REPORTS

OF

CASES DETERMINED

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

By JOHN SHEPLEY,
COUNSELLOR AT LAW.

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JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE PERIOD OF THESE REPORTS.

Hon. EZEKIEL WHITMAN, LL. D. Chief Justice.
Hon. ETHER SHEPLEY, LL. D. } Justices.
Hon. JOHN S. TENNEY, }

A TABLE

OF CASES REPORTED IN THIS VOLUME.

ERRATA.

Page 29, paragraph 1, last line, of abstract, for "revised," read *revived.*
42, " 3, line 2, for "plaintiff" read *defendant.*
129, " 3, line 3, of opinion, for "c. 6. § 115," read *c.* 115.
165, line 13, for "c. 206," read *c.* 209.
461, line 3, for "c. 49," read *c.* 39.
490. " 2, line 4, of opinion, for "c. 116," read *c.* 16.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF CUMBERLAND.

ARGUED AT APRIL TERM, 1845.

Mem. — Thirteen cases argued at this term were published in the last volume.

Isaac Dyer *versus* Daniel Burnham *& al.*

If a contract in writing be made by one as agent for another, to convey an interest in certain lands on the payment of a promissory note, given as the consideration therefor, and the contract does not bind the principal to make the conveyance, but the agent is personally responsible for the payment of any damages sustained by any breaches of the contract, the payment of the note cannot for that cause be avoided for want of consideration.

A contract, not under seal, to convey an interest in real estate upon the performance of certain conditions, made by an authorized agent of the proprietor of the estate, may bind the principal, as it would if made by himself.

If from the whole instrument it can be collected, that the object and intent of it are to bind the principal, and not merely the agent, Courts will adopt that construction of it, however informally it may have been expressed.

The assignment of a contract to convey an interest in real estate upon the performance of certain conditions, vests an equitable interest therein in the assignee, which will be protected and made available by courts of law.

And if the contract be to convey an interest in an undivided half of the land, upon the payment of one half of certain notes given to a third person, as the consideration of a former purchase of the same estate, and both parties fail to make their respective payments of those notes, but the maker of the note, given as the consideration of the contract, sustains no injury thereby, but both he and the owner of the land treat it as still subsisting until cancelled by them; such neglect of payment furnishes no defence to the maker of the last mentioned note, on the ground of failure of consideration.

And if the maker and payee of the note suffer the contract for the conveyance of the land, in which they are both interested, to become forfeited by reason of the neglect by each of performance on his part; and the payee afterwards joins with others in obtaining a new contract for the conveyance of the same land to them upon more favorable terms, this can furnish no defence to a suit upon the note.

ASSUMPSIT by the plaintiff, as indorsee, against Daniel Burnham and David Webster, as makers of a note given by them to Ovid Burrall, and by him indorsed to the plaintiff, "without recourse," dated Oct. 10, 1845, for $2,580, payable in one year, with interest, at any bank in Portland. The same defence was to be open, that would exist if the suit was brought by Burrall.

Webster was defaulted. Burnham defended. The plaintiff read the note to the jury, the signatures having been admitted to be genuine.

In defence, the counsel for Burnham read the depositions of Ovid Burrall, Stephen J. Bowles and John Black. The case was submitted to the decision of the Court upon this evidence, the depositions to be subject to all the objections therein made; and upon the whole case, thus presented, it was agreed by the parties, that the Court should render judgment for the plaintiff or defendants according to their legal rights upon the evidence.

The facts proved by these depositions appear in the opinion of the Court.

W. P. Fessenden, for the plaintiff, admitted that the defendants were entitled to the same defence, as if the suit had been brought by Burrall, but could not conjecture the grounds of defence.

Howard, for Burnham, made the objections to the right of the plaintiff to recover, stated in the opinion of the Court.

In support of the objection, that this was the mere personal contract of Black, and could not bind the heirs of Bingham, either at law or in equity, to convey the land, he cited Story's Agency, § 147, 148; 2 Kent, 629, 630, 631.

W. P. Fessenden, in reply, said that a sufficient answer to the whole was, that Burnham and Webster had availed them-

selves of the contract assigned to them as the consideration of the note, and in consequence of their surrender of that contract, had obtained a new one satisfactory to themselves. If in consequence of the decline of value of such lands, or from any other cause, they did not choose to perform on their part the conditions of this new obligation, and thus to entitle themselves to a deed, as they might have done, it was not the fault of the plaintiff, but their own. The contract was binding on the Bingham heirs; but were it not so, the result would be the same. Black would then have been personally liable; and that was a sufficient consideration for the note.

The opinion of the Court was drawn up by

TENNEY J.— On the 15th day of August, 1835, John Black, agent for the divisees in trust of the estate of William Bingham, as such agent, contracted in writing, not under seal, to deliver to Stephen J. Bowles and Ovid Burrall, their heirs and assigns, a deed in fee, with warranty against the demands of all persons claiming under the said William Bingham, of a certain parcel of land in the County of Washington, on condition that payment should be made of five notes of hand given by said Bowles and Burrall, of the same date, for $6,192 each, payable in sixty days, one, two, three and four years, according to their tenor. As appears by a writing upon the back of this contract, on October 10, 1835, Bowles and Burrall, in consideration of the sum of $15,480, assigned one half of the contract to the defendants, provided they should in addition to the sum last named, pay one half of the notes given to Black by Bowles and Burrall. One third of said sum of $15,480 was paid in cash, and the defendants gave four notes for the balance, two to Bowles and two to Burrall, payable in one and two years. The one first payable, given to Burrall, negotiated to the plaintiff, after its maturity, is the one declared upon in this suit. It does not appear, at what time the name of Burrall, in his own handwriting was affixed to the assignment, but it was not written so early as the assignment was dated, and there is no evidence of a formal delivery of the

contract to the defendants, upon the execution of the assignment. The note to Black payable in sixty days was paid, half by one party to the assignment and half by the other; and the defendant, Burnham, paid upon the second note to Black, on March 1, 1837, the sum of $1,871,32. No payment was made upon either of the notes to Black afterwards. On January 31, 1838, Bowles assigned all the interest remaining in him, by virtue of the contract of Black, to the defendants, on condition, that they should pay or cause to be paid, three-fourths of the principal and interest due on the notes to Black, and gave up the two notes of the defendants, which he held, nothing having been paid thereon. On the same 31st day of January, 1838, Black, not considering the contract forfeited by the laches of the other contracting party, but treating it as in full force, agreed with the defendants to renew the same, to convey three-fourths of the same land in consideration of three-fourths of the amount due on the original notes to him, and took their promissory notes for the same, payable in one, two and three years, with interest annually, and gave them a written memorandum, that he would make and execute a contract in the usual form, in fulfilment of this agreement; and on the 17th of April following, delivered to Burnham a contract similar to that given to Bowles and Burrall, that a deed was to be delivered of three-fourths to the defendants, and one-fourth to Burrall, the latter having given his notes for the quarter of the balance due, on performance of the condition in the contract by the defendants and Burrall.

The last contract being forfeited by a failure to pay the notes, a new contract was made by Black, as agent of the owners of the land, with Burrall and other persons, to convey the land on the payment of a sum equal to thirty-seven and a half cents an acre. Webster has been defaulted, and Burnham defends the suit, on the ground that the note declared upon in its origin was without consideration; but if otherwise, that the consideration has since failed.

1. It is contended that the original contract was not binding on those in whom was the title to the land, but was only the

personal obligation of Black. If this proposition were true, and Black was personally responsible for the damage, which might be sustained by a failure to perform his contract, which is not denied, there would still be a consideration for the note. But we think the devisees were liable under this contract. The rule that a deed must be executed in the name of the principal, acting by an attorney, is inapplicable to this case. This is a promise upon consideration to deliver a deed of the land described, on the fulfilment of the condition, and is an instrument of no higher character, than one having no reference to real estate. It is a maxim of the law, in construing promises, that the intention of the parties, shall be effectual, *ut res magis valeat, quam pereat.* If from the whole instrument it can be collected, that the object and intent of it are to bind the principal, and not merely the agent, Courts will adopt that construction of it, however informally it may be expressed. Story's Agency, § 154. Black, *as the agent of the devisees,* agreed to convey the title, which was in them, and which the testator derived from the Commonwealth of Massachusetts; the instrument clearly discloses the intention of the agent to bind his principals and not himself.

It is objected, that the contract of Black was not by law assignable. The assignment vested in the assignees an equitable interest in the contract, and it is a well settled rule, that such will be protected and made available by Courts of law.

A farther ground for the denial of consideration for the note is, that no claim for a conveyance to them could have been made by the defendants, inasmuch as the language ("meaning to convey to the said Stephen J. Bowles and Ovid Burrall the same title, which the said Bingham derived from the Commonwealth of Massachusetts") embraced in parenthesis, shows the intention to convey to *Bowles and Burrall only*, the title, which William Bingham derived from the Commonwealth. The words relied upon, referred to the *title* intended to be conveyed, and the extent of the covenant of warranty. The construction contended for in behalf of the defendants, would take away the obvious meaning of a previous clause in

the contract. The promise was to deliver to Bowles and Burrall, *their heirs and assigns, a deed in fee,* &c. The deed was to be delivered to the party contracted with, or those who should represent them, as *heirs or assigns;* that deed was to be *in fee,* which would secure an estate of inheritance at law, belonging to the owner forever; descendible to his heirs; an estate of perpetuity and conferring an unlimited power of alienation. 2 Kent's Com. § 53, p. 4 and 5.

It is objected, under the first head of the defence, that it does not appear, that Burrall executed the assignment so as to render it valid; and that the evidence shows no delivery of the contract consequent upon the assignment. The defendants introduced the contract and the assignment thereon, of the same date with that of the note in suit. The notes of the defendants, which were intended to be considerative of the assignment, were delivered, and certain payments made by them upon the notes to Black, agreeably to the terms of the assignment; and there is no evidence that the name of Burrall was not affixed in season to be effectual. After the assignment, an interest in the contract remained with Bowles and Burrall, and it was as proper, that they should have the possession, as that it should pass to the defendants. Both parties to the assignment treated it as a perfect and valid obligation, acted under it, in performance of the duties assumed, and it became a binding agreement according to its terms.

