire* v. *Parker*, 6 East, 3, this rule was recognized as correct; but Mr. Justice Lawrence expressed an opinion, that if the post should depart so early after receipt of the intelligence, that it would be inconvenient to require a strict adherence to the rule, it would not be reasonable to require the notice to be sent before the second post. In the case of *Scott* v. *Lifford*, 9 East, 347, the holder placed the bill in the hands of his banker, who presented it in London, and it was dishonored on June 4. On the 5th, they returned it to the plaintiff, also residing in London, who put a notice directed to the defendant, residing at Shadwell, into the two-penny post on the 6th. This notice was decided to be sufficient on the ground stated by Mr. Justice LeBlanc, that "it cannot be contended, that a banker ought to give notice of the dishonor to any but his customer, for whom he held the bill." In this case the holder, in accordance with the rule, put his notice into the post of the next day after he received intelligence from his banker, that the bill had been dishonored. In the case of *Langdale* v. *Trimmer*, 15 East, 291, the bill was presented at a banking house in London, and was dishonored on February 25. The party, supposing that it might have been presented too early on that day, presented it again on the 26th, and on the same day returned it to the plaintiffs, who gave notice to the defendant, residing at Farnham, by a letter in the post of the 27th. In this case the banker was not obliged, according to the rule, to notify the first dishonor until the 26th; and on that day the notice was given, and no time

was claimed on account of the second presentment on that day. And the plaintiffs gave notice to the defendant by the post of the day following that, on which they received intelligence, that it was dishonored. Lord Ellenborough said, the plaintiffs "were not bound to lay aside all other business and send notice of the dishonor on the same day after five o'clock, but might return it by the post of the next day, after they had received it." In the case of *Williams* v. *Smith*, 2 B. & A. 497, Abbott, afterward Lord Tenterden, fully considered the question, and established a rule, which he designed to be free from all difficulties in practice. It so far varied from the one laid down in the earlier cases, as not to require in any case the notice to be actually sent by the post departing after the dishonor and on that day, and requiring it in all cases to be sent as early as by the post of the following day. After speaking of the great importance of some plain and precise rule as to the time, within which notices of the dishonor of bills must in all cases be given, he says, "that time I have always understood to be the departure of the post on the day following that, in which the party receives the intelligence of the dishonor." And it should be noticed, that this variation appears to have been made, as Mr. Chitty states, on page 515, to avoid the difficulties alluded to by Mr. Justice Lawrence respecting an early or late departure of the post, and for the purpose of settling upon a rule so certain, that no such question or difficulty could arise for the decision of a jury. And this rule is believed to have remained, as the settled rule in England without change or modification, except in two particulars. And those seem rather to be the necessary results of the application of the rule, than a variation of it. These are, first, that Sunday is not to be regarded as a day for business. So that if intelligence of dishonor be received on that day, it is to be considered as received on Monday. And if the dishonor, or intelligence of it, take place, or be received on Saturday, Monday is to be considered, as the day following. And second, that if there be no post departing on the day following the day of dishonor, or

intelligence of it, the notice must be sent by the next post after that day.

The cases will now be examined, which have been supposed to authorize the party, in certain cases, to postpone sending the notice until the post departing on the second day after the bill has been dishonored, or intelligence of it has been received. In the case of *Haynes* v. *Birks*, 3 B. & P. 599, the bill was presented by the bankers of the plaintiff in London and dishonored on Saturday, October 1. On Monday the 3d, the bankers sent intelligence of it to the plaintiff, residing at Knightsbridge, who gave notice to the defendant, residing at Tottenham Court Road, on Tuesday the 4th. Lord Alvanley said, "it was impossible for the bankers on Saturday night to give notice to the plaintiff, since the bill was not presented till between nine and ten o'clock. On Sunday, of course, they were not bound to do so. And on Monday they did apprise the plaintiff of the non-payment." Except that he did not account Sunday to be a business day, he insisted upon a more strict performance in theory, than the rule, as before stated, required; for he said the plaintiff "certainly was bound to write by the two-penny post on Monday, and supposing him to have done so, the defendant would only receive his letter on Tuesday." In the case of *Bray* v. *Hadwen*, 5 M. & S. 68, the plaintiffs, residing at Tavistock, paid into their bankers at Launceston a bill on London, which was dishonored. Their bankers received notice of its dishonor at Launceston on Sunday morning at half-past eight o'clock, July 17. The post left that place for Tavistock at twelve o'clock on the Monday and Tuesday following. The bankers put a notice for the plaintiff into the postoffice at Launceston, on Monday, after the post for that day had departed, which was conveyed by the post of Tuesday. It was insisted, that they should have sent by the post of Monday. The decision was, that the bankers were not obliged to open their letter on Sunday; and as they were to be considered as receiving intelligence of the dishonor on Monday, the notice sent by the post of the following day was in season. And this was strictly in conformity

to the rule. The case of *Wright* v. *Shawcross*, is stated by the reporter, in a note to the case of *Williams* v. *Smith*, before noticed, 2 B. & A. 501. The bill was presented and dishonored in London, on April 3, 1817. By the post of the 4th a notice was sent to the plaintiff, which was received by him on Sunday the 6th. And he sent a notice to the defendant by the post of Tuesday evening. It was contended, that he should have sent it by the post of Monday evening. The decision was that the plaintiff was not bound to open his letter before Monday, and receiving intelligence as of Monday, the notice by the post of the following day was in season. This also was in conformity to the rule.

The case of *Bancroft* v. *Hall*, 1 Holt, 476, is not opposed to the rule. It was decided by Mr. Justice Bayley on a different ground from that of extending the time for giving notice. The bill was presented and dishonored in London, and the plaintiff, residing in Manchester, received intelligence of it on May 24; and on that day despatched a letter by a private hand to his agent in Liverpool, where the defendant resided, requesting him to give the notice. This letter was received by the agent in the afternoon of the 25th, who "went about six or seven in the evening to the counting house of Hall, but after knocking at the door and ringing a bell, no one came to receive a message. The merchants' counting houses at Liverpool do not shut up till eight or nine. The 26th was Sunday; and notice was not in fact given till the morning of the 27th." Mr. Justice Bayley said, "Here the notice reaches Liverpool on the 25th. No expedition could have brought it earlier." He also said, "It was the defendant's fault, that he did not receive notice on the 25th; which he might have done, if he had kept his counting house open till eight or nine, which are the customary hours of closing at Liverpool." This is but a decision, that the plaintiff had performed his duty by causing his agent to call at his place of business during business hours to notify him on the 25th. The case of *Firth* v. *Thrush*, 8 B. & C. 387, instead of being opposed to it, distinctly affirms the rule. The bill was dishonored on August

4, 1826, and the holder employed his attorney to ascertain the residence of the defendant. The attorney obtained that information on October 16, and on the 17th consulted his client, and on the 18th, sent the notice to the defendant. The question made was not, whether the rule should be so varied as to allow a notice from the holder on the 18th to be in season; but whether in analogy to the rule allowing a banker a day to return a bill to his customer, the attorney should be allowed a day to consult his client. And Lord Tenterden so states. He says, "the question is, whether he was entitled to take a day to consult his client?" He gives his reasons for deciding, that he had a day; and says, "*if the letter* [giving information of the defendant's residence] *had been sent to the principal, he would have been bound to give notice on the next day.*" The other Justices concurred in these opinions. And the rule is rather affirmed, than varied, by the case of *Geill* v. *Jeremy*, 1 Moody & Mal. 61. The plaintiff received intelligence of the dishonor by the post at nine o'clock in the morning of Thursday, August 31. The post left his place of residence for London, where the defendant resided, at six o'clock that evening. There was no post on Friday. And the notice was sent by the post of Saturday. The point decided was, that when it becomes impossible to execute the rule because there is no post on the day following the receipt of the intelligence of dishonor, a notice sent by the next post will be in season. Lord Tenterden said, "the general rule is, that the party need not write on the very day, that he receives the notice. If there be no post on the following day, it makes no difference." This is evidently said in answer to the argument, that the plaintiff should have sent the notice by the post of Thursday evening. He then states the ground, upon which the case was decided, that "*the next post after the day, on which he receives the notice, is soon enough.*" The case of *Hawkes* v. *Salter*, 4 Bingh. 715, is the only one found, in which a different opinion has been expressed. In that case the bill was presented and dishonored at Norwich, on Saturday, January 7, 1827. The defendant resided near North Walsham, and the post for that

place left Norwich at half past nine o'clock in the morning. The testimony of a witness stated, that a letter giving notice to the defendant, was put into the post by himself or another clerk, to be sent by the post of Tuesday morning, the 10th. The reporter states, that "Best C. J. expressed himself clearly of opinion, that it would have been sufficient, if the letter had been put into the post, before the mail started on the Tuesday morning; but that there was no sufficient evidence, that it had been put in even on Tuesday morning." It is worthy of notice, that this opinion did not affect the rights of any one. That it was but the expression of an opinion, which decided nothing. Such appears to be the law as exhibited by the English cases, presenting, with a single exception, an uniform and unbroken current of authority in support of the rule laid down in the works of Bayley and Chitty.

And such was decided to be the rule of law in the United States, by the Supreme Court in the case of *Lenox* v. *Roberts*, 2 Wheat. 373. In the case of the *Bank of Alexandria* v. *Swan*, 9 Peters, 33, that case was named as stating the rule correctly. And this last case is in conformity to and not opposed to the rule. The note was presented by the notary of the bank, and was dishonored, at Alexandria on August 25, 1829. The jury found a special verdict, which states, "we find, that the 26th day of August, 1829, and long before the closing of the mail of that day at Alexandria, that Benjamin C. Ashton, on behalf of the said bank, put into the postoffice at Alexandria, a letter written by him, addressed to the defendant at Washington." The letter being produced, was found to be post marked at Alexandria on the 26th. And no one is at liberty to allege, contrary to the special verdict, that the notice was not sent by the mail of the day following the day of dishonor.

The decided cases shew, that the same rule prevails in the State of New York. It was so laid down in the case of *Smedes* v. *Utica Bank*, 20 Johns. R. 382. In the case of *Mead* v. *Engs*, 5 Cow. 303, the rule is even more strictly stated. In the case of *Howard* v. *Ives*, 1 Hill, 263, the point

decided was, that when a bill is dishonored on Saturday, Sunday not being a day of business, Monday is to be considered as the day following the day of dishonor, and that notice by either mail of Monday, if there be two, was in season. This was no new doctrine, but in accordance with the rule and with the English cases. The facts were, that the bill was presented and dishonored in the city of New York, between the hours of three and five o'clock, P. M. on Saturday. The plaintiff, a party to be notified, resided at Troy. The mail left New York for Troy on Sunday; and on Monday at half past five o'clock, A. M. and at five o'clock P. M. The notary put into the postoffice in New York, a notice to the plaintiff in season for the mail, which left on Monday at five o'clock, P. M. This notice the plaintiff received at Troy on Tuesday, at eight o'clock, A. M. and on the same day he put into the postoffice at Troy a notice directed to the defendant residing at Lansingburg. It was contended, that the notice should have been sent to the plaintiff by the mail of Sunday, or by the mail of Monday morning. It was decided otherwise in perfect conformity to the rule. The former cases were cited with approbation; and there is no indication of an intention to vary the rule laid down in them.

The same rule appears from the decided cases to have prevailed in Massachusetts. The point particularly presented in the case of *Williams* v. *Johnson*, 17 Mass. R. 449, was, whether it was necessary, that the notice to the indorser should have been put into the postoffice on the day of the dishonor, or on the day following, in season for the mail of the day. The decision was, that it would be in season to place it in the office on the day following that of the dishonor, "*provided it was put into the postoffice early enough to go by a mail of that day.*" In the case of *Shed* v. *Brett*, 1 Pick. 401, it is said, that notice may be given immediately after the paper has been dishonored, "though it is not necessary, it should be given until the day after, *or if the indorser is in another town, by the next mail after the day, on which the demand is made.*"

In the case of *Talbot* v. *Clark*, 8 Pick. 54, Parker C. J. says, "The law is entirely settled here, in England, and in New York, that notice must be sent by the next day's mail after knowledge of the dishonor of a bill."

It does not appear that any such question was presented or decided in the case of *Chouteau* v. *Webster*, 6 Metc. 1.

The rule was decided to be the law in this State in the cases of *Goodman* v. *Norton*, 17 Maine R. 381, and in *Beckwith* v. *Smith*, 22 Maine R. 125.

The rule of law is differently stated by Chancellor Kent. 3 Kent, 106. He requires the notice to be put into the office on the day following the day of dishonor, or that of the receipt of intelligence of it; but does not require to be put into the postoffice in season to be conveyed by the post of that day. And in a note he states, that to be the rule "now generally and best understood in England and in the commercial part of the United States." The origin of this opinion may be found in a note to that page, where he says, "In *Hawkes* v. *Salter*, 4 Bing. 715, and *Bray* v. *Hadwen*, 5, M. & S. 69, and *Geill* v. *Jeremy*, 1 Moo. & Mal. 61, it was held, that the holder had in such case [if the demand be made on Saturday,] the whole of Monday *to write the notice*, and that a letter by the Tuesday morning's post was sufficient." These cases have already been examined, and the first one only has appeared to sustain the position. And the position, that the notice need not be sent until the post of the second day after the day of dishonor, or the day of the receipt of intelligence of it, is very objectionable; as well as opposed to the uniform current of authority, a single case excepted. If it were adopted and applied between the cities of Boston and Portland, the effect might be to permit the holder to delay sending a notice to the indorser until the fourth post after the paper had been dishonored. Apply the position to a supposed case. The mail leaves Boston for Portland twice each day, at seven o'clock, A. M. and at three o'clock, P. M. The bill is presented and dishonored in Boston at twelve o'clock on Monday, the notice, if put into the postoffice in Boston too late on

Tuesday for the last mail of that day, will be conveyed to Portland on Wednesday by the fourth mail after the bill was dishonored. This would permit a delay unnecessary for the holder, injurious to the indorser, and authorized by no decided case.

Mr. Justice Story, in the case of *Mitchell* v. *Degrand*, 1 Mason, 180, said, "when a bill is once dishonored the holder is bound to give notice by the next practicable mail, to the parties whom he means to charge for the default." And the case of *Lenox* v. *Roberts*, was referred to in a note as authority. In section 290 of his treatise on bills, he states the rule as Bayley and Chitty do, with the exception of making, in section 291, the day allowed to each party to consist of twenty-four hours after the bill has been dishonored, or intelligence of it received. In a note, where he doubtless felt at liberty to suggest improvements in the law, after quoting the language of Chitty, stating the rule, he says, "it appears to me, that the rule is not so strict, as it is laid down in this last passage of Mr. Chitty; and that it would be more correct to say, that the holder, is entitled *to one whole day to prepare his notice*, and that therefore it will be sufficient, if he sends it by the next post, that goes after twenty-four hours from the time of the dishonor. Thus, suppose the dishonor to be at four o'clock P. M. on Monday, and the post leaves on Tuesday at nine or ten o'clock, it seems to me, that the holder need not send by that post, but may safely wait, and put the notice into the post-office early enough to go by the post on Wednesday morning at the same hour. I have seen no late case which imports a different doctrine; on the contrary they appear to me to sustain it. But as I do not know of any direct authority, which positively so decides; this remark is merely propounded for the consideration of the learned reader." These two very distinguished jurists, will not claim to be exempted from liability to error. While they agree, that the holder has one whole day merely to write or prepare his notices, they disagree as to what shall be considered a whole day. One holding it to be the natural day following the day of dishonor or notice of it;

and the other twenty-four hours after those respective events. They both appear to have been led by a somewhat inaccurate use in the books and in legal opinions of the terms, "his day," "an entire day," and "a whole day," to the conclusion, that these phrases were to be understood literally. That such was not the intention of those, who introduced and used them, could, it is believed, he made apparent by one having sufficient leisure for such an examination. If those phrases were to be literally understood, and a rule to be derived from them were in all cases to be fully adhered to, the effect would be to contradict, break down, or vary, several other well settled rules. Such a construction would require the rule now under consideration to be varied in a manner yet to be ascertained, because the time, which shall constitute the day, remains to be settled. It would also contradict and require a variation of the well established rule, relative to the mode of giving notice, when all the parties reside in the same place. "When the parties reside in the same town the holder, or other person to give notice, must, on the day after the dishonor, or on the day after he received the notice, cause notice to be actually forwarded by the post, or otherwise, to his next immediate indorser *sufficiently early in the day, that the latter may actually receive the same before the expiration of that day.*" Chitty on bills, 515; Story on Bills, § 291. It would have the like effect upon another rule equally well established, that when notice is to be given in the place, where the bill has been dishonored, to persons or corporations known to be accustomed to close their places of business at a certain hour of the day the notice should be given to them on the day following the dishonor, before the hour for closing their places of business. Chitty, 516; Story, § 291. When Baron Graham said, in the case of *Bray* v. *Hadwen*, "that each party was entitled to an entire day for the purpose of giving notice," he could not have meant, that the notice need not be put into the postoffice in season to be sent by the post of the day allowed to the party. The plaintiffs in that case received notice of the dishonor on Sunday. For the purpose of business, Mon-

day was considered to be the day of their first knowledge of it. The post left at twelve o'clock. They put the notice in on the evening of Monday. The Baron said, they were entitled to an entire day, and "had the whole of Monday to put in their letter." It is obvious, that this was said in answer to the argument, that it should have been put in before twelve o'clock on Monday to be conveyed by that post. If they had been allowed the entire day following that, on which they were considered as having received notice, they might have placed their notice in the postoffice on Tuesday, after the post of that day had departed, and it would have been in season. It cannot be believed, that Baron Graham would have sanctioned such a course. It is believed, that no more was intended by the use of such phrases, than that each party should have a day to give his notice, taking care to perform that duty at such time during the day allowed him, that the notice shall be actually given to a party residing in the same place at the proper hour of that day, and be sent to a party residing in another place by the post of that day. Thus understood, the rule allowing each party a day, will not be in conflict with any other rule. All the rules will operate in harmony. And this is the sense, in which Lord Ellenborough admitted it in the case of *Smith* v. *Mullett*, 2 Campb. 208. He says, "if a party has an entire day, he must send off his letter conveying the notice, within post time of that day." In the case of *Jameson* v. *Swinton*, 2 Campb. 373, Mr. Justice Lawrence seems to have considered the rule as applicable only, where all the parties resided in the same place. He could not therefore have understood it differently without regarding it as contradicting the well established rule for giving notice in such cases. In that case he says, "This is allowing only one day to each party, which, where the parties all reside in the same town, seems now to be the established rule."

The rule, as propounded for consideration by Mr. Justice Story, to consist of a day of twenty-four hours after the dishonor or notice of it, would be liable to this further objection; that the indorser, after having received notice, would often be

unable to determine, whether he had been notified in season or not, until after he had been able to ascertain the hour of the day, when the presentment was made. And this would be very inconvenient, when the parties resided in different countries, or in distant States. And the holder also would have the power often of affecting the right of the indorser to an early notice, by delaying the presentment until a late hour of the day. Mr. Justice Thompson observes, in the case of the *Bank of Alexandria* v. *Swan*, that "the law, generally speaking, does not regard the fractions of a day." And Lord Tenterden, in the case of *Geill* v. *Jeremy*, says, "In these cases it is of great importance to have a fixed rule, and not to resort to nice questions of the sufficiency of a certain number of hours or minutes." If the proposed day of twenty-four hours should be allowed, it might often become necessary to have a jury determine the hour and moment of presentment to enable the Court to determine, whether the notice was sent by the next post, that left after twenty-four hours from the time of the dishonor. This would be undesirable, and inconvenient.

The proposed change, which would require notice to be forwarded by "the next practicable mail," or "at a convenient time after business hours of the next day," instead of by the post of the next day, is suited to introduce much more inconvenience, than it can obviate.

Is the Court to determine, what was a convenient time after business hours, or which was the next practicable mail, and to do it in each particular case; or is there to be an attempt to make a general rule? If such an attempt be made, is there reason to expect, that any certain and uniform rule can be adopted, and prevail throughout the several States? Business hours, and that, which may be considered to be a practicable or convenient time for forwarding notices by the post, may be very different in different places, and different among different classes of business men in the same place. Banking corporations and houses often establish hours of business differing from those of individuals in the same place. Is the rule to be varied, and conformed to the business habits of each

place, and to those of each class of persons in the same place? The arrangement and hour of departure of the post from a place may be expected to be changed not unfrequently; and no certain rule can therefore be established respecting a practicable mail. If business hours are to constitute an element in the composition, out of which a rule is to be formed, there must be proof of those hours in the city or place, from which the notice has been sent, and a difference in the testimony may be expected from those engaged in different kinds of business; and in such case a jury must decide each case upon the testimony. Many other inconveniences and dangers will present themselves to any one, who duly considers the effect of the proposed change. The rule, as now established, is certain, uniform, easy of comprehension, not difficult of execution, not liable to change by the change of arrangement in the post, or of business hours. The one proposed in all these particulars is defective, and however apparently salutary, if generally received, it cannot fail to be productive of uncertainty, litigation, and loss.

The result of this examination is a conviction, that the rule, as before stated by Bayley and Chitty, is fully established; that it has become the settled law in England and in the United States; that in the application of it in practice, the Lord's day is not to be accounted a day of business or taken into the account; that the rule, that each party has a day to give notice, was never intended to be, and should not be construed so as to be in conflict with any other established rule; that no modern case has been found, which has actually decided the rights of parties upon a different doctrine; and that the only opinions opposed to these positions are those of Chief Justice Best, and Chancellor Kent; Mr. Justice Story, suggesting one rather for consideration, than as exhibiting the law, at the same time admitting, that it is unsupported by any decided case.

## Samuel Duncan *versus* Gilmore Sylvester & *al.*

Where the description in the deed commences with, "one undivided moiety or half part of a certain lot or tract of land, butted and bounded as follows," and proceeds with a particular recital of the metes and bounds of the lot, and concludes with these words, — "containing fifty-two acres and eighty rods and no more, and including the salmon fishery contiguous to said land," but an undivided half of the salmon fishery is conveyed.

A conveyance by one tenant in common of a specific part of the common real estate is void as against a co-tenant; and is not valid until such co-tenant gives notice to the grantee, that he elects to avoid it.

Where the plaintiff and defendant were tenants in common of a salmon fishery, the plaintiff is entitled to recover damages, in an action of the case, for a continued deprivation of the enjoyment of his rights, in being kept out of the occupation of any part of the fishery, after he was first deprived of it by the defendant, without having first regained possession by entry or otherwise.

The owner of land adjoining tide waters, becomes, by the ordinance of 1641, the proprietor of the flats to low water mark, not to exceed the distance of one hundred rods, subject to the free fishing of each householder in the waters covering them. But the householder, or citizen, does not thereby become entitled to place weirs, or other permanent erections, upon those flats, or to set his nets, or seines, "making them fast in the usual way by grapplings to the shore." These are advantages, often of great value, which the riparian proprietor has over others.

Trespass on the case against the defendants for cutting away the plaintiff's nets, and depriving him of his rights of salmon fishery from 1834 to the date of the writ in 1840.

To show his title, the plaintiff introduced a deed from Abner Knight to Samuel Duncan, dated July 19, 1819. It appeared also, that Sylvester was the owner of one undivided half of the premises, claiming under a deed from Abner Knight to George Knight, dated July 18, 1817, and a deed from George Knight to him, dated June 20, 1833, and that the plaintiff and said George had occupied and enjoyed the salmon fishery jointly, from July, 1819, to June, 1833, there being privileges for two strings of nets only.

The plaintiff proved, that on May 19, 1834, he went to said salmon fishery, and attempted to set his net; that the defendants were first there, and forbid the plaintiff from setting his

net, and denied his right to any part of it; that Sylvester had two strings of nets set; that the plaintiff proceeded to set his string of nets between those of Sylvester, "making them fast in the usual way by grapplings to the shore and moorings;" that the defendants cut the plaintiff's nets adrift; and that the defendants had occupied the whole privilege since.

Testimony was introduced on each side in relation to the income of the fishery and the damage.

The descriptive part of the deed from Abner Knight to George Knight, is given in the opinion of the Court. The deed from Abner Knight to the plaintiff, was of an undivided half of the same premises described in his deed to George Knight.

At the trial, before SHEPLEY J. the counsel for the defendants contended, that the conveyance from Abner Knight to George Knight included the whole of the salmon fishery. The Judge instructed the jury, that it conveyed only an undivided half.

The counsel for the defendants further contended, that although the plaintiff's action might be maintained, to recover damages for the wrongful act by which the defendants dispossessed and ousted him, he was not entitled to recover in this action damages for withholding the possession, until he first regained the possession by entry or otherwise.

And the defendants' counsel further contended, that the conveyance from George Knight to Gilmore Sylvester, being by metes and bounds, although voidable by Duncan, yet that the present action was not maintainable, unless Duncan had first elected to avoid said conveyance, and given Sylvester notice of his election, by entry or otherwise.

The Judge instructed the jury, that if they were satisfied from the evidence, that the defendants dispossessed the plaintiff, the foregoing positions of the defendants' counsel constituted no objection to the recovery by the plaintiff of damages for the whole period of time for which he was kept out by the defendants from the occupation of his undivided half of said fishery.

The verdict was for the plaintiff, and the defendants filed exceptions, which were allowed.

*W. G. Crosby* argued for the defendants. The grounds taken appear in the opinion of the Court.

In support of his position, that the resistance on the part of the defendants to the occupation by the plaintiff and denial of his right, amounted to an ouster, he cited Stearns on Real Actions, 41.

That one ousted cannot maintain trespass for a wrong done, after the disseizin and before re-entry. *Bigelow* v. *Jones*, 10 Pick. 164; Stearns, 409, 410; *Thomes* v. *Moody*, 2 Fairf. 141; *Allen* v. *Thayer*, 17 Mass. R. 302; *Maddox* v. *Goddard*, 15 Maine R. 222; *Porter* v. *Hooper*, 13 Maine R. 29; *Allen* v. *Carter*, 8 Pick. 177.

*F. Allen*, for the plaintiff, understood, that the only point on which the Court had any doubt was, whether the plaintiff could recover damages for the whole period. He contended strenuously, in a written argument, that the plaintiff might so recover; and cited Stearns on Real Actions, 13, 46, 150; Fitzherbert, 190, 191; Oliver's Precedents, 299 to 315; 15 Johns. R. 432; Buller's N. P. 70, 71, 73; 17 Mass. R. 289; 15 Mass. R. 472.

The opinion of the Court was drawn up by

SHEPLEY J. — This bill of exceptions presents three questions for consideration. 1. Whether the deed from Abner Knight to George Knight conveyed the whole or an undivided half of the salmon fishery. 2. Whether a conveyance made by one tenant in common of a portion of the common estate by metes and bounds be void as against a co-tenant, or valid until he give notice to the grantee, that he elects to avoid it. 3. Whether the plaintiff be entitled to recover damages for being kept out of the occupation of any portion of the salmon fishery, after he was deprived of it, without having first regained possession by entry or otherwise.

1. The description of the estate conveyed by the deed from Abner to George Knight, is "one undivided moiety or half

part of a certain lot or tract of land situate in Northport aforesaid, and butted and bounded as follows, viz.;" it then proceeds with a particular recital of the metes and bounds of the lot, and concludes with these words, "containing fifty-two acres and eighty rods and no more, and including the salmon fishery contiguous to said land." Was the fishery included in the lot, half of which was conveyed, or included in the conveyance as a distinct portion of property? There is no indication of an intention to convey two distinct pieces of property, the one being an undivided half of the lot, and the other the entire salmon fishery. The grammatical arrangement of the language is opposed to such a construction, and is suited to convey an undivided half of the fishery as a right appertaining to the lot. The word *containing*, is clearly connected with the word *lot*, or *tract*, as its substantive, showing, that the whole lot contained a certain number of acres and rods. The word *including*, is coupled to it, and must have the same antecedent, showing, that the lot included the fishery. No other construction can be admitted without doing great violence to the language.

2. It appears to have been held, in the case of *White* v. *Sayre*, 2 Ohio R. 110, that a tenant in common could legally convey a particular part of his undivided share of the estate. If this were admitted to be the established law, the other tenants in common, without any fault of their own, would be deprived of their right to enter and occupy every portion of the common estate, and of their right to have any portion of it thus conveyed, assigned to them on a partition of the common estate. Nor can the co-tenant justly be required to give notice to the grantee. If he were, he might become a trespasser, before he was aware of the existence of such a conveyance. He may entirely disregard it, and proceed to occupy any portion of the estate as freely as before such a conveyance, because it can have no legal effect upon his rights. *Bartlett* v. *Harlow*, 12 Mass. R. 348; *Mitchell* v. *Johnson*, 4 Conn. R. 495; *Cogswell* v. *Reed*, 3 Fairf. 198.