2. Has the consideration of the note failed? It is contended that there has been a failure of consideration, because Bowles and Burrall omitted to make the payments required of them in order to obtain a conveyance of the land, according to the original agreement between them and Black, excepting the payment upon the note first payable, whereas the defendants discharged their duty in reference to the same note, and caused to be indorsed upon the one next due, a large sum. Both parties to the assignment failed to make the payments, according to their several contracts. The assignment contains no agreement on the part of Bowles and Burrall, nor is there other evidence in the case, that the defendants' notes were to

be void, if the former failed to pay one half of their own at maturity; the consideration of the notes, given by the defendants, was, that they were permitted to come in and share with Bowles and Burrall, the benefit which both parties expected to derive from the contract. Nothing in the case shows, that they have been prejudiced by the laches of Bowles and Burrall, and they cannot be relieved from liability, by the omission of the party with whom they contracted, when a similar neglect, if not to the same extent, is imputable to them. The owners of the land, by receiving a payment on their notes, precluded themselves from insisting upon an immediate forfeiture of the contract; and their agent afterwards treated it as subsisting and in force, and renewed it with the defendants and Burrall, taking notes for the amount due, and extending the time of payment. At that time, the defendants made no complaint against Bowles and Burrall, like that now presented, and they cannot escape liability for that reason.

After Bowles transferred his remaining interest in the contract to the defendants, they presented themselves to the agent of the owners, as having a right to the proportion, which they held by virtue of the two assignments, and admitted their indebtedness in the same ratio upon the original notes given for the contract. The agent recognized the claim of the defendants, exacted no forfeiture, or additional price for a renewal of the former agreement, but treated them in all respects as a party to the first contract; which being binding upon the parties thereto, and the interest assigned by Bowles and Burrall being upon a valid consideration, the defendants have derived all the benefit from the assignment, to which they were entitled. No neglect of the assignors has operated to their prejudice, or caused in any degree a failure of the original consideration of the note in suit.

The renewed contract was forfeited long before the last contract, which Black made with Burrall and others, to convey the land to them. It is not denied, that this forfeiture was attributable, in part at least, to the neglect of the defendants; and the fact, that Burrall was a party to the former, was not

an obstacle to his being interested in the latter; his becoming a party took away no rights, which belonged to the defendants. If his acts or neglects have produced an injury to them, a claim to damages may be investigated in a suit proper for the purpose, but from the facts before us, the note declared upon cannot be impeached for want, or failure of consideration.

Judgment for the plaintiff.

RICHARD GOWER *versus* JAMES MOORE.

When the maker of a promissory note dies before it becomes payable, the indorsee should make inquiry for his personal representative, if there be one, and present the note, on its maturity, to him for payment.

If it should be made to appear, that the indorser knew that the note would not be paid on presentment, and that the maker had deceased and his estate was insolvent, such knowedge would not relieve the holder from his obligation to make presentment and give due notice of its dishonor.

THE suit was against Moore, as indorser of a note given by Robert Witherspoon to him, and indorsed by the defendant, dated August 12, 1841, and payable on August 15, 1843.

Witherspoon, the maker of the note, died in February, 1842; administration was taken out on his estate, and it was rendered insolvent; one Freeman, then the holder of the note, proved it before the commissioners as a claim against the estate, and notified the defendant, after the death of Witherspoon and before the note became payable, that the maker of the note being dead, he should look to the defendant for payment; and that the defendant, about a month after the day of payment, was notified by the then holder of the note, that it was unpaid, and that he should look to the defendant for payment.

This was the plaintiff's case; and thereupon GOODENOW, the District Judge presiding, directed a nonsuit. To this the plaintiff filed exceptions.

J. C. Woodman, for the plaintiff, said the rule was well established, that where there were no funds in the hands of

the drawee, when the bill became payable, that no demand or notice was necessary. 1 T. R. 405 and 712. No demand on the maker of the note, or notice to the indorser is necessary, in order to charge him, where it can be of no use, or where the maker cannot be found, or has gone out of the State. Here the estate had been rendered insolvent, and the note had been allowed by the commissioners, and all done which could have been to secure the demand out of the property of the maker. 2 Greenl. 209; 4 Mass. R. 45; 6 Metc. 290; 5 Mass. R. 176; 7 Pick. 291.

Dunn, for the defendant, said that here was no legal demand or notice. A demand before the note fell due is useless, and one, a month after it has become payable, is too late. 19 Maine R. 447.

The opinion of the Court was by

SHEPLEY J. — This is a suit by the indorsee against an indorser of a promissory note, made on August 12, 1841, and payable in two years. Before it became payable the maker had deceased, an administrator had been appointed, the estate had been represented to be insolvent, commissioners of insolvency had been appointed and the holder of the note had proved it before them. When the maker of a note dies, before it becomes payable, the holder should make inquiry for his personal representative, if there be one, and present the note on its maturity to him for payment. The case of *Hale* v. *Burr*, 12 Mass. R. 86, may be considered as presenting an exception to this rule; but doubts have been expressed, whether it could be considered as either correct in principle, or founded upon sufficient authority.

In this case the indorser may be considered as knowing, that the note would not be paid on presentment; and that the estate was insolvent. But such knowledge does not relieve the holder from his obligation to make presentment and give due notice of its dishonor. The promise of the indorser is a conditional one to pay, if the note be duly presented to the maker and seasonable notice be given to him of its dishonor.

The holder cannot assume the right to decide, that his performance of the condition will be of no service to the indorser, and thus put that matter in issue to relieve himself from the performance of the condition imposed upon him by law. *Nicholson* v. *Gouthit*, 2 H. Bl. 609; *Clegg* v. *Cotton*, 2 B. & P. 239; *Prideaux* v. *Collier*, 2 Starkie's R. 57.

The various relations, which the parties, whose names are upon negotiable paper, sustain towards other persons, whose names are not upon it, cannot be anticipated.

The real debtors, who may feel obliged to pay, may not wish to exhibit themselves as such. A deceased party may possibly have held a contract of some responsible person to pay in case the note should be duly presented for payment. So may an indorser. To hold an indorser liable and yet deprive him of the benefit of such a contract could not be justified. It is best for a commercial community that the rules be simple, subject to few exceptions, and not liable to be varied to meet the apparent injustice of particular cases. The notices given to the defendant in this case were either too early or too late to be of any avail.

Exceptions overruled.

STEPHEN LONGFELLOW & *al. versus* ELIZABETH PATRICK, *Adm'x.*

The *estate*, as the word is used in the Stat. 1838, c. 322, "to be absorbed, or used up, in paying the bills of last sickness of such deceased person and the funeral expenses, and the allowance made to the widow by the Judge of Probate," is such estate only as is included in the inventory; and does not embrace rights or credits accidentally or designedly omitted in taking the inventory.

That statute is not unconstitutional.

THE action was debt against the defendant, as administratrix of the estate of David Patrick, deceased, intestate, upon a judgment recovered by the plaintiffs against the intestate in his lifetime.

With the general issue, the defendant, by brief statement, pleaded, that the amount of the estate of the intestate, coming to her hands as administratrix, was absorbed and used up in paying the bills of last sickness of the intestate, his funeral expenses, and the allowance made to the widow, and expenses of administration. The plaintiffs replied, by counter brief statement, that the estate was not insolvent, but that one Olive Grant was largely indebted to the intestate at the time of his decease, to wit, to the amount of thirteen hundred dollars or more, which the defendant did not inventory; and that a suit was pending thereon at the time of the death of the intestate, which the defendant was requested to prosecute, but refused, and abandoned the same, and so wasted the estate.

At the trial, it appeared by the proceedings in the Probate Court, that the defendant had accounted for the full amount of the inventory, and that her administration account was balanced by the allowance of the amount of the expenses of the last sickness, and of the funeral, the expenses of administration, and the allowance to the widow. The last account of administration was settled in 1839.

The plaintiffs then offered to prove, that when the intestate died, there was "a large amount of rights and credits belonging to said estate, which came to the defendant's knowledge, and which she neglected and refused to inventory, or account for, and has never inventoried or accounted for." This testimony was rejected by the presiding Judge; and a nonsuit was then entered by consent of the parties, which was to be set aside, and a new trial granted, if this testimony was illegally rejected.

Longfellow & Son, pro se, contended that the defendant could not protect herself under the Stat. 1838, c. 322. That statute was intended to apply to those cases only, where the administrator has inventoried and accounted for all the goods and estate, rights and credits of the intestate. Then, if all the estate has been applied in the manner it would be in case of insolvency, the law will not require the expense of insolvency to be incurred. But it cannot apply to those cases,

where all the goods, estate, rights and credits have not been inventoried and accounted for. *Patrick* v. *Grant*, 14 Maine R. 233; *Colman* v. *Hall*, 12 Mass. R. 573; Rev. Stat. c. 106, § 22, and c. 109, § 3; *Swett* v. *Patrick*, 2 Fairf. 179, and 3 Fairf. 9. This is the only remedy the plaintiffs could have.

E. Hayes, for the defendant, contended that this case came within the express terms of the Stat. 1838, c. 322. There was no necessity of a representation of insolvency under the circumstances. The proceedings furnish a complete bar to this suit against the administratrix. It was not competent for the plaintiffs to show in this summary method, that the intestate left property not inventoried, and thus sustain an action against the administratrix. Had there been any ground to have charged the defendant with a fraudulent omission in the inventory, or with waste or maladministration, the remedy of the plaintiffs was in the Probate Court, or upon her bond as administratrix. 15 Mass. R. 266; 6 Pick. 333; 7 Pick. 250; 15 Mass. R. 148 and 491.