3. For the purpose of ascertaining, what damages the plain-

tiff may be entitled to recover, it may be well to determine, what right or property he had in the salmon fishery. The deeds, from which both parties claim to have derived their rights, assume to convey a salmon fishery as contiguous to the lot of land, which adjoins the Penobscot Bay. The verdict in this case, founded upon the testimony introduced, shows that such a fishery may be a valuable property, if it can have a legal existence. The State may regulate its navigable waters, and the fisheries within them; yet all the citizens are entitled as of common right to the fish in those waters; while each is bound to use this common right as not abusing it; and no one can unnecessarily interfere with or injure another in the use of the same right. It does not, however, follow, that each will be entitled to enjoy precisely the same or equally valuable rights. The owner of the land adjoining tide waters becomes, by the ordinance of 1641, the proprietor of the flats to low water mark, not to exceed the distance of one hundred rods, subject to the free fishing of each householder in the waters covering them. But the householder, or citizen, does not thereby become entitled to place weirs, or other permanent erections, upon those flats, or to set his nets or seines, "making them fast in the usual way by grapplings to the shore." These are advantages often of great value, which the riparian proprietor has over others. Having a common right with others to fish in those waters, he may, without any unreasonable exercise of that right, or improper interference with the rights of others, avail himself of these superior advantages. This is believed to be the foundation, upon which the valuable private rights or privileges of fishery, often conveyed and leased by one to another for no inconsiderable amount of money, rest. And their existence as private rights, appears to have been recognized in the legislation respecting the fisheries. The fishery in this case, described as contiguous to the land, appears to have been occupied since 1819, if no longer, as a privilege for two strings of nets only, which were made fast by grapplings to the shore. Since the year 1833, Ingraham Duncan and Gilmore Sylvester appear to have been the owners in com-

mon of the tract of land, to which this fishery was contiguous. In the month of April or May, 1834, Ingraham Duncan leased one-half of that fishery to the plaintiff. This would convey to him the right, in common with the owner of the other half, to use the privilege with the advantage of fastening his nets by grapplings to the shore. This right, so secured to him by lease, may be properly denominated an incorporeal hereditament, which is described in the books as a right issuing out of a thing corporate, or concerning, or annexed to, or exercisable within, the same. Thus a right of common, being a profit which one has in the land of another to pasture his cattle, to catch fish, to dig turf, to cut wood, to travel over, and the like, is an incorporeal hereditament. The lease or conveyance of a right to make grapplings fast to the shore, for the security of nets, can no more be considered as conveying title to any portion of the estate, than a conveyance of a right of way, or a right to dig turf could be. If one, who had a private fish pond upon his own land, should grant a piscary out of it with the right of fastening nets to the bank, such right or privilege would still be but an incorporeal hereditament. They would be properly so denominated, because in none of these cases would any title to the land pass to the grantee. Co. Lit. 4, (b.); Com. Dig. Piscary, A. They are rights merely, incorporeal, intangible, incapable of a *pedis possessio;* and properly speaking, one cannot be dispossessed of them; for they are always considered to be in the possession of those having a right of possession or enjoyment. Cruise's Dig. Tit. 35, c. 13, § 13. Of course, although one may be disturbed, or prevented from enjoying them, he can make no entry to regain possession; or maintain any action to regain possession of that, which the law adjudges to be already in his possession, and of which it declares, that he cannot be dispossessed. The objection cannot therefore be a valid one, "that he was not entitled in this action to recover damages for withholding the possession, until he first regained the possession by entry or otherwise." And the authorities relied upon to support it cannot be applicable to this description of property. An action on the case

is the proper remedy for one injured by the disturbance or deprivation of the enjoyment of an incorporeal hereditament. Com. Dig. Action on the case for a disturbance, A.; *Stocks* v. *Booth*, 1 T. R. 428. It may be maintained by a tenant in common of such a right, and he may recover damages against his co-tenant for a continued disturbance or deprivation of the enjoyment of it.

The case of *Atkinson* v. *Teasdale*, 3 Wil. 278, was an action on the case for the disturbance of a common of pasture by a tenant in common against his co-tenant. The declaration alleged a disturbance on a particular day, "and on divers other days and times between that day and the suing forth of the original writ." The plaintiff obtained a verdict, and judgment was entered upon it. The case was much contested and twice argued, but no objection was taken to the plaintiff's right to recover for the continued wrong. The case of *Blissett* v. *Hart*, Willes, 508, was a like action for the disturbance of a ferry, against one who had set up another ferry near to it. The declaration alleged the injury on a certain day, and continued on divers other days and times. The plaintiff had judgment. This also was a case much contested and twice argued on a motion in arrest of judgment. The forms for the disturbance of such rights in the best precedents for declarations, contain a clause for a continuance of the wrong. And there is little reason for requiring numerous actions to be brought for each disturbance, when entire redress may be obtained by one without a violation of any rule of law. It is difficult to perceive any sufficient reason for the application of a different rule to actions of this description from that, which prevails in actions on the case for other injuries, and in actions of trespass. And it is well settled, that entire damages may be recovered in the latter class of actions for a repetition and continuance of the injury, as well as for the first injurious act. The case of *Winsmore* v. *Greenbank*, Willes, 577, affords a remarkable instance of such a recovery in an action on the case, for enticing away the wife of the plaintiff, and inducing her to conceal herself from him, and for a continu-

ance of the injury from August 8, to December 24, 1742. The plaintiff obtained a verdict for heavy damages. The case was argued on a motion to set aside the verdict as against the evidence, and for excessive damages, and on a motion in arrest, and without success. The arguments to set aside the verdict do not appear in the report of the case. That it could not have escaped their notice, that damages were given for a continuance of the injury is apparent, for the opinion states a distinction in this respect between the commencement and the continuance of a nuisance; that notice was required for its removal, before damages could be recovered for its continuance; and that such a rule was not applicable to that or other actions on the case for a different injury, "because every moment that a wife continues absent from her husband, it is a new tort." Indeed it would seem to be more reasonable to require one, who had been injured by several distinct acts of trespass, committed at different times by the same person, to commence different actions of trespass to recover his damages, than it would to require the plaintiff to commence several actions on the case for each separate injurious act, showing a continued deprivation of his right to enjoy the same fishery.

The policy of the common law and of our legislature is to prevent a multiplication of suits, whenever it can be done without introducing confusion of rights, surprise upon parties, or practical inconvenience, or injustice. And none of these results will be produced by allowing the plaintiff in this case to recover for a continued deprivation of the enjoyment of his rights.

It is further insisted in the argument for the defendants, that the plaintiff cannot recover against both the defendants for such a continued disturbance. It might be sufficient to observe, that such a point does not appear by the bill of exceptions to have been made during the trial. It is obvious, however, that if made, it must have presented a question of fact for the decision of the jury, whether both of the defendants continued to act together and to deprive the plaintiff of the enjoyment of his rights. And it does not appear, that any incorrect in-

structions were given respecting it, or that any requested, were refused. The bill of exceptions does not recite the testimony introduced in the case. There is no motion to set aside the verdict as against the evidence, and if there were, the Court has no means for determining, whether the jury were authorized by the testimony to find, that both the defendants were alike guilty. The jury were required by their instructions to find, that the plaintiff was kept out of the occupation of his half of the fishery by the defendants, not by one of them, during the whole time, for which the damages were assessed. There is nothing in the case authorizing the Court to determine, that they were not fully justified by the testimony in coming to that conclusion. *Judgment on the verdict.*

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FRANKFORT BANK *versus* BENJAMIN JOHNSON *& al.*

A contingent liability affects only the credibility, not the competency of a witness.

To a commentary of the presiding Judge upon the testimony, whether perfectly correct and appropriate or not, a bill of exceptions cannot be taken. Juries are not bound by such commentaries, and the Court never refuses to counsel the opportunity, in a proper manner, before the cause is fully committed to the jury, to correct any misapprehension or misstatement of the testimony.

A settlement with the cashier of a bank, made by the directors, is not conclusive upon the bank, if the cashier was guilty of fraud in procuring it to be made.

The directors of a bank have authority to make a settlement with the cashier, whose accounts exhibit a deficit in the funds.

The directors of a corporation have no power to make a donation from, or misappropriate, its funds in violation of the laws and rules regulating its mode of action.

But the fraudulent conduct of the directors of a bank, in making a settlement with the cashier, would not annul or make it void, unless the cashier was also guilty of fraud.

Corporations are subject to the same laws in relation to the acts of their agents, which are applied to individual persons with respect to the acts of agents of their appointment.

DEBT on the bond of Johnson, as principal, and of the other

defendants, as his sureties, to the Frankfort Bank, dated Oct. 9, 1839. The case came before the Court on exceptions in behalf of the bank, to the rulings and instructions of TENNEY J. presiding at the trial, and on a motion to set aside the verdict, as against evidence, and against the weight of evidence. The facts sufficiently appear in the opinion of the Court, as do also the rulings and instructions of the Judge, to which exceptions were taken.

The case was concisely argued orally by

*Kelly*, for the plaintiffs: — and by

*Hathaway* and *Hubbard*, for the defendants, — and much at length, in a written argument, by

*Merrill*, for the plaintiffs.

The opinion of the Court, WHITMAN C. J. holding the Court for jury trials in the County of Washington, at the time of the argument, and taking no part in the decision, was drawn up by

SHEPLEY J. — This is a suit against Johnson, as principal, and others, as his sureties, on his official bond, as cashier of the Frankfort Bank, made on October 9, 1839. Two breaches are alleged. The first, that the cashier "had received the sum of $8000, of money belonging to the bank, and given no credit for the same, nor in any way accounted for it in the books of the bank." The second, that "he had improperly included in a settlement an item of interest on the notes and bills of said bank, over due, in order to make up his balance of assets equal to the liabilities, and equal to his leger account of notes and bills," amounting to the sum of $2273,24. The defendants obtained a verdict in their favor. The case has been presented by a bill of exceptions, and on a motion to set aside the verdict as against the weight of evidence; and it has been argued orally, and by one of the plaintiffs' counsel also, in writing.

The motion to set aside the verdict will be first considered. The capital of the bank was $50,000. The deposition of the

cashier, which had been taken to be used in actions between several other parties, was introduced by the plaintiffs in this case, as testimony against him; and thus introduced, it will be entitled to the usual confidence, so far as his statements are not contradicted by other testimony. It appears from those statements, and from other testimony, that the bank was embarrassed; that its assets were not available as cash; that its bills had frequently been presented and payment demanded, when the bank had no funds to pay them; that as early as the month of December, 1839, the bank had mortgaged property for security to the Suffolk Bank to the amount of 11 or 12,000 dollars; that on or about Jan. 20, 1840, it procured a loan of Read & Co. of Boston, on notes for $8,000, signed by the president and others and indorsed by the bank; that during the following spring or summer a majority of the directors resorted to the improper and unwise course of purchasing its own stock, by using its discounted notes and other paper, with the intention to sell it again, apparently hoping by that operation to obtain cash or paper of more value, than it then held; that to effect this purpose the president of the bank was authorized to use, and did use, $25,400 of its paper in the purchase of 308 shares of its own stock; that a contract was made, on July 30, 1840, by the president, with Henry Roop for the sale to him of 400 shares of its stock at par, to be paid for by $2,500, in cash, by $5,000, in acceptances at thirty, sixty, and ninety days, which appear to have been paid, and by $32,500 in the notes of Roop with a surety, which proved, as might have been anticipated, to be worthless. This contract was executed on the second day of September, following; and the whole of these proceedings were approved by a majority of the directors. A new cashier was appointed, and the former cashier retired on that day, after having, as he states, delivered to the new cashier, or to the president, all the assets and property of the bank, except some of the bank books, which he refused to surrender, till his official bonds were cancelled. A settlement appears to have been made with him on that day, and an account exhibiting the assets and liabilities of

the bank to have been made out and signed by him and the president, which was the basis of that settlement. The bond declared upon appears to have been then cancelled on its face, and the names of the principal and sureties, to have been erased, that the cashier might exhibit it in that state to his sureties as proof of their discharge. That settlement was approved by a vote of a majority of the directors. The argument correctly states, that this vote does not authorize the cancellation of the bond, or the erasure of the names. The president testifies, however, that he did it in the presence of the other directors, and the cashier testifies, that two other directors, making a majority of the existing board of directors, were present and agreed to it. The whole of the proceedings therefore, by which the sureties were discharged, appear to have been the deliberate acts of the plaintiffs, acting in the only manner, in which they could legally act by their regularly constituted officers. Such a settlement, with such a disposition of the bond, should surely be sufficient to discharge the sureties, unless it was procured by fraud, or unless there be satisfactory proof, that by some error, not then known and noticed, the cashier did not account for all the property of the bank, which had been in his possession. The plaintiffs now insist upon their right to recover upon both of these grounds. As it respects the alleged fraud, it must be a fraud in relation to, or touching that settlement, which will destroy its effect; and not frauds committed by the officers of the bank upon the stockholders or otherwise, having no connexion with that settlement. Fraudulent acts, not connected with it, can only be used as tending to lead a Court or jury to infer fraud in the settlement, because the parties to it had been guilty of previous frauds, exhibiting a settled purpose to defraud the bank or its stockholders, whenever a favorable opportunity should occur. The written argument for plaintiffs does not make this most important distinction. Important, because a Court or jury cannot be authorized, without proof of such a formed design, to infer, that parties have been guilty of a fraud in one transaction, because they have been guilty of it in others wholly uncon-

nected with that one. And however extensive may have been the frauds in other matters, an examination of the testimony presented to the Court, is far from exhibiting any such evidence of fraud in making that settlement, especially on the part of the cashier, as would lead to the conclusion, that the jury must have acted under the influence of some bias or prejudice in finding a verdict for the defendants, on the ground, that the cashier had not been proved to have been guilty of any fraud in making it.

The next ground, on which the plaintiffs claim to have the verdict set aside, is, that there was full and satisfactory proof, that a mistake was made in that settlement, by which the cashier did not account for the two items claimed in this suit. The most material testimony relating to each of the two items will be examined separately. The claim to recover the sum of $8000, arises out of the loan procured from Read & Co. The cashier receipted for those notes to the president, and much reliance is placed upon the effect of that receipt. It should not however bind him, much less his sureties, if it should appear, that he did not in fact receive those notes as a part of the funds of the bank. And the testimony is quite satisfactory, if not wholly conclusive, to prove, that he did not in fact receive them. It appears, that he was ordered by the directors to indorse them in behalf of the bank, and that having done so, they were retained by the president, and by him passed to Read & Co. to procure funds for the bank; that they remained outstanding, unpaid, and not within the control of the cashier, at the time of the settlement. He does not appear to have had possession of them at any time, except for the mere purpose of obeying an order of the directors by indorsing them. The receipt for them appears to have been improperly required, and to have been given through a misapprehension of duty and of right. This disposes of so much of the testimony, as would charge him with them solely on the ground of that receipt. He would however be chargeable with, and should account for, any proceeds of them when received. There is a document, which shows, that he did, or

should have received, what was obtained of Read & Co. for them. And that is the settlement made by the cashier with the president on February 20, 1840. By that document it appears, that the president received of Read & Co., for those notes, the sum of $7166,64, and that he accounted for it, with the cashier. And as it appears from the settlement made with the cashier, that the notes were not included in the list of the liabilities of the bank, there would appear to be a deficiency of assets and charges on the other side of that account, equal to the amount of those notes. Thus a loss is exhibited, for which the cashier should account, unless that loss occurred in the dealings of the bank without his fault; and if so, it should have been exhibited in his accounts. Mr. Alden testified on this point, in substance, that he had examined the accounts upon the bank books, that the cashier's account was balanced, and that a memorandum on the book exhibited the four $2000 notes, due to Read & Company, as unpaid and not included in the settlement. "That the $8000 was secured in part by State stock, and so far is put in twice." That State stock appears by the account to have amounted to $2000, which would reduce the apparent deficit, if Mr. Alden be correct, to $6000. Mr. Bradbury states, in substance, the same state of facts respecting these notes; that he examined the books; that there appeared to be a large deficiency in the cash account; that he found the cashier's account deficient by the amount of those notes and the other item of interest; and that the books were loosely kept. Both these witnesses had been cashiers of banks, and both state, that they do not know, or that they have no reason to suppose, that the directors made a mistake in their settlement with the cashier. Opposed to this is the testimony of the president, that there was at the time of the settlement, a full investigation which satisfied him, that all was correct; that he is perfectly satisfied now, and was then, that there was no deficiency; that he "should have supposed, if there was nothing but the account on the book, there was a deficiency of $8000; but from what was before the directors, it was clear, the whole

was accounted for; and that he "knows there was no deficiency in Johnson's account." Rich, another director, testified, that he was present at the settlement; that he examined partially the accounts, and discovered no deficiency; that he knew of no money received by the cashier and not accounted for. The cashier, in his testimony, introduced by the plaintiffs, states positively, that there was no deficiency. The witnesses do not state when, or from what cause, the deficit in the accounts originated. So far as it respects their testimony, it might have arisen, if it existed, from the misuse or subtraction of the funds by the cashier, before these sureties became liable. Or it might have happened since that time by the action of the bank in its negotiations to attempt to sustain its credit, and in the purchase and sale of its stock, without the fault of the cashier, except the neglect to charge such losses in his accounts. No one of the witnesses speaks particularly of the profit and loss account, or states the items, of which it was composed, while these sureties were liable. The account settled only exhibits a loss in that account to the amount of $660,11. There is reason to believe, that no considerable amount of losses could have been charged to that account, since this bond was executed. For the amount once charged could only be diminished by the credit of profits; and how there could have been much profit to credit is not perceived; when it could only be derived from its paper, stated not to be available as cash, and $25,400 of which appears to have been exchanged, as before stated, for its own stock, and on the remainder of which the interest appears to have remained unpaid at the time of settlement, to the amount of $2273,24. If therefore it should appear, that the bank suffered losses during that time, without the fault of the cashier, to the amount of the deficit exhibited by the accounts, which ought to have been charged to swell the account of profit and loss, it would prove, that the plaintiffs can have no just claim upon the cashier and his sureties to make up that deficiency, which, if Mr. Alden be correct, as before stated, amounted to $6000.

The documents do show, that the bank lost without his fault

the discount on the notes for $8000, amounting to $833,36, the sum of $7166,64, being all that was received for them. The president in his account with the bank, settled on September 2, 1840, makes this remarkable charge against the bank, and it was allowed. "For 308 shares of the capital stock of this bank, purchased in with the $25,400 of the debts due the bank, by the direction and assent of the directors, $30,800." The bank therefore appears to have paid him $30,800, for its own stock, purchased by him with its own funds, for $25,400, thereby suffering a loss of $5,400. There is another charge also in the same account, "for this amount of bills of this bank, less the discount, delivered to H. Roop, $25,000." The term, "less the discount," is believed to have been used to indicate, that the whole apparent amount of the paper delivered was not charged, but a sum less by the amount of a discount allowed upon it. If this be the true explanation, the bank must have sustained a loss on that sum to the amount of the unknown discount, which it is not improbable, may have been two per cent. because Roop in his contract engages, that the bills of the bank shall be taken up in the city of New York at a discount of not more than two per cent. But if this last item of loss, resting rather upon probability than proof, be rejected, there will remain apparently lost by the bank, without the fault of the cashier, an amount larger, than the deficit according to the testimony of Mr. Alden. In addition to this, there is the consideration, that after this bond was executed, the directors, knowing the state of the bank, had the most urgent reasons for a careful examination of its condition, and the state of its funds and resources; and it would have been very difficult for the cashier to have misapplied or subtracted during that time such an amount without their knowledge, and especially without the knowedge of the president. And it could not have been believed that the cashier could have lost, wasted, or subtracted, such an amount without a knowledge of it. It would therefore have been difficult for the jury to have found a verdict for the plaintiffs without coming to a conclusion, that the president and cashier had committed deliber-

ate perjury. This they could not have been expected to do, when the documents presented to them exhibited the losses alluded to as occurring without the fault of the cashier. It may be, that those apparent losses may be explained in such a manner, as to leave the cashier without excuse for the apparent deficit in his account; and it may be, that a more perfect examination would prove, that the only error or fault on his part consisted in his neglect to charge those or other losses to the account of profit and loss. However this may be, the Court can only examine the case, as now presented, without the aid of the bank books.

As it respects the other sum claimed, the argument for the plaintiffs assumes, that the proof was conclusive, that "interest on the bills and notes" to the amount of $2,273,24, was charged by the cashier and included in that settlement. How is that fact established? The account settled contains this item, "for notes and bills discounted, $36,990,82." If charged to the bank it was contained in that item. The only witness, who appears to have testified respecting it, was Mr. Bradbury. According to the bill of exceptions, he stated, that "in the notes and bills discounted the columns were not added up; interest cast on notes and bills to Sept. 2, 1840. There was $2,273,24, interest on bills and notes, which made the amount carried into the trial balance; the face of the notes was only entered, being $36,987,66, without any interest; and the account was deficient the amount of the interest aforesaid, and the four $2000 notes, as appeared on the books." If this witness stated correctly, that the face of the notes without any interest, amounted to $36,987,66, as the cashier charged the bank for them in the account settled but $36,990,82, there could be in that charge an excess of only $3,16. The witness also stated, that the item of interest "made the amount carried into the trial balance," and that the account was deficient to that amount; but he appears to have stated it to be so, "as it appeared on the bank books." And if by "the trial balance" the witness intended, as is probable, to refer to one contained in the bank books, there would be nothing inconsistent in the

testimony. And if he did not, it is not perceived, how those two statements can be reconciled; and in such case the testimony would afford no satisfactory proof, on which a verdict could be found for the plaintiffs for this part of their claim. The result of a careful examination of the testimony is, that there is no just ground to believe, that the jury conducted improperly in finding a verdict for the defendants, and that the Court would be wholly unauthorized to set it aside.

The questions of law presented by the bill of exceptions remain to be considered. It is contended, that Benjamin Shaw was not a competent witness, because he was responsible to the bank for his negligence and misconduct in making the settlement and cancelling the bond. This objection assumes it to be a fact already proved, that he had been guilty of them. Whatever may be the result of this suit, he will not thereby be relieved from such liability. A verdict for the defendants would not be legal testimony in a suit against him to prove, that the settlement was correctly made, or that the bond was properly cancelled, because it could only be matter of record in a suit between other parties. It has been long settled, that such a contingent liability affects only the credibility, not the competency, of the witness. In the case of the *Union Bank* v. *Knapp*, 3 Pick. 96, the clerk, who testified that he made the mistake, which occasioned the suit, and that, if the money should be lost, he would sell his house or any thing else, if required, to pay it, was held to be a competent witness for the bank. It is also contended, that he was interested in the event of this suit, because certain depositions, taken at his expense, to be used in this and other suits, would be taxed in the bill of costs recovered by the defendants in this case, if they should prevail, and that Shaw would thereby be entitled to the whole expense, and to call upon Johnson for it, instead of the proportion agreed to be paid. But no such result would follow. Their agreement respecting the payment of that expense would not be altered or affected, nor could either of them obtain any new rights, by the use which might be made of them by either of the parties.

The next objection is to the instruction, "that the jury would be authorized to presume, the directors knew of the deficiency, if it appeared distinctly upon the books, unless the plaintiffs satisfied them, that the directors did not know of such deficiency." It is said, that this was equivalent to withdrawing the testimony of the two directors entirely from the jury. It is not perceived, that it could have such an effect, unless the jury should conclude, that their testimony disclosed such a want of intelligence, as to render it unworthy of their confidence.

The next complaint relates to the instruction, "that if the account was imperfect, it did not follow, that the deficiency was not made up on settlement, and might be paid without its appearing on the books." The truth of this, as an abstract proposition, cannot be denied; and the jury were to judge, whether it was applicable to the testimony introduced. If it be alleged to be an unfair commentary upon the facts, juries are not bound by commentaries upon the facts, nor do they consider themselves to be. They will judge, whether they are founded upon a misapprehension, or even upon a perversion of the facts, if such a case may be supposed, and will give them such weight only, as they may deserve. The Court never refuses to counsel the opportunity in a proper manner to correct any misapprehension or misstatement of the testimony; and the proper time to do it, is before the cause is fully committed to the jury. To such commentaries upon the testimony, whether perfectly correct and appropriate or not, a bill of exceptions cannot be taken. *Jackson* v. *Carver*, 4 Peters, 80; *Ex parte* Crane, 5 *Idem*, 198. These observations apply not only to this objection, but to several other remarks made by the presiding Judge upon the testimony. To the one contained in the next cause of complaint, "that he was not aware, that the plaintiffs had offered any evidence, which they relied upon to show fraud;" and to those relating to the crippled condition of the bank, to the intelligence of a witness, and to the probability, that he would suffer the amount claimed in this suit to escape his attention, or that it would be unnoticed

by the other directors; to the expression of his own opinion, that he could hardly think so, and to his allusion to the argument of the plaintiffs' counsel.

The next cause of complaint, so far as it has not been already noticed, is found in the instruction, "that if the settlement was obtained, when there was a deficiency, by the fraud of the cashier by imposing upon the directors, or they aided him in the fraud, the plaintiffs could recover. But fraud was not to be presumed, but might be proved by circumstances more or less remote." This instruction, so far as it embraced the matters connected with the settlement, was favorable to the plaintiffs, giving to them the benefit of any testimony tending to prove, that the settlement was under such circumstances procured by the fraud of the cashier acting separately or with the aid of the directors. If the counsel did not consider it to be sufficiently comprehensive to embrace every possible mode, in which the cashier might have been guilty of fraud in that settlement, they should have requested more full instructions. There can be no doubt, that the law as stated, was correct.

The last and most material cause of complaint, as found in the instructions, is, "that the vote of the directors of September 2, 1840, and the cancellation of the bond, if made in the presence of the directors there present, was conclusive against the plaintiffs, unless the plaintiffs had satisfied the jury beyond a reasonable doubt, that the settlement was made through mistake, or ignorance of a deficiency, which actually existed; that if there was a deficiency, and the directors had full knowledge of it, and no fraud was practised by the defendant, the plaintiffs could not recover, as it was competent for the directors to allow the cashier such sum, as they pleased, if it were ten thousand dollars, as between them, and if so, and a settlement made without fraud of defendants, the settlement would be a defence." And that "no fraud in the directors would annul or avoid the settlement unless participated in by Johnson." It will be necessary to examine separately the legal propositions contained in the different clauses or sentences. That respecting the vote of the directors and the cancellation of the

bond could not have been understood by the jury, as affirming, that they would be conclusive regardless of all considerations of fraud, if the settlement was not made through mistake or ignorance of a deficiency; for they were instructed, that it would not be conclusive, if the cashier had been guilty of fraud in procuring it to be made. Being thus understood, the plaintiffs surely can have no just reason to complain of it. If there be error in it, the error will be found in its being too favorable to them, by allowing the validity of those acts to be affected by the mere ignorance of the officers of the bank. The next clause, which states in effect, that if the settlement was made with a knowledge on the part of the directors, that there was a deficit in the assets and without fraud on the part of the cashier, it would be valid, may be considered as involving two affirmations; that the directors had competent authority to make it, and that its validity would not be affected by their own fraud only. The part having reference to any fraud, alleged to have been committed by them, will be considered in connexion with the direct affirmance of the same proposition. To deny the authority of the directors of a bank to make a settlement with a cashier, whose accounts exhibit a deficit in the funds, would be to refuse to the bank all right and power to adjust, settle, and relinquish, disputed claims. A right fully existing in every person and corporation capable of transacting business in the usual manner, and necessary to enable them to do it. Such a power is not to be confounded, as it appears to have been in the written argument, with one sometimes assumed by the officers and agents of a corporation, and which has no legal existence, to make donations from, or misappropriate, its funds in violation of the laws and rules regulating its mode of action. This power to settle and relinquish such claims cannot be affected by the amount, which its exercise may enable them to dispose of. The remark, "that it was competent for the directors to allow the cashier such sum, as they pleased, if it were ten thousand dollars," when applied to the facts of the case, only affirmed that they had the power to settle and to relinquish all claim

to recover from the cashier any deficit exhibited in his accounts, whatever the amount might be; and did not assert, as the written argument insists, that they had the right or power to "give away the property of the company by tens of thousands." For to suppose, that the cashier did not deny, that he was justly chargeable with the amount claimed, is to disregard his positive testimony to the contrary, and to suppose him to be guilty of fraud in the settlement. And if guilty of it, he continued to be liable according to the instructions, although he had made a settlement, and obtained an erasure of the signatures to the bond. The remaining clauses assert, that the fraudulent conduct of the directors in making that settlement would not annul or avoid it, unless the cashier was also guilty of fraud. This is considered in the written argument as a most extraordinary and startling proposition, and at variance with the settled law, as exhibited by the judicial opinions of the highest tribunals. Let the effect of a contrary doctrine upon the practical affairs of life be considered. A person employs an agent, who within the scope of his authority makes a contract with another, and in so doing conducts fraudulently towards his principal, the person with whom he contracts, being entirely innocent and ignorant of the fraud. Is that contract to be annulled and the innocent person to be compelled to suffer loss for the negligence, folly, or misfortune of the principal, who employed the unfaithful agent, and is such a principal to throw the loss upon the innocent, instead of seeking his redress from his own unfaithful agent? Such a question requires no answer; and yet it exhibits the practical result of the doctrine contended for, unless corporate bodies and their directors or agents are to be exempted from the application of the rules of law, which are operative, when applied to individual persons. And why should a corporation, or its stockholders, be permitted to select unfaithful agents or directors, who in the exercise of the powers conferred upon them in making contracts or settlements with innocent persons, commit frauds upon the corporation, and then to claim to be relieved from the effect of those con-

tracts and settlements, and the consequences of their own conduct in the selection of such agents, and to throw their losses or any part of them upon the innocent parties, instead of being required to abide by them, and being left to obtain their redress from their own fraudulent agents? Are corporate bodies to be so favored by the law, as to be held irresponsible for the misconduct of agents of their own selection, while the innocent, with whom they transact business, are to be made to suffer the losses occasioned by it? When judicial tribunals decide these questions in the affirmative, there may be cause for alarm. But they have not so decided. In the case of *Minor* v. *The Mechanic's Bank of Alexandria*, 1 Peters, 71, much relied upon in the argument, the cashier was considered to be aiding the directors to commit the frauds upon the bank, and it is so expressly stated by Mr. Justice Story, who says, "the question then comes to this, whether an act or vote of the board of directors, in violation of their own duties and in fraud of the rights and interest of the stockholders of the bank, could amount to a justification of the cashier, who was *a particeps criminis*." But if such directors or agents should assume powers not conferred upon them, and while doing so commit frauds upon the corporation, no doubt it would be entitled to relief from any contracts or settlements so made, because it would be the duty of the person contracting or settling with them to make himself acquainted with the extent of their power. While these clauses in the instructions are under consideration, it should be remembered, that they are founded upon the supposition, that the jury should conclude, that the cashier was a perfectly innocent party in making that settlement with the directors, who are to be considered as conducting fraudulently within the scope of their authority; and there can be no doubt, that the law was correctly stated.

There remains one other cause of complaint, that the presiding Judge refused to instruct the jury as requested, "that if any one or more of the directors, who approved the settlement of the 2d Sept. 1840, acted under a mistake in so doing, the remainder of said directors voting would not constitute a legal

majority, and said vote would not be binding upon the plaintiffs." The proposition would seem to amount to this, that a majority of the directors of a corporation, legally authorized to bind it in the transaction of business, is not to be ascertained by computing the number present, but by ascertaining the intelligence, with which they acted; and that if a number of them, sufficient to prevent a majority, are so careless, as not to understand all the facts, which they might, and ought to know to enable them to make a proper contract or settlement, the corporation will not be bound by it, although the other party supposed, that they all were fully informed of every fact. If the law were such as the requested instruction supposes it to be, it would allow a corporation to vacate or annul its own acts and contracts by proof of the carelessness or ignorance of the agents of its own selection, and to make the other party chargeable with the consequences resulting from it. It could not claim to be relieved on the ground of mistake, for relief is granted in such cases only, when the error or mistake was mutual. The doctrine of the requested instruction is inadmissible as a rule of law, and as one might have been assured, it is not sustained by any legal authority.

*The exceptions and motion are overruled.*

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CHARLES EDMUNDS *versus* SAMUEL WIGGIN.

To maintain an action for goods sold and delivered, the plaintiff must prove the contract of sale; the delivery of the goods, or such a disposition of them as will be equivalent to it; and their value.

If there be proof of the sale and delivery of goods, and no proof of payment, the presumption of the common law is, that they were sold on credit, or that the right to detain them for payment was waived.

When a jury have retired and have again come into Court without having agreed upon a verdict, the power of the presiding Judge is not limited by the Rev. Stat. c. 115, § 67, to the explanation of such questions of law only as should be voluntarily proposed by the jury.

EXCEPTIONS from the District Court, REDINGTON J. presiding.

Assumpsit on an account annexed to the writ, which was for one "red sleigh," under date of Nov. 24, 1840, charged at $36. The plaintiff, to make out the issue on his part, called one Sewall Gilbert as a witness, who testified, that sometime in the fall, probably in November, 1840, he and the defendant left Thomaston, where the latter resided, and proceeded together, in a horse wagon, to the town of Brooks; and the succeeding day they came to Belfast, on their way to Thomaston, and put up at the Phœnix House; there having been a fall of snow, the defendant stated to the witness, that he was going down to the plaintiff's shop to buy a sleigh, and went away and was absent about half an hour, when the defendant and the plaintiff returned, bringing with them a sleigh, into which they harnessed the defendant's horse, the plaintiff stating at the same time that he had sold the sleigh to "Sam," and the defendant that he had bought it; and thereupon the defendant and witness went off in the sleigh. The witness thought such a sleigh worth $26 or $27.

The defence relied on was, that the sleigh was purchased with money, and paid for at the shop of Edmunds, before the delivery at the Phœnix House, as testified to by Gilbert. The testimony of Gilbert being the only evidence in the case, the defendant moved the Court to direct a nonsuit, which the Judge declined to do; whereupon the cause was submitted to the jury, the defendant's counsel contending, that in the transaction, as testified to by the plaintiff's witness, the plaintiff stating that he had sold, and the defendant that he had bought, the presumption was, that the sale was a cash sale, and the purchase money paid at the plantiff's shop before the delivery of the sleigh at the Phœnix House, and that it was incumbent on the plaintiff, before he could prevail, to prove in some way, either negatively that the sleigh was not paid for at the time of purchase, or affirmatively that the sale was on credit, or that the usual course of dealing in the plaintiff's business was on a term of credit, which had expired before the commencement of this suit. But the Judge ruled otherwise, and instructed the jury, that from the facts proved, if they believed

the testimony, there was no legal presumption for or against the proposition of a cash sale, or for, or against a sale on credit; and that the rule of law, that where one party has proved his property into the hands and use of another, that other party is held to account or pay for the same, applies here; and that the plaintiff, having proved the sleigh into the hands and use of the defendant, had gone far enough, and was entitled to their verdict, unless the evidence had satisfied them, that the defendant had paid for the sleigh; and that the burthen of proof here was on the part of the defendant.

Under these instructions, the jury, after having been in their room sometime, returned into Court and took their seats, the foreman declaring that they had not been able to agree, and that there was no prospect of their being able to agree. Whereupon the Judge again addressed the jury substantially as before, reciting the aforesaid rule of law, and instructing them that the same was sufficient for the plaintiff to entitle himself to their verdict, unless the defendant, on whom was the burthen of proof, had, from all the evidence in the case, satisfied them that the sleigh had been paid for. The jury returned a verdict for the plaintiff for the sum of $27,75; and the defendant filed exceptions to the several rulings and instructions of the presiding Judge.

*H. C. Lowell*, for the defendant, argued in support of the positions taken in defence at the trial, and contended that the rulings and instructions were erroneous. He cited Cushing's Pothier on Cont. of Sale, 205; Com. on Cont. (3d Am. Ed.) 205; 2 Kent, 492; Hill. on Sales, 3, 151; 7 Wend. 406; 6 Cowen, 110; 4 Greenl. 376; 3 Greenl. 97; 2 Greenl. 5; 6 Shepl. 436.

*Heath*, for the plaintiff, said that a presumption of law, was an inference from facts proved. There was no proof, that such articles were uniformly sold for cash, and the law will not make any such presumption. 3 Taunt. 274; Hill. on Sales, 9; 3 Wheat. 75; 3 B. & P. 585.

It being a matter of inference, it was rightly left to the jury. 17 Mass. R. 188; 1 Metc. 221.

The opinion of the Court was drawn up by

SHEPLEY J. — The principal question presented by this bill of exceptions will be decided by ascertaining, what proof is necessary to maintain the action for goods sold and delivered. This appears to be determined, by the rules of evidence, to be proof of the contract of sale; of the delivery of the goods, or such a disposition of them, as will be equivalent to it; and of their value. 2 Stark. Ev. 874, Metc. Ed. The contract may be proved by testimony showing the terms of the agreement; the admission of the existence of the contract by the parties; or their acts affording satisfactory evidence, that one must have been made. Business is so transacted between man and man, that it frequently happens, that no proof, of what took place between them, when the contract was made, or when the goods were delivered, can be produced. When goods are not sold on credit, the seller may detain them, until the price is paid by the purchaser. If there be proof of a sale and delivery, and no proof of payment, the presumption of the common law is, that they were sold on credit, or that the right to detain them for payment was waived. Hence it is, that entries made in the handwriting of a deceased clerk or other person, of the delivery of goods, are considered as sufficient proof of a sale and delivery, without any evidence of what actually took place at the time. Pothier's treatise on the contract of sale is founded upon the civil law, which differs from the common law in some particulars, holding, that the right of property does not become vested in the purchaser by a sale and delivery without payment of the price, unless the goods were sold on credit. The language, which the witness states, that the parties in this case used at the time of the delivery, did not exhibit the terms of the contract of sale, but their admissions only, that such a contract had been made. From the use of that language payment would not necessarily be inferred, or the reverse of it. *Hathaway* v. *Burr*, 8 Shepl. 567. And the case was left subject to the general rules of evidence applicable to the action for goods sold and delivered.

It appears, that the jury returned into Court, before they

had agreed upon a verdict; and that they were again instructed, what would be the conclusion of the law upon the facts submitted to them. It is contended, that this was erroneous. Such is believed to have been the settled practice in those judicial tribunals, in which the Judges have been accustomed to commit the cause to the jury by a statement of the law accompanied by a commentary in elucidation of the facts. The right to do so in this State is recognized by statute. That the words, "if proposed to him," contained in c. 115, § 67, were not designed to limit the power of the Judge to the explanation of such questions of law only, as should be voluntarily proposed by the jury, will be obvious, when it is considered, that a discretion is therein confided to him to restate any particular testimony and to send them out, before they have agreed, more than once; and that to enable him to exercise it properly he must make suitable inquiries respecting their difficulties, and thus become informed of any respecting the law as well as the facts. *Exceptions overruled.*

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JOHN LITTLE, *Pet'r. versus* JAMES COCHRAN *& al.*

The justices taking the examination of a debtor, should not administer the oath prescribed by the statute, if they discover by the examination any thing inconsistent with the oath. Any course of examination, therefore, by the creditor, which would have a tendency to exhibit conduct of the debtor inconsistent with that oath, would be pertinent and appropriate.

The debtor is required by the oath to declare, not only that he has not conveyed property with intent to defraud the creditor on whose execution he has been arrested or committed, but also that he has not, since that debt was contracted, conveyed or entrusted to any person or persons whomsoever, all or any part of the estate, real or personal, whereof he has been the lawful owner or possessor, with any intent or design to secure the same, or to receive or expect any profit, advantage or benefit therefrom, to himself or others, *with any intent or design to defraud any of his creditors.*

If the justices deprive the creditor of his rights, by preventing or restraining such an examination, a writ of *certiorari* will be granted, on the petition of the creditor.

*Harding* argued for the petitioner, citing *Hayward, petitioner,* 10 Pick. 358, and *Dow* v. *True,* 19 Maine R. 46.

*Handley* argued for the respondents.

The opinion of the Court was drawn up by

SHEPLEY J. — This is a petition for a writ of *certiorari*, to bring before the Court the record of the proceedings of two justices of the quorum, in taking the disclosure of Isaac Carkin, jr. under the statute for the relief of poor debtors. The justices have presented, under their signatures, a document certified by them to be the record of their proceedings. It commences with the second interrogatory propounded to the debtor; and it presents such an appearance as to prevent one from concluding, that one leaf or page must have been removed or lost, since it was authenticated. There is a leaf annexed, not authenticated in any form, or referred to in the record, exhibiting three motions purporting to have been made by the attorney for the creditor, and remarks as if made for a decision upon them by the justices. The counsel have presented another document certified by one of the justices to be a true copy. It commences with a formal statement, that an application had been made by the debtor to be admitted to take the oath; that the notification and return had been examined by them and found to be correct; that they proceeded to an examination of the debtor; and that he disclosed four notes of hand, signed by Stephen Simmons, dated April 18, 1839, for $100 each, and interest, and an execution against one Jones for about $10, which are stated to be among the debtor's effects in bankruptcy, and assigned over to the creditor, subject to that lien. It then states, that the attorney for the creditors put the following interrogatories, and the first as well as the other interrogatories and answers then follow. With this document also, but not annexed to it or referred to in it, is presented a loose leaf, signed by the justices and not certified to be a copy of any record or proceeding, exhibiting the same matter contained in the leaf annexed to the first document. Without noticing the less important inaccuracies thus presented, some of the objections to the validity of the proceedings of the justices will be considered. It appears from the dis-

closure, that the debtor formerly purchased a tract of land of Daniel F. Harding, and for security, mortgaged the same to him. This mortgage was not recorded, and the debtor afterward conveyed the same premises to Stephen Simmons for $400, and received the promissory notes disclosed in payment. One of the objects of the attorney for the creditor appears to have been, to show by the interrogatories and answers, that the conveyance to Simmons was merely colorable and made with an intention to defraud Mr. Harding. The following interrogatories, with the decisions of the justices respecting them, appear in both the documents presented.

"28. What was your intention in selling the land to Simmons instead of Harding? The Court decide the above question an improper one.

"30. At the time you conveyed to Simmons as aforesaid, had he any attachable property? was he then reputed to be a man of property or no property? did you make any inquiries as to his standing? The Court decide the above not to be pertinent to this case.

"36. When you conveyed the land to Simmons, how did you calculate to pay Harding's notes? Objected to by debtor's attorney, saying we have answered far enough, inasmuch as we have been fourteen hours under examination, and pray, that this examination will cease. Counsel for creditor prays, that the examination go on."

Thus closes the disclosure, which is then signed by the debtor. The justices in their certificate state, that they "received all pertinent interrogatories, that were propounded," and that the debtor answered them. There is no other explanation of the conclusion of the disclosure, unless it be found in the leaves before alluded to, which cannot be regarded as part of the record or permitted to have any influence. If the matter therein contained were a part of the record, it would communicate little more light. The justices probably relieved the debtor from making answers to the interrogatories before noticed, and thus concluded their examination, because they did not consider it to be material to a correct decision of the

question before them, whether the debtor had made the conveyance to Simmons with an intent to defraud Mr. Harding, as he was not the creditor, on whose execution the debtor had been committed. It is now contended, that such an inquiry was not pertinent. The justices are not to administer the oath prescribed by the statute, if they shall discover by the examination any thing inconsistent with the oath. Any course of examination, therefore, which would have a tendency to exhibit conduct of the debtor inconsistent with that oath, would be pertinent and appropriate. The debtor is not required by the oath to declare only, that he has not conveyed property with intent to defraud the creditor, on whose execution he has been committed or arrested; but that he has not, since that debt was contracted, "conveyed or entrusted to any person or persons whomsoever, all or any part of the estate, real or personal, whereof I have been the lawful owner or possessor, with any intent or design to secure the same or to receive or expect any profit, advantage, or benefit therefrom, to myself or others with an intent or design to defraud any of my creditors." The debtor should therefore have fully answered any questions tending to show, that he had so conveyed that land to Simmons. As the justices appear to have deprived the creditor of his rights by preventing or restraining such an examination, the writ prayed for may be issued.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF CUMBERLAND.

ARGUED AT APRIL TERM, 1845.

## DANIEL MARSTON *versus* REUBEN HUMPHREY *& al.*

Where a bill in equity prays that the administrator, the widow and the minor children of a person deceased, intestate, may be decreed to release to the plaintiff their interest in the real estate which belonged to such intestate at the time of his decease; and the administrator and widow have made answers, and proof has been taken, but no guardian, generally, or *ad litem*, has been appointed for the minors; the bill should be dismissed for want of proper parties, or the proceedings in taking proof be set aside, and the plaintiff left to proceed in making proper parties, and thereafter to perfect his case for a hearing.

Where the father conveys to the son real estate under a parol agreement, that the son should pay the debts of his father, and support his father and mother during their lives; and years afterwards, he having paid the debts, the son gives to the father a bond wherein it is said, that if the son shall well and truly provide for and support the father and mother during their lives, "then this obligation to be void; otherwise to remain in full force, and the aforesaid deed to be void;" the case is not cognizable in equity by this Court as one of trust, either express or implied.

Nor can the Court decree a reconveyance on the ground of enforcing the specific performance of a contract in writing, for no contract for a reconveyance is found.

And even if there were a stipulation in the bond, that the estate, upon breach of the condition, should be reconveyed, still if the grantee in the deed, and obligor in the bond had deceased, after a partial performance, leaving a widow and creditors who had no knowledge of any latent equities, a court of equity might well hesitate, when so great an alteration had taken place,

in the exercise of the power of decreeing a reconveyance, as it must first appear that it would be strictly equitable to make such decree.

If the plaintiff in equity once had a right to a specific performance of a contract, and had, nevertheless, prosecuted his claim at law for damages for the breach of it to judgment, his claim to a specific performance would no longer remain.

And when the obligor in the bond had deceased, and the estate, in the due administration thereof, had been rendered insolvent, and the obligee had presented his claim for the breach of the condition thereof, and it had been allowed, and the list of allowed claims had been returned to, and allowed by the Judge of Probate, it is tantamount to a judgment at law in his favor, and equally deprives him of the right to a specific performance.

THIS was a bill in equity brought against Reuben Humphrey, as administrator of the estate of William Marston, deceased, Margaret Marston, widow of said deceased, and the five minor children of said William Marston. The administrator and the widow put in answers, and the plaintiff proceeded and took his evidence. The minor children never had any guardian appointed by the Judge of Probate, and none was appointed for them for the present suit. They did not appear.

The facts sufficiently appear in the opinion of the Court.

*Fessenden* and *Deblois* argued for the plaintiff. The principal grounds on which they claimed to support their bill are stated in the opinion of the Court. Deblois, in his opening, cited 7 Johns. R. 557; 3 Johns. Ch. R. 367; 4 Johns. Ch. R. 302; 5 Littel, 77; 1 Tenn. R. 79; 4 Bibb, 11; 4 Hen. & M. 450; 1 Desaus. 191; 4 Paige, 115; 2 J. J. Marsh. 487; 1 Gill & J. 272; 3 Litt. 444; 1 Story's Eq. § 30; 1 Cruise, 33, § 5; 1 Inst. 202 (a); 1 Roll. Abr. 474; 22 Pick. 238; 2 Story's Eq. 24; 14 Pick. 27; 12 Pick. 233; 16 Mass. R. 221; 1 P. Wms. 321; 3 Ves. 696; 5 Ves. 303; 1 Johns. Ch. R. 342; 2 Mad. Ch. 128; 1 Sch. & L. 135; 2 P. Wms. 294; 15 Ves. 349; 16 Ves. 278; 19 Ves. 325.

*Longfellow*, sen'r, argued for the defendants, citing 17 Mass. R. 303; 8 Greenl. 320.

The opinion of the Court was drawn up by

WHITMAN C. J. — As the jurisdiction of this Court, in matters of equity, is limited and specific, it is essential that every

bill should aver clearly and explicitly such facts as will bring the case within some one or more of the specifications. In this case the averments are, that, in October, 1828, the plaintiff conveyed in fee all his real estate to William Marston, since deceased, by deed in form absolute and unconditional, purporting to be made for the consideration of one thousand dollars by him paid; that the same was, nevertheless, made without any consideration actually, at the time, received therefor; that the inducement to make the deed was an agreement, verbally made between the plaintiff and said William, that he should support the plaintiff and his wife, who were his parents, during their lives, and pay all the plaintiff's debts; that about six years afterwards, William made a bond to the plaintiff with a condition, in which it is recited, that "on the first day of October, 1828, the said Daniel Marston conveyed to the said William Marston, by deed, all the real estate, that he then possessed;" and then proceeds to say, if the said William Marston shall well and truly provide for and support the plaintiff and his wife during their lives, "then this obligation to be void; otherwise to remain in full force; and the aforesaid deed to be void;" that William has since deceased, and has not performed his contract; that his estate is insolvent, and that William, immediately after taking said conveyance, entered into possession of the premises conveyed, and so continued until his death, in 1840, when he left a widow, and five minor children. The prayer of the bill is, that the wife and children may be decreed to release their interest in the estate so conveyed to William; and that the deed made to him may be cancelled; or that the said wife and children, and the administrator, may be decreed to make suitable provision for the support of the plaintiff and his wife during their lives.

The widow of William, and the administrator of his estate, are the only parties defendant before us; and they have filed their answers, admitting that the estate had been conveyed, as set forth in the bill, and the entry and possession under the conveyance, by William till his decease; and averring that he paid the debts due from said Daniel, amounting to about nine

hundred dollars. To these answers a replication has been filed; and the cause has, thereupon, proceeded to proof, without the appointment of any guardian, *ad litem*, for the minor children; so that their interests have not been represented.

It is very clear, that this course of proceeding was irregular. The rights of minors in a court of equity are not to be disregarded. Upon motion the Court would have appointed some one as guardian, who would have looked to their interests; and no proceeding to take proof should have been resorted to, till he had become a party before the Court. It is true, that even then, a decree could not be made against the interests of his wards, that would be absolutely conclusive upon them. But it is to be presumed that the guardian would so represent their interests, as that the Court would be enabled to make a decree in reference to them, which would not be disturbed when they became of age. A reasonable time thereafter would, nevertheless, be allowed them to question its justice. In the present state of the case it would be regular, either to dismiss the plaintiff's bill for the want of proper parties; or to set aside the proceedings in taking proof, and leave the plaintiff to proceed in making proper parties, and thereafter to perfect his case for a hearing.

But there appearing to the Court to be some reason to doubt if the plaintiff, upon proceeding *de novo*, could present a case entitling him to the relief prayed for, we have fully heard the arguments of his counsel in reference thereto; and the result in our minds is, that the bill must be definitively dismissed. The objections to its maintenance, even with proper parties, are insurmountable. The bill itself does not state a case clearly within any of the specifications of equity powers delegated to this Court.

The conveyance set forth to William was not in trust, either express or implied; not implied, because, as the bill states, the conveyance was made upon a stipulation, that, in consideration of it, William should pay the plaintiff's debts, and support the plaintiff and his wife during their lives, which, it is evident, had been partially performed. At the time the bond was ex-

ecuted it must be presumed the plaintiff's debts had been paid by William, as six years had then elapsed after the making of the conveyance, and as the payment of debts forms no part of the condition of the bond; and, not only so, but until that time, the plaintiff must have been satisfied with the performance of that part of the agreement, also, relating to the support of himself and wife, as otherwise some reservation or stipulation would then have been made concerning it. The case, then, is not cognizable by us as one of trust.

The counsel for the plaintiff places his claim to our interference upon the ground, that we have power to enforce the specific performance of contracts in writing; and considers the bond as forming a contract for a reconveyance of the estate upon a failure, which is alleged to have taken place, in the performance of the condition; or that we have power to decree, that provision shall be made for the support of the plaintiff and his wife during their lives. But there are many obstacles presented in the case to the exercise of such a power in either of the proposed modes. Whether specific performance of a contract shall be decreed depends upon the circumstances of each particular case. Story on Eq. § 742. It must appear that it would be strictly equitable to make such a decree. "If the character and condition of the property, to which the contract is attached, have been so altered, that the terms and restrictions of it are no longer applicable to the state of things," equity will not interfere. *Ib.* § 753. The refusal of a court of equity to interfere works no injury. The right to proceed at law will be thereby unaffected. And where a decree for specific performance must be refused, even by courts having general equity powers, there are few, if any cases, in which it would be proper to decree damages for non-performance. *Ib.* § 797, 798 and 799. This Court can hardly be considered as clothed with any such power. It is nowhere given in express terms; and we must be very cautious in assuming equity powers by inference.

The bond, supposed to contain an agreement for a reconveyance, is not in terms to that effect. The stipulation in it is

merely that a conveyance, long before made, operating a complete and absolute transfer of title, should be void. There is not a word of stipulation for a reconveyance of the estate. It is merely said, that the deed shall be void. By this stipulation, upon non-performance, the deed either becomes void, or it does not. If it becomes void, there is no ground for a court of equity to interfere. The estate upon reentry would revest in the grantor; and so the remedy would be complete at law. If the stipulation has no such effect, then it is merely nugatory. In either case to decree a reconveyance would be unauthorized by any stipulation contained in the bond. It would not be an enforcement of an agreement made by the parties.

But if there were a stipulation in the bond, that the estate, upon breach of the condition, should be reconveyed, a court of equity might well hesitate in the exercise of its power, under the circumstances disclosed in this case. While the estate in fee was absolute in William, it would seem that he intermarried with the defendant, now his widow. She then acquired a right to be endowed thereof upon his decease. No court of equity could disregard such a right. She had no knowledge, we must presume, for there is no evidence tending to show that she had, of any latent equities, if any there were, connected with the estate in favor of the plaintiff. Such latent equities would operate as a fraud upon her, if they could be so enforced as to deprive her of a right, which every appearance indicated to her, that she acquired on her intermarriage with the deceased.

Again, it is scarcely to be questioned, that the deceased, after receiving the conveyance, in pursuance of the understanding between him and the plaintiff, paid debts, due from the plaintiff, to a considerable amount, and in part consideration for the conveyance. This would, certainly, create an equitable lien upon the estate; and a reconveyance of it could not be decreed till there could be an adjustment of the amount so paid.

Again; the rights of the creditors of the deceased are to be considered. The plaintiff placed in the hands of the deceas-

ed the estate in question, with the semblance at least of an absolute ownership therein. Relying upon that, as we may well presume, they gave him credit, insomuch that his estate upon his decease was ascertained to be insolvent. They could not have been apprised, so far as appears, of any equitable claim that the plaintiff might pretend to have in the estate. It would operate now as a fraud upon them if the title in the deceased were now to be annulled. A court of equity could not aid in any such procedure.

Another obstacle, of not less magnitude, the right of the plaintiff to the relief sought for, is to be found in the exhibits introduced by the defendants, which show that the plaintiff must be regarded as having sought his remedy at law upon his bond. It appears that he has, in pursuance of the provisions of law, preferred his claim, under that instrument, to the commissioners appointed to examine the claims against the estate of the deceased, which has been represented as insolvent; and that they have allowed him, for the breaches of the condition therein, a sum much beyond the penal sum of the bond; and much beyond the value of the estate in question; and that this, among the list of claims allowed, has been, without objection, returned to and accepted by the Judge of Probate. This is tantamount to a judgment at law in his favor for the amount. It is so treated in reference to the liability of the administrator for the dividend thereafter to be declared. If the plaintiff had a right to the specific performance of a contract, and had, nevertheless, prosecuted his claim at law for damages for the breach of it to judgment, it would be unprecedented, still to allow him to succeed in a claim in equity for a specific performance.

*Bill dismissed.*

## Thomas Austin *versus* Isaac Stevens.

The husband of a tenant for life is not regarded as holding the land adversely to the title of the reversioners during the continuance of his legal right to the occupation thereof; but if he continues in possession after the determination of that estate, claiming it as his own, he is then to be considered as holding by an adverse title.

Under the provisions of Rev. St. c. 91, § 1, and c. 145, § 6, the demandant may maintain a writ of entry, declaring on his own seizin, when he has a deed of the demanded premises, duly acknowledged and recorded, from the owner thereof, if his grantor could have maintained the action; although such grantor was disseized thereof by the tenant at the time of the execution and delivery of the deed.

By the common law, permanent improvements made and annexed to the freehold by a tenant for life or years, became a part of the estate of inheritance. And such was the law in this State, prior to the act of 1843, c. 6, additional to c. 145 of Rev. St.

The legislative department of the government may, prospectively, determine that a tenant for life shall have the right to make permanent improvements upon the estate; and that he, or those claiming under him, shall be entitled to receive compensation for the value of them, to be ascertained in such manner as it may judge best.

If the St. 1843, c. 6, must be construed to be applicable to a case where by the laws of the State, the improvements made by the tenant for life had been incorporated into and become a part of the reversionary interest, and were the absolute property of the reversioner; and to authorize one, who had no title to the improvements, for many months before the passage of the act, to obtain the value of them from the grantee of those who during that time had, by the existing laws, a perfect title to them; so much of the act, as attempts to do this, must be in direct conflict with those provisions of the constitution of this State, which secure to each citizen the right to possess and preserve his private property, unless it be required for the public use; and is therefore wholly inoperative.

In a writ of entry dated Oct. 28, 1844, the demandant, declaring on his own seizin within twenty years and alleging a disseizin by the tenant, demanded an undivided portion of a farm in Windham. The general issue was pleaded, with a brief statement, wherein the tenant requested that the jury would inquire, and by their verdict ascertain the increased value of the premises by reason of the improvements made thereon by him.

At the trial before WHITMAN C. J. the demandant proved title in Jonathan Varney; the marriage of Varney with Dorothy Sanborn; the will of Varney; his death; the approval of his will in the Probate Court, Sept. 10, 1806, wherein he devised to said Dorothy "the whole of my estate, real and personal, during her natural life;" the marriage of said Dorothy afterwards with Stevens, the tenant; and that they lived upon the premises until her death, on April 4, 1841.

The reversion was not devised by Jonathan Varney; and the demandant read in evidence deeds, duly acknowledged and recorded, made since the decease of said Dorothy, from heirs at law of Jonathan Varney to the demandant, of about four-ninths of the farm.

The tenant then offered in evidence deeds from the collector of United States direct taxes to Howe, but made no proof of any preliminary proceedings, showing authority to make the deed; from Howe to Staples; from Stevens and wife to Staples; and from Staples to Stevens and wife. The counsel for the demandant objected to the admission of each of these deeds; and the objections were sustained by the presiding Judge, and the deeds were excluded.

The tenant then offered "evidence to prove the increased value of the premises by reason of the improvements made on the same by himself, and that they were proper and judicious under the circumstances of the case; and that he had been in the sole possession of the premises, claiming title in himself exclusively, since the date of the deed of Staples to him in January, 1819, and that since that time he claimed the premises adversely to the reversioners. This evidence was objected to by the demandant, and excluded by the presiding Judge.

The tenant contended, that the demandant could not, under the facts, sustain his action, because that at the time he took his deed from the heirs of Jonathan Varney, the tenant was in possession of the premises, claiming title thereto. This objection was overruled by the presiding Judge.

The Judge ruled, that the deed from Staples to Stevens gave the latter no title to the land as against the reversioners

or their grantees, and did not entitle the tenant to claim for his improvement of the estate against them, or either of them; and could not be set up as available against the title proved by the demandant, as derived by him under the deeds of the heirs and reversioners of the estate demanded.

If the rulings were correct, the tenant was to be defaulted; otherwise the cause was to stand for trial.

The case was argued in writing.

The argument for the tenant was as follows, by

*W. P. Preble & Son.*

It appears from the case reserved, that Dorothy Varney, widow of Jonathan Varney, became possessed of the demanded premises by virtue of a will, approved Sept. 10, 1806, whereby her deceased husband bequeathed the same to her during her natural life. It further appears that the defendant afterward married the said widow and thereby became tenant, for the life of his said wife, of the demanded premises. It further appears that the wife died April 4th, 1841. It also appears that Woodbury Storer, acting as collector of the direct tax imposed by the government of the United States, on the alleged failure of the tenant to pay the tax assessed on said premises, conveyed the same by deed to Daniel Howe, dated August 11, 1818, and recorded the same day. It also appeared that said Howe on the same eleventh day of August, 1818, by a deed duly acknowledged and recorded, conveyed the same premises to Joseph Staples. It also appeared, that the defendant and his wife Dorothy by deed, dated Nov. 4, 1818, and recorded Sept. 8, 1844, conveyed all their right in the premises to said Joseph Staples. It further appeared that said Joseph Staples by his deed dated January 9, 1819, duly acknowledged and recorded the same day, conveyed to the defendant the demanded premises. It further appears, that the defendant has been in the sole possession of the premises, occupying and improving them as his own, claiming title in himself exclusively and adversely to the supposed reversioners since the said 9th day of January, 1819, the date of said Joseph Staples' deed to the defendant. That, since the said time, he has increased the value of the

demanded premises by improvements made on the same by himself, and that such improvements were proper and judicious under the circumstances of the case. It further appears, that after the death of the said Dorothy and before any entry made by the heirs in reversion of Jonathan Varney, the demandant purchased of the supposed heirs of the reversion of the premises, by deed duly executed and recorded, about four ninths of the demanded premises, and thereupon on 28th Oct. 1844, sued out the present writ of entry, counting on his own seizin within twenty years, and a disseizin by this defendant.