The opinion of the Court was drawn up by

Shepley J.— The plaintiffs are judgment creditors of the defendant's intestate. The defendant exhibited evidence, that she had returned an inventory of the estate; that she had obtained an allowance to herself as his widow; that she had settled an account in the Court of Probate; and that the whole amount of the estate contained in the inventory had been applied to the payment of the expenses of the funeral and last sickness, and to pay her allowance and expenses of administration.

The plaintiffs offered to prove, that she had not made a full and perfect inventory of the estate. That certain valuable rights and credits were wilfully omitted.

The statute relied upon in defence provided, that when the amount of the estate shall be absorbed or used up in the payment of such expenses and of the allowance to the widow, "it shall not be necessary to represent such estate insolvent; and

if the estate be thus settled, the administrator shall be wholly discharged from all claims, which the creditors of the deceased might otherwise have had against such estate, any law or usage to the contrary notwithstanding."

The documents produced by the defendant bring her case within the language of the act of March 15, 1838, c. 322, unless the word estate can be considered as including all the property, rights, and credits, of the intestate, and not that portion only, which was included in the inventory. That the word estate as there used had reference to the estate represented by the inventory will be apparent from several considerations. If it were not so, a faithful administrator by the omission to include any property or credit in the inventory, because he had no knowledge of its existence, would, by a settlement of an estate as provided in the act, be subjected to a suit, when the first knowledge of such omission might be presented to him at the trial. He might thus be subjected to loss, when the statutes providing for the settlement of estates contemplate, that he should have opportunity to correct such an omission without suffering any injury. By the estate as inventoried alone could such an administrator be guided in coming to a conclusion, whether it would be necessary for his protection to render the estate insolvent. And by that only could the Court of Probate be guided in the appointment of commissioners, and in the discharge of all its other duties, except when called upon to act in relation to some estate said to be omitted in the inventory. A similar provision is found in the Revised Statutes, where the word funds is used instead of the word estate, c. 109, § 4, by which the protection is made effectual in such cases, if the funds derived from the estate as inventoried, and acknowledged by the administrator, have been thus exhausted. If this must be the construction of the statute as applicable to an administrator, who had faithfully executed his trust, it will not admit of a different construction upon proof of unfaithfulness. It is not usual to find any such distinction in the construction or application of statutes designed upon the performance of certain acts for the protection of

persons against suits. The protection is made effectual for all coming within the description irrespective of any moral considerations; and some other remedy is provided, by which a person injured may obtain redress for an injury occasioned by unfaithfulness or fraud.

It would be necessary in this case to disregard the express provisions of the statute, to permit the suit to be maintained for the purpose of trying an issue, of a somewhat anomalous character in such a suit, to ascertain whether the administratrix had faithfully executed her trust. It is insisted that such a course of proceeding must be permitted, or a party injured by the unfaithful conduct of an administrator, in omitting to inventory all the property of the intestate, will in cases like the present be without remedy. For he cannot institute a suit upon the official bond, until he has established his debt by the judgment of a Court, or the report of commissioners of insolvency. This argument can only prove what too often happens, that one change of a statute provision requires another to be made, and yet it is not made, and thereby a remedy supposed to be continued is found to be defective or destroyed. A court of justice would not be authorized to refuse to give effect to the change actually made, if it should perceive, that such might be the result. It is not however certain, that the plaintiffs in this case are without remedy. The Court of Probate is authorized in some cases to consider those to be creditors of an insolvent estate, who have not established their debts by the judgment of a Court on the report of commissioners. And an estate, settled as in this case, must be considered as one actually insolvent, according to the provisions of the Revised Statutes, c. 109, § 29, which provides, that proof of a debt may be made before the Court of Probate, if further assets come to the hands of the administrator. If the Judge of that Court should be satisfied, that assets existed in such a case, it is not perceived that he would not be authorized to act in behalf of a creditor who, if they were obtained, would be entitled to share them, by a citation to the administrator, and by a removal of him, if necessary, that the assets might be secured and accounted for to

be applied to the payment of such as well as other debts. It appears also to have been contemplated in c. 113, § 18, of the Revised Statutes, that suits might be instituted by a Judge of Probate upon the official bond of an administrator in other cases, than those provided for in § 10, 11, and 12; that he should recover, and hold the amount recovered in trust for those interested in the penalty. And creditors, as before stated, who have not already established their debts against the estate may be interested in the future assets of an insolvent estate.

The act of March 15, 1838, cannot be considered as unconstitutional, for it acts only upon the remedy by a discharge of the administrator from all suits under certain circumstances; and leaves the contract valid and effectual against any assets, which have not come to hand and been exhausted.

Nonsuit confirmed.

NATHAN D. APPLETON, *Ex'or versus* RUFUS HORTON, JR.

In proceedings in equity, the answer of the defendant, negativing every material allegation made against him in the bill, ordinarily, is equivalent to the testimony of one credible witness that the facts stated in the bill are not true; and the plaintiff, in such case, must adduce proof sufficient to overcome such denial and fully establish his allegations.

The defendant in a bill in equity, in good faith and without design to defraud any one, contracted to convey a tract of wild land, situated at a great distance from him, and which he had never seen, to a third person, or his assigns, upon the payment of a certain sum in money and giving security for the payment of an additional sum at a future day, within a stipulated time; and such third person, by means of fraudulent representations and contrivances, made a contract of sale thereof to the plaintiff in equity at a greatly enhanced price; and at the request of such third person the defendant in equity made a conveyance of the land to him, and he to the plaintiff in equity; and the defendant, being wholly ignorant that any fraud had been practised, received out of the money and security given by the plaintiff sufficient to pay the consideration of his conveyance thereof. *It was held*, that the bill, under such circumstances, could not be sustained.

THIS was a bill in equity originally drawn against Rufus Horton, jr. Jabez Churchill, Randall Fish, and Charles Dolbier,

but it was served on Horton alone. It was heard upon bill, answer and proof.

The bill was in favor of the late Hon. John Holmes alone, was commenced by him, and prosecuted also by him until after the proof had been taken, and the case set down for argument, when he died. Mr. Appleton was appointed executor of his will, and revived the bill. A concise history of the case is given in the opinion.

Howard & Shepley argued for the plaintiff, and put in the brief which *Mr. Holmes* had prepared for the argument of his case. On this brief were cited the following authorities. Story on Part. 371, 47; 18 Pick. 95; 2 Kent, 613; 1 Madd. Pr. 560; 1 Metc. 193; 6 Johns. R. 110; 22 Pick. 546; 18 Maine R. 418; same, 436; 17 Maine R. 329; *Warren* v. *Emerson & al.* U. S. Circuit Court at Portland; 16 Maine R. 403; Paley on Agency, c. 3, § 1, 2; 13 Peters, 26; 3 Peters, 210; 9 Ves. 21; 2 Cowen, 129; 1 Jac. & W. 19; 5 Johns. Ch. R. 174; 2 Johns. Ch. R. 596; 6 Munf. 283; 4 Price, 131; 2 Johns. Ch. R. 512; 3 Cranch, 270; 2 Metc. 319; 8 Pick. 9; 9 Pick. 272; 2 Kent, 515; 2 Hill, 159 and 451; 13 Wend. 518; 1 Salk. 289; 23 Wend. 260; 18 Wend. 175; 12 Wend. 413; 3 Wend. 631; 9 Cond. Engl. Ch. R. 65; same, vol. 12, 625; same, vol. 5, 14; same, vol. 2, 7; same, vol. 4, 131; Dougl. 228; 1 Pet. C. C. R. 496; Story's Agency, 3, 117, 270; 1 Mad. Chancery, 262; 15 Maine R. 225; 17 Maine R. 329; 15 Maine R. 286; 1 Metc. 560; 2 Sumn. 206; 9 Cranch. 153.

Fessenden, Deblois & Fessenden argued for the defendant.

The opinion of the Court was delivered on April 24, 1846, by

WHITMAN C. J. — The plaintiff's bill sets forth, that the defendant, Horton, together with Churchill, Fish, Dolbier, and others unknown, were owners of and interested in a tract of land; that the three last named individuals, acting for themselves as well as agents for Horton, and with his knowledge and consent, represented said tract to the plaintiff's testator

and certain individuals associated with him, to have a large quantity of excellent timber standing and growing thereon; and as affording excellent facilities for getting the same to market; and that the plaintiff's testator and his associates, in certain proportions, in September, 1835, were induced, by such representation, to become purchasers of the tract; and, therefor, to give their joint and several promissory notes for large sums of money, the plaintiff's testator's proportion of which was $6,250; that the defendant, Horton, received a large proportion of the consideration; that the plaintiff's testator had paid him about $5,000 thereof; and on the 8th of September, 1840, on a settlement with said Horton, for a note for a part of said consideration, and costs of suit thereon, gave said Horton a new note for $2000, being a part of said consideration, with sureties, with a mortgage of real estate, as further security for the payment thereof; that at the time of the contract for the sale, the title in and to the tract, stood in the name of Samuel E. Crocker, who thereafter conveyed the same to Churchill, Dolbier and Fish, to and for the use of themselves, and of said Horton and others, who conveyed the same to the plaintiff's testator and his associates; that said tract was of much less value, and contained much less timber, than had been represented by Churchill, Dolbier and Fish, acting as agents for said Horton, and with his knowledge and consent; and that, for the purpose of defrauding the plaintiff's testator and his associates, there were exhibited to them certain certificates, highly exaggerating and misrepresenting the quantity and value of said timber, and facilities for getting it to market; that the plaintiff's testator made several payments to said Horton without knowing that he had any connexion with the sale, or concern therein, and in the belief that he was a *bona fide* purchaser of the notes given as aforesaid, and continued so uninformed till after the giving of the note for $2000; and that Churchill, Dolbier and Fish, for themselves, and as agents for Horton, employed one Solon Whiting to pretend to be desirous of purchasing said tract, at a large price, for a company in New York; when in fact no such company existed,

and Whiting himself being utterly worthless, with a view to induce the plaintiff's testator and his associates to become purchasers thereof, at a price greatly beyond its real value; and that said Whiting, in pursuance thereof, did make such pretences to the plaintiff's testator and his associates. The plaintiff thereupon prays that said Horton and others may be held to make discovery, &c. and that said note and mortgage may be decreed to be given up and cancelled, and for the restoration of the sum so as aforesaid paid to said Horton.