The first objection to the plaintiff's maintaining the present suit, is, that the defendant at the time when the said supposed heirs of the reversion undertook to convey the premises to the demandant, was in the sole and exclusive possession thereof claiming them as his own, occupying them under a deed from Joseph Staples, duly acknowledged and recorded, and under a possession avowedly adverse to any claim of the heirs. The Rev. Stat. c. 145, § 6, does not authorize the purchasing up of dormant titles. It is still necessary that the grantor should be in possession of the premises conveyed at the time of conveying them, either actually or constructively and in contemplation of law. The statute referred to, dispenses with an actual entry when there was a right of entry, but only in the case of the person who had the right of entry, and not in the case of his grantee. If the statute should be construed otherwise, the whole law in regard to the purchase of dormant titles is necessarily repealed by implication.

In case of an actual disseizin, the disseizor has a right of entry at any time within twenty years, and he can maintain no action after a lapse of twenty years; it follows therefore, that if the grantor, having a right of entry merely, there being a person in the actual possession and improvement and holding the premises adversely, can convey the title to a third person, without entry, and that third person without entry can maintain an action, declaring on his own seizin, the whole law of real estate by virtue of the sixth section referred to, has undergone a radical change, and every person is at liberty to speculate in dormant titles, who chooses to embark in it.

The second objection to the ruling of the Judge, is, that at all events, the defendant is entitled to his betterments. By the deed of the defendant and his wife to Staples of Nov. 4, 1818, the wife ceased to have any interest in the premises.

The defendant, at the time of the commencement of the plaintiff's suit, had been in the possession of the demanded premises, for more than twenty years, claiming them as his own. Now it is contended that under section 23d of the Rev. Stat. already referred to, the defendant is entitled to his betterments, for he has been in actual possession claiming them for more than six successive years before the commencement of the action. In connection with this branch of the case the Court is referred to the additional act to chapter 145, of the Rev. Stat. approved March 4, 1843.

If the deed from Staples of Jan. 9, 1819, should be construed as conveying to Stevens, the defendant, only the life estate in the premises which formerly appertained to Dorothy Stevens, then the defendant is the assignee or grantee by deed from the tenant of the life estate, and falls within the provisions of the additional act referred to, provided his buildings and improvements, erected and made by the defendant, were proper and judicious under the circumstances of the case. Now the case expressly finds, the improvements made by the defendant were of that character.

*Fessenden, Deblois & Fessenden*, in their argument for the demandant, contended: —

That the main questions arising on the report of this case, were decided in the case, *Varney* v. *Stevens*, 22 Maine R. 331.

The deed of Stevens and wife to Staples, and his deed back to them, had no effect whatever upon the rights of the reversioners. They were mere naked releases, for a nominal consideration, passing the life estate to Staples and from him back to them. The deed from Stevens and wife to Staples could not operate as a forfeiture of their life estate, for that only was conveyed. Having failed to accomplish his object by fraud, he attempts to do it by procuring an act of the legislature to give him betterments, which did not belong to him, as was decided in the case already cited.

The statute of March 4, 1843, cited and relied on by the counsel for the tenant, if applicable to the present case, is unconstitutional and void.

On the decease of the widow of Jonathan Varney, his heirs at law became seized of the whole estate, in fee simple, unencumbered by any legal or equitable claim to betterments or improvements made thereon. They had vested rights to the whole estate; and no law passed by the legislature, after their rights had so vested, could divest them. The direct effect would be, to take the property from one man and transfer it to another by an act of legislation. And this the legislature cannot do. Constitution of Maine, art. 3, § 1, 2, — art. 6, § 1, — art. 4, § 1, — art. 1, § 21; *Ken. Pur.* v. *Laboree*, 2 Greenl. 275; *Lewis* v. *Webb*, 3 Greenl. 326; *Lewiston* v. *Durham*, 4 Greenl. 140; *Oriental Bank* v. *Freeze*, 18 Maine R. 109; *Society, &c.* v. *Wheeler*, 2 Gallison, 143; *Dash* v. *Van Kleeck*, 7 Johns. R. 477; 3 Dall. 386; 11 Mass. R. 396.

On the death of the tenant for life, the defendant's right wholly ceased; and any improvements made by him upon the premises were but a part of the estate; and as such belonged to the reversioners. *New Gloucester School Fund* v. *Bradbury*, 2 Fairf. 118; *Runey* v. *Edmands*, 15 Mass. R. 291; *Varney* v. *Stevens*, before cited.

After the marriage the tenant had a legal right to the enjoyment of the estate in right of his wife until her death, and did not hold adversely to the reversioners. They had no power to enforce their rights until her death. To entitle any one to betterments, there must be a holding adversely to the owner. *Varney* v. *Stevens*, 22 Maine R. 331; *Bacon* v. *Callender*, 6 Mass. R. 303; *Mason* v. *Richards*, 15 Pick. 141; *Larcom* v. *Cheever*, 16 Pick. 260.

The opinion of the Court was delivered on April 24, 1846, as drawn up by

Shepley J. — This is a writ of entry by which the possession of certain lands in Windham is demanded. A farm, comprising the premises, was formerly owned by Jonathan

Varney, who by his will, proved on September 10, 1806, devised the same to his wife during her natural life. She was afterward married to the tenant, and continued to reside with him upon it until her death on April 4, 1841. It was sold to Daniel Howe by a collector of direct taxes assessed under a law of the United States, and was conveyed to him on August 11, 1818. He on the same day conveyed his right to it by a deed of release to Joseph Staples. The tenant and his wife by a like deed, conveyed all their right to it to Staples, on the fourth day of November following. And Staples by a like deed, conveyed all his rights to the tenant on Jan. 9, 1819.

The legal effect of all these proceedings, so far as the rights of the tenant could be affected by them, was determined in the case of *Varney* v. *Stevens*, 22 Maine R. 331. In that case it was decided, that he must be considered to have been in possession of an estate for life under a legal title to it, and that he could not therefore be regarded as holding the estate adversely to the title of the reversioners during the life of his wife, by virtue of a possession and improvement. Since the determination of that estate, he must be considered as claiming to hold by an adverse title. As the demandant claims an undivided portion of the estate by conveyances from some of the heirs at law, made while they were thus disseized by the tenant, he could not according to the rules of the common law maintain this action. The statute, c. 145, § 6, provides, that "the demandant shall not be required to prove an actual entry under his title, but proof, that he is entitled to such an estate in the premises, as he claims, as heir, devisee, purchaser, or otherwise, and also, that he has a right of entry therein, shall be deemed sufficient proof of the seizin alleged in the declaration." This section alone would not authorize the demandant to maintain the action. He could not prove, that he had a right of entry. For a conveyance made by a person disseized to another not in possession, would not, by the rules of the common law, convey even a right of entry. But those rules have in this respect been changed by statute, c. 91, § 1, which provides; "when any person shall make a deed of any lands or other

real estate owned by him in severalty, or in common with others, acknowledged and recorded in the manner prescribed in this chapter, whether at the time of the execution and delivery of the deed he is seized or not seized of such lands or estate, but to or for which he has a right of entry, such lands or estate, or all the title or interest, which the grantor has in the same, shall pass by such deed of conveyance as effectually, as if the grantor was at the time of the conveyance, seized of the same." However great may be the mischiefs anticipated by such a change of the common law, as will permit dormant titles to be purchased from persons disseized, who have a right of entry, it has been the pleasure of the legislature thus to authorize it, by language too clear and decisive to admit of any different construction. The heirs at law of Varney, from the facts presented, appear to have had a right of entry into the premises, when the demandant obtained conveyances from some of them, and he thereby brings his case within the provisions of the statute, c. 145, § 6, by which he may maintain the action by proof of a right of entry, without any proof of an actual entry.

The tenant offered to prove, that the estate had been increased in value by proper and judicious improvements made upon it by him. By the act of March 4, 1843, the sections of statute, c. 145, from the 26th to the 45th inclusive, except the 35th, are made applicable "to all real actions now pending or hereafter brought by a reversioner or a remainder man, or his or their assigns, after a termination of a tenancy in dower, or of any other life estate, against the assignee or grantee by deed of or from the tenant of the life estate, or against the heirs at law, or legal representatives of such tenant." The effect of this legislation would seem to be to authorize the grantees, heirs, or legal representatives, of a tenant for life to claim and obtain compensation for the increased value of the premises by reason of all proper and judicious improvements made upon them by him or them, by the proceedings in an action brought to recover possession of them, although such tenant for life, or his grantee, may not have held the premises by an adverse

possession, or for any particular period of time. And to do it even in cases, where by the existing laws those improvements may have become a part of the estate of inheritance before the passage of the act of March 4, 1843. For the act makes those sections applicable to all such actions between such parties without regard to the facts or circumstances, which have occurred in any particular case before its enactment.

By the common law permanent improvements made and annexed to the freehold, by a tenant for life or years, became a part of the estate of inheritance. *Elwes* v. *Mann*, 3 East, 38. The act of March 4, 1843, appears to have been passed with a knowledge, that such was the law. For if the improvements, to which it refers, were not so connected with the freehold, that they became part of the estate, the person making them, or his assignee or legal representative, would have been entitled to the benefit of them by removing them without any statute provision.

The legislative department of the government may by law determine, that a tenant for life shall have the right to make permanent improvements upon the estate, and that he or those claiming under him shall be entitled to receive compensation for the value of them to be ascertained in such mode, as it may judge best. In many conceivable cases such statute provisions may be alike desirable for the promotion of the best interests of the parties entitled to the estate and for the public welfare. Courts of equity of general jurisdiction have been so sensible of this, that they have at times interposed to aid or permit such improvements to be made by a tenant for life, or to make compensation for them. In the case of *Hibbert* v. *Cook*, 1 Sim. & Stu. 552, the vice chancellor ordered compensation to be made to a widow, who was a devisee for life, out of her former husband's personal estate for expenses incurred by her in finishing a new mansion house on the devised estate, which house the testator had nearly completed before his death. But he refused to make any compensation for repairs, which she had made upon it in consequence of an injury by the dry rot. While the lord chancellor would

not, in the case of *Nairn* v. *Majoribanks*, 3 Russ. 582, authorize a new roof to be put upon a mansion house by a tenant for life at the expense of the testator's estate, even if it should appear to be for the benefit of all parties interested in the estate. In the case of *Cogswell* v. *Cogswell*, 2 Edw. 231, it appeared, that city lots with buildings upon them had been devised for life. That ten feet were taken from the fronts of the lots after the death of the testator to widen the street, by which the buildings upon the lots were destroyed. The Court directed the executors to appropriate a sum out of the residuary personal estate to rebuild upon them, reserving an interest of six per cent. upon the cost, with a reasonable sum for depreciation and repair, to be paid out of the rents during the life estate.

While the exercise of the legislative power is admitted to be both constitutional and expedient, to determine what shall be the respective rights and duties of tenants for life, and of reversioners in relation to improvements made during the continuance of the estate for life, it will not follow, that their rights to such improvements can be altered or changed, after they have been fixed and established by the laws existing at the time, when the life estate falls. The right of the legislative department to authorize a person holding lands by possession and improvement, to claim and obtain compensation for his improvements has been admitted. But if he should voluntarily abandon his improvements with the land, and they should by the existing laws, as they would now do, become the property of the owner of the estate, would any intelligent person claim for the legislature the constitutional power to deprive the owner of any portion of his estate except for public use? Although there is a similarity between the grantee of a tenant for life and one holding by possession and improvement in this, that the tenant in each case is found in possession of the premises; yet there is an essential distinction between them at common law in this, that by the determination of the estate for life an event has occurred, by which the rights of a grantee of a tenant for

life to improvements have been determined, while no event attended by such consequences has occurred to affect the rights of one holding by possession and improvement. So an act of the legislature might constitutionally determine, what should be the rights of married women to dower in the estates of their husbands; and might deprive them of their right to claim it on the decease of their husbands. But should a widow, by the existing laws, become entitled to dower in the estate of a deceased husband, no one would insist, that she could be deprived of that dower by an act of the legislature.

In this case, by the laws of the State, as they were at the time of the death of the tenant for life, on April 4, 1841, the permanent improvements made by the person in possession of the estate for life became absolutely incorporated into, and a part of, the reversionary estate. Those improvements had continued to be an integral part of that estate for twenty-three months before the passage of the act of March 4, 1843. If that act must be construed to be applicable to such a case, and to authorize one, who had no title to the improvements for nearly two years before its passage, to obtain the value of them from the grantee of those, who during that time had by the existing laws a perfect title to them, it is manifest, that so much of the act as attempts to do this, must be in direct conflict with those provisions of the Constitution of this State, which secure to each citizen the right to possess and preserve his private property, unless it be required for the public use.

*The tenant is to be defaulted.*

EDWARD WHITE *versus* JOHN HENRY *& al.*

A minor son is not emancipated by a marriage without the consent, and contrary to the directions of his father.

A payment of wages to a minor seaman, not emancipated, and known by his employer to have been under the age of twenty-one years at the time of making the contract, furnishes no defence to an action by his father to recover the same, who had no knowledge of the hiring until after the wages were earned.

ASSUMPSIT to recover the wages of a minor son of the plaintiff for the term of three months and twenty days, commencing on Oct. 28, 1843, as a seaman on board a vessel belonging to the defendants.

The services were performed, and the defendants proved payment therefor to the son, and contended that this was a discharge from the father.

The defendants at the time of making the contract, knew that the son was under age. The plaintiff did not know of the intention of the son to go to sea, nor of his having shipped until after he had sailed. The plaintiff had always supplied his son with the means of support so long as he would stay with him. The son was married in 1842, against his father's wishes, and without his consent, and contrary to his direction, having gone secretly into the State of Connecticut for that purpose, because his father would not permit him to marry here. The plaintiff has never expressly or impliedly given his assent to the marriage, but has always been ready and willing to support his son in a manner becoming his degree and station in life. The son, however, has declined to live with his father, and has lived with his wife, having no children, when not at sea.

If the plaintiff was entitled to recover, the defendants were to be defaulted, and judgment was to be entered for the amount of the wages, at fourteen dollars per month; and if not, the plaintiff was to become nonsuit.

*Haines*, for the plaintiff, could find no authority showing that a minor son would be emancipated by a marriage, against his father's wishes, without his consent, and in a mode forbid-

den by our laws. Such marriage does not change the relation between father and son. Emancipation will not be presumed, but must be proved. *Sumner* v. *Sebec*, 3 Greenl. 223.

The father is entitled to the earnings of his minor son, where there has been no emancipation. 2 Mass. R. 115; 15 Mass. R. 275; 3 Greenl. 77; Reeves' Dom. Rel. 290; Law Reporter, vol. 7, 132.

*Mitchell*, for the defendants, said that the son was married, and lived away from his father, and in the same neighborhood, and within seven miles of the defendants. No notice was given by the plaintiff to the defendants, that he claimed the earnings of the son. The defendants had no knowledge, that the marriage was without the assent of the father, and they had a right to presume from the circumstances that the father gave his assent. The marriage is legal, although the father's consent was not given. 16 Mass. R. 159. Here the son made the contract and received the pay; and upon the facts, the father is not entitled to receive payment a second time. 3 Pick. 201; 2 Metc. 13.

The opinion of the Court was drawn up by

Tenney J. — It is a general principle well settled, that parents are under obligation to support their minor children, and that they are entitled to their earnings. When a contract between the parent and child exists, that the latter shall enjoy the fruit of his labors; or when the parent neglects to support him, the rule will not apply. If the father, or person having the care and control of the minor, should consent to his marriage, this may be another exception to the principle, so far as his earnings are necessary for the support of his wife and children; for the consent to the marriage may imply a consent that he should, from his earnings, have the means of discharging his new obligations.

The statute requires, that when a male, under the age of twenty-one years is to be married, the consent of the parent, guardian, or other person having the care or government of such party within the State, shall be obtained before marriage.

Rev. Stat. c. 87, § 7. We cannot believe that the violation of an express provision of law, can secure to a minor, who is guilty thereof, a privilege, which he would not otherwise possess, and constitute another exception to the general law.

If the son is not entitled to his earnings, a payment to him of their value by his employer, (without the consent of the father, express, or implied) knowing his minority, cannot deprive the father of the right to recover a just compensation for the labor, of which he has been deprived without his own fault or neglect.

The case at bar finds, that the son, whose wages are claimed in this action, refused to live with his father, who provided every thing necessary for his comfort and convenience. He went away without the knowledge, and married against the will and express direction, of his father. The father has in no way consented that he should have his earnings, but has always been ready and willing to support him in a manner becoming his degree and station in life. The defendants, knowing that he was a minor, without the knowledge or consent of his father, employed him as a seaman, and have paid him his wages in full.

To allow this defence to prevail would hold out encouragement to sons, impatient of parental control, while in their minority, to resist the reasonable authority of their fathers, and give the latter little means to secure their own legal rights beyond the exercise of physical restraint; would offer inducements to youth to enter into improvident and ill advised marriages, which maturer years would cause them to regret and deplore.

It is insisted that the defendants were authorized to suppose, that the son's marriage was by the father's consent. The father could not be deprived of that, which was his own, when no negligence was imputable to him, and the defendants by the knowledge of the son's minority, could have informed themselves of the facts before they made payment to him.

Defendants to be defaulted, and judgment to be entered at the rate of $14 a month for the time the son was employed, and interest from the date of the writ.

PETER LUNT *& al. versus* ZACHARIAH B. STEVENS.

In an action brought by two plaintiffs, a writing signed by one of them, not under seal and without consideration, forbidding the further prosecution of the action in his name and purporting to be a discharge of the same, produced by the defendant, will not have that effect, for it is not technically a release, not being under seal, and does not amount to an accord and satisfaction, nothing being paid.

An assignment by one partner to the other of his interest in all the partnership demands, is good in equity, and gives to the assignee the right to use the name of the assignor to enable him to collect for his own use any debts due to them jointly at the time; and the discharge of the assignor, given afterwards without consideration, will not discharge an action brought in the name of both.

The Stat. of 1821, c. 62, (Stat. of limitations) was repealed by the repealing act of 1841, and the exception in the former act of "such accounts as concern the trade of merchandize between merchant and merchant," was entirely omitted in the Rev. Stat. of limitations, c. 148. Therefore, since the Rev. Stat. went into effect, the operation of the statute of limitations, to bar an action on such accounts, was not prevented.

Where the plaintiffs, the defendant and two others had built a vessel jointly, and after the lapse of more than six years from the time any cause of action had accrued, the defendant wrote a letter to a son of one of the plaintiffs, wherein he, after stating the difficulties that he and the two other owners had experienced in their attempts to procure a settlement with the plaintiffs, says, "when the whole can be settled we are ready; then, if I owe your father I will pay every cent that is due;" and no attempts had been made by the plaintiffs to procure a settlement; *it was held*, that the demand was not thereby taken out of the operation of the statute of limitations.

IN 1825, Lunt and Bradley, the plaintiffs, Stevens, the defendant, and Barbour and Baker, undertook to build a vessel together, the plaintiffs taking one-fourth, and each of the others a fourth. The vessel was built, each contributing towards the building, and continued in use for several years, Lunt acting as ship's husband, furnishing the outfits and receiving the earnings. Lunt was a merchant in Portland and Stevens was a blacksmith and farmer in Westbrook. On June 14, 1837, the defendant wrote a letter to a son of Lunt, in which he says that Lunt has had the whole earnings of the vessel, and the others have never received a dollar, and then makes use of this language. "I never knew whether she made

one dollar or five thousand. Mr. Baker and Mr. Barbour are in the dark as well as myself on account of what she earned while we owned her together. If the whole from the beginning to the end can be settled, I am willing and should be glad. I, myself, Baker and Barbour have spent a good many days for to settle, but could not. When the whole can be settled we are ready, then if I owe your father I will pay every cent that is due." This letter was introduced in evidence by the plaintiffs, insisting that a new promise was found in the above extract. The writ was dated June 5, 1843. The pleadings and facts are stated in the opinion of the Court.

*Fessenden, Deblois* and *Fessenden*, argued for the plaintiffs, citing 1 Greenl. 163; 3 Greenl. 97; 4 Greenl. 41; 4 Pick. 110; 15 Mass. R. 481; 11 Mass. R. 157; 8 Mass. R. 466; 22 Pick. 291; 23 Pick. 302; 6 Greenl. 307; 8 Pick. 193; Comb. 152; 2 Salk. 445; Dyer, 279; 5 Com. Dig. Merchant, A and F 4; 4 Bac. Abr. 596; Shower, 126; 1 Salk. 125; 1 Atk. 128 and 196; 4 Bro. Ch. 434.

*W. P. Fessenden* argued for the defendant, citing 17 Maine R. 145; 2 Pick. 368; 4 Greenl. 41 and 413; 2 Pick. 368; 22 Maine R. 100; 21 Maine R. 435; 14 Maine R. 302; 6 Peters, 151.

The opinion of the Court was by

WHITMAN C. J. — The account, upon which this action is brought, is for goods sold and delivered, and for advances made on account of a quarter part of a vessel, built and owned by the plaintiffs and the defendant, and two other persons. The last item charged was delivered in March, 1829. The defendant pleaded the general issue, and filed a brief statement, setting up in defence the statute of limitations, and a discharge of the demand. The plaintiff replied to the brief statement, setting up the statute of limitation, that the alleged promise had been revived within six years, and that the account was concerning merchandize, between merchant and merchant. The cause went to trial upon these points, without evidence of the correctness of the items of charge; and a nonsuit is to be

entered if the grounds of defence relied upon are sustained; otherwise the cause is to stand for trial.

The defendant, in the first instance, produced a paper, signed by Bradley, one of the plaintiffs, dated in June, 1843, forbidding the further prosecution of this action in his name; and purporting to be a discharge of the same; and disclaiming any knowledge of there being any thing due from the defendant, "because all accounts between said parties have been of many years standing, and may or may not have been adjusted." This writing is not technically a release, not being under seal; nor can it amount to an accord and satisfaction; for nothing appears to have been paid. Such a writing amounts to but little, if any thing more than evidence tending to show, that nothing was due from the defendant to the plaintiffs. To counteract this effect the plaintiff, Lunt, introduced an assignment in writing, and under seal, executed by the said Bradley, on the seventeenth day of November, 1840, of all his "interest in all or any demands, which may have been due to the said Lunt and myself at the time of the dissolution of the copartnership between the said Lunt and myself, on the thirteenth day of April, 1829." There can be no doubt but that such an assignment must be good in equity; and that it gives Lunt a perfect right to use the name of Bradley, to enable him to collect, to his own use, any debt due to them jointly on the day of the dissolution of the copartnership. The writing, therefore, made by Bradley cannot be regarded as entitled to much if any weight. It can have no effect in discharge of the action.

But the statute must avail the defendant, unless a new promise has been made within six years before the commencement of this suit, or unless the account originated between the plaintiffs and the defendant as merchants, and concerned the trade of merchandizing, and so forms an exception to the operation of the statute of limitations of 1841. Such an exception was contained in the statute of 1821, c. 62; but that statute was repealed by the repealing act of 1841; and the exception was omitted in the revised statute of limitations of that year. And

it has often been held that statutes of limitation have reference to the remedy only, and are subject to modification at the pleasure of the Legislature. The plaintiffs therefore cannot, upon this ground, avoid the statute bar.

As to the new promise relied upon, it is to be found, if at all, in a letter dated in 1837, written by the defendant to the son of the plaintiff, Lunt; and which appears to have been so written in reply to one, which the father had before addressed to the defendant; and by a saving in the revised statute of limitations of 1841, would not be affected by the provisions therein. The defendant in that letter, after stating the difficulties that he and the two other owners had experienced in their attempts to procure a settlement with the plaintiffs, says, "when the whole can be settled we are ready; then, if I owe your father, I will pay every cent that is due."

The modern adjudications agree, that to take a case out of the statute, there must be either an absolute promise to pay, or an acknowledgment of indebtedness, or a conditional promise to pay, with proof of the performance of the condition. The promise, relied upon by the plaintiffs, is supposed to be of the latter description. To ascertain whether such a promise has been made we must look to the meaning of the defendant, as contained in his letter. Does it contain a conditional promise? If it does, what is the nature of it? Is it to pay the debt in question? and has the condition been performed? What did the defendant mean by the words, "when the whole can be settled?" and what by the words, "we are ready." By examining the whole of the letter it will be discerned, that he referred solely to the concern in the vessel. He speaks of the difficulties theretofore encountered by him, and the two other owners, in their attempts to come to a settlement with the plaintiff; and, when speaking of a settlement proposed to be made, he uses the pronoun *we*, showing the whole that he proposed to have settled, was the concern between all the owners.

Till that was done it could not be seen how each one stood in relation to each of the others. The settlement, to which he referred, was that which he complained, that he, and the other

two owners, had been seeking for, in vain, for years. If on such an adjustment it should appear that any balance was due from him to the plaintiffs, he was ready to pay it. No such adjustment has been made; nor can it be made in this action. The defendant may, on the whole, have paid much more than his proportion in building the vessel; in which case, if the plaintiffs had advanced more than their proportion, their claim would be against the other owners for reimbursement, and not against the defendant. Thus it would seem to be clear, that there was no such conditional promise by the defendant, as is supposed by the plaintiffs; and there can be no pretence of the performance of the condition of the promise, which, it may be considered, that he did in fact make.

Besides: it can scarcely be inferred, that he had reference to any other, than an amicable and mutual settlement between those concerned. No one, upon reading his letter, could suppose he had in view an ascertainment of the balance due in an action at law. Such, then, was not the condition to be performed, in order to render the promise absolute. It is not like the case, in which a promisor in a note of hand said, "if it could be proved that he signed the note he would pay it;" nor like the case supposed in *Perley* v. *Little*, of one who says, without saying more, "*if I owe you any thing on the claim presented, I will pay you.*" In the former, proof of the signature could only be made in a suit at law. The promisor, therefore, must have that mode of performing the condition in contemplation. In the latter, the claim was supposed to be presented; and whether any amount was due on it was to be ascertained. No intimation is supposed to have been given as to how that should be done. The inference might well be that it was to be done in a suit at law. If the language were, "if you and I can settle, and I owe you any thing upon such settlement, I will pay you," the condition could only have been performed, so as to render the promise absolute, by a mutual adjustment. So in the case before us, if the parties concerned in the vessel, could come to a mutual adjustment between themselves, and any thing should be found due by the defend-

ant to the plaintiffs, the defendant might be regarded as promising to pay it. There is no reason to suppose that he contemplated having any thing of the kind accomplished by litigation. There is, then, no satisfactory evidence of a promise, such as is relied upon by the plaintiffs; nor of the fulfilment of the condition of that, which was made.

*Plaintiffs nonsuit.*

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ST. JOHN SMITH *versus* ZEBULON TRICKEY.

The defendant and several others signed a paper wherein they agreed, that all notes to which they were respectively a party, left in a certain bank for collection, should be considered the same as if made payable at that bank, and then said — "and we further agree, that notices left at the places set against our names shall be considered legal and binding on us" — and no place was set against the name of the defendant; he was left thereby in a condition to insist upon his legal rights as indorser, so far as it respected the place to which notices should be sent.

ASSUMPSIT against the defendant, who was admitted to have indorsed the note of which a copy follows: —

"$282,16. For value received, we jointly and severally promise to pay Zebulon Trickey, or his order, two hundred and eighty-two dollars and sixteen cents in ninety days from date, with interest. "Thomas Seal,

"Westbrook, Dec. 20, 1837. "Jeremiah Bailey."

The waiver book, as it was called by the cashier of the bank, introduced in evidence at the trial, and referred to in the opinion of the Court, was in these words: —

"We the subscribers, hereby agree, that all notes, bills, acceptances and other securities discounted or left for collection at the Casco Bank, whereon we, or either of us, are promisors, acceptors, indorsers, or parties in any respect, shall be considered by us as though the same were made payable, expressly at said bank; and we further agree, that notices left at the places set against our names shall be considered legal and binding on us; and we hold ourselves liable therefor,

although the promisors or other parties to said notes, bills, acceptances, or other securities, residing out of the town of Portland, may not be notified thereon, nor demand made on them."

This was signed by several persons, and among the rest, by the defendant and by the makers of the note. It did not appear at what time their signatures were made, but merely, that the time must have been as early as Sept. 20, 1831. There was no place set against the name of the defendant.

*W. P. Fessenden*, for the plaintiff, contended that the waiver signed by the defendant applied to all demands left in that bank for collection; and that the true construction of the paper was, that where the party affixing his signature to the paper, did not put down a place at which his notices should be left, that he thereby waived all claim to notice.

*Haines*, for the defendant, contended that this contract of waiver could have no effect upon the defendant in the present case, whatever construction might be given to it, as it was made more than six years before the note fell due.

But the waiver is only of demand, not of notice. Notice was to be given to those who named a place, as well as to those who did not. If the defendant had named Cape Elizabeth, and notice had been sent to Westbrook, it would not have been pretended, that the notice was legal. As no place was fixed by the defendant, that clause in the paper was inoperative as to him.