Horton alone appears to have been summoned to answer to the bill, and the plaintiff, alone, complains of the injury alleged to have been done jointly to his testator and his associates. The requisite parties, therefore, do not seem to be before the Court. But Horton has appeared, and put in his answer without insisting upon any exception, on account of such defect; and the plaintiff's testator, in his lifetime, filed a general replication thereto; and proofs have been taken, and the cause has been fully argued as between the testator and Horton.

In the first place, Horton's answer expressly negatives every material allegation made against him in the bill. In proceedings in equity this, ordinarily, is equivalent to the testimony of one credible witness that the facts stated in the bill are not true. The plaintiff, in such case, must adduce proof sufficient to overcome such denial, and fully establish his allegations. Horton, furthermore in his defence, states that he was, for a valuable consideration one of the assignees of a bond, conditioned for the conveyance of the tract, upon the performance of certain conditions; and that he had given to the said Churchill a bond to assign and convey to him, upon certain terms and conditions, his interest in the tract; and that, after a lapse of time, Churchill notified him that he was ready to perform the conditions, and take a conveyance of his interest in the tract, as had been agreed between them; and, thereupon, he, on receiving the money and securities, as had been stipulated, caused his interest to be conveyed to said Churchill, and his appointees, Dolbier and Fish; that he knew nothing of any means made use of by Churchill, Dolbier and Fish, or either

of them, to induce the plaintiff's testator, or any one else to buy the premises of them; that they never were his agents for any such purpose. And the plaintiff's proofs are so far from negativing this statement, that they seem to be fully in confirmation of it. Churchill's testimony, taken somewhat irregularly by the testator, in his lifetime, after having named him as a party defendant in his bill, corroborates Horton's statement very explicitly. Under such circumstances fraud cannot be imputed to him. And it does not appear that any contract was ever made between him and the testator, out of which any misunderstanding has arisen. The conveyance which Horton caused to be made to Churchill, Dolbier and Fish was without reference to any understanding, so far as appears, with the testator or his associates. He received the notes of the latter in payment, in part, for the consideration for his conveyance, but they were indorsed to him by his assignees, Churchill and others, with whom, alone, the testator and his associates had contracted. There is no proof in the case tending to show that Horton had the slightest intimation of any thing that had passed between his assignees, and the testator and his associates, to induce them to make the purchase of Churchill and others. The allegation that he had any concern in procuring Whiting to make false pretences of a wish to purchase the tract, is wholly unsupported by proof, as is also the allegation of his connexion with the exhibition of false certificates. He did no act, so far as appears, personally, or by authorization, either express or implied, with a view to deceive any one. It does not appear that he had any connexion with Dolbier and Fish, further than to cause a conveyance to be made to them at the request of Churchill, and to receive from those three persons the consideration, agreed by Churchill to be paid to him. Neither of them can be regarded as his agents with power to make sale for him. Surely, if A gives a bond to B, to convey a farm to him, provided he elects to take it within a certain period, and in case of taking it B stipulates to pay a part of the consideration at the time of taking it, and to give satisfactory security for the residue, payable at a future day,

and B bargains with C, to let him have the farm on terms agreed upon between them, and B and C go to A, and C pays A the part of the consideration agreed upon between A and B, and gives security for the residue, without any knowledge on the part of A, that any unfair means were used by B to induce C to make the purchase, the security so taken by A will be good in his hands. It would be the same in effect as if B had taken the conveyance to himself, and had afterwards conveyed to C taking his negotiable notes for the consideration, and transferred them to A in payment for the consideration agreed to be paid to him.

The case before us is even more favorable to the defendant than the case supposed. His interest was actually conveyed to Churchill, to whom he had contracted to convey it, and his appointees, and not to the testator and his associates, who did not bargain with the defendant, and who took their conveyance from those to whom the defendant had caused the conveyance to be made. The defendant, therefore, might well take a transfer of the securities his assignees had received as the consideration for their sale to the testator and his associates.

If the testator suffered damage, by reason of fraudulent misrepresentations and foul practices, the remedy of the executor is against the grantors of the testator, who perpetrated the fraud, and not against Horton, who, for aught that appears, was innocent of it. Horton had set his price upon his interest in the land. Churchill, Dolbier and Fish were content to give it. They make no complaint of any thing that he said or did. Nothing existed between them, that can be deemed to amount to a mutual mistake, in reference to the premises. Horton does not appear to have had any particular knowledge of the value of the land. It is not pretended, that he ever personally made any representation whatever to Churchill, or either of his two associates. It does not appear that he ever formed any estimate in his own mind of the value of the timber on the land. There cannot, therefore, be said to have been any mistake in his apprehension about it. There is, therefore, no ground to

suppose that any thing like a mutual mistake existed between him and any one else concerning it.

The bill, therefore, must be dismissed with costs for the defendant, Horton.

TAYLOR M. RUNDLETT *versus* GEORGE SMALL.

When a legal appropriation of a payment has been made upon one of two or more claims of one creditor against the same debtor, one of the parties, alone, cannot change that appropriation, but it may be changed by the consent of both; and in such case the indebtedness first discharged is revised by implication of law, where there is no express promise.

Where it is competent to show what testimony a witness had given at the trial of a former suit between the same parties, it is not necessary to call the same witness to prove it, although he is then present in Court, and was called at the former trial by the same party who would now show what his testimony then was, but it may be shown by other witnesses.

Where a witness is called to prove the consideration of certain notes, not declared on in the present suit, and the appropriation of certain payments, and produces a daybook and leger, kept by him and belonging to the party calling him, to enable him to testify with more accuracy, and it appears from him that there was also a journal kept, containing an abstract of the daybook, not present, this does not prevent the witness from giving such testimony, without producing such journal.

AT the trial of this action before WHITMAN C. J. the defendant consented, after the testimony was all out on both sides, that the cause should be taken from the jury, and to have a default entered, with the understanding, that if the rulings of the presiding Judge were erroneous, a new trial should be granted.

The opinion of the Court states the ground of the action, and sufficient of the facts proved, to show the subject matter of the rulings, the objections made, and the rulings of the presiding Judge.

Howard & Shepley argued for the defendant, and

W. P. Fessenden & Munger, for the plaintiff.

The opinion of the Court was by

TENNEY J. — This action is for the recovery of a sum of money paid by the defendant and indorsed on a note, dated July 1, 1840, for $337,54, in six months and interest after, and as the plaintiff contends, afterwards allowed on an account in his favor against the defendant.

It is not in controversy, that there were paid and indorsed on the note the sum of $100, Dec. 28, 1840, and the sum of $200, Jan. 27, 1841, and the note afterwards taken up on payment of the balance. It is proved, that on the 27th Jan. 1843, the plaintiff brought an action against the defendant, declaring upon a note dated July 15, 1841, for $127,41, and on a balance of account for $212,03; and after the same action was entered in Court, the defendant offered to be defaulted for the sum of $145, and defended against the balance of the claim. The plaintiff attempted to show in the trial of the action at bar, that the defence in the former suit was, that the said sums of $100, and $200, were paid upon the account, and not upon the note of July 1, 1840, and that the indorsement upon the latter was erroneous; and that this appeared from the testimony of John M. Small, on his cross-examination, he having been called by the plaintiff, to show that he had authority from the defendant to draw certain orders in the defendant's name; that upon this evidence of the misappropriation, and the intimation of the Court, that the claim upon the account could not be sustained, the sum offered was accepted, and judgment rendered for the plaintiff for the same. For the purpose of showing that such were the proceedings and facts, the testimony of John M. Small, on the former trial was offered, and allowed to be proved by another witness, though objected to by the defendant, "inasmuch as he was in the court house at this trial, and was summoned and used as a witness by the plaintiff, in the former suit."

A witness, who had been the plaintiff's book-keeper testified to the identity of his daybook, leger, cashbook, charges, &c. which books contain items of debt and credit, tending to show the origin of the notes, and the appropriation of pay-

ments made, &c. On cross-examination, he stated, that the figures in the leger in one of the columns referred to pages of the journal, so called, and that this journal was in Boston. The defendant called for the journal, and objected to the proof of its contents, unless it was produced. But the Judge overruled the objection, and permitted the witness to swear, that the journal was an abstract of the daybook, and not a copy, and that to the best of his recollection, it *contained* nothing excepting what was in the daybook and leger.

Was the testimony of John M. Small in the trial of the former action improperly allowed to be given in evidence by another witness? Whenever a legal appropriation of a payment has been made upon one of two or more claims of a creditor against the same debtor, one of the parties cannot change that appropriation; but it may be changed by the consent of both, and in such case the indebtedness first discharged, is revived by implication of law, when there is no express promise. If a debtor insists upon a different appropriation from that first made, and the creditor consents, that the change may take place, by word or act, and it is made, the former cannot insist that the debt, to which the payment was first applied is not in force. In the trial of an action upon one of several debts in favor of the same individual against a debtor, if it is insisted that a payment made, and indorsed or credited upon another claim, should have been applied to the reduction of the one in suit, and the creditor assents thereto, and the appropriation is made accordingly, and judgment taken for the balance only, the debtor cannot have the benefit of the payment on both demands, but there would be a revival of the debt first paid.