The opinion of the Court was by

Shepley J. — The facts stated in this case show, that the residence of the defendant had been established in the town of Cape Elizabeth for a great number of years. And that he had no place of business elsewhere for about five years before the note was made, or since that time. That there was no postoffice in that town; and that letters directed to persons residing there were usually delivered to them from the postoffice in the city of Portland, that being the most convenient postoffice for such persons. That a notice was made out for the defend-

ant in due form on the last day of grace by the cashier of the Casco Bank, in which the note was left for collection, and handed to the messenger, who on the same day deposited it in the postoffice in Portland, directed to the defendant at Westbrook. The notice would of course be sent to Westbrook, where the defendant did not reside; and there is no evidence to prove, that it was ever received by him. It is not contended, that he could be charged by such a notice. The plaintiff claims to charge him on the ground, that he had waived or dispensed with demand and notice by a written agreement made with the bank. The agreement appears to have been prepared to be signed by those, who transacted business with the bank; and it was signed by the defendant several years before the note, on which this suit was brought, was made. That agreement contains three distinct clauses or stipulations. By the first clause, the signers agree, that notes, bills, acceptances and other securities, to which they were parties, discounted or left for collection in that bank, should be considered as made payable at the bank. The defendant by this clause waived a presentment of the note to the makers at Westbrook. But the clause does not dispense with a notice to himself. By the second clause the signers "further agree, that notices left at the places set against our names shall be considered legal and binding on us." There was no place set against the name of the defendant. As the bank was not informed of any particular place, to which notices for him should be sent, it is insisted, that it amounted to a waiver of notice. A person, who was willing to agree to the first and last clauses, and was not willing to designate any place, where notices for him should be left, might properly sign the agreement without inserting any place against his name. It would then truly exhibit the intention. If the bank was not satisfied to deal with him upon such terms it should have required him to insert a place against his name. If a place had been designated, a notice left at that place would have been sufficient. The omission to designate a place left the parties in a condition to insist upon their legal rights, so far as it respects the place to which notice should be sent.

The third and last clause of the agreement is a waiver of presentment for payment to all persons residing out of Portland and first liable on the paper. The signers hold themselves to be liable to pay such paper although no demand has been made upon such persons for payment. But there is no waiver of a notice to themselves in this clause, that payment has not been made according to agreement. It has for a long time been the settled law, that a waiver of demand is not a waiver of notice. The case does not show, that the defendant was legally notified, or that he waived notice; and the action cannot be maintained.

*Plaintiff nonsuit.*

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SAMUEL H. SAWYER *versus* ASA HANSON.

Where a mortgage of a dwellinghouse, standing on land of a third person with his permission, has been foreclosed, and the mortgagor, after having received thirty days notice in writing to quit the premises in manner provided by Rev. Stat. c. 128, "Of forcible entry and detainer," still remains in possession, the mortgagee cannot, nor can his assignee, sustain a complaint against the mortgagor, under that statute, to obtain possession of the premises.

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

The defendant, on the seventeenth of June, 1843, owned the southwesterly half of a dwellinghouse in Portland, standing on land of another person by permission of the owner thereof; and on that day mortgaged the same to St. John Smith, to secure the payment of a sum of money in six months from date. The mortgage contained a provision, that the mortgagor should have the right, "to continue in possession of the premises until the expiration of said six months." On March 29, 1844, Smith transferred "all his right, title and interest in the within described property," to one Forsaith; and on May 23, 1844, Forsaith, in the same manner, made a transfer thereof to the plaintiff. The money secured by the mortgage

had not been paid. The defendant remained in possession. On June 1, 1844, the plaintiff notified the defendant in writing to deliver up to him the possession of the house, "formerly owned and now occupied by you, immediately." On the fifth day of July following, the defendant still remaining in the occupation of the house, the plaintiff made his complaint, alleging that the defendant, "on June 1, 1844, having before that time had lawful and peaceable entry into the said premises, and whose estate therein was determined on May 29, 1844, then did and still does unlawfully refuse to quit the same; although the complainant avers, that he gave notice in writing to said Hanson, thirty days before making this complaint, to quit the premises." This complaint was tried in the Municipal Court for the city of Portland, and from thence carried by appeal to the District Court. On the trial in the District Court, these facts were made to appear on the part of the complainant, and he there rested his case.

The counsel for the defendant then moved for a nonsuit. 1. Because the process of forcible entry and detainer would not lie in this case, said house being personal property. 2. Because the relation of landlord and tenant did not exist between the parties.

A nonsuit was ordered by the District Judge, and the complainant filed exceptions.

*O'Donnell*, for the complainant, contended that the nonsuit was improperly ordered. Neither of the objections are sustainable. It is not necessary, in order to maintain this process, that the owner of the tenement should have the fee of the land on which it stands. The mortgagor is tenant of the mortgagee. Rev. Stat. c. 128, § 2, 5; 13 Pick. 39; 17 Pick. 103; 13 Maine R. 209; 18 Maine R. 264.

*Wells & Sweat*, for the defendant, contended that the nonsuit was rightly ordered by the District Judge, because by his own showing the complainant had no sufficient ground on which he could support his complaint. 13 Johns. R. 340; 11 Johns. R. 503; 1 Fairf. 429; Bac. Abr. Forc. Ent. & Det. D; Co. Lit. 6 (a); 5 Metc. 343.

The opinion of the Court was by

TENNEY J. — This complaint is to obtain possession of one half of a dwellinghouse, standing upon land, not claimed as the property of either party, erected thereon by the owner's consent. It is alleged, that the defendant, on the first day of June, 1844, having before that time had lawful and peaceable entry into the lands and tenements of the complainant, &c. "and whose estate in the premises was determined on the 29th day of May, 1844, then did and still does unlawfully refuse to quit the same; although the complainant avers, that he gave notice in writing to said Hanson, thirty days before the day of making this complaint to quit the premises."

The complainant relied upon a mortgage of the property described in the complaint from the defendant to one Smith, dated June 17, 1843, to secure a note of the same date payable in six months; Smith, on March 29, 1844, made a written assignment of said mortgage and note to one Forsaith; who, on May 28, 1844, assigned the same to the complainant. On June 1, 1844, the defendant was served with a notice in writing signed by the complainant, to quit the premises immediately. A nonsuit was directed by the District Court to which exceptions were taken.

The statute referred to, under which this process is sought to be maintained, is applicable to three cases only: — 1st. Where any unlawful and forcible entry has been made into any lands or tenements. 2d. Where there has been any unlawful and forcible detainer thereof. 3d. "Whenever a tenant, whose estate in the premises is determined, shall unlawfully refuse to quit the same, after thirty days' notice in writing, given by the lessor for that purpose." Rev. St. c. 128, § 2 and 5. The evidence presents no such forcible entry or detainer, as to sustain the complaint. *Commonwealth* v. *Dudley*, 10 Mass. R. 403; *Saunders* v. *Robinson*, 5 Metc. 343. And we are not satisfied that the complaint can be maintained upon the evidence, by virtue of the other provision. To bring the case within the 5th section, the relation of landlord and tenant must be shown to have existed, and the lease to have termin-

ated; and a holding over by the lessee. The language clearly imports that the process, under this part of the statute, shall be in favor of a lessor or his assignee against a lessee or one holding under him. The determination of the estate referred to, may be of a lease for years, or where a tenancy at will existed; it was not intended for those cases, where the title could be contested; but where the relation was such, that the defendant was precluded from denying to the complainant the right of possession by his own contract.

A lease is defined to be *a contract* for the possession and profits of lands and tenements on the one side, and a recompense of rent or other income on the other. Any words, which show the intention of the parties, that one shall divest himself of the possession, and the other shall come into it, whether they run in the form of license, covenant or agreement, are of themselves sufficient. 4 Cruise's Dig. 67.

There is no allegation in the complaint, and no evidence shown by the exceptions, of any contract or agreement between the parties. The house having been the property of the defendant was mortgaged by him for security of his debt; according to the facts in the case, this mortgage had been foreclosed, and he divested of all estate in the premises; after which, the interest of the mortgagee passed to the complainant by the assignments. The latter was the absolute owner of the house, it being personal property, and the defendant was in the occupation of the same; the complainant's title accrued two days before the notice to quit, given to the defendant; no relation of landlord and tenant can be implied or inferred from the facts reported.

*Exceptions overruled.*

DAVID DYER *versus* NATHAN L. WOODBURY.

As the statute is peremptory, that the penalty of a poor debtor's bond shall be "in double the sum for which he is arrested or imprisoned," an officer cannot be held to have performed his duty, if he takes a bond otherwise.

But by the provisions of the poor debtor act of the Rev. Stat. (c. 148, § 43,) the creditor cannot recover of the officer, for such failure of official duty, "to a greater extent than the damage actually sustained by him thereby."

The officer who arrests a debtor upon an execution, is bound to accept a bond, made in all respects in conformity to the true intent and meaning of the statute, with sufficient surety or sureties approved as the statute requires, but still is bound to act in good faith, as well towards one party as the other; and if he knew or had good reason to believe that a fraud had been practised, and that the sureties in the bond tendered to him by the execution debtor were utterly worthless, he would not be bound to receive it, although the sureties were approved by two justices; and should he knowingly accept such bond, and thereupon liberate the debtor, he would be guilty of a breach of official duty.

In an action of the case against an officer for neglect of official duty, the plaintiff can recover but the amount of damages actually sustained.

THE return of Waterhouse, a deputy of the defendant, upon the execution in favor of the plaintiff against Daniel Burnham and David Webster, was — "March 8, A. D. 1844. I arrested the within named Daniel Burnham, who thereupon gave the bond which is hereunto annexed as the statute requires, and was discharged from the arrest.

"J. M. Waterhouse, Dept. Sh'ff."

The balance due on the execution, at the time of the arrest, with interest and officer's fees, was $5,221,63, and the penalty of the bond was in the sum of ten thousand dollars.

The facts are given in the opinion.

*W. P. Fessenden* argued for the plaintiff, citing *Clap* v. *Cofran*, 7 Mass. R. 98; *Winthrop* v. *Dockendorff*, 3 Greenl. 161; and *Howard* v. *Brown*, 21 Maine R. 385.

*Howard & G. F. Shepley* argued for the defendant, citing *Carey* v. *Osgood*, 18 Maine R. 152; *Cunningham* v. *Turner*, 20 Maine R. 435; and *Horn* v. *Nason*, 23 Maine R. 101.

The opinion of the Court was by

WHITMAN C. J. — This is an action of the case against the sheriff of this county, for an alleged misfeasance of his deputy, Joshua M. Waterhouse. The declaration contains three counts; one for suffering an escape of a debtor of the plaintiff's, while under an arrest on execution for the debt; one for a false return of the deputy of his doings on the same execution; and one for arresting the debtor thereon, and suffering him to go at large, without taking a bond as provided in the Rev. Stat. c. 148, § 20. The right to recover upon either of these three modes of stating the plaintiff's case depends upon the state of facts, as contained in the report of the Judge. In substance the allegation is, that the deputy, on an execution in favor of the plaintiff, arrested Daniel Burnham, the debtor therein, and suffered him to escape, without taking bail as prescribed in the section of the statute above cited.

It appears that the deputy did arrest the debtor, as alleged, and took a bond, as provided in the section cited; excepting that it was not in double the amount of the sum requisite to satisfy the execution; and with the exception, also, that the sureties in the bond were utterly worthless; and thereupon liberated the debtor. The bond, however, was approved, as to the sureties, by two disinterested justices of the peace, both being of the quorum, as required in said section.

Under the section cited, we think the deputy should have refused to accept the bond, as it was not in double the amount requisite to satisfy the execution. The statute is peremptory, that it should be so; and no officer can be holden to be perfectly blameless in taking a bond otherwise.

It is insisted, however, on the part of the defendant, that he is exonerated by the force of § 43 of said statute. That section provides, that if the officer, taking a bond from a debtor under arrest upon execution, shall, "from mistake, accident or misapprehension," take a bond in a penal sum less or greater than the sum required by law, that the same shall, nevertheless, be valid; and that the officer taking it "shall not be responsible to either party to a greater extent than the damage actually

sustained by him thereby." This provision clearly contemplates, that the officer, so doing, is guilty of a misfeasance; and only guards against a recovery of damages against him, beyond the actual injury sustained from his failure in the discharge of his duty. This provision in the statute was, doubtless, made in view of the principle, that in an action of debt for a voluntary escape, the creditor would be entitled to recover the amount of his debt. If the officer, in such case, should, by accident, mistake or misapprehension, take a bond, not in the amount required, the provision would, doubtless, relieve him from such liability. But the present is an action of the case, in which the plaintiff can recover only the damage he may actually have sustained. It becomes, therefore, unnecessary to inquire, whether the bond was taken in less than double the amount required, "from mistake, accident or misapprehension."

It is insisted further, on the part of the defendant, that the bond taken by the deputy has been accepted by the plaintiff; and that, therefore, he cannot now complain of its not having been taken in conformity to law. But the case does not furnish evidence of that fact. The acts relied upon to establish this point in the defence, were wholly unauthorized by the plaintiff; and, as soon as his agent became apprized of them, they were disavowed. Mr. Fessenden, at the time he did the acts alluded to, had not been retained as the attorney of the creditor; and was not such in the original suit. But if the creditor had in fact authorized a suit to be commenced on the bond, we are not to be understood as admitting, that it would have been, of itself, a waiver of any claim against the defendant for the misfeasance of his deputy. If he had been successful in obtaining satisfaction of his debt, by a suit upon his bond, it might be very reasonable that he should not prosecute for the misfeasance.

It is insisted further, on the part of the plaintiff, that the deputy was bound to see, that the sureties were responsible; and that he was culpable if they were not so, notwithstanding the approval by the justices. The provision in the statute is,

that, "whenever any debtor, arrested or imprisoned on execution, shall give bond to the creditor, with sufficient surety or sureties, to be approved in writing by the creditor, or any two justices of the peace and of the quorum, he shall be released from his arrest and imprisonment." The officer, therefore, who may make such an arrest, is bound to accept of a bond made in all respects in conformity to the true intent and meaning of the statute, with sufficient surety or sureties, approved, &c. A bond taken without the approval would be good against those who had executed it, if the creditor should think proper to accept it. The object of having an approval of the sureties by two justices is, doubtless, twofold; first to protect the officer against the claim of the creditor, in case the sureties should prove insufficient; and secondly, to prevent oppression, on the part of the officer, by captiously objecting to the sufficiency of the sureties. The officer, however, is bound to act in good faith, as well towards one party as the other. It would seem scarcely reconcilable with such an obligation, that he should be utterly regardless of the sufficiency of the sureties, and yield to a palpable violation of law, on the part of the approving justices. In this case it cannot be questioned, that the justices were guilty of a most flagrant disregard of duty. They approved of one as sufficient, who had been a town pauper; and of another, who was, not only utterly destitute of property, but was, at the time of executing the bond, a minor, as the sureties in a bond for ten thousand dollars. An officer knowing, or having good reason to believe such to be the facts, in reference to a bond, tendered to him by a debtor in execution, could not be bound to receive it, though the sureties should be approved of by two justices. It would be a fraudulent attempt, which he should resist. In this instance the debtor, Burnham, knew, unquestionably, that he was practising a gross imposition, deliberately contrived; and the justices can hardly escape from the suspicion of having colluded with him in the contrivance. Before certifying they were bound to know, or to possess themselves of knowledge, that the individuals, they would certify to be sufficient, were actually so, at

least in appearance. In this instance there could not have been the slightest appearance of property in either of the sureties. It would be monstrous to say, that an officer would be bound to accept from a debtor a bond under such circumstances. And, if an officer were knowingly to accept of a bond, so prepared, and thereupon liberate the debtor he would be guilty of a breach of official duty, for which he would be responsible to the creditor; and we can but think it a duty incumbent upon officers to be watchful against any such practices.

In the case before us, however, there is not any decisive evidence, that the defendant's deputy was placed upon his guard against imposition of the kind alluded to, or that he ought to have been apprehensive of any thing of the kind, or that he had any other knowledge of the sufficiency of the sureties than what the certificate of the justices afforded. We do not feel, therefore, authorized to adjudge the defendant to be liable to the plaintiff upon this ground.

The taking of the bond, without conforming in strictness to the provisions of the statute, and, thereupon, liberating the debtor, forms the only legitimate cause of action to be relied upon by the plaintiff. The liberation of the debtor, under such circumstances, was tantamount to a voluntary escape, permitted by the officer unjustifiably. Whatever damage the plaintiff has sustained therefrom, he is entitled to recover. This being an action of the case, the whole amount of the plaintiff's demand against his debtor, would not be recoverable unless it should appear that his loss by reason of the misconduct of the deputy, would be to that amount; and we cannot be satisfied from the evidence, that such will be the case. Although the escape took place by the permission of the officer, it was an escape on the part of the debtor, and when a debtor has escaped from an arrest upon an execution, the judgment upon which it issued will still remain in force against him. 3 Comyn, 647, Title Escape, E. It does not appear that the debtor is not now as responsible as when arrested and discharged. The damages to be assessed, therefore, must depend

upon the extra trouble which may have been occasioned by the arrest and the voluntary discharge of the debtor, which we estimate at fifty dollars; and judgment may be entered upon default for that sum.

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JABEZ C. WOODMAN *versus* ALBERT VALENTINE.

A surety in a poor debtor's bond has no authority, under the poor debtor act of the Rev. Stat. c. 148, to surrender and deliver his principal into the custody of the jailer, against the will of such principal.

Where one of the alternatives of the condition of such bond is, that the debtor shall "be delivered in custody of the jailer," a legal delivery only, and not an illegal commitment, will constitute a performance of that part of the condition.

A poor debtor's bond must be made in conformity with the statute provisions in force at the time in all its material parts, or it will not be a good statute bond, although it may secure to the creditor equally valuable rights.

If one of the alternatives of the condition of the bond, taken since the Rev. Stat. were in force, be — 'And take the oath or affirmation as provided in the seventh section of an act entitled an "Act supplementary to an act for the relief of poor debtors,' passed April 2d, 1836, and perform all the other conditions provided by the laws of the State, relative to the relief of poor debtors" — that part of the bond which relates to the statute of 1836, cannot be considered as void, and rejected as surplusage.

EXCEPTIONS from the District Court, GOODENOW J. presiding.

The facts are stated in the opinion of the Court. One of the alternatives in the condition of the bond was in these words: — "And take the oath or affirmation as provided in the seventh section of an act entitled an 'Act supplementary to an act for the relief of poor debtors,' passed April 2d, A. D. 1836, and perform all the other conditions provided by the laws of the State relative to the relief of poor debtors." The only ruling of the District Judge is thus stated in the exceptions: — "Hereupon the Court ruled the law to be with the plaintiff, and directed a verdict for the plaintiff for twenty dollars, which was found accordingly." The defendant filed the exceptions.

*Dunn*, for the defendant, supposed it to be very clear, that as this bond was given after the Rev. Stat. went into operation,

and provided for the taking of the oath prescribed in the statute of 1836, that it was not good as a statute bond. The plaintiff, then, at common law can recover, if any thing, but the damages actually suffered, merely nominal in this case. He contended, that the defendants had actually performed the condition of the bond; but should the Court otherwise determine, the condition has been performed as far as it was in the power of the surety to perform it, as he offered to surrender the principal to the jailer, and that is sufficient as it respects him. *Pease* v. *Norton*, 6 Greenl. 229.

*J. C. Woodman, pro se*, read an argument in writing. *Kavanagh* v. *Saunders*, 8 Greenl. 422; *Morse* v. *Rice*, 21 Maine R. 53; and 2 Black. Com. 340, were cited. The principal grounds taken are noticed in the opinion of the Court.

The opinion of the Court was by

SHEPLEY J.— This is a suit upon a poor debtor's bond. The judgment was recovered on February 21, 1840. The debtor was arrested on execution and liberated by giving this bond on December 20, 1841. The condition of the bond should have been made in conformity to the provisions of the Revised Statutes. It appears to have been made with the design, that it should be in conformity to the provisions of the acts passed in the years 1835 and 1836.

It is contended in defence, that there has been a performance of one of the alternatives named in the condition of the bond. The testimony recited in the bill of exceptions shows, that the surety went with the principal to the office of the prison keeper, and offered to surrender the principal to him in discharge of the bond, informing him that the principal had come with him to be surrendered for that purpose. The prison keeper was not satisfied, that the bond was a lawful one, and he refused to receive the principal, unless he would go into prison voluntarily. He refused to do so, and was not therefore received by the prison keeper. The defendant's counsel insists, that the surety was authorized by law to surrender his principal in discharge of his bond, and that he has done all,

which he could do, to perform that part of the condition. It becomes important to consider whether the surety could lawfully surrender his principal without his consent, and thus be discharged from his obligation.

The act for the relief of poor debtors, passed in the year 1822, c. 209, authorized the surety of a poor debtor to surrender his principal. The sixth section of that act provided, that such bond "shall be discharged and void, whenever the principal therein shall surrender himself, or be surrendered by his surety, to the keeper of the prison." This provision ceased to be operative after the act passed in the year 1831, c. 520 was in force. The latter act was repealed by the act of 1835, c. 195; the eighth section of which provided, that a poor debtor might be released from an arrest or imprisonment by giving a bond conditioned to do certain acts named, "or be delivered in custody of the jailer within said time." This act was repealed by the repealing act found in the Revised Statutes. The twentieth section of c. 148, provides for the release of a poor debtor from arrest or imprisonment, by his giving a bond conditioned to perform certain acts "or deliver himself into the custody of the keeper of the jail." The clause contained in the act of 1822, which authorized the surety to surrender his principal, has been wholly omitted in the Revised Statutes. Instead of the words, "or be delivered in custody of the jailer," contained in the act of 1835, the words, "or deliver himself into the custody of the keeper of the jail," are found in the Revised Statutes. It cannot be presumed, that such a change has been unintentionally made. The language of the law now in force clearly requires the act of surrender to be performed by the principal. There is no provision of law authorizing the surety, by implication or otherwise, to surrender his principal against the will of such principal. When it was intended, that bail or sureties should be authorized to surrender their principals in discharge of their obligations, provision has been made for it. Ch. 114, § 99 and 100. The debtor in this case did not intend to surrender himself and go into prison. He refused to do it. The prison keeper could not

lawfully detain him, if he was not legally committed to his custody. Although the words contained in the condition of the bond are, that he should "be delivered in custody of the jailer;" a legal delivery only could have been intended to be provided for. Such a delivery only, and not an illegal commitment, could be a performance of the condition. The defence therefore fails.

The bill of exceptions states, that the Court directed a verdict for the plaintiff for a certain sum. The bond was not made in conformity to the provisions of the statute then in force. The plaintiff contends, that all that part of the condition, which refers to the acts passed in the years 1835 and 1836, is void; that the condition should be considered to be the same, as it would have been, if that language had been omitted; and that the clause, "and perform all other conditions provided by the laws of the State relative to the relief of poor debtors," was sufficient to require the debtor to take the oath and perform the duties required of him by the Revised Statutes. If this be admitted, the conclusion, which he would draw from it, does not follow, that is, that the bond would be a good statute bond. It is not sufficient to make it a statute bond to show, that the same rights might be secured to the parties by it as would have been secured to them by a bond made as the statute requires. A bond, whose penal sum is less or more than double the sum, for which the debtor had been arrested or imprisoned, might secure the rights of the parties as fully, if it could be regarded as a statute bond, as one whose penal sum was precisely double that amount. But such bonds were never considered to be statute bonds, before the Revised Statutes were in force. A bond must be made in conformity to the statute provisions, in all its material parts, or it cannot be regarded as a statute bond. It is a material part of the condition of the bond, provided for by statute, c. 148, § 20, that it should require the debtor, as one of the alternatives for his discharge, to "take the oath prescribed in the twenty-eighth section" of that chapter. It is material for the purpose of making the oath certain, which is to be administered to the debtor. It is material to prevent delay and difficulty at the

time of the examination; and to remove all doubts from the minds of the justices respecting the oath, which they are to administer. If that part of the condition of the bond, which is alleged to be void, had been omitted, the condition would have contained no express provision, that any oath should be administered to the debtor. The debtor and justices would have been left to ascertain in the best manner they could, what acts the laws of the State relative to the relief of poor debtors required of them. It was not the design of the legislature, that they should be left in such a condition.

There is nothing in the condition of the bond, which will prevent its being a good bond at common law; but it cannot be considered such a bond, as the statute required. The defendant was entitled to a hearing in damages, that they might be assessed at such an amount only, as the plaintiff could prove that he had actually sustained.

*Exceptions are sustained, and a new trial is granted.*

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CYRUS SMITH *versus* WENDELL P. SMITH.

When a valid mortgage of personal property is made and duly recorded, an officer is not authorized either by Rev. Stat. c. 117, or by the act of amendment of 1842, c. 31, to make an attachment of the same *on mesne process*, as the property of the mortgagor, without first paying or tendering the full amount of the debt due, secured by the mortgage.

If a mortgage of personal property is duly recorded, it becomes effectual, being otherwise valid, without a formal delivery of the property, whether it be the first, or a second mortgage of the same property.

There may be a second mortgage of personal property, under our statutes, which shall be valid against all but the first mortgagee and his assigns.

It is not necessary, that the payment or discharge of a first mortgage of personal property should be recorded, in order that a second one should hold the property against an attaching officer.

Where an officer returns upon a writ an attachment of personal property, and sets up such attachment in defence, on the trial of an action of replevin against him for the same property, it is to be presumed that he did whatever was necessary to constitute and preserve his attachment; and in the absence of any opposing proof, this will be sufficient evidence, that the property had been in his possession.

REPLEVIN for certain articles of household furniture. The

case came before the Court on exceptions to the ruling of the Judge at the trial; and on a motion to set aside the verdict as against evidence. The evidence is set forth in the exceptions; and thereupon, as the exceptions state, the defendant contended and requested the Court to instruct the jury, that at the time of making said attachment by the defendant, said Sawyer had an attachable interest in said property replevied; and at the time of making and recording said mortgage from said Sawyer to the plaintiff, the mortgage to Ilsley being in existence, the said mortgage to the plaintiff was inoperative and void, and could not be valid by the subsequent payment to Ilsley; and that for either of these causes the action could not be maintained. WHITMAN C. J. presiding at the trial, declined to give such instructions, and instructed the jury, that if they believed the testimony of Sawyer, the mortgagor, the money was actually loaned by the plaintiff; but even if this were so, if Sawyer intended to defeat or delay his creditors, and the plaintiff knew, or had reason to believe, that such was Sawyer's design, the mortgage was fraudulent and the action could not be maintained; but if the whole transaction was *bona fide* on the part of the plaintiff, and he had no reason to believe that Sawyer intended to defeat or delay his creditors, then the action was maintainable.

To which instructions and refusal to instruct, and to the rulings of the Court in matters of law, the defendant excepted; a verdict having been returned for the plaintiff.

No copy of the mortgage is found among the papers. The material facts appearing in the evidence are stated in the opinion of the Court.

*Wells & Sweat* argued for the defendant. The grounds taken appear in the requests for instruction and in this opinion of the Court. They cited 3 Pick. 255; 13 Maine R. 236; 15 Maine R. 48; Rev. St. c. 117, § 40; 7 T. R. 9; 10 Pick. 166; 4 Kent, 138; 18 Maine R. 127; 22 Maine R. 234; 19 Maine R. 49; 3 Metc. 268; 4 Hill, 271.

*W. P. Fessenden* and *Munger*, for the plaintiff.

The opinion of the Court was drawn up by

TENNEY J. — The property in controversy was the household furniture of George Sawyer, who gave a mortgage of the same to Rufus Read, on June 30, 1842, to secure various debts, to run eight months. On January 30, 1843, Joseph Ilsley received this mortgage of Read, who discharged it the next day. Sawyer gave a mortgage of the same property to Ilsley for the security of a loan of $300, payable in six months. On August 10, 1843, Sawyer borrowed of the plaintiff the sum of four hundred dollars on a credit of nine months, three hundred of which was received by Ilsley in payment of the debt secured by the mortgage to him; and for the security of the plaintiff's loan, Sawyer gave a mortgage to him of the same property, and dated August 10, 1843, which was recorded Nov. 20, 1843. By an arrangement between Ilsley and those with whom the money to discharge his mortgage was deposited, he did not actually receive it till Dec. 12, 1843, when he assigned his mortgage to the plaintiff. On the 14th of May, 1844, the last mortgage being undischarged, the defendant attached the property, being in the house occupied by Sawyer, and which he continued to occupy till the December following, upon a writ made upon a *bona fide* debt against Sawyer in favor of Stephen Hall & al. which property was replevied by the plaintiff on the same day. A question, whether the transaction between the plaintiff and Sawyer was fraudulent as against creditors was submitted to the jury, and the Judge instructed them, that unless they were satisfied of the fraud, the action was maintainable. The jury found a verdict for the plaintiff. The counsel for the defendant contend, that the instruction of the Judge was erroneous. First. Because the defendant was legally justified in making the attachment. Second. That the mortgage to Ilsley being in existence when the one to the plaintiff was executed, the latter was inoperative and void, and did not become valid by the subsequent discharge of the former; but if otherwise, a delivery of the property was necessary that it should vest in the plaintiff, of which there was no evidence. Third. That the mortgage

upon its face was fraudulent. And fourth. That from the case, the property was never taken from the possession of the plaintiff; and no demand was made upon the defendant before the commencement of the action.

1. By Rev. Stat. c. 125, § 30, the mortgagor of personal property has sixty days after breach of the condition within which to redeem it; when the defendant made the attachment the plaintiff's right was defeasible. But if the property vested in the plaintiff as mortgagee, it was not in the power of the defendant to make an attachment without first paying or tendering to the plaintiff, the full amount of the debt secured. Ch. 117, § 38, Rev. Stat. The 40th section of the same chapter, as amended in 1842, by statute entitled "An Additional act to amend the Revised Statutes," c. 31, § 12, confines the right of a creditor to make an attachment, to a seizure and sale upon *execution*. *Pickard* v. *Low*, 15 Maine R. 48. *Paul* v. *Hayford & al.* 22 Maine R. 234.

2. If a mortgage of personal property is recorded, it becomes effectual, being otherwise valid, without a formal delivery of the property. *Bullock* v. *Williams*, 16 Pick. 33. *Goodenow* v. *Dunn*, 21 Maine R. 86. It is not perceived, that a delivery of the same property mortgaged subsequently, while the former mortgage exists, becomes more necessary. The existence of the mortgage to Ilsley could not prevent that to the plaintiff, from having effect, after the first should be discharged; and while the right of redemption of Ilsley's mortgage continued, the defendant not claiming by virtue of it, there was no one, who could object to its discharge by the plaintiff; it was discharged long prior to the attachment made by the defendant, and was in fact cancelled at the time of the execution of the mortgage to the plaintiff; the latter was *bona fide*, duly recorded, and it does not lie with the defendant to say, that before the origin of his claim, it was subject to another, and thereby void.

3. Neither is the mortgage to the plaintiff fraudulent upon its face. It was upon a legal and sufficient consideration, and was properly recorded, in order to give it full effect. The

mortgage to Ilsley is not denied to be valid and legally recorded. The creditors of Sawyer had all the notice arising from both to which they were entitled. The cancellation, partial or entire payment of mortgages, is not required to be recorded. The defendant and the creditor, who directed the attachment, had constructive notice at least of the claims of Ilsley and the plaintiff, and could have easily ascertained their true condition.

4. The case finds, that the defendant attached the property as a deputy sheriff upon mesne process. It is to be presumed, that he did whatever was necessary to constitute a valid attachment; he must have taken possession of it, and have retained that possession, in order to preserve the claim, which he set up at the trial as his defence. There is nothing in the exceptions showing, that possession was not taken by him, or that the possession was in the plaintiff at the time he instituted this suit. A demand upon the defendant before the commencement of the action was unnecessary. His interference with the property was unauthorized, and his liability was fixed immediately. The case cited from 3 Metc. 268, is inapplicable to the one before us; that was presented under a statute different entirely from any in this State. *Cutter* v. *Copeland*, 18 Maine R. 127.

The question of fraud was submitted to the jury upon evidence adduced by both parties, under proper instructions from the Court; and it would be interfering too much with the rights of jurors to say that the verdict could not stand.

*Exceptions and motion overruled.*

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CHARLES MUSSEY *versus* PETER PIERRE.

An alien acquires no life estate in the lands of his wife by virtue of his marriage; and a levy thereupon as the estate of the husband gives no title to the creditor.

ON March 24, 1839, Reuben Ruby conveyed the demanded premises to Elizabeth Pierre, the wife of Peter Pierre, who

was then an alien and has not since been naturalized. On Jan. 7, 1843, the demandant levied upon the life estate of Pierre to satisfy an execution against him. This action is a writ of entry against Pierre.

*Fessenden, Deblois & Fessenden* argued for the tenant, citing 12 Mass. R. 348; 2 Kent, 53; 1 Cruise, 164; 7 Cranch, 619; Year Books, 11 Hen. 4, 26 and 14 Hen. 4, 20; Co. Lit. 2 (b).

*Rand* argued for the demandant, and cited Stearns on Real Actions, 195, and Rev. St. c. 145, § 9.

The opinion of the Court was by

WHITMAN C. J. — This is a writ of entry. The defendant pleads *nul disseizin*, with a brief statement, setting forth that, although his wife is seized of the demanded premises in fee; yet that he, being an alien, has nothing therein. It is not controverted that he is an alien; and it is admitted, that the fee in the estate is in his wife. In such case it is not easy to perceive how he can be held amenable in this process. He, in right of his wife, is not seized of any estate therein. He could not become a tenant by the curtesy; and could not lawfully convey or lease the same; nor could it be legally attached, as in anywise pertaining to him. The claim of the plaintiff, therefore, being under and by virtue of an attachment and levy upon it, as a life estate in the defendant, cannot be upheld.

The estate, however, seems to have been conveyed to the wife during coverture; and perhaps, was paid for by him, so as to create a resulting trust for his benefit. If such was the case, possibly, it might be reached by a process in equity, and be made responsible for his debts. As to this, however, we give no opinion.

*Default taken off — and plaintiff nonsuit.*

GEORGE WARREN *versus* LEVI WHITNEY *& al.*

When a person has received a benefit from, or occasioned a loss to another, and a statute, or rule of public policy, protects him from making compensation, the moral obligation so to do remains, and constitutes a legal consideration for a promise to do it.

But a promise to pay a debt voluntarily discharged, is not binding for want of a legal consideration.

THE parties agreed upon a statement of facts, the material parts of which appear in the commencement of the opinion of the Court.

*Howard & Shepley* argued for the plaintiff, and contended that this case came within the general rule, that a moral obligation to pay a debt is a sufficient consideration for an express promise in writing so to do, when, as here, there was a good and sufficient original consideration for the promise. 2 H. Black. 116; 3 B. & P. 249, and note; 1 Chitty on Pl. 40; *Maxim* v. *Morse*, 8 Mass. R. 127.

The release, in this case, was made at the request and for the benefit of the defendants, and not for the benefit of the plaintiff; and in such case a new promise to pay the debt released is binding. *Valentine* v. *Foster*, 1 Metc. 520; Am. Jurist, vol. 21, 276.

*Barnes* and *E. H. Daveis*, for the defendants, contended that the promise, relied upon to support this action, was void in law, as a fraud upon the other creditors. Chitty on Con. (Perk. Ed.) 685 and 50; 13 Johns. R. 257; 16 Johns. R. 283; *Valentine* v. *Foster*, 1 Metc. 520. In the case last cited, the Court say, that the only case found, which holds that a promise to pay a debt, which the party has himself voluntarily discharged, is binding, is the case of *Willing* v. *Peters*, 12 Serg. & R. 177. The latter case has been overruled by the same Court in 9 Watts, 396.

The opinion of the Court was drawn up by

SHEPLEY J.—It appears from the case stated, that the defendants were indebted to the plaintiff before Jan. 16, 1836,

on a promissory note; and that on that day they made an assignment of their property for the benefit of their creditors. The assignment contained a release of all debts due from the defendants to their creditors. The plaintiff became a party to it, and thereby released his debt, and received a dividend upon it from the assignees. The defendants, by a contract in writing, made on March 14, 1836, promised to pay the plaintiff any balance of the debt, which might remain unpaid by the assignees. And they afterward paid a small amount of such balance. The plaintiff having voluntarily released his debt upon an agreement to receive his proportion of the property conveyed to the assignees, the transaction was equivalent to an accord and satisfaction. There was no longer a subsisting debt due from the defendants to the plaintiff; and no consideration for the new promise; unless a moral obligation to pay a debt, which has been discharged by payment of part only, can be considered sufficient.

This Court had occasion to consider and to deny, that a moral obligation can constitute in all cases a legal consideration for a contract, and to lay down some rules respecting it, in the case of *Farnham* v. *O'Brien*, 22 Maine R. 475. It was there stated, that when a person had received a benefit from, or occasioned a loss to, another, and a statute or rule of public policy protected him from making compensation, the moral obligation to do it remained, and would constitute a legal consideration for a promise to do it. When a debt has been voluntarily discharged, a case is not presented within the rule. The case of *Willing* v. *Peters*, 12 S. & R. 177, would however authorize the plaintiff to recover in this case. The authority of that case must be considered as essentially impaired, if not wholly destroyed, by the case of *Snevily* v. *Reed*, 9 Watts, 396. In the latter case, the plaintiff had discharged the defendant from custody under a ca. sa.; and thereby discharged the debt. The defendant subsequently promised to pay it; and the Court considered, that there was no legal consideration for the promise.

The case of *Stafford* v. *Bacon*, 1 Hill's R. 533, decided, that a promise to pay a debt voluntarily discharged, was not binding for want of a legal consideration.

The counsel for the plaintiff insist upon a distinction, that when the release is made at the request and for the benefit of the debtor, the new promise is binding; and that when not so made, it is not. The case of *Valentine* v. *Foster*, 1 Metc. 520, is referred to as establishing such a distinction. If the debt be released for the benefit of the debtor, it is not the less perfectly discharged. When a moral obligation has been properly held to constitute a legal consideration a plea of accord and satisfaction could not have been supported. The party must have pleaded a statute bar, or facts to bring his case within some rule of public policy forbidding a recovery, such as infancy or coverture. There is little similarity between such cases and a case, in which a party could have pleaded and have sustained his plea, that he had satisfied and paid the debt.

*A nonsuit is to be entered.*

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WILLIAM DALE, *Adm'r. versus* RICHARD GOWER *& al.*

If the declarations of an intestate would be good evidence against him, were he living and the action brought by him, they are admissible when the action is brought by his administrator.

In an action of trover for goods, where the sale thereof to the plaintiff is alleged to have been fraudulent as to creditors of the seller, the declarations of the plaintiff tending to show that he was not in a condition to have paid any amount towards the consideration for the property, or that he had not the ability to have paid the consideration named in the conveyance, are admissible.

The declarations of the seller of goods, *made at the time of the sale*, are not only admissible for the purpose of discrediting his testimony when he had been called as a witness, but also as direct evidence of the sale.

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

Trover by the plaintiff, as administrator of the estate of Robert Witherspoon, against Richard Gower and Abiezer S.

Freeman, for the conversion of a wagon and other articles of personal property, alleged to have been the property of the intestate.

To prove his case the plaintiff introduced a deed from James Moore to Witherspoon, dated Aug. 12, 1841, the descriptive part of which follows: — "The farm on which I now live in Poland, and also the farm on which the said Witherspoon now lives in Poland, and also convey to him, the said Witherspoon, all my personal property which I now have in my possession and keeping in the town of Poland." The defendants claimed under an after purchase of Moore, and contended that the sale to the intestate was fraudulent and void as to themselves, being prior creditors, and *bona fide* purchasers, to pay their demands.

Much testimony was introduced on the one side and on the other. The defendants proposed to ask a witness called by them, "Whether or not the said Witherspoon did not state to him at that time, that he, the said Witherspoon, had no means or property whatever." The presiding Judge ruled, that it was not admissible.

The exceptions also state, "that prior to the deed in August, 1841, the defendants proposed to prove that the said Witherspoon acknowledged, that he had no property whatever, but the Court ruled that the evidence was inadmissible, being prior to the deed."

The exceptions further set forth, that the presiding Judge, among other remarks, stated to the jury, "that the defendants had proved various declarations of Moore, that he sold the property to Gower and Freeman, but that was merely the confessions of Moore, and that those confessions, not under oath, would not prove alone a sale from Moore to the defendants, but were admissible as evidence tending to impair the character of his testimony." Moore had been called as a witness by the plaintiff. It appeared that some of the statements of Moore were made at the time of the alleged sale to the defendants.

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

*J. C. Woodman* argued for the defendants, citing 6 Greenl. 14; 17 Maine R. 378; 1 Stark. Ev. 381; 23 Maine R. 289; Greenl. Ev. § 108, 120; 16 Mass. R. 108; 24 Pick. 242; 23 Maine R. 221; 11 Pick. 308; 19 Pick. 56; 1 Metc. 342; 3 Metc. 199.

*Deblois* and *True* argued for the plaintiff, citing 1 Stark. Ev. 41, 52, 92; 2 Stark. Ev. 42; 1 Greenl. Ev. 220.

The opinion of the Court was by

WHITMAN C. J. — We are of opinion, that the Court below erred in not suffering evidence to be introduced of the declarations of the intestate, when living, as to his destitution of property, prior to his purchase of Moore. His declarations would be good evidence against him if he were living; and the administrator of his estate is not privileged in this particular, any more than he would be if he were alive. The declarations, if admitted, would have tended to show, that the deceased was not in a condition to have paid Moore any amount towards the consideration for the property, which Moore had conveyed to him; and that the pretence of his having paid three hundred dollars, or of his having the ability to pay the consideration named in the conveyance, was wholly fictitious.

Again; — we think the Court erred in saying to the jury, that Moore's declarations were confessions of his having sold the property to the defendants, and evidence only tending to lessen his credibility. Some of his declarations were, to be sure, of that character; but many of them were parts of the *res gestæ;* and as such were direct evidence of a sale. They accompanied the acts of the sale and delivery. Of this description were portions of the testimony of Hutchins, Pratt and Penney, which proved declarations accompanying the delivery of some of the articles.

*Exceptions sustained. — New trial granted.*

THOMAS MCLELLAN *versus* THE PRES'T, &C. CUMBERLAND BANK.

If an action against an aggregate corporation, for maliciously causing the plaintiff to be arrested on an execution issued on a judgment in their favor against him, can under any circumstances be sustained, it cannot be done, without showing both malice and want of probable cause; and the arrest complained of, must have been wholly groundless, and that known to the defendants.

Whatever may have been the previous conversations between the parties, or even their understandings of what was agreed upon between them, or of the by-standers who might have been present at the negotiation, yet if the parties finally proceed deliberately and fairly to put their agreement into a written instrument, that writing is conclusive not only upon them, but also, there being no fraud, upon third persons.

Where the creditor has two separate claims against the same five debtors, on different bonds, and the creditor, in consideration that one of them "has settled and adjusted the suit on the first bond," covenants with the debtor, that he will not collect of him any portion of the execution issued upon the second bond; this is not a release of the execution debtors on the second bond.

CASE for a "malicious arrest and imprisonment" on an execution in favor of the defendants against the plaintiff and several others.

At the trial, before WHITMAN C. J. the parties agreed, after their evidence was all before the jury, that if upon this testimony, including that offered by the plaintiff and rejected by the presiding Judge, or so much thereof as should have been received as legal evidence, the Court should be of opinion that this action is maintainable, then it is to be submitted to a jury to ascertain the damages; and if not, the plaintiff is to become nonsuit.

The facts considered to have been proved by the evidence, are found sufficiently in the opinion of the Court.

*Howard* and *Rand* argued for the plaintiff. To the point, that an action on the case, and not *audita querela*, was the proper remedy, they cited 5 Metc. 228; 10 Mass. R. 103; 17 Mass. R. 158.

That an action on the case will lie for a malicious arrest on an execution, known to the party directing it to have been pre-

viously satisfied, and against a corporation. 11 East, 297; 3 T. R. 185; 1 D. & Ry. 97; 11 Mass. R. 500; 3 Hill, 193 and 531; 2 Hill, 629; 7 Cowen, 485; 23 Pick. 24 and 139; 7 Mass. R. 186; 16 East, 6; 2 Kent, 284; 2 Wend. 452; 3 Campb. 403; 17 Mass. R. 503.

That the testimony offered by the plaintiff, to show that the execution had been in fact actually satisfied, was erroneously excluded. 1 Greenl. Ev. § 275, 277, 279, 282, and 285.

*A. Haines*, for the defendants, contended that a covenant never to prosecute an existing demand operates as a release only where made with a sole debtor; and in such case it is allowed to have such effect for the purpose merely of avoiding circuity of action. 2 Johns. R. 450; 2 Salk. 575; 8 T. R. 168; 2 Saund. 48; 7 Johns. R. 207; 13 Pick. 414; 22 Pick. 305; 17 Mass. R. 623; 4 Greenl. 421.

The written agreement between the bank and Dow is conclusive in relation to the arrangement between them, and it cannot be varied by parol evidence. 1 Stark. Ev. (7 Am. Ed.) 500; 2 Stark. Ev. 753; 11 Johns. R. 215.

But if the testimony offered was admissible, it would not show, that the execution was satisfied, or intended by the parties to be satisfied.

The opinion of the Court, SHEPLEY J. taking no part in the decision, was drawn up by

WHITMAN C. J.—This is a suit against the defendants, an aggregate corporation, for maliciously causing the plaintiff to be arrested on an execution, which had been issued on a judgment against him, and certain other individuals, in favor of the defendants. If the action, upon the evidence offered on the part of the plaintiff, is not maintainable, a nonsuit is to be entered; otherwise the action is to stand for trial.

The first question, obviously presented by the case, is, can a corporation aggregate be chargeable with malice? Such corporations have been held answerable in trover; and might, perhaps, be holden answerable in other actions, sounding in tort, for acts done by their officers, under circumstances imply-

ing an authority to do them. But it may well be doubted if such corporations can be implicated, by the acts of their servants, in transactions in which malice would be to be found, in order to the sustaining an action against them therefor. But this case does not render it necessary that we should enter into the further consideration of this particular point.

To support this action there must be proof of turpitude on the part of the defendants. There must be both malice, and the want of probable cause. Buller's N. P. 14. The arrest complained of, must have been wholly groundless, and that known to the defendants. *Waterer* v. *Freeman*, Hob. 260. Was the suing out of the execution, on which the arrest was made unauthorized; and must the defendants be believed to have known it to be so?

On the part of the plaintiff it was proved, that a previous execution on the same judgement had been issued; and it was attempted to be proved, that it had been fully satisfied by two of the other debtors therein, viz. John and Jeremiah Dow, who were partners in trade. One of those, John Dow, was produced as a witness to prove it. He testified that an officer, by virtue of the first execution, entered their store, and seized their stock in trade; and that, thereupon, they effected an adjustment with the defendants; whereupon their goods were liberated from the seizure; that the adjustment was in writing, which he produced; and that he considered it a settlement of the execution, by virtue of which the seizure had been made; but that the writing contained the true statement of the matter. The plaintiff, also, offered other witnesses, who were present at the negotiations concerning the adjustment, to prove, that they understood it as including a satisfaction of that execution. And it was contended for the plaintiff, that the terms of the writing produced were not, in reference to him, to be deemed conclusive, he having been no party to the instrument. But the ground upon which his position rested, that the first execution had been discharged, depended upon the fact, whether it had been so or not; and that depended on the import of the writing between the defendants and the Messrs. Dow. What-

ever may have been the previous conversations between these parties, or even their understandings of what was agreed upon between them, or of the bystanders, who might be present at the negotiation, yet, if the parties finally proceeded deliberately and fairly to put their agreement in writing, nothing is better understood, than that the writing is conclusive upon them; and that all the previous conversations and understandings, in reference to the subject, are inadmissible to control the import of the writing. The plaintiff, in placing his reliance upon a negotiation, which has been thus terminated, is in the predicament of the Messrs. Dow, as much so as if he had claimed land under a deed made to them. Whatever the import of the writing was as to them, it must be deemed the same as to him. It contained a degree of evidence of a higher nature, and paramount to that upon which he would rely, and he must be controlled by it.

In that writing it is set forth, expressly, that the defendants, "in consideration, that the said John Dow and Jeremiah Dow have settled and adjusted the suit on the first bond, herein before named," (not being the one on which judgment had been recovered) the defendants agreed, that they would not collect any portion of the execution, then issued, of the Messrs. Dow. This was neither in form or substance a release of the debtors in the execution; and amounted only to a covenant in favor of the Messrs. Dow; leaving the other debtors liable as if nothing of the kind had transpired. The concluding clause of the writing confirms this view of the effect of it. It is, that, although the defendants were not to collect anything more of the Messrs. Dow, yet, that they were not to be responsible to those individuals for any amount, which their co-sureties might be compelled to pay to the defendants, "under, upon or by virtue of said bonds, or either of them;" and which they should call upon the Messrs. Dow for, by way of contribution.

It is thus evident, that it never could have been the understanding, on the part of the defendants, that they had discharged the first execution; or that they had received the amount, or even any part of the debt, for which it had been

issued, of the Messrs. Dow. The writing contained the agreement with those gentlemen. To that they had a right to refer; and must necessarily have done so, as their guide to their future proceeding. There is, therefore, not the least reason to consider them as having sued out the alias execution, on which the plaintiff was arrested, in bad faith; or otherwise than in perfect accordance with their agreement with the Messrs. Dow.

*Plaintiff nonsuit.*

# A TABLE

OF THE

# PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

## ACTION.

duced by the defendant, will not have that effect, for it is not technically a release, not being under seal, and does not amount to an accord and satisfaction, nothing being paid. *Lunt* v. *Stevens*, 534.

11. If an action against an aggregate corporation, for maliciously causing the plaintiff to be arrested on an execution issued on a judgment in their favor against him, can under any circumstances be sustained, it cannot be done, without showing both malice and want of probable cause; and the arrest complained of, must have been wholly groundless, and that known to the defendants. *McLellan v. Cumberland Bank*, 566.

See ASSIGNMENT, 3. BANK, 9, 10, 12. BANKRUPTCY, 3, 4. BILLS AND NOTES, 6, 8. LANDLORD AND TENANT, 3. OFFICER, 11. PLEADING.

## ADMINISTRATOR.

1. It is only when the funds in the hands of the administrator are not "sufficient to extend beyond the payment of the expenses of the funeral and administrator, and the allowance to the widow and children," that it is not necessary to appoint commissioners of insolvency on an insolvent estate; and then only is the administrator "exonerated from the payment of any claim of a subsequent class;" and it is then only, that he has a defence against a suit on a legal demand, brought after the expiration of the year, without the appointment of commissioners of insolvency. *Ludwig* v. *Blackinton*, 25.
2. When the administrator was appointed before the Rev. Stat. were in force, and returned his inventory afterwards, he must account for the property contained in it according to existing laws. *Ib.*
3. Where the plaintiff is entitled to judgment against an administrator of the estate of an intestate, no commissioners of insolvency having been appointed, he will, by the provisions of Rev. Stat. c. 120, § 4, be entitled to one execution against the goods and estate of the intestate for the amount of the debt, and to another against the administrator personally for the amount of the costs. *Ib.*

See EVIDENCE, 19.

## AGENT.

See BANK, 6, 17. SHIPPING.

## ALIEN.

An alien acquires no life estate in the lands of his wife by virtue of his marriage; and a levy thereupon as the estate of the husband gives no title to the creditor. *Mussey* v. *Pierre*, 559.

## AMENDMENT.

See COVENANT, 4. EQUITY, 7. REAL ACTIONS, 3. TRESPASS, 3.

## ARREST.

See ACTION, 11.

## ASSIGNMENT.

1. When mutual accounts exist, the balance only can be protected for the benefit of an assignee of one of the parties. *Leathers* v. *Carr*, 351.
2. Under the statute of April 1, 1836, concerning assignments, where there was an exception, in the assignment, of property not exempted by law from attachment, such assignment was utterly void. *Foster* v. *Libby*, 448.
3. An assignment by one partner to the other of his interest in all the partnership demands, is good in equity, and gives to the assignee the right to use the name of the assignor to enable him to collect for his own use any debts due to them jointly at the time; and the discharge of the assignor, given afterwards without consideration, will not discharge an action brought in the name of both. *Lunt v. Stevens*, 534.

See ACTION, 9. BILLS AND NOTES, 6. CONTRACT, 2. TRESPASS, 2.

## ATTACHMENT.

See BANKRUPTCY, 4. MORTGAGE, 2, 3, 9, 11, 16. OFFICER.

## ATTORNEY AT LAW.

If a counsellor and attorney at law is employed by the principal to defend an action against himself and two sureties, upon a note signed by them, such employment will not, of itself, make the sureties holden for the payment of the bill for services in the defence, without the consent of the sureties, either through the agency of the principal or in some other way, that such attorney should be employed as their attorney.
*Smith* v. *Lyford*, 147.

See RECEIPTER, 1.

## AUDITA QUERELA.

1. Injury, or danger of injury, is essential to the maintenance of an action of *audita querela*. *Bryant* v. *Johnson*, 304.
2. Such action is in the nature of a bill in equity, to obtain relief against oppression. It lies where, after judgment, the debt has been paid or released, and yet the debtor is arrested, or in danger of being arrested, on an execution issued on such judgment; and where the debtor has had no opportunity to avail himself of such payment or release, in defence; and in other cases where a defendant had good matter to offer in defence, but had no opportunity to offer it before judgment against him. *Ib.*
3. If a levy on land be nugatory and void, the action of *audita querela* cannot be maintained by reason of such levy. *Ib.*

## BAILMENTS.

1. Where a common carrier by sea engages to deliver goods at a place named for a stipulated sum as freight, and the owner is willing to receive his goods before they arrive at the place appointed in the bill of lading, and does receive a part of them, the carrier is entitled to a *pro rata* freight.
*Hunt* v. *Haskell*, 339.
2. A common carrier by sea has by the law merchant a lien on goods carried by him for the payment of their freight; but he has no right to cause a sale to be made thereof, of his own mere motion, for the payment of the freight. *Ib.*
3. Where goods are illegally sold for the discharge of a lien for the freight thereof, and the owner afterwards obtains the possession of them through one who had made the purchase, he is entitled to recover of the seller, in an action of trover, not the value of the goods sold, but merely whatever damages and loss he sustained in regaining possession of his goods, over and above what was fairly due to the defendant. *Ib.*

## BANK.

1. A person becomes legally entitled to shares in a bank by having them transferred to him on the books of the bank. The certificate of ownership is but additional evidence of title. *Agricultural Bank* v. *Burr*, 256.
2. The legal title to shares in a bank, evidenced by the records of the corporation, will not be affected by the owner's permitting the bank to treat them as its own property. *Ib.*
3. Whether a bank has paid in fifty per cent. of its capital stock in gold or silver within six months after receiving its charter, is to be ascertained and proved in the manner prescribed in the statute, by the certificate of the commissioners appointed for that purpose. *Ib.*
4. When a bank has been in operation for several years, it is to be presumed that the remaining fifty per cent. of its capital stock has been paid within twelve months after the reception of its charter. *Ib.*
5. Where a bank charter is received and takes effect on the first day of a certain month, the corporation may legally act under the charter on that day; and a legal transfer of shares in the bank may be made on the first day of the same month of the next year. *Ib.*
6. In no proper sense can individuals be considered as agents of a bank in making their own note payable to the same bank. *Ib.*

See Bills and Notes, 5. Corporation.

## BANKRUPTCY.

he therein engaging to redeliver the same to the officer on demand; and then the officer made a demand of the goods, and failing to obtain them, brought an action upon the receipt; the defendant afterwards filed his petition in bankruptcy, was decreed a bankrupt, obtained his certificate of discharge, and pleaded it in bar of the action; *it was held*, that the action could be no further maintained. *Fowles* v. *Treadwell*, 377.

See EQUITY, 16. RECEIPTER, 3, 4.

## BETTERMENTS.

See CONSTITUTIONAL LAW. SEIZIN AND DISSEIZIN.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Where the plaintiff received post notes, payable at a future day and in another State, and agreed to account for the same to the defendant on his note to the plaintiff if collected; or to return them, if payment thereof should be refused; it was the duty of the plaintiff to cause the post notes to be seasonably presented for payment, when the day of payment should come, and if they were not then paid to return them to the defendant. *Medomak Bank* v. *Curtis*, 36.
2. Where a note is made payable "from the avails of the logs bought of M. M., when there is a sale made," it is not payable upon a contingency, but absolutely; and when a reasonable time has elapsed to make sale of the logs. *Sears* v. *Wright*, 278.
3. Parol evidence is inadmissible to show, that it was the intention of the parties, when the note was given, that if it turned out, that on manufacturing the logs, there was a total loss thereof to the owner, the note was not to be paid. *Ib.*
4. A bill of exchange, promissory note, or order, made payable to a particular person, which has been paid by one whose duty it was to make the payment, without any right to call upon another party to repay the amount, is no longer a valid contract. It has performed its office, and ceases to have a legal existence. *Ballard* v. *Greenbush*, 336.
5. But this rule does not apply to a bank note, which is not a contract with any particular person, but with any one who may become the bearer or holder of it. *Ib.*
6. It is only when an assignee has acquired a title through the promisee, that he can insist upon the right to maintain an action in the name of the payee of a paper not negotiable. *Ib.*
7. The possession of an indorsed promissory note is *prima facie* evidence that it is the property of the holder; but although the legal property may pass to the holder, it is competent to show by parol testimony, that such note was held in trust, to be accounted for in a particular manner. *Scott* v. *Williamson*, 343.
8. Where certain notes, payable to the plaintiff, had been indorsed and delivered to the defendant, to be by him appropriated, when collected, in part payment of notes of a much greater amount held by the defendant against the plaintiff, secured by a mortgage of land; and, afterwards, a settlement was made between the parties, wherein these notes were not accounted for by the defendant, he stating that he had never received payment therefor, and he covenanting, on such settlement, that he would not collect any further sum on his notes against the plaintiff, unless disturbed in the quiet enjoyment of the mortgaged estate; *it was held*, that the plaintiff might recover of the defendant, in an action for money had and received, the amount of the notes thus indorsed and delivered to the defendant, on proof that he had received payment thereof before the settlement. *Ib.*
9. If a note, payable to a thrid person or *bearer*, has been transferred to the defendant, and he has transferred it to the plaintiff without indorsing it himself, and the plaintiff, *afterwards*, procures the indorsement of the defendant by stating to him, "that it was a mere matter of form, and that by putting his name on it he would not be rendered liable therefor;" testimony of these facts is admissible to show, that the indorsement was made without consideration. *Larrabee* v. *Fairbanks*, 363.
10. And if the indorsement of the defendant was procured upon such note by false pretences on the part of the plaintiff, parol proof thereof is admissible, and furnishes a complete defence. *Ib.*

11. It is sufficiently early to charge the indorser of a promissory note, living in a different State, if a notice of the dishonor, directed to him, be put into the mail within a convenient time after the commencement of business hours of the day succeeding that of the dishonor. *Chick* v. *Pillsbury*, 458.
12. The defendant and several others signed a paper wherein they agreed, that all notes to which they were respectively a party, left in a certain bank for collection, should be considered the same as if made payable at that bank, and then said — "and we further agree, that notices left at the places set against our names shall be considered legal and binding on us" — and no place was set against the name of the defendant; he was left thereby in a condition to insist upon his legal rights as indorser, so far as it respected the place to which notices should be sent. *Smith* v. *Trickey*, 539.

See Evidence, 14, 15. Usury, 1.

## BOND.

See Contract, 10. Poor Debtors.

## CARRIER, COMMON.

See Bailments.

## CHEATING BY FALSE PRETENCES.

On the trial of an indictment, under the statute, for cheating by false pretences, the offence is complete, if there be one pretence, and that proved to be false, and made with a fraudulent design to obtain credit for goods, and credit is induced to be given thereby, although the indictment charges that the goods were obtained by more than one false pretence.
*State* v. *Dunlap*, 77.

## CONSIDERATION.

1. In this State, it has not been authoritatively settled, that a total want of title in a grantor will not be a good defence to a note given in consideration of his conveyance, when not in the hands of an innocent indorsee.
*Jenness* v. *Parker*, 289.
2. When a person has received a benefit from, or occasioned a loss to another, and a statute, or rule of public policy, protects him from making compensation, the moral obligation so to do remains, and constitutes a legal consideration for a promise to do it. *Warren* v. *Whitney*, 561.
3. But a promise to pay a debt voluntarily discharged, is not binding for want of a legal consideration. *Ib.*

See Bank, 8, 9, 10. Contract, 3, 6. Conveyance, 4, 5. Guaranty, 3.