In the case at bar, the question was, whether such part of the payment made and indorsed on the note of July 1, 1840, as was sufficient to discharge the balance of the account, claimed in the first suit, was allowed thereon, in consequence of said claim being defended upon the ground of the misappropriation, the testimony of John M. Small, a witness, whom the plaintiff could not impeach, and the intimation of

the Court that the defence was made out. If all these facts should be settled, as the plaintiff insists they were, it amounts to a consent of the parties, that the payment should be applied to the account instead of the note; and consequently the indorsement made upon the latter would not be regarded a discharge of that debt. It was competent for the parties to show what took place at the trial of the former suit, and the defendant does not object to its propriety. The plaintiff did not rely upon facts which might be within the knowledge of John M. Small at the time of the trial of the present suit, but upon his testimony given in the other. That testimony is not attempted to be impeached as erroneous by him; but this action is sought to be maintained on the assumption, that it was true, and produced the result of the former suit; that testimony was a part of the *res gesta*, under the issue presented in the trial of this action, and could be proved as well by a witness who heard, as by the one who gave it; and the fact, that John M. Small was summoned and used by the plaintiff as his witness in the former suit, does not render the evidence allowed objectionable.

2. The plaintiff did not rely upon any thing contained in the journal to support the claim declared on. The books introduced enabled the witness to testify to facts, and it appeared that the journal was abstracted from the daybook; the defendant could not be prejudiced by the absence of the journal.

Exceptions overruled.

Oliver Pierce *versus* John Conant.

The Stat. of 1841, c. 69, § 5, having given a party who has paid usury a right, "in an action at law," to recover back the excess of interest he may have paid above six per cent. and being merely remedial and not penal, such party may have his remedy by an action for money had and received.

Where interest was cast upon a note at the rate of seven and an half per centum, and added to the principal, and the amount thus ascertained was settled by the indorsement to the creditor by the debtor at the same time of notes of a third person for a part, and by his own three notes, payable at different times, for the balance; *it was held*, that the amount paid by the transfer of the notes of the third person included such part of the usurious interest as the amount thus paid bore to the whole sum: —

That each of the debtor's own notes included such portion of the usury as the amount of such note bore to the whole amount: —

And that the statute of limitations, applicable to such suits, barred the recovery by the debtor, in an action against the creditor, of any sum further than the amount of usury paid within one year next before the commencement of the suit.

Money had and received. The writ was dated Feb. 27, 1844. The general issue was pleaded, with a brief statement, that the supposed cause of action did not accrue within one year next before the commencement of the suit.

On Jan. 23, 1833, J. & A. Conant loaned the sum of fifteen hundred dollars to the plaintiff and G. & H. Pierce, and took their note therefor, payable on demand, with interest annually. This note was afterwards indorsed by J. & A. Conant to the defendant.

On Oct. 10, 1839, a settlement or adjustment was made by the plaintiff and defendant. Interest on the note was cast at the rate of seven and an half per cent. annually, the costs of a suit on the note, $17,69, added, and $130, which had been paid and indorsed on Feb. 11, 1839, deducted, leaving then due, according to such computation, the sum of $2,322,27. This sum was discharged by the indorsement by the plaintiff, without recourse to him, to the defendant, of four notes in his favor against one Atherton, secured by a mortgage on real estate, on which were then due $1365,91, and by giving his own three notes to the defendant for the balance, $956,36,

payable in one, two and three years with interest annually. The report of the case then proceeds thus — "which three notes last mentioned were secured by a mortgage on real estate, given by the said Oliver Pierce to the said John Conant, and the payment of the balance due on the last mentioned notes was made on the eighth of December, 1843." It did not appear in any other manner how and when those three notes were paid. No part of the Atherton notes were paid in any way but by a foreclosure of the mortgage; and on Sept. 6, 1843, the defendant sold the land on a long credit for the most he could obtain for it, being twelve hundred dollars, and being all he has received on those notes and that mortgage.

It was agreed, that if the action could be maintained, the defendant was to be defaulted, and such damages were to be assessed by the Court, as the plaintiff was entitled to upon the facts.

Fessenden, Deblois & Fessenden contended that the action for money had and received, was the proper remedy to recover back the usurious interest actually paid to the defendant. This is not a penal action, but it merely seeks to recover back the money the defendant has illegally taken from the plaintiff. Rev. Stat. c. 69, § 5; 12 Mass. R. 34; 13 Mass. R. 104; 2 Burr. 803; 19 Maine R. 406.

The last notes from the plaintiff to the defendant included usury. 15 Mass. R. 98; 2 Campb. 599; 8 T. R. 390; 22 Maine R. 184.

The last money paid is the usurious interest. It cannot be said, that the defendant had received usury so long as he had taken only the amount justly due and legal interest. The statute of limitations commences running only from the time of the last payment. 7 T. R. 184; 5 Mass. R. 53; 3 Wils. 250.

The reception of the Atherton notes and mortgage, was only a payment of the amount for which they were taken. 22 Maine R. 363.

W. Goodenow, for the defendant, said there were several fatal objections to the plaintiff's recovering in this action.

Money voluntarily paid cannot be recovered back; and if the plaintiff relies to recover it back by virtue of a statute provision, he should declare upon the statute. 18 Maine R. 166; 12 Mass. R. 134; 9 Mass. R. 38.

There was no usury included in the first note, but reckoned upon it, at the settlement, by a bargain then made. The bargain was, that the plaintiff should pay by his own notes $956,36, and for the balance the defendant should take the Atherton notes and mortgage, which were transferred without any liability of the plaintiff. And, in fact, the defendant lost more than the difference between six, and seven and an half per cent. interest. This was not an usurious transaction; and had it been, the usury was paid by the Atherton notes at the time they were passed over. The case cited from 22 Maine Reports is not in point, for there usury was included in the first note, and the second was a mere renewal of the other, without payment of any thing. As the Atherton notes were indorsed without recourse, the contract was not usurious; but were it a payment of usury the right to recover is barred by the statute.

There is no ground for saying that there was no payment of usury, if any there was, until the last money was paid. The authorities are precisely the other way, that the first money paid is the usury. But if every payment included a portion of the additional one and an half per cent., then so small an amount was paid within the year, that the damages must be merely nominal.

The opinion of the Court was drawn up by

WHITMAN C. J.—This is an action for money had and received. The object of the plaintiff is to recover $272,02, alleged by him to have been paid to the defendant, as and for usurious interest, on a loan of $1500, made to him by the defendant, in 1833. The first question raised in the defence is, as to the maintenance of such an action, for such a purpose. It is urged that the action is misconceived; and several cases have been cited by the counsel for the defendant, supposed by

him to sustain the position. The St. of 1841, c. 69, § 5, gives to a party, who has paid usury, a right "in an action at law," to recover of the payee the excess he may have paid over simple interest. Although this is, as required by statute, an action at law, it is insisted, that the declaration should be special, setting forth a case, coming within the purview of the statute. If the action were in its nature penal, and not remedial, the reasoning of the defendant's counsel would have great force; and could not, perhaps, be controverted. But the provision in the statute is entirely remedial. It enables a party, who has paid money to one, who had no right to exact and receive it of him, to recover it back. The simple amount only, so paid is reclaimed. The authorities cited do not apply to such a case. The objection urged, that the defendant could not be apprised, by a declaration so general, that he was called upon for money paid as and for usurious interest, would apply, with equal force, to every action for money had and received, without containing any specification. In such case the defendant has it in his power to possess himself of the requisite information, by applying for a bill of particulars, which the Court would compel the plaintiff to furnish; and this would obviate the further objection made, that a recovery in such case would be no bar to future action.

The case, much relied upon by the counsel for the defendant, of *Palmer* v. *The York Bank*, 18 Maine R. 166, was altogether different. The plaintiff therein sought to recover, for a breach of contract, damages beyond the amount contracted to be paid. It was the case of a suit upon bank notes; upon a demand of payment of which the holder became at common law, entitled to recover the amount claimed, with simple interest thereon. A statute had authorized a recovery, by way of penalty, for refusing prompt payment, interest at the rate of twenty-four per centum per annum. The Court merely held, that, to recover such a rate of interest, the plaintiff should have declared for it. Not having done so he was held to be restricted to the terms of his contract, and the recovery of interest, as at common law, by way of damages for

breach of the contract. In the case at bar money is alleged to have been received by the defendant, which in conscience he ought not to detain from the plaintiff; and the action is brought to compel him to refund it, as required by positive law. The mode of proceeding is therefore unobjectionable.

It is next contended by the counsel for the defendant, that a settlement, which took place between him and the plaintiff, should preclude the latter from maintaining his action. The amount then ascertained to be due, including interest, at the rate of seven and one-half per centum per annum, after deducting a payment which had been made upon the original loan, was $2304,58. Of this sum $1348,22 was then paid, together with $17,69, costs of suit, which had then accrued. This payment was made by the transfer of certain notes, and a mortgage, which the plaintiff held against another person. This left a balance of the original loan and interest, computed as above, of $956,36, for which new security, by notes and mortgage, was given by the plaintiff to the defendant. The defendant insists, that these two sets of securities amounted to payment, at that time, of the usurious interest; and so that no usurious interest has been received within one year next before the commencement of the suit. This ground of defence is clearly good as to so much of the extra interest as can be regarded as having been then paid. The statute contains a limitation, restricting the right of the payer to recover it back, to the term of one year from the time of payment. The extra interest was added into, and formed a component part of the gross sum then settled for; and the amount then paid and secured, by the notes and mortgage of another person, was clearly a payment *pro tanto;* and it comprised its proportion of the extra interest; and of course was payment thereof; and therefore not now recoverable. *Darling* v. *March,* 22 Maine R. 184.

For the residue, viz. $956,36, the defence, upon this ground, is not sustainable. In this sum was included its proportion of the extra interest; and the new security, taken therefor by the

defendant of the plaintiff, was not payment. All the authorities agree that such a renewal of an original security, tainted with usury, carries with it the original taint. The new security, therefore, must be regarded as containing about $115, of the extra interest.

It is contended, however, that even this amount is not recoverable; and it may be so; for the report of the facts leaves it doubtful whether the whole was paid within the year next preceding the suing out of the writ. And such parts of it as were not so paid would come within the principle of *Darling* v. *March*, before cited. The language of the report is, that the payment of the balance due on the last mentioned notes (viz. for the $956,36,) was made on the eighth of December, 1843." What that balance was does not appear. The language of the report would seem to imply, that it was short of the original amount; and the original amount, $956,36, was made payable in one, two and three years. It is rather to be presumed, that the two first instalments had been before paid; and the language of the report does not forbid the presumption that portions of the last instalment had been previously paid. We could not, therefore, be authorized to conclude, that any thing beyond a nominal amount of extra interest had been paid, within the year preceding the suing out of the writ. And for that amount, viz. one dollar, judgment may be entered upon default.