## CONSTITUTIONAL LAW.

1. The legislative department of the government may, prospectively, determine that a tenant for life shall have the right to make permanent improvements upon the estate; and that he, or those claiming under him, shall be entitled to receive compensation for the value of them, to be ascertained in such manner as it may judge best. *Austin* v. *Stevens*, 520.
2. If the St. 1843, c. 6, must be construed to be applicable to a case where by the law of the State, the improvements made by the tenant for life had been incorporated into and become a part of the reversionary interest, and were the absolute property of the reversioner; and to authorize one, who had no title to the improvements, for many months before the passage of the act, to obtain the value of them from the grantee of those who during that time had, by the existing laws, a perfect title to them; so much of the act, as attempts to do this, must be in direct conflict with those provisions of the constitution of this State, which secure to each citizen the right to possess and preserve his private property, unless it be required for the public use; and is therefore wholly inoperative. *Ib.*

## CONTRACT.

1. Where the defendants, by a contract in writing, undertook "to clear him (the plaintiff) from all liabilities, tax, or assessment, that have or may arise,

from his one share in the Scythe Factory," the name used by a company of unincorporated individuals who had associated to carry on the manufacture of scythes, of whom the plaintiff was a member, *it was held*, that the meaning was, that the defendants would indemnify the plaintiff for whatever of damage he might unavoidably sustain from his liabilities, that were strictly legal; and that if the plaintiff should be compelled to pay company debts, he should first seek his remedy over against his associates for all, except his share, and for the whole, if there was company property sufficient for the purpose. *Lombard* v. *Fiske*, 56.

2. And where a creditor of the company had obtained judgment against the individuals composing it, including the plaintiff and principal defendant, and had taken out execution, and the judgment debtors had been arrested thereon, and had severally given bonds; and afterwards one of the number agreed with the creditor to pay him the amount, and take an assignment of the judgment and bonds for his own benefit, to a third person, and the money was paid and the assignment was executed; and then a suit was brought, in the name of the creditor, against the plaintiff on his bond, and judgment was rendered by default for debt and costs, including the extra interest, given against the principal in such bonds by the statute, without notice given by him to the defendants, and the same was paid by the plaintiff; *it was held*, that even if the payment by one of the judgment debtors on the assignment to a third person, was not a payment and discharge of the judgment and bonds, the plaintiff was not entitled to recover of the defendants the extra interest so paid. *Ib.*

3. Contracts to pay for real estate, and pews in meetinghouses by statute are to be deemed such, are not voidable, unless there shall appear to have been a total failure of consideration; whether the conveyance of the same be by general warranty, or otherwise. If any thing passed by the conveyance, a note given for the consideration is recoverable; and if there be a partial failure of consideration, the grantee is remitted to his covenants, if any there be, for his remedy. *Severance* v. *Whittier*, 120.

4. Where a contract is made whereby one party engages to cut and haul timber from land of the other at a stipulated price per thousand feet, "to be estimated by P. (a surveyor named) and cut to his satisfaction," the parties are bound by his estimate, it not appearing that such surveyor acted corruptly, or made any gross mistake. *Oakes* v. *Moore*, 214.

5. Where the plaintiff performed labor upon a vessel and charged it to the same, and afterwards requested payment therefor of the defendant, supposing him to be the owner; and the defendant wrote to the plaintiff, saying that he held the vessel for security, and that it did not belong to him to pay any bills on her, but at the same time that he was holden for them, and requested the plaintiff to take an order on a third person for the amount; this was held to be sufficient to authorize the jury to find a verdict for the plaintiff. *Oakes* v. *Cushing*, 313.

6. And as such labor increased the value of the security, that was held to be a sufficient consideration for the written promise of the defendant to pay therefor. *Ib.*

7. When one person performs services for the benefit and with the knowledge and tacit consent of another, the law implies a promise to pay a reasonable compensation for them. Such a promise, however, is implied only, when there does not appear to have been an express agreement or employment. *Weston* v. *Davis*, 374.

8. When two or more persons are jointly interested to have certain services performed, and one of them requests a third person to perform them, he may be presumed to have done so in behalf of all those interested, unless there be something to indicate a different intention. *Ib.*

9. When one intends to give credit to two or more persons, that intention, to affect them, should be made known, expressly, or by inference from the circumstances attending the transaction. *Ib.*

10. Where a bond was given to the plaintiff by the defendants, with a condition that it should be void, if the defendants should pay the plaintiff's part of all debts due from a company consisting of the plaintiff and one of the defendants, and save and keep him harmless and indemnified from all his liabilities for the company, "as is named in a certain agreement," described,

between the partners; and after the making of the agreement and prior to the execution of the bond, the defendants, as principals, and the plaintiff as their surety, had given their note for one of the demands named in the agreement, which note was afterwards paid in part by the plaintiff; *it was held*, in a suit upon the bond, that the defendants were liable for the amount paid on the note by the plaintiff. *Jepson* v. *Hall*, 422.

See Bank, 7. Bills and Notes, 12. Consideration. Equity. Evidence, 1, 5, 16, 17, 24. Guaranty. Lien, 4, 5, 6. Payment. Shipping.

## CONVEYANCE.

1. Where a resolve of the Commonwealth of Massachusetts authorized the conveyance of a lot of land, and provided that such conveyance should not "affect the rights or claims of any actual settlers, claiming lands under any title, not derived from the Commonwealth, or by possession merely, against each other; but that all such claimants may pursue their legal remedies as if no such conveyance had been made;" *it was held*, that this provision extended not only to such as were actual settlers upon the land at the time, but to their grantees and assignees. *Tilton* v. *Hunter*, 29.
2. The recording of deeds is constructive notice only to those, who would claim under the same grantor. *Ib.*
3. If a conveyance is made of a tract of land, described by metes and bounds, containing fifty acres, having at the time a house, barn and shed thereon, but having no particular portion of the land designated by occupation or otherwise with the buildings, and these words are in the habendum of the deed — "excepting and reserving all the buildings on said premises" — the whole land, including that under the buildings, passes to the grantee, and the grantor retains the buildings as personal property. *Jenness* v. *Parker*, 289.
4. To constitute a valid defence, in an action between the parties or wherein the same defence may be made, to a note given in consideration of land conveyed by deed with covenants of warranty, the defect of title must be entire; and so that nothing valuable passes by the conveyance. *Ib.*
5. If, in such case, any thing valuable does pass to the grantee short of an absolute interest, in conformity to the terms of the deed, it becomes a case of unliquidated damages, the remedy for which should be sought by an action of covenant broken. *Ib.*
6. Where the grantee enters into the actual occupation and improvement of the premises under his deed, but does not record it, the title cannot be revested in the grantor, by the delivery back of the deed, for one purpose, and yet remain in the grantee for another. *Hall* v. *McDuff*, 311.
7. If the grantee consents to the delivery back of such unrecorded deed to the grantor, for the purpose of having security given by mortgage for a portion of the consideration money remaining unpaid, no authority is thereby given to the grantor to make an absolute conveyance of the estate. *Ib.*
8. Where the description in the deed commences with, "one undivided moiety or half part of a certain lot or tract of land, butted and bounded as follows," and proceeds with a particular recital of the metes and bounds of the lot, and concludes with these words, — "containing fifty-two acres and eighty rods and no more, and including the salmon fishery contiguous to said land," but an undivided half of the salmon fishery is conveyed. *Duncan* v. *Sylvester*, 482.
9. A conveyance by one tenant in common of a specific part of the common real estate is void as against a co-tenant; and is not valid until such co-tenant gives notice to the grantee, that he elects to avoid it. *Ib.*

See Consideration, 1. Equity, 8. Estoppel. Fraud. Trustee Process.

## CORPORATION.

1. If the cashier of a bank enters into a contract in behalf of the corporation, without authority for the purpose, and the bank claims the benefit of the contract, it is thereby ratified by the corporation. *Medomak Bank* v. *Curtis*, 36.

2. Corporations are subject to the same laws in relation to the acts of their agents, which are applied to individual persons with respect to the acts of agents of their appointment. *Frankfort Bank* v. *Johnson*, 490.

See BANK. EQUITY, 1, 2, 3, 4. EVIDENCE, 14, 15, 18.

## COSTS.

See RECEIPTER, 4. USURY, 3.

## COUNTY COMMISSIONERS.

1. If it be not irregular to grant an order of notice at a court holden in another county, it is improper to call the County Commissioners out of their county, to answer to a petition for a mandamus, complaining of their acts and doings, as such, within their county. *Woodman* v. *County Com'rs*, 151.
2. A writ of mandamus is grantable at the discretion of the court, and not as matter of right. *Ib.*
3. Where there has been an increase of damages to land, occasioned by the location of a highway over it, by the verdict of a jury, and the prevailing party has taxed his bill of costs, and laid it before the County Commissioners for allowance, and they have allowed a part of the items, and rejected the rest, this Court will not grant a writ of mandamus to the commissioners for the purpose of correcting their decision as to the taxation of such costs, to the end that other items may be allowed. *Ib.*

## COVENANT.

1. It is in the election of a subsequent grantee of a mortgagor, with covenants against incumbrances and for quiet enjoyment, to elect to redeem as under the former, or to suffer an eviction as under the latter. If he redeems, his right of action will commence from the time of such redemption; but if he waits for an eviction, his right of action will then take place. *Heath* v. *Whidden*, 383.
2. The covenant for quiet enjoyment runs with the land, and descends to heirs; but that against incumbrances does not. *Ib.*
3. If twenty years had elapsed from the time the cause of action arose for breach of the covenants for quiet enjoyment, without any explanation, satisfaction would be presumed; but no period short of that, without other circumstances tending to raise the presumption, would be sufficient. *Ib.*
4. In a special action on the covenants of a deed of warranty containing the usual covenants, setting out all the facts, and alleging a breach of the covenant against incumbrances, it is competent for the Court to permit an amendment by alleging a breach of the covenant for quiet enjoyment. *Ib.*

See CONVEYANCE, 5.

## DAMAGES.

In an action against an officer for a false return, made by mistake, in certifying that he had left with the plaintiff a true copy of a notice to appear and submit to an examination, &c. that he might thereby prevent the issuing of an execution against his body, (under the poor debtor act of 1831,) when in fact there was an error in the copy; and the mistake was known to the present plaintiff in season to have avoided any inconvenience thereby, at a trifling expense; *it was held*, that the plaintiff was entitled to recover only such sum as would have fully paid him for ascertaining the truth, and not damages for the injury sustained by him in being arrested and imprisoned on the execution. *Wright* v. *Keith*, 158.

See CONVEYANCE, 5. GUARANTY, 2. OFFICER, 4, 13, 15.

## DEED.

See CONVEYANCE.

## DEPOSITION.

See EVIDENCE, 11, 12, 13.

## DOWER.

As the mortgagor in possession is seized as to all persons but the mortgagee, his widow is entitled to be endowed of the equity of redemption; and an assignment of her dower will be valid and effectual against all persons excepting the mortgagee and those claiming under him.
*Campbell* v. *Knights*, 332.

## EQUITY.

1. No individual members of a body corporate have the right, by a bill in equity, without the consent of such corporation, legally obtained, to call the agents or officers thereof to account with the plaintiffs, or to make settlements and adjustments with them, for money of the corporation, alleged to be in the hands of such officers. *Hersey* v. *Veazie*, 9.
2. If the defendants in the bill in equity, as agents of the corporation, have acted fraudulently towards it, obtained fraudulent judgments against it, and on them have made a fraudulent sale of its franchise, these are wrongs primarily committed against the corporation. And until it has been shown to have been incapable of doing it, or to have been faulty, no corporator can assume the right of the corporation to obtain redress for such wrongs, and to settle for them with the persons committing them. *Ib.*
3. If after proper exertions made to procure the corporation to obtain redress, it had been found incapable of doing it, or had improperly or collusively refused to do it, the corporators might, perhaps, have obtained redress by making such corporation a party defendant; but unless it is made a party, it would be improper for the Court to proceed and compel the defendants to make a settlement, which could not be conclusive upon the rights of the corporation. *Ib.*
4. Where shares in a corporation have been transferred by a debtor to his creditor, the latter agreeing with the former "to account for the said shares, or reconvey them," the debtor has no such interest as would enable him to maintain a bill in equity against a third person by reason thereof. *Ib.*
5. It is a general rule, that all interested in the subject of a bill in equity should be made parties thereto, as plaintiffs or defendants, that a complete decree may be made between them. *Hussey* v. *Dole*, 20.
6. The want of proper parties to a bill in equity may be taken advantage of at the hearing. *Ib.*
7. But when the objection for defect of parties is not taken until the hearing, it is competent for the Court, on such terms as they may deem proper, to order the case to stand, with leave to the plaintiff, if he shall move therefor, to amend by adding new parties. *Ib.*
8. Where a conveyance is made of certain lands in trust that the grantee will appropriate the proceeds of the sale thereof in a certain manner; and afterwards, another grantor, by deed of warranty, conveys the same and other lands to the same grantee, who at the same time gives back to the last grantor a bond, conditioned to account to him for the proceeds of all the sales in a manner different from that indicated in the first conveyance; the grantee will not be relieved from the duty undertaken by him in the bond, by reason of any claims on the part of those interested in the trust, upon which the first conveyance was made. *Ib.*
9. This Court has power under the revised statutes (c. 96, § 10) to hear and determine, as a court of equity, "all suits to compel the specific performance of contracts in writing," "when the parties have not a plain and adequate remedy at law." But under this provision the court must see not only that the contract is in writing, but that it is in force as such. If merged in a judgment, it would no longer be a contract in writing within the purview of the statute. *Bubier* v. *Bubier*, 42.
10. It should appear, also, that the plaintiff had not a plain and adequate remedy at law. If he has a judgment in his favor upon the contract in a court of law, he must be regarded as having there a plain and adequate remedy upon it. *Ib.*
11. And if the contract be in reference to the personalty, and not to the realty, it is, with a few exceptions of a peculiar character, considered that a party has his appropriate remedy at law; and will not be entitled to the aid of a court of equity to enforce the performance of it. *Ib.*

## ERROR.

3. On such exceptions this Court can only affirm or reverse the judgment. *Ib.*
4. In proceedings in error, there should be a strict adherence to the rules of law. *Ib.*
5. In order to obtain the reversal of the judgment of the justice, by a writ of error, sufficient cause for the reversal should appear, either upon the record, or upon legal exceptions. *Ib.*

## ESTOPPEL.

The law will not permit one who has by deed admitted a matter to be true, to allege it to be false; but the estoppel cannot be extended beyond the exact terms of the admission. *Campbell* v. *Knights*, 332

## EVIDENCE.

1. Although contracts in writing cannot be varied in their terms by parol evidence, yet it is competent for one party to show by parol, that the performance of such contract has been prevented or waived by the other party. *Medomak Bank* v. *Curtis*, 36.
2. It is not competent for the respondent to prove on the trial of an indictment, that a witness, introduced by the attorney for the State, "bore a notoriously infamous character." *State* v. *Bruce*, 71.
3. On the trial of an indictment wherein the accused is charged with having obtained property of a witness by means of threats, testimony to prove that the same property was afterwards found, "in a concealed state in the dwellinghouse of" the accused, is admissible, as it might have a tendency to corroborate the testimony of the witness by satisfying the jury, that the respondent was conscious of having improperly obtained it. *Ib.*
4. The burden of proof is upon the plaintiff, in an action against an officer for neglecting to attach an article of personal property upon a writ, to show that he has suffered damage by such neglect. The Court cannot infer it without proof. *Wolfe* v. *Dorr*, 104.
5. Where the plaintiff, by his agreement in writing, acknowledged that he had received of the defendant, on June 15, 1841, $40,00 and on June 4, 1842, $12,00, and promised to indemnify the defendant against a certain claim and procure a discharge therefrom, when the defendant should "pay two fifty dollar notes, signed by him and payable to the plaintiff at different times, dated Aug. 18, 1840; the above named $40,00, and $12,00, are in part pay for the two fifty dollar notes above named;" and where the defendant produced at the trial of an action on the last note, the fifty dollar note first payable, cancelled; *it was held*, that these facts furnished no legal presumption, that the note taken up was paid by other money, and not by the sums mentioned in the agreement, especially, as there was testimony tending to show, that the defendant had promised to pay the note in suit. *Neal* v. *Brainerd*, 115.
6. Testimony, then irrelevant, may with propriety be admitted, under the expectation that it will be connected with the case by other testimony, to be laid out of the case unless so connected as to become relevant. *State* v. *McAllister*, 139.
7. Testimony, having a tendency to prove the issue, is admissible for the consideration of the jury, although alone it might not justify a verdict in accordance with it. *Ib.*
8. On the trial of an indictment for passing counterfeit bank bills, knowing them to be such, testimony that the accused passed similar bills about the same time to other persons, is admissible, to show the *scienter*. *Ib.*
9. By the Rev. Stat. c. 1, § 2, all acts of incorporation are made public statutes, and the Court will judicially take notice of them. *Ib.*
10. In a criminal trial, an unnecessary omission on the part of the accused to offer evidence which might operate in his favor, if attainable, is a circumstance which the jury may consider, with other evidence in the case; and under this principle, the omission of the accused to furnish evidence of his previous good character, may be called to the consideration of the jury in support of the prosecution. *Ib.*
11. The certificate of the person who takes a deposition, that "the witness was sworn according to law," is sufficient evidence that the oath was adminis

See Action, 1, 11. Bank, 1, 2, 3, 4. Bills and Notes, 3, 7, 9, 10. Contract, 8. Execution, 2. Indorser of Writ, 3, 4, 5, 12, 13. Militia, 1, 2, 3, 5, 8, 9. Officer, 5, 16. Poor Debtors, 9. Practice, 10, 11. Replevin. Trespass, 3.

## EXCEPTIONS.

See ERROR. NEW TRIAL, 2. PRACTICE, 3, 13.

## EXECUTION.

1. It is a part of the duty of officers, employed in the levying of executions, before proceeding to levy upon an undivided portion of the estate of the debtor, to ascertain whether it presents a case, in which the setting off of a portion of it by metes and bounds will be prejudicial to, or spoil the whole. If he should persist in setting it off in severalty, when by so doing, he would injure the whole, he might subject himself to an action, as for a misfeasance; and the like would be the case, if he should unreasonably persist in setting it off in undivided portions, when it could with propriety be set off in severalty. *Mansfield* v. *Jack*, 98.
2. The return of an officer, that the land, upon which an execution is to be levied, "cannot be divided without prejudice to, or spoiling the whole," is conclusive of the fact, as between the creditor and debtor, and those claiming under them; and can be controverted only in an action against the officer, or his principal, for misfeasance. *Ib.*
3. And it would seem, that an execution may be legally levied upon an undivided portion of any lands, or buildings of the debtor, where the officer will certify, that it "cannot be divided without prejudice to, or spoiling the whole," if its value is more than sufficient to satisfy the execution. *Ib.*
4. Where a levy is made upon an undivided share of certain real estate, in order that such levy should be supported against any one but the debtor and those claiming under him, it should not appear, that he was tenant in common of a larger tract, including the premises levied upon; nor otherwise than that he was the owner of an undivided portion of that particular parcel, or that, owning the whole of that parcel, in severalty, the levy could not be made thereon of a particular portion, setting it out by metes and bounds, without damage to the estate. *Gregory* v. *Tozier*, 308.

See ACTION, 11. ALIEN.

## FISHERY.

1. Where the plaintiff and defendant were tenants in common of a salmon fishery, the plaintiff is entitled to recover damages, in an action of the case, for a continued deprivation of the enjoyment of his rights, in being kept out of the occupation of any part of the fishery, after he was first deprived of it by the defendant, without having first regained possession by entry or otherwise. *Duncan* v. *Sylvester*, 482.
2. The owner of land adjoining tide waters, becomes, by the ordinance of 1641, the proprietor of the flats to low water mark, not to exceed the distance of one hundred rods, subject to the free fishing of each householder in the waters covering them. But the householder, or citizen, does not thereby become entitled to place weirs, or other permanent erections, upon those flats, or to set his nets, or seines, "making them fast in the usual way by grapplings to the shore." These are advantages, often of great value, which the riparian proprietor has over others. *Ib.*

See CONVEYANCE, 8.

## FORCIBLE ENTRY.

See MORTGAGE, 15.

## FRAUD.

1. If a woman conveys her estate to a third person, in trust, for her own use, and then marries, the conveyance is fraudulent and void as to her prior creditors. *Hamlin* v. *Bridge*, 145.
2. The bankruptcy of the husband does not take away the right of a creditor of the wife before the coverture to look to her property, fraudulently conveyed, for the payment; nor does his discharge as a bankrupt, destroy the right to enforce the debt against the property of the wife. *Ib.*

See BANK, 10, 13, 16. EQUITY, 16.

## FREIGHT.

See Bailments. Shipping.

## GUARANTY.

1. Where there is a guaranty by a third person to pay the amount due on a note, then payable, at a stipulated time, no demand on the maker of the note, or notice to the guarantor, is required to make the latter liable on his guaranty. *Cooper* v. *Page*, 73.
2. If one, in consideration of fifteen dollars, guaranties the payment of the note of a third person for three hundred dollars, and the contract of guaranty is broken, the note remaining unpaid, the damages to be recovered, are — not the consideration paid — but the amount due on the note guarantied. *Ib.*
3. A guaranty of payment of a pre-existing promissory note, where the only consideration is a past benefit or favor conferred, and without any design or expectation of remuneration, is without valuable consideration, and cannot be enforced. *Ware* v. *Adams*, 177.

## HUSBAND AND WIFE.

See Fraud. Tenancy for Life, 1.

## INDICTMENT.

1. If all the facts alleged in an indictment may be true, and yet constitute no offence, the indictment is insufficient. And a verdict does nothing more than to verify the facts charged. *State* v. *Godfrey*, 232.
2. Where an offence is created by statute, and there is an exception in the enacting clause, the indictment must negative the exception. But if there be a proviso which furnishes matter of excuse to the party, it need not be negatived in the indictment, but he must show it, if he would avail himself of it. *Ib.*
3. Where certain persons were authorized by an act of the legislature to erect a dam across a river which had by prescription become a public highway, in a certain manner, and within prescribed limits, and they had proceeded to erect a dam across the river, at or near the same place; and an indictment at common law was found against them for causing a nuisance by the erection of the dam; such indictment is insufficient, and on the return of a verdict of guilty thereupon, judgment must be arrested, if the indictment contains no averment that the dam was beyond the limits prescribed in the charter, and does not in any way allege, that it was not erected in pursuance of the authority given by the statute. *Ib.*

See Cheating. Evidence, 2, 3, 8, 10. Practice, 1, 2.

## INDORSER OF WRIT.

1. The liability of the indorser of a writ is incurred when the writ is indorsed. *Thomas* v. *Washburn*, 225.
2. Where the liability of an indorser of a writ was incurred before the Revised Statutes were in operation, and an action against him was commenced after they had become laws in force, the provisions of those statutes in relation to the form of action and the limitation of suits do not apply. *Ib.*
3. In an action against the indorser of a writ the return of an officer on the execution, showing that no property of the judgment debtor was to be found within his precinct, is conclusive of the fact so returned between the parties. *Ib.*
4. But such return is not conclusive evidence of the inability of the judgment debtor. *Ib.*
5. The liability of indorsers of writs depends upon the inability or avoidance of the debtor; and if it be shown that he was possessed of property, which it is reasonable to suppose could have been seized upon execution by the creditor, he exercising ordinary care and vigilance, in any other county in the State than the one to which the officer's return refers, it would be a defence to an action against an indorser of a writ for want of ability in the debtor. *Ib.*

## INFANT.



## INNHOLDER.



## JUSTICE OF THE PEACE.



## LANDLORD AND TENANT.

2. Where the plaintiffs, the defendant and two others had built a vessel jointly, and after the lapse of more than six years from the time any cause of action had accrued, the defendant wrote a letter to a son of one of the plaintiffs, wherein he, after stating the difficulties that he and the two other owners, had experienced in their attempts to procure a settlement with the plaintiffs, says, "when the whole can be settled we are ready; then, if I owe your father I will pay every cent that is due;" and no attempts had been made by the plaintiffs to procure a settlement; *it was held*, that the demand was not thereby taken out of the operation of the statute of limitations. *Ib.*

See COVENANT, 3.

## MALICIOUS THREATS.

A person whose property has been stolen, has himself no power to punish the thief without process of law, and cannot claim the right to obtain compensation for the loss of his property by maliciously threatening to accuse him of the offence, or to do an injury to his person or property, with intent to extort property from him. *State* v. *Bruce*, 71.

See PRACTICE, 2.

## MANDAMUS.

See COUNTY COMMISSIONERS. PRACTICE, 8.

## MILITIA.

1. As the order of the Major General of a division, convening a court martial, was required by the militia act of 1834, c. 121, to be recorded by the orderly officer of the division in the orderly book kept by him, a copy of such record properly certified by him, was legally admissible in evidence.
*Parker* v. *Currier*, 168.
2. The orignal papers, signed and sealed by the president of a court martial, holden in pursuance of an order from the Major General of the division, setting forth particularly the proceedings of such Court, were, as well as certified copies of the same, competent and sufficient evidence to sustain an action for the recovery of a fine imposed by such court martial. *Ib.*
3. In an action against a town or plantation for neglecting to furnish money instead of rations for soldiers present at a militia review, under the provisions of the militia act of 1834, the clerk of the company is entitled to maintain the action, by showing that the soldier named in the writ was an inhabitant of the town, and a member of a militia company: that he performed militia duty as a member thereof at an inspection and review ordered by the Major General of the division; and that the commanding officer of the company made a requisition of the selectmen for the money for the soldiers under his command, to be paid at the time of the inspection and review, as provided for by the statute.
*Williamsburg* v. *Gilman*, 206.
4. Defining the limits of militia companies by the selectmen of towns, was not made a condition to be performed before the members of companies were required to perform militia service. *Ib.*
5. Being actually present with the company, armed and equipped, and doing militia duty at an inspection and review, is *prima facie* evidence, that the soldier belonged to the company. *Ib.*
6. If a soldier, who had cause to have been excused from the militia duty which the law designed he should perform, chose to waive the right, and did actually do the duty, that he could have been excused from, does not relieve the town from its obligation to furnish the money required by the statute. *Ib.*
7. It is not necessary that the requirement of the selectmen of a town by the commanding officer of a militia company to furnish money for the soldiers at an inspection and review, should contain, or be accompanied with, a list of the names of the soldiers; or that if one was furnished, that the list should be accurate, if it contained a sufficient number. *Ib.*
8. The commanding officer of the company is a competent witness on the trial of such action. *Ib.*

15. Where a mortgage of a dwellinghouse, standing on land of a third person with his permission, has been foreclosed, and the mortgagor, after having received thirty days notice in writing to quit the premises in manner provided by Rev. Stat. c. 128, "Of forcible entry and detainer," still remains in possession, the mortgagee cannot, nor can his assignee, sustain a complaint against the mortgagor, under that statute, to obtain possession of the premises. *Sawyer* v. *Hanson*, 542.
16. When a valid mortgage of personal property is made and duly recorded, an officer is not authorized either by Rev. Stat. c. 117, or by the act of amendment of 1842, c. 31, to make an attachment of the same *on mesne process*, as the property of the mortgagor, without first paying or tendering the full amount of the debt due, secured by the mortgage. *Smith* v. *Smith*, 555.
17. If a mortgage of personal property is duly recorded, it becomes effectual, being otherwise valid, without a formal delivery of the property, whether it be the first, or a second mortgage of the same property. *Ib.*
18. There may be a second mortgage of personal property, under our statutes, which shall be valid against all but the first mortgagee and his assigns. *Ib.*
19. It is not necessary, that the payment or discharge of a first mortgage of personal property should be recorded, in order that a second one should hold the property against an attaching officer. *Ib.*

See ACTION, 8, 9. COVENANT, 1. DOWER. EQUITY, 22, 23, 24. LIEN, 4.

## NEW TRIAL.

1. When a case is presented on a motion or petition for a new trial, or for a review, for any cause not arising out of an illegal or erroneous act of the Court, a new trial cannot be claimed as a matter of right; but may be granted or refused by the Court in the exercise of its legal discretion. And in such case, it may be granted on such terms and conditions, as the Court may consider reasonable. *Tuttle* v. *Gates*, 395.
2. But when a case has been reserved on the report of the presiding Judge, or presented on a bill of exceptions, and it has been ascertained that the instructions to the jury were erroneous, or that illegal testimony was admitted, or that legal evidence, material to the issue, was excluded, the party, if aggrieved, would seem to be entitled to a new trial as a matter of right; the Court can impose no conditions, unless it has acquired some authority from his consent; and if a new trial is granted, the whole case should be opened for trial. *Ib.*

See PRACTICE, 7.

## NUISANCE.

See INDICTMENT.

## OFFICER.

1. The general rule is, that where personal property attached upon the writ, has been lost through the negligence of the attaching officer, or has been misappropriated by him, he is liable to the attaching creditor for the fair value of the property at the time it would have been taken on the execution, had it remained to be taken thereon. *Franklin Bank* v. *Small*, 52.
2. There are exceptions, however, to this general rule; such as where the officer, immediately upon having attached the property, converts it to his own use; or where he should realize a greater value by a sale thereof; or should obtain it of a receiptor, or of some one who had tortiously taken it from him. *Ib.*
3. When an officer has a precept wherein he is commanded to arrest the body of an individual, he has the right to select such particular time of day as he thinks most expedient, under the circumstances, and is authorized to make use of so much force as is necessary to accomplish the object. *Wright* v. *Keith*, 158.
4. In an action against an officer to recover damages occasioned by neglect of official duty, in omitting to serve and return an execution in favor of the plaintiff, the measure of damages is the amount of the injury actually sustained. *Ware* v. *Fowler*, 183.
5. Where the officer arrested the debtor, who gave a poor debtor's bond, which was approved by two justices, and the debtor released, but neither the ex-

ecution nor the bond was returned into the clerk's office, *it was held*, that the defendant might show, in mitigation of damages, that the obligors were insolvent and unable to pay the debt. *Ib.*

6. If an officer has cross executions put into his hands, wherein the creditor in one is debtor in the other, and he is requested to set off one against the other, he must make the set-off, if the law allows it, or he will render himself liable. *Leathers* v. *Carr*, 351.