Edward Kennard *versus* William Burton.

The father of a minor daughter, living with and performing labor for him, may, under the provisions of Rev. Stat. c. 26, maintain an action against an individual to recover damages sustained by the plaintiff in the loss of the services of the daughter, occasioned by an injury caused by the negligence or misconduct of the defendant, whereby a collision took place between his wagon and that in which the daughter of the plaintiff was, upon the public highway, by which she was thrown from the wagon and injured.

Evidence of the complaints of suffering made by the daughter of the plaintiff, after receiving an injury from the collision of two wagons upon the public highway, but during the time when it was material to prove such suffering to have existed, is admissible.

When persons meet and pass each other upon the public highway, it is, by Rev. Stat. c. 26, the duty of each "to drive to the right of the middle of the traveled part of the road or bridge, when practicable." And when it is not practicable, that is, when it is difficult or unsafe for him to do so on account of his vehicle being heavily loaded or for other cause, he should stop a reasonable time at a convenient part of the road, to enable the other person to pass, and without any request from him.

Where two persons meet when traveling in their respective wagons upon the public highway, and a collision takes place, and one of them is thereby thrown from his wagon and injured; in order that the person injured should maintain an action for the damages sustained by him, the injury must not have been caused by any want of ordinary care on his part to avoid it, although he was traveling in the manner prescribed in Rev. Stat. c. 26, and the other party was not.

The rule is, that if the party injured, by want of ordinary care contributed to produce the injury, he will not be entitled to recover; but if he did not exercise ordinary care, and yet did not by the want of it contribute to produce the injury, he may recover.

This was an action of the case, wherein the plaintiff claimed damages for the loss of service of his daughter Caroline, and for medical aid furnished, occasioned by an injury as was alleged, caused by the carelessness and improper conduct of the defendant, while traveling upon the highway in Gorham, on Nov. 7, 1843.

It appeared that upon that day, the plaintiff's daughter Caroline, eighteen years of age, and Mrs. Tukey were riding from Westbrook to Gorham together in a wagon, and met the defendant, who was driving a team of two horses in a wagon loaded with barrels of potatoes, and was sitting upon the

barrels; that he was driving so near the side of the road on his left, that the wagon in which Caroline and Mrs. Tukey were, was obliged to be, and was, turned out of the traveled part into the ditch, in passing the defendant; that the defendant passed on, without stopping or turning out, in the centre of the highway; and that in attempting to get by, the fore wheel of the wagon of Mrs. Tukey and the plaintiff's daughter struck the hind wheel of the defendant's wagon, and they were both thrown out of the wagon on the right side thereof, and there the injury was sustained.

Mrs. Tukey testified, that on their return home the same day, Caroline complained of great pain from the injuries she had received from being thrown out of the wagon. This testimony was objected to by the counsel for the defendant. WHITMAN C. J. before whom the trial was had, admitted it.

There was testimony introduced on the part of the defendant, tending to show that the other wagon might with ordinary care have passed him without danger, and that his wagon had a heavy load thereon.

1. The defendant's counsel requested the Court to instruct the jury, that where two carriages meet and one is in the centre of the highway and is heavy laden, and it is difficult for it to turn out, and the other, a light carriage, undertakes to go by without requesting the driver of the heavily laden one to turn out, and a collision takes place, the person who drives the heavily laden wagon is not liable for the damages. The Court declined to give this instruction.

2. The defendant further requested the Court to instruct the jury, that in such a case as above stated, if there is a sufficient space in the highway for the carriage which undertakes to go by, to do so, the party driving the heavily laden wagon is not responsible for the collision. The Court declined to give such instruction.

3. The defendant further requested the Court to instruct the jury, that if the defendant did not turn out nor stop his wagon, yet if the plaintiff's daughter in going by, through negligence and want of ordinary care, drove her wagon on to the

wagon of the defendant, the defendant is not liable in this action. The Court declined to give said instruction.

4. The defendant further requested the Court to instruct the jury that as there was no proof of any medical advice or services procured for the daughter in consequence of any injuries received, the plaintiff could recover nothing more than the value of the loss of his daughter's services. The Court declined to give said instruction; and instructed the jury, that they would not be confined to giving damages for the mere pecuniary loss, but might give damages to the plaintiff for the loss of his daughter's society, and the comfort arising from it.

And the Court further instructed the jury that if the defendant was in the centre of the traveled part of the road, and it was difficult for him to turn out, if he did not stop his team, when the plaintiff's daughter undertook to go by, although there might be sufficient space in the highway for her wagon to pass by the defendant's wagon, it would not prevent the defendant from being liable in this action for any injury which happened by the collision, and that the damages might be enhanced, if the injury was wantonly inflicted; and that the jury might judge of the recklessness of the defendant by his conduct, by the indifference which he manifested after the injury occurred; by his taking no pains to ascertain the extent of the injury which he had occasioned; and by his not descending from his load to afford them aid; that the cases read to the jury of *Smith* v. *Smith*, 2 Pick. 621, and *Butterfield* v. *Forrester*, 11 East. 60, had no application in principle to the present case.

5. The defendant further requested the Court to instruct the jury that if there was negligence on the part of the defendant and the plaintiff's daughter was injured, still the defendant is not liable, if by using ordinary care the plaintiff's daughter might have avoided the collision. This instruction the Court did not give.

To which ruling and instructions and refusal to instruct the defendant excepted.

Wells and *Sweat*, for the defendant, contended, that the action could not be maintained in the name of the father. The statute, Rev. St. c. 26, § 6, gives the action only to the "person injured." The language of the St. c. 25, § 89, varies only in saying that, "if any person shall receive any bodily injury, or shall suffer any damage in his property." If this last applied to an injury by a person, instead of one arising from a defect in a highway, it would not aid the plaintiff, for the daughter cannot be considered as "his property." They relied upon *Reed* v. *Belfast*, 20 Maine R. 246, as directly in point; contending that there was no difference in the meaning of the two statutes in this respect.

The testimony of Mrs. Tukey in relation to the complaints of the plaintiff's daughter, on their return home, of the injuries previously received, was improperly admitted. They were made hours after the accident happened, and were no part of the *res gesta*. 8 Pick. 122; 24 Pick. 246; 1 Stark. Ev. 247; 1 Greenl. Ev. § 102.

It was the duty of the plaintiff's daughter to have passed the plaintiff on the side where there was ample room for her to have done so, and to have passed in safety. It was not the duty of the defendant, with his heavily loaded wagon, to turn out of the path, whenever he saw a horse wagon approaching. Even if such was his duty, when required by the other party, it could not be so without such request. By the omission of such request, and by proceeding without requiring him to turn out or stop, the plaintiff's daughter waived any right to have the defendant do so, if she had the right to require it. 2 Taunt. 314; 5 Car. &. P. 379.

Whether it was, or was not the duty of the defendant to turn out, the plaintiff's daughter and her companion in the wagon were bound to use ordinary care and diligence in driving, and not wantonly to run into danger, even if the other party should have conducted differently. 24 Com. L. R. 301; 38 Com. L. R. 245 & 248; *Lane* v. *Crombie*, 12 Pick. 177; *Crumpton* v. *Solon*, 2 Fairf. 335; *Palmer* v. *Barker*, 2 Fairf. 338; *French* v. *Brunswick*, 21 Maine R. 29; 2 N. H. R.

392; 19 Wend. 399; 24 Wend. 465; 7 Pick. 188. And the burthen of proof is on the plaintiff to establish the fact, that ordinary care has been used by the party alleged to have been injured.

The ruling of the presiding Judge upon the subject of damages was erroneous. 3 Stark. Ev. 1454; *Rising* v. *Granger*, 1 Mass. R. 47; *Dickinson* v. *Boyle*, 17 Pick. 78.

Howard & Shepley argued for the plaintiff, contending: that the testimony objected to, was rightly admitted. When the bodily or mental feelings of an individual are material to be proved, the usual expressions of those feelings, made at the time they would be likely to exist, are admissible as original evidence. 1 Greenl. Ev. § 102.

It is said, that this action cannot be maintained, because the injury was not a personal one to the plaintiff, and the case of *Reed* v. *Belfast* is cited to maintain this position. That decision was under a different statute, having entirely different language from the one under which this suit is brought. The statute confines the action against towns to a particular species of injury; but a person sustaining any injury may maintain a suit against the person causing it. The words of a statute are to be taken in their usual acceptation; and we are to look only to the usual common law mode of ascertaining the meaning of the word, injury.

The requests to give instruction were properly refused. One sought to have the Judge instruct the jury, that certain cases in the Reports were applicable to the present one, instead of requesting to give as an instruction a principle of law. This is a sufficient cause for refusal. But the cases were not applicable. Those were cases where the party injured wantonly ran upon the carriage of the other. The law on this subject is not correctly stated in any one of the requests, where it is applicable to the present case. They are all objectionable on the ground, that they request instructions upon questions merely speculative.

First request. The statute is imperative, that it is the duty of each of the persons meeting with vehicles upon the public highway to turn to the right, or stop. A request to stop is

necessary only when one overtakes another in passing the same way.

Second. This is understood to mean, that it was the duty of the plaintiff's daughter to have turned to the left of the defendant's wagon, and passed there, had there been room. It is to request the court to instruct the jury, that it was her duty to have violated the express provisions of the law, to enable her to recover of the defendant the damages caused by his misconduct. In endeavoring to do this, and to escape injury from the defendant, she would be exposed to strike against some one legally passing on the other side, and in doing which she would be clearly a trespasser.

Third. The state of facts in this case does not call for this instruction. The injury was occasioned by the refusal of the defendant to turn to the right, and thus enable the plaintiff's daughter to pass on the side the statute requires. It could be no evidence of want of care, that she did not cross over to the left, and pass there, or go out of her proper path.

The fifth states the same principle with some variation. There is, however, no difference in substance. The defendant's wagon must do as it did, or pass to the other side of the way. Besides, when the defendant was out of his proper place, and on the very part of the road where the plaintiff had the right to be, and was required by law to be, he was guilty of a wrong, and had no right to require the women in the wagon to go out of their course to avoid him, or to make use of the care which might be required, if he had been rightly there. The state of facts, exhibited by the testimony in this case is such, that the question, whether due diligence to avoid the defendant was used or not, was not properly before the jury.

The principles laid down by the presiding Judge upon the subject of damages were correct. 3 Esp. R. 119; 3 Wils. 18; 11 East, 23; 2 T. R. 4.

The opinion of the court was drawn up by

Shepley J. — This suit arises out of a collision of the wagons, in which the plaintiff's daughter and the defendant

were traveling on the highway. The Statute, c. 26, prescribes certain duties to be performed by those, who thus travel; and provides by the sixth section, that "any person injured by any of the offences or neglects aforesaid shall also be entitled to recover his damages in an action on the case to be commenced within one year after such injury."

The counsel for the defendant contend, that the design of the statute was not to make those offending against its provisions liable for any other than direct injuries to the person or property of another; and that the services of a child during infancy cannot be considered the property of the father. They rely upon the case of *Reed* v. *Belfast*, 20 Maine R. 246. It was a different statute, containing different language, which received a construction in that case. That statute authorized a person, who had received an "injury in his person, or in his horse, team, or other property," occasioned by a defect of a highway, to recover damages. The manner, in which he must receive the injury, was prescribed by the statute; and the word injury was considered as thereby limited to the class of injuries named. In the clause of the statute now under consideration the word *injured*, is not limited by any other words used in connexion with it. There is nothing in the other sections of the statute, which can have that effect. It was the design of the statute to regulate the conduct of such persons, not to abridge any rights, which they might have by the common law. When the inquiry arises, what constitutes an injury, the common use of language and the common law must decide. There can be no other safe guide. Their decision would be, that the loss of the services of a child would be an injury to the father. The case of *Williams* v. *Holland*, 6 C. & P. 23, cited by the council for another purpose, exhibits a case of recovery of damages for an injury occasioned by a collision on a highway to the son of the plaintiff, as well as to his cart. In the case of *Hall* v. *Hollander*, 4 B. & C. 660, Abbott C. J. said, "it is a principle of the common law, that a master may maintain an action for a loss of service sustained by the tortious act of another, whether the servant be a child or not;" although

the action in that case could not be maintained, because the child was too young to be able to perform any service.

The counsel also insist, that the complaints of suffering made by the daughter after the injury, and her description of the place injured, were improperly admitted.

The rule, as stated in Greenl. Ev. § 102, is, that "whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence." By the time in question, is not intended the time of injury, but the time, when it is material to prove a condition of bodily or mental suffering. And that may be material for weeks and perhaps months after an injury has been inflicted. If other persons could not be permitted to testify to them, when the person injured might be a witness, there might often be a defect of proof. The person injured might be unable to recollect or state them by reason of the agitation and suffering occasioned by it.

Several requests were made for instructions, which were refused. The two first, intended to define the duties of persons passing each other with carriages on the highway, appear to have been founded upon a misapprehension of the duties enjoined by the statute.

When persons meet and pass each other, the first section requires, that each shall drive his "carriage or other vehicle to the right of the middle of the traveled part of such road or bridge, when practicable." When it is not practicable, that is, when it is difficult or unsafe for him to do so on account of his vehicle being heavily loaded, or for other cause, the second section requires, that he should stop a reasonable time at a convenient part of the road to enable the other person to pass. And this he should do in obedience to the statute without any request. These rules can be easily comprehended and obeyed. Those, who disregard them, cannot justly complain, when they are held responsible for any injuries, which they may thereby occasion. It appears from the testimony presented in this case, that the defendant violated them. He did not turn to the right from the middle of the traveled part of the road.

His excuse was, that his wagon was heavily loaded, that the earth was frozen, and that the wheels were in ruts, so that it would have been difficult or unsafe for him to have done so. In such case the law required him to stop a reasonable time at a convenient part of the road for the other wagon to pass; and this he did not do. The two first requests were therefore properly refused.

The third and the fifth requests present the question, whether the driver of the other wagon was not bound to exercise ordinary care to avoid an injury, although the defendant was conducting improperly. In suits against towns for the recovery of damages for injuries occasioned by defects in highways, the law is settled, that the plaintiff must shew, that the injury was not occasioned by negligence or the want of ordinary care on his own part. The same rule prevails, when the suit is brought against an individual to recover damages for an injury occasioned by some obstruction or nuisance, which he has caused to be placed in the road. *Flower* v. *Adams*, 2 Taunt. 314; *Marriott* v. *Stanley*, 1 Man. & Gran. 568; *Smith* v. *Smith*, 2 Pick. 621; *Harlow* v. *Humiston*, 6 Cow. 191. It prevails also in cases of collision of vessels and boats, when meeting and passing in a river or canal. *Lack* v. *Seward*, 4 C. & P. 706; *Luxford* v. *Large*, 5 C. & P. 421; *Sills* v. *Brown*, 9 C. & P. 601; *Raisin* v. *Mitchell*, Id. 613; *Vennall* v. *Garner*, 1 Crom. & Mee. 21; *Rathbun* v. *Payne*, 19 Wend. 399. It would seem, that a somewhat modified rule might prevail in admiralty in cases of collision of vessels upon the high seas. When the injury was occasioned by a want of skill or ordinary care in the management of each vessel, Lord Stowell considered, that the loss should be apportioned between them. The Woodrup Sims, 2 Dodson's R. 83.

The duties required of each party, in cases of injury by collision and otherwise on the highways, have often been discussed in the decided cases. In the case of *Knapp* v. *Salsbury*, 2 Campb. 500, there was a collision of a post chaise and a cart. Lord Ellenborough said, "if what happened arose from inevitable accident, or from the negligence of the

plaintiff, to be sure the defendant is not liable." In the case of *Jones* v. *Boyce*, 1 Stark. R. 493, the coupling rein broke, one of the leaders became ungovernable, the coachman drew the carriage to one side of the road, where it came in contact with piles, one of which it broke, and the wheel was stopped by a post. The carriage was not overturned. The plaintiff being alarmed jumped from the top of it, and his leg was broken. Lord Ellenborough instructed the jury, if they should be of opinion, that the reins were defective, the inquiry would be, "did this circumstance create a necessity for what he did, and did he use proper caution and prudence in extricating himself from the apparently impending peril." In the case of *Chaplin* v. *Hawes*, 3 C. & P. 554, the driver of a cart injured the plaintiff's horse, rode by his servant, while the cart was passing a gate on the wrong side of the road. The plaintiff's servant was rightfully on the same side of the road and about to meet and pass the cart. Best C. J. stated to the jury, "if the plaintiff's servant had such clear space, that he might have easily got away, then, I think, he would have been so much to blame as to prevent the plaintiff's recovering." In the case of *Pluckwell* v. *Wilson*, 5 C. & P. 375, there was a collision of the chaise of the plaintiff and the carriage of the defendant. Mr. Justice Alderson left it to the jury to say, "whether the injury to the plaintiff's chaise was occasioned by negligence on the part of the defendant's servant without any negligence on the part of the plaintiff himself; for that if the plaintiff's negligence in any way concurred in producing the injury, the defendant would be entitled to the verdict." In the case of *Williams* v. *Holland*, 6 C. & P. 23, there was a collision of the plaintiff's cart and the defendant's chaise. Mr. Justice Bosanquet told the jury, "if the injury was occasioned partly by the negligence of the defendant, and partly by the negligence of the plaintiff's son, the verdict could not be for the plaintiff." In the case of *Bridge* v. *The Grand Junction Railway Company*, 3 Mees. & Wels. 244, the injury was alleged to have been occasioned by the negligent management of a train of railway carriages; and Baron Parke said, "there

may have been negligence in both parties, and yet the plaintiff may be entitled to recover. The rule of law is laid down with perfect correctness in the case of *Butterfield* v. *Forrester*, 11 East, 60, and that rule is, that although there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover. If by ordinary care he might have avoided them, he is the author of his own wrong. That is the only way in which the rule as to the exercise of ordinary care is applicable to questions of this kind."

An examination of the cases leads to the conclusion, that the correct rule is, that if the party by the want of ordinary care contributed to produce the injury, he will not be entitled to recover. But if he did not exercise ordinary care, and yet did not by the want of it contribute to produce the injury, he will be entitled to recover. In the case of *Lane* v. *Crombie*, 12 Pick. 177, the Court held, that the burden of proof was on the plaintiff to show, that the injury was not occasioned by her own negligence. In the case of *Hartfield* v. *Roper*, 21 Wend. 615, a child about two years old was in the beaten track of a highway and a sleigh and horses passed over it. It is stated in the opinion, that "it is perfectly well settled, that if the party injured by a collision on the highway has drawn the mischief upon himself by his own neglect, he is not entitled to an action even though he be lawfully in the highway pursuing his travels." In the case of *Palmer* v. *Barker*, 2 Fairf. 338, the opinion states, that when two persons are traveling in opposite directions, and are about to meet and pass each other, "in so doing both are bound to use ordinary care and caution."

The counsel for the plaintiff contend, that this doctrine should not be applied to a case, where one person is traveling on the side of the road by law assigned to him, and another is refusing to obey the law. There is, however, no good reason, why a person, who is traveling on the proper side of the road, should recover damages of one who is not, for an injury,

which his own want of ordinary care has contributed to produce. A person should not by his own negligence occasion even the misconduct of another to be productive of greater mischiefs, than it otherwise would have been, and then claim of him a compensation for the entire injury. And the common law does not attempt to apportion the loss in such cases. The wrongdoer is made responsible for his own misconduct, not for the consequences of another's neglect to exercise ordinary care.

They also contend, that the requested instructions were not applicable to the testimony in the case; that they did not state the law correctly; and were therefore properly refused.

The third request may be liable to the objection, that it would not have left the jury at liberty to decide, whether the alleged negligence and want of ordinary care contributed to occasion the injury. The fifth requested instruction is not liable to such an objection, for if there had been no collision, there would have been no injury occasioned by the defendant.

It is true, that the testimony might not have authorized a jury to find, that the daughter of the plaintiff by her want of ordinary care contributed to produce the injury; but the defendant so contended, and he was entitled to have the jury pass upon it under instructions, which would have presented it more fully and perfectly to their consideration.

The verdict is set aside
and a new trial granted.

JAMES DEERING *versus* PROPRIETORS OF LONG WHARF.

Where the grantors, for a certain consideration, "give, grant, bargain, sell and convey" to the grantee, his heirs and assigns, "a certain gore or strip of flats" described in the deed, "the said strip or gore to begin at the lower end of Milk Wharf, so called, and to run four hundred and eighty feet towards the channel. And the said (grantors,) for the consideration aforesaid, hereby release to the said (grantee) or to any other person or persons that may build any wharf on the western line of said strip of flats and in the continuation of the said new wharf and on the line thereof to the eastward, all our right, title and interest to the said gore of flats to the channel, or so far as our right extends, for the use and benefit of the proprietors of the wharf which may be built as aforesaid. To have and to hold the said granted and bargained premises, with the privileges and appurtenances thereof, to the said (grantee,) his heirs and assigns, to his and their use and behoof forever." After this follow the usual covenants in a warranty deed. — *It was held*, that by the first description was conveyed to the grantee named, and to his heirs and assigns, an absolute estate in fee of the premises so described; and that by the second, all the right, title and interest of the grantors in the premises thus described, be the same more or less, passed to the grantee named in the deed, and not "to the use and benefit of the wharf which might be built."

The owner may lawfully erect wharves upon his own flats, for his own use and benefit; but the public have the right equally with him to pass and repass with vessels and boats upon and over the water where there is no occupation with wharves or buildings.

If the language used in a deed of land indicates clearly the intention of the parties, that intention will stand, notwithstanding the law may prevent its being carried into effect.

Although neither the habendum nor the covenants in a deed can control the premises, when the latter are free from doubt; yet upon a question of intention of the parties in reference to the premises, the language used in the habendum and covenants may be important and sometimes decisive, and may appropriately be taken into consideration.

The owners of upland to which flats adjoin may sell the upland without the flats, or the flats without the upland.

WRIT of entry demanding a strip of flats ground in Portland, situated easterly of and near to Long Wharf, and extending from a line passing by the end of Milk Wharf to low mater mark.

On June 26, 1796, John and Lucy Nichols made a deed to Nathaniel Deering; and the main questions in controversy

between the parties grew out of the construction to be given to that deed. A copy follows: —

"Know all men by these presents, that we John Nichols of Portland in the county of Cumberland, and Lucy, wife of the said John, in her right, in consideration of the sum of ten pounds ten shillings lawful money, paid us by Nathaniel Deering of said Portland, the receipt whereof we do hereby acknowledge, do hereby give, grant, bargain, sell and convey unto the said Nathaniel Deering, his heirs and assigns forever, seven eighth parts of a certain gore or strip of flats in Portland aforesaid, between the flats belonging to the said John, Nathaniel and others, and flats belonging to Joseph Holt Ingraham and which he purchased of the heirs of Ephraim Jones, deceased, which said strip is in common to the said John and Lucy and the said Ingraham in the right of his wife Abigail, deceased; the said strip or gore to begin at the lower end of Milk Wharf, so called, and to run four hundred and eighty feet towards the channel. And the said John and Lucy in her said right, for the consideration aforesaid, do hereby release to the said Nathaniel, or to any other person or persons that may build any wharf on the western line of said strip of flats, and in the continuation of the said new wharf and on the line thereof to the eastward, all our right, title and interest to the said gore of flats to the channel, or so far as our right extends, for the use and benefit of the proprietors of the wharf which may be built as aforesaid. To have and to hold the said granted and bargained premises, with the privileges and appurtenances thereof, to the said Nathaniel Deering, his heirs and assigns, to his and their use and behoof forever. And we, the said John and Lucy, for us, our heirs, executors and administrators, do covenant with the said Nathaniel Deering, his heirs and assigns, that we are lawfully seised in fee of the premises; that they are free of all incumbrances; that we have good right to sell and convey the same to the said Nathaniel as aforesaid; and that we will warrant and defend the same to the said Nathaniel, his heirs and assigns, forever,

against the lawful claims and demands of all persons. In witness whereof," &c.

The demandant had become the owner of the demanded premises, so far as private rights extended, with the exception of whatever right passed to the wharf proprietors by said deed. The facts are stated in the opinion of the court.

The tenants were defaulted; and the case was submitted, on the report of the Judge, to the decision of the whole court; and if the demandant was not entitled to recover, the default was to be taken off and a new trial granted.

Howard & Shepley, for the tenants.

By the deed from John and Lucy Nichols, of June 26, 1790, the interest of John and Lucy Nichols (which they held in the right of the said Lucy) passed to Nathaniel Deering, to the use of the said Nathaniel or of any other person or persons that might build any wharf on the western line of said strip of flats, and in continuation of said new wharf and on the line thereof to the eastward. The "new wharf," the continuation of which is referred to in said deed, was the same as that afterwards called "Deering's Wharf."

Deering's Wharf, as the case finds, was erected a short time previous to the date of the deed from John and Lucy Nichols, and the "continuation" of said wharf was erected by the defendants, (Nathaniel Deering being one of them) immediately after the date of said deed as contemplated by the parties, and by the terms of the deed. This conveyance having been made to Nathaniel Deering to the use of the said Nathaniel and the others who should continue said wharf, he stood seized to the uses, and the statute of uses executed the use, and vested the legal estate in the defendants, who (including the said Nathaniel,) have made the continuation contemplated by the deed. *Thacher* v. *Omans*, 3 Pick. 521.

The continuation of the wharf, an act to be done *in futuro*, would constitute a good consideration for a deed of bargain and sale to take effect *in futuro*. *Green* v. *Thomas*, 2 Fairf. 318; 1 Johns. Cas. 91; 11 Johns. R. 351; 20 Johns. R. 87; 3 Wend. 233; 4 Mass. R. 136.

The second clause in the deed from John and Lucy Nichols clearly relates to the same land described in the first part of the description. There is no other description of any other parcel of flats, and there is but one gore of flats described in any part of the deed. The expression, therefore, "the said gore," in the last paragraph, must refer to and describe the gore, and the only gore previously described.

The premises referred to in the second clause in the deed can only be located by reference to the description in the first clause. The well settled principle of construction of deeds is, that effect should be given to every part of the deed. Co. Litt. 36, (a); Bracton, Lib. 2, folio 94—5.

Applying the principle to the deed in question, the second clause must refer to the same gore described in the first clause, or it can have *no operation whatever;* for the case finds, that the gore described and bounded in the first clause is of greater extent than the ownership of the grantors. And that so far from their having any thing more to convey below that gore, the terminus of 480 feet is of itself below low water mark, and of course below where their ownership or propriety in the flats ceased, and the right of the sovereign or the State attached. "*Idem semper refertur proximo antecedenti.*" Co. Litt. 20. (b).

Where a deed admits of two constructions, the one conformable to, and the other contrary to law, the former is preferred. Co. Litt. 42, (a.) 183, (a.) (b). 1 Wend. 388.

What gore then if not the demanded premises, was conveyed by the second clause? The grantors had no other to convey; describe no other; give no other metes and bounds.

They had conveyed in the first clause, not only all the land they had, but had undertaken to convey even more, and to include a portion of flats below low water mark belonging to the State. This very difficulty they undertook to correct in the second clause.

The line of low water mark, being an uncertain boundary, and the grantors not knowing whether it might not extend below low water mark, or fall short of it, they change the

terminus of 480 feet, and substitute for it, "the channel, or so far as our right extends," thus enlarging the grant to go below the 480 feet and to the channel, if their right extended to the channel, or limiting the grant to the line of low water above the 480 feet, if the right extended only thus far.

Thus the latter clause was designed to explain and qualify the first, to designate more clearly the extent of the conveyance, and to operate as a declaration of the uses.

The habendum in the deed, being to the said Nathaniel, without any "declaration of the uses," would not control the declaration of uses in the premises, for it is well settled, that the premises shall control the habendum, and that if the habendum is repugnant to the premises it is void. *Corbin* v. *Healy*, 20 Pick. 514; *Sumner* v. *Williams*, 8 Mass. R. 162.

The deed of John and Lucy Nichols having vested in the proprietors all the interest and estate they had in the premises, nothing passed by the subsequent conveyance of Lucy Nichols to the plaintiff.

As this suit, however, originated in an attempt on the part of the plaintiff to deprive the defendants of coming over these flats to their wharf, and an assertion of a right on his part to obstruct the free passage of boats and vessels over the flats to Long Wharf; and as the defendants, in addition to their title by deed to the premises, claim also a right to enjoy the use of the dock as appurtenant to their wharf, as they have used and enjoyed it for forty years and more, it may not be amiss to consider their rights in this respect as independent of the deed.

By the common law, the shore of the sea, between common high water and low water mark, belonged to the king, and was not the subject of private property without a special patent or grant. Sir Matthew Hale, *De jure maris et brachiorum ejusdem*, commonly cited as Hargrave's tract, *de jure maris*, c. 4th; 2 Black. Com. 262; Co. Lit. 261, (a.); *Storer* v. *Freeman*, 6 Mass. R. 438.

By the colonial ordinance of 1641, this principle of the common law was so far modified, as to yield to "the proprietor of the land adjoining" propriety to the low water mark