7. But if there be reasonable apprehension of danger in proceeding to act, the officer may require an indemnity from the consequences attendant upon making such set-off. *Ib.*

8. The Lord's day is not to be reckoned as one of the four days during which an officer must keep goods after seizure on execution before the sale. *Tuttle* v. *Gates*, 395.

9. A sale of goods, made by an officer on execution, must be regarded as a legal transfer of the property, although he may not have conformed to the requirements of the statute in making the sale. *Ib.*

10. But this principle may not apply to the sale by an officer of any description of personal property, not tangible, and represented only by documentary evidence of title. *Ib.*

11. Any person injured by any such irregular proceedings of an officer may, by an action against him, obtain redress. *Ib.*

12. As the statute is peremptory, that the penalty of a poor debtor's bond shall be "in double the sum for which he is arrested or imprisoned," an officer cannot be held to have performed his duty, if he takes a bond otherwise. *Dyer* v. *Woodbury*, 546.

13. But by the provisions of the poor debtor act of the Rev. Stat. (c. 148, § 43,) the creditor cannot recover of the officer, for such failure of official duty, "to a greater extent than the damage actually sustained by him thereby." *Ib.*

14. The officer who arrests a debtor upon an execution, is bound to accept a bond, made in all respects in conformity to the true intent and meaning of the statute, with sufficient surety or sureties approved as the statute requires, but still is bound to act in good faith, as well towards one party as the other; and if he knew or had good reason to believe that a fraud had been practised, and that the sureties in the bond tendered to him by the execution debtor were utterly worthless, he would not be bound to receive it, although the sureties were approved by two justices; and should he knowingly accept such bond, and thereupon liberate the debtor, he would be guilty of a breach of official duty. *Ib.*

15. In an action of the case against an officer for neglect of official duty, the plaintiff can recover but the amount of damages actually sustained. *Ib.*

16. Where an officer returns upon a writ an attachment of personal property, and sets up such attachment in defence, on the trial of an action of replevin against him for the same property, it is to be presumed that he did whatever was necessary to constitute and preserve his attachment; and in the absence of any opposing proof, this will be sufficient evidence, that the property had been in his possession. *Smith* v. *Smith*, 555.

See Action, 2, 3, 4, 5, 6, 7. Bankruptcy, 4. Damages. Mortgage, 2, 3, 9, 11, 16. Receipter.

## PARTNERSHIP.

See Assignment, 3. Equity, 18, 19, 20.

## PAYMENT.

1. Where a person promises, by his note, to deliver a certain quantity of hay, of a stipulated quality, at a place named, and within a stated time, the promise is performed, if hay, sufficient in quantity and quality, was deposited at the place within the time agreed upon, and set apart and appropriated to the payment of the note. *Leballister* v. *Nash*, 316.

2. It is not necessary, in such case, that the hay "should be weighed and specially turned out." The quantity may be otherwise ascertained, at the risk of the person making the payment; and no turning out, or change of position, is necessary, further than to separate or set it apart, so that it may be identified and removed by the owner. *Ib.*

See Bills and Notes, 4, 5. Contract, 2.

## PLEADING.

Where the demandant entered under a levy, and thereupon became seized, and gave a bond to the tenant, conditioned to convey the same premises to him by deed of warranty on payment of a certain sum, and the tenant entered into possession thereof under the demandant, and continued in possession until the commencement of the suit, without having paid the sum agreed upon, he cannot set up any defects in the levy in defence, showing no title in himself, or submission on his part to the title of any one else. *Goodenow* v. *Kilby*, 425.

See ACTION, 10. BANKRUPTCY, 4. TRESPASS, 4.

## POOR.

1. A person of the age of twenty-one years may gain a settlement in a town by having his dwelling and home therein for the space of five years together, without receiving support or supplies as a pauper, irrespective of the manner in which his home had been acquired or continued. *Augusta* v. *Turner*, 112.
2. Thus a female, *non compos mentis*, over twenty-one years of age, who had removed into a town with her mother, and composed a part of her family during the time, was held to have been capable of gaining a settlement in her own right by such residence. *Ib.*
3. Under the Stat. 1821, c. 122, a legitimate child, after he has become twenty-one years of age, although voluntarily living with his father, no longer has a derivative settlement under him, if the father acquires a new one; but the settlement of the child when he became twenty-one years of age, remains, until he gains a new one for himself. *Hampden* v. *Brewer*, 281.

## POOR DEBTORS.

1. Where one of the alternatives in the condition of a bond, given by a debtor to procure his release from arrest on an execution, is, that the debtor shall "deliver himself into the custody of the keeper of the jail, and go into close confinement," the penalty of the bond is saved, if the debtor seasonably surrenders himself at the jail to the control and custody of the jailer. *Rollins* v. *Dow*, 123.
2. When the debtor has once surrendered himself into the custody of the jailer, he cannot be made liable upon his bond by reason of any negligence or misconduct of the jailer. *Ib.*
3. When the proceedings, intended for a performance of the condition of a poor debtor's bond, take place before justices having no jurisdiction, they are wholly void. *Ware* v. *Jackson*, 166.
4. When provisions are contained in the condition of a poor debtor's bond, unauthorized by the statutes then in force, it is not valid as a statute bond, can be good only at common law, and is subject to chancery. *Ib.*
5. Since the act of 1842, c. 31, amendatory of the Revised Statutes, was in force, the damages in such cases are again to be assessed by the Court, and not by the jury. *Ib.*
6. A certificate of two justices of the peace and of the quorum, showing that the creditor had been duly notified, and that the debtor had taken the oath prescribed by the statute for the relief of poor debtors, may be amended by them after it has once been signed, by stating by whom they were selected as justices. *Ayer* v. *Woodman*, 196.
7. The mere fact that a justice of the peace and of the quorum has issued a citation to the creditor, does not disqualify him from acting in the same case in the examination of the debtor. *Ib.*
8. When the justices have been selected according to the provisions of the statute and have entered upon the performance of their duties, preparatory to the examination of the debtor, neither party can interrupt the performance of them by denying, or attempting to revoke, the authority of one of the justices, without the consent of the parties interested. *Ib.*
9. Where the official certificate of two justices of the peace and of the quorum, of their doings in the examination of a poor debtor, had been intro-

duced in evidence, and both justices had been examined as witnesses at the trial, and their testimony in relation to facts, stated in the certificate, was conflicting, it is admissible as evidence tending to corroborate the statement of one of them. *Ib.*

10. If one of the conditions of a bond, made, since the Revised Statutes were in force, to procure the discharge of the principal from arrest on an execution, be "to cite the creditors before *two justices of the peace, quorum unus*, and submit himself to examination, and take the oath or affirmation as prescribed by law for the relief of poor debtors," instead of before *two justices of the peace and of the quorum*, such bond is not a statute bond; but it is valid as a bond at common law, if the creditors accept it.

*Fales* v. *Dow*, 211.

11. Taking the oath required by law before two justices of the peace, *quorum unus*, would be a compliance with the latter clause of the condition; but his showing that he had caused to be "cited David Fales and Levi H. Dana," when the creditors were rightly named in the execution and in the bond as "David N. Fales and Levi H. Dana," does not prove, that he has performed the first clause of the condition, requiring him to cite the creditors before two justices. *Ib.*

12. If the debtor has not performed the condition of such bond, the damages are to be assessed by the Court, and not by the jury, under the provisions of the statute of 1842, c. 31, § 9. *Ib.*

13. If one of the alternatives of a poor debtor's bond be, that the debtor should cite the creditor, named in the execution, before two justices of the peace, *quorum unus*, and submit himself, &c. instead of before "*two justices of the peace and of the quorum*," as required by Rev. Stat. c. 148, § 20, such bond can be good only at common law." *Hovey* v. *Hamilton*, 451.

14. If but one justice of the peace and of the quorum appears at the time and place fixed in the notice from the debtor to the creditor, he has no power under the statute to adjourn to a subsequent time. *Ib.*

15. If the justices who administered the oath to the debtor, are not authorized, in conformity with the provisions of the statute, to act in the matter, their certificate of discharge has no validity whatever. *Ib.*

16. The justices taking the examination of a debtor, should not administer the oath prescribed by the statute, if they discover by the examination any thing inconsistent with the oath. Any course of examination, therefore, by the creditor, which would have a tendency to exhibit conduct of the debtor inconsistent with that oath, would be pertinent and appropriate.

*Little* v. *Cochran*, 509.

17. The debtor is required by the oath to declare, not only that he has not conveyed property with intent to defraud the creditor on whose execution he has been arrested or committed, but also that he has not, since that debt was contracted, conveyed or entrusted to any person or persons whomsoever, all or any part of the estate, real or personal, whereof he has been the lawful owner or possessor, with any intent or design to secure the same, or to receive or expect any profit, advantage or benefit therefrom, to himself or others, *with any intent or design to defraud any of his creditors.* *Ib.*

18. If the justices deprive the creditor of his rights, by preventing or restraining such an examination, a writ of *certiorari* will be granted, on the petition of the creditor. *Ib.*

19. A surety in a poor debtor's bond has no authority, under the poor debtor act of the Rev. Stat. c. 148, to surrender and deliver his principal into the custody of the jailer, against the will of such principal.

*Woodman* v. *Valentine*, 551.

20. Where one of the alternatives of the condition of such bond is, that the debtor shall "be delivered in custody of the jailer," a legal delivery only, and not an illegal commitment, will constitute a performance of that part of the condition. *Ib.*

21. A poor debtor's bond must be made in conformity with the statute provisions in force at the time in all its material parts, or it will not be a good statute bond, although it may secure to the creditor equally valuable rights. *Ib.*

22. If one of the alternatives of the condition of the bond, taken since the Rev. Stat. were in force, be — 'And take the oath or affirmation as provided in

the seventh section of an act entitled an "Act supplementary to an act for the relief of poor debtors,' passed April 2d, 1836, and perform all the other conditions provided by the laws of the State, relative to the relief of poor debtors" — that part of the bond which relates to the statute of 1836, cannot be considered as void, and rejected as surplusage. *Ib.*

See ACTION, 2. BANKRUPTCY, 3. OFFICER, 12, 13, 14.

## PRACTICE.

1. Where there are two counts in an indictment, properly joined, and the respondent is found guilty on both, the attorney for the State may afterwards, before judgment, enter a *nolle prosequi* as to one of the counts. *State* v. *Bruce*, 71.
2. On the trial of an indictment wherein the accused is charged with having obtained property of a witness by means of threats, an instruction to the jury, on such trial, that if the threats were maliciously made, with intent thereby to extort the property from the owner, it was immaterial whether they did or did not produce any effect upon the mind of such owner, is correct; as the offence consists in maliciously threatening to accuse one of an offence, or to injure his person or property, with intent to extort money or pecuniary advantage, or with intent to compel him to do an act against his will. *Ib.*
3. No point, or question, is open on the hearing and determination of the law of the case, brought before the Court by bill of exceptions, which does not appear thereby to have been made on the trial of the issue. *Cowan* v. *Wheeler*, 79.
4. A request that a particular instruction should be given to the jury, may be legally withheld, whenever it requires the Judge to assume a fact, which, if existing, was not established conclusively between the parties; and the existence of which was denied by the opposing party. *Ib.*
5. Where a claim for rent of certain real estate was filed in set-off; and the plaintiff objected, that the same estate was holden by the defendant in trust for the use of the plaintiff, the most that could with propriety have been requested of the presiding Judge, with reference to the allowance of the item, no question being there made as to the legal right to file such item in set-off, was, that the jury should be instructed to consider whether the rent claimed accrued from an estate held in trust by the defendant for the use of the plaintiff; and if they found that it did, to disallow it, otherwise to allow it. *Ib.*
6. When it is intended that the testimony of a witness should be considered as discredited and destroyed, in a suit at law, the case should be presented to a jury, and not to the Court, for decision. *Wolfe* v. *Dorr*, 104.
7. Where the facts are ascertained, what is a reasonable time is a question of law to be decided by the Court; where the facts are in dispute, it is to be decided by the jury under the instruction of the Court in matter of law; and if the Judge decides a question rightly, which should have been submitted to the jury, a new trial will not be granted for so doing. *Greene* v. *Dingley*, 131.
8. A writ of mandamus is grantable at the discretion of the Court, and not as a matter of right. *Woodman* v. *County Com'rs*, 151.
9. Remarks which do not state any rule or principle of law, made by the presiding Judge at a trial, upon the testimony, are not the proper subject for consideration for the whole Court. *Ayer* v. *Woodman*, 196.
10. Where the report of the case states, "that all the aforesaid testimony and evidence offered are subject to all legal objections," the opposing party is not precluded from objecting to the testimony, on the hearing of the law question, because no specific objection thereto appears to have been made at the trial. *Whitman* v. *Granite Church*, 236.
11. When an execution is issued under the seal of the Court, the presumption is, that it was issued by order of Court. *Bryant* v. *Johnson*, 304.
12. To a commentary of the presiding Judge upon the testimony, whether perfectly correct and appropriate or not, a bill of exceptions cannot be taken. Juries are not bound by such commentaries, and the Court never refuses to counsel the opportunity, in a proper manner, before the cause is fully com-

mitted to the jury, to correct any misapprehension or misstatement of the testimony. *Frankfort Bank* v. *Johnson*, 490.

13. When a jury have retired and have again come into Court without having agreed upon a verdict, the power of the presiding Judge is not limited by the Rev. Stat. c. 115, § 67, to the explanation of such questions of law only, as should be voluntarily proposed by the jury.
*Edmunds* v. *Wiggin*, 505.

See County Commissioners. Covenant, 4. New Trial. Review.

## PRINCIPAL AND SURETY.

See Attorney at Law.

## PROBATE.

Where the Judge of Probate, in 1795, issued a warrant to three freeholders, directing them first to set off the widow's dower in the real estate of an intestate, then to make an appraisement of the remaining two-thirds, and to distribute the same among the heirs, if it could be done without prejudice to or spoiling the whole; and the commissioners performed the duty, returning that they had appraised the remaining two-thirds of the estate at a certain sum, and that the same could not be divided without prejudice to or spoiling the whole; and the Judge of Probate assigned "the real estate whereof the intestate died seized and possessed," and "which remains to be distributed or divided to and among his heirs or legal representatives," "an appraisement having been made thereof, and the return having been accepted," to one of several heirs, he paying to the others their respective shares of the sum at which the two-thirds were appraised; *it was held*, that if the Judge of Probate had power to assign the whole, he did not in fact make an assignment of but two-thirds. *Greene* v. *Hardy*, 453.

See Equity, 30. Set-off.

## REAL ACTIONS.

1. The distinguishing characteristics in a declaration in a writ of right are, that the demand is of the land as the demandant's right and inheritance in fee, averring a seizin of himself, or of an ancestor under whom he claims, taking the esplees, &c.: and that he ought to have possession of the same, but that the tenant deforceth him. The words, "*as by our writ of right*," are wholly immaterial in our mode of proceeding.
*Plummer* v *Walker*, 14.
2. If the demandant, in his writ, alleges that *he was seized as of fee and right*, but concludes by alleging a disseizin done to himself by the tenant, it is but a writ of entry; and a judgment thereupon is no bar to a writ of right. *Ib.*
3. The Court may permit the demandant in a writ of entry, or a writ of right, to amend his declaration by diminishing the extent of his claim, even after a verdict is returned into Court and before it is affirmed. *Ib.*
4. In a writ of entry, where the tenant pleads that he was not tenant of the freehold, but merely tenant at will to another who had the title, the demandant may, since the Revised Statutes were in force, (c. 145, § 10) elect to consider the person so in possession a disseizor, for the purpose of trying the right, if he has actually ousted the demandant, or withheld from him the possession of the premises; and the demandant may prevail if his title be paramount to that of him under whom the tenant in possession holds. *Gregory* v. *Tozier*, 308.

See Pleading.

## RECEIPTER.

1. If an attorney, to whom a demand is entrusted for the purpose of receiving or securing the amount due, authorizes an officer, who may receive a writ thereon, to take the receipt of a certain individual for the goods which he

directed to be attached, or approves the same after it is so taken, the officer is discharged from his liability for not retaining the possession. This, however, does not release those who had given the receipt, but is only an adoption of the act by the creditor for his own benefit, who thereby acquires an equitable interest therein, which will be protected by the Court.
*Farnham* v. *Gilman*, 250.

2. And if the creditor has brought a suit against the officer for neglecting to keep the goods attached, so that they might be taken on the execution, and has failed therein on the ground, that the receipt was approved by the attorney of the creditor, this furnishes no bar to a recovery upon the receipt. *Ib.*
3. Where goods were attached, and the debtor, with a surety, gave a receipt therefor to the officer, and such proceedings were had, that both had become liable upon the receipt; and then the principal debtor went into bankruptcy and obtained his certificate of discharge as a bankrupt, under the laws of the United States; such certificate will discharge the bankrupt only, and not the other receipter. *Ib.*
4. And it seems to have been held by a majority of the Court, that prior to the statute of 1844, c. 115, that on such discharge of the bankrupt, he was entitled to costs against the plaintiff. *Ib.*
5. Where by a mistake of the clerk of the Court the execution upon which the demand upon the receipters was made, was issued for too large a sum, and this error was afterwards corrected, the goods having been disposed of so that they could not be delivered to the officer when the demand was made, *it was held*, that the objection of a want of due demand of the goods could not prevail. *Ib.*

See BANKRUPTCY, 4.

## RECOGNIZANCE.

In an action upon a recognizance to prosecute an appeal from a judgment of a justice of the peace, it should appear from the record, that the justice who rendered the judgment from which the appeal was taken, had jurisdiction of the cause; and also, that the recognizance was entered into before the same justice who rendered the judgment; otherwise the recognizance has no validity. Nothing is to be presumed in favor of the jurisdiction of inferior magistrates, it not being general, but confined and limited by particular statutes. *Green* v. *Haskell*, 180.

## RELEASE.

Where the creditor has two separate claims against the same five debtors, on different bonds, and the creditor, in consideration that one of them "has settled and adjusted the suit on the first bond," covenants with the debtor, that he will not collect of him any portion of the execution issued upon the second bond; this is not a release of the execution debtors on the second bond. *McLellan* v. *Cumberland Bank*, 566.

See ACTION, 10.

## REPLEVIN.

In replevin, where *non cepit* is pleaded, with a brief statement alleging the property in the articles replevied to be in the defendant, the plaintiff, after proving the taking, is not bound to prove property in himself; but it is incumbent on the defendant to show that he is the owner thereof.
*Greene* v. *Dingley*, 131.

See SHIPPING, 6.

## REVIEW.

An application for a review of an action, being addressed to the discretionary power of the Court, will not be granted, if the Court are satisfied, that if the review should be granted, a trial would result in a verdict similar to the one before returned, on which judgment must be rendered.
*Parker* v. *Currier*, 168.

## RIPARIAN RIGHTS.

See FISHERY, 2.

## SALE.

1. The law relating to the delivery of personal property does not require parties to a sale to perform acts extremely inconvenient, if not impossible; but it accommodates itself to their business and to the nature of the property. *Boynton* v. *Veazie*, 286.
2. Thus, when all the logs and boards designated by a particular mark are sold while floating upon the waters, a constructive or symbolical delivery only is required. And this may be done by the performance of any act which shows, that the seller has parted with the right and claim to control the property, and that the purchaser has acquired that right. *Ib.*
3. In such case, the delivery of one raft of boards, upon the water, having the same mark as of the logs upon it, for the whole lumber thus marked, would afford sufficient evidence of such a delivery. And the same raft may be used to make such a delivery of the whole lumber having the same mark, although it had before been used to make a delivery of a portion thereof between the same parties. *Ib.*
4. When the terms of sale of personal property are agreed on, and the bargain is struck, and every thing the seller has to do with the goods is complete, the contract of sale becomes absolute, without actual payment or delivery, and the property in the goods is in the buyer; and if they are destroyed by accidental fire, he must bear the loss. *Wing* v. *Clark*, 366.
5. A delivery of an article sold to a person appointed by the vendee to receive it, is a delivery to the vendee. *Ib.*
6. If the contract of sale of logs be illegal, as contravening the provisions of the St. 1824, c. 271, but a full consideration is paid and the logs are delivered, the seller can neither reclaim the logs, nor recover their value, by an action therefor. *Marks* v. *Hapgood*, 407.
7. And if, after the sale, the logs are attached as the property of the seller, the officer has no claims thereto superior to those of the debtor. *Ib.*
8. To maintain an action for goods sold and delivered, the plaintiff must prove the contract of sale; the delivery of the goods, or such a disposition of them as will be equivalent to it; and their value. *Edmunds* v. *Wiggin*, 505.
9. If there be proof of the sale and delivery of goods, and no proof of payment, the presumption of the common law is, that they were sold on credit, or that the right to detain them for payment was waived. *Ib.*

See ACTION, 1. EVIDENCE, 23. OFFICER, 9, 10. TAXES.

## SCHOOL DISTRICT.

1. A school district cannot be considered as promising to pay for unauthorized repairs upon their school house by using it afterwards. *Davis* v. *School District No. 2, in Bradford*, 349.
2. A vote of a school district "to authorize the agent to lay out ten per cent. of the school money belonging to the district this year, and ten per cent. of the next year's school money, or as near as may be, in repairing the school house in said district," does not authorize the agent to expend on account of the district a greater sum than the amount of the ten per cent. for those two years, although it might require more to put the house in good repair. *Ib.*

## SEIZIN AND DISSEIZIN.

1. By the statute commonly called the betterment act, the common law in relation to disseizin is so far altered, that a wood lot, constituting part of a farm, may be subject to a disseizin by the occupant of the farm, if used for the purpose of cutting fuel and getting house-bote and fence-bote there-

from, openly and notoriously, and in a manner comporting with the management of a farm. But the possession must still be open and notorious. *Tilton* v. *Hunter*, 29.

2. If one, without the knowledge of the owner of the land, causes it to be run out, and a plan made thereof, at the same time claiming it as his own, this does not constitute a disseizin. *Ib.*
3. Under the provisions of Rev. St. c. 91, § 1, and c. 145, § 6, the demandant may maintain a writ of entry, declaring on his own seizin, when he has a deed of the demanded premises, duly acknowledged and recorded, from the owner thereof, if his grantor could have maintained the action; although such grantor was disseized thereof by the tenant at the time of the execution and delivery of the deed. *Austin* v. *Stevens*, 520.

See TAXES, 7.

## SET-OFF.

Where a person has deceased, and his estate has been rendered insolvent and commissioners have been appointed, all claims and demands between such estate and a creditor are subject to be set off, and the balance only should be allowed, or recovered, although there could have been no set-off if both parties had lived. *Medomak Bank* v. *Curtis*, 36.

See OFFICER, 6, 7.

## SETTLEMENT.

See POOR.

## SHERIFF.

See OFFICER. ACTION.

## SHIPPING.

1. If the master of a vessel in his bill of lading for goods received on freight inserts a price for the transportation, and in so doing acts under a clear mistake, in supposing that price had been agreed on with the owners, when the fact was otherwise, it will not be obligatory on the owners; especially if the mistake was occasioned by the mismanagement of the party insisting upon taking advantage of it. *Barnard* v. *Wheeler*, 412.
2. If the shipper of goods on freight contracts for the price thereof with the general agent of the owner of the vessel, having reason to know, that although his agency might be general, yet that his authority was restricted in that particular instance, the shipper cannot claim to have the terms of the contract fulfilled as against the principal of such agent. *Ib.*
3. Nor will such contract of the agent be ratified by the principal by an omission to give notice of his disaffirmance of it, until after he can possess himself of complete knowledge as to how the contract came to be made, and how it would affect his interests. *Ib.*
4. If the owner of a vessel detains goods transported in her for their freight, and they are wrongfully taken out of his possession by a writ of replevin, an action of assumpsit, commenced during the pendency of the action of replevin, may be supported against the owner of the goods for their freight. *Ib.*
5. Should a tender of the freight money, alleged to be due, be made to a mere servant of the owner of the vessel in whose custody the goods were placed for safe keeping only, such servant has no power to waive any rights of his employer in relation thereto. *Ib.*
6. When goods detained by the owner of a vessel for the payment of the freight, have been wrongfully taken from him by the owner of the goods by means of a writ of replevin, if the owner of the vessel brings an action of assumpsit for the freight, and attaches other goods to secure the demand, the lien upon the goods for the freight is not thereby discharged. *Ib.*

See BAILMENTS.

## STATUTES CITED.



## TAXES.

1. As the law was in 1837, the improved land of non-resident owners living within the State, could not be legally sold for the payment of taxes thereon, without giving the owner notice in writing two months before advertising the same for sale. *Moulton* v. *Blaisdell*, 283.
2. Where land of a non-resident owner living within the State, part thereof being improved and the other part unimproved, is taxed as one estate, and sold at auction for the payment of such taxes for one integral sum at one bid, the sale must be valid for the whole, or the title entirely fails. *Ib.*
3. In order that a collector's sale of land of non-resident owners for the payment of taxes thereon, for the year 1837, should be legal, the collector in his proceedings should have conformed to the law applicable to the real estate as it in fact existed; and if the assessors inserted it upon their lists of assessments as essentially different from what in truth it was, and a sale was made conforming to the law applicable to the estate as so represented, but inapplicable as it really was, the sale is invalid. *Ib.*
4. The rules prescribed in Mass. St. Feb. 2, 1819, for the sale of certain non-resident, unimproved lands by the sheriff for the payment of taxes thereon, while in force, must have been complied with, or the proceedings are void, and the deed of the sheriff passes no title to the purchaser. *Wallingford* v. *Fiske*, 386.
5. Where the taxes upon such non-resident and unimproved lands were set to different persons, or upon different and distinct rights, numbers of lots, or divisions, the sheriff could not legally advertise and sell the whole of a township, including the several interests distinctly and separately taxed, or so much thereof as should be necessary to pay all the taxes; but each interest should be separately advertised and sold for the payment of the tax for which the same was liable, or the sale will be void. *Ib.*
6. And if a sale of such land be made for one entire sum, upon one bid, to pay the whole amount of the taxes thereon for five years, and the mode adopted in reference to the sale of the land for the payment of the taxes thereon for four of the five years was illegal, the sale is invalid, although it might have been legal, if made in the same manner to pay the taxes for the other year only. The sale must be valid for the whole, or the title entirely fails. *Ib.*
7. Such a deed is as ineffectual to give a seizin, as to convey a title. *Ib.*

## TENANCY FOR LIFE.

1. The husband of a tenant for life is not regarded as holding the land adversely to the title of the reversioners during the continuance of his legal right to the occupation thereof; but if he continues in possession after the determination of that estate, claiming it as his own, he is then to be considered as holding by an adverse title. *Austin* v. *Stevens*, 520.
2. By the common law, permanent improvements made and annexed to the freehold by a tenant for life or years, became a part of the estate of inheritance. And such was the law in this State, prior to the act of 1843, c. 6, additional to c. 145 of Rev. St. *Ib.*

See CONSTITUTIONAL LAW.

## TENANCY IN COMMON.

See CONVEYANCE 9. EXECUTION, 4. FISHERY, 1. TROVER, 1.

## TENANCY AT WILL.

See LANDLORD AND TENANT.

## TENDER.

See SHIPPING, 5.

## TRESPASS.

1. If the plaintiff, during the pendency of an action of trespass in his favor against several persons for a joint trespass, committed upon his person and property, receives of one of them a sum of money, and gives a receipt therefor "in full of said L's trespass, where he and Wilson P. Hunter, (another defendant) were in company, together with others;" this operates as a discharge of the other joint trespassers, and the action can no longer be maintained against either of them. *Gilpatrick* v. *Hunter*, 18.
2. Where the owner of goods assigns and delivers them to another person, as security for the payment of a debt, by a valid assignment; and the assignee makes an assignment of them to the plaintiff, by an instrument which is void as against the provisions of the statute on that subject, and delivers them over to the plaintiff with the assent of the original owner; an action of trespass can be maintained therefor by the plaintiff against one who takes them without right and as a mere wrongdoer. *Barker* v. *Chase*, 230.
3. In trespass *quare clausum*, it is not necessary to prove the trespass to have been committed on the day alleged in the declaration; and an amendment, changing the time, although unnecessary, may be permitted by the presiding Judge. *Moore* v. *Boyd*, 242.
4. Where the plaintiff sets out specially the circumstances of his case in an action of trespass, it may, under the provisions of the st. 1835, c. 178, be regarded as an action of trespass or of the case. *Leathers* v. *Carr*, 351.

See ACTION, 8. LANDLORD AND TENANT, 3.

## TROVER.

1. To maintain the action of trover, it is necessary that all the tenants in common should join as plaintiffs; and that they should be the legal owners of the goods, and entitled to the possession of them. *Huskell* v. *Jones*, 222.
2. If A, for a consideration received from B, by an instrument under seal, "sells and delivers to C, the agent and attorney for said B," certain personal property, on condition that the conveyance should be void on the payment by A of the consideration received from B, C having power on certain

## ERRATA.

An error has occurred in the case *Merrill* v. *Parker*, p. 89. An opinion was first drawn by the Chief Justice, to which the other Justices did not assent; and the opinion by SHEPLEY J. published as a dissenting opinion, was delivered as the opinion of the Court, and judgment was entered accordingly. By accident the opinion drawn by the Chief Justice was sent to the reporter, and from the minutes found upon it, he was induced to think that this was the opinion of the Court, and the other a dissenting opinion; and they were so published.

The abstract of the case should therefore be corrected by inserting the word *not* immediately before *be maintained*, in the last line but one of the abstract. The same correction should be made on page 571, 6th line.

Page 103, 7th line, strike out *and*, next following the word *creditor;* page 154, 1st line, for *refuting* read *refusing;* page 269, 9th line, instead of 1828, read 1825; page 519, 10th line, insert *to* after the word *magnitude*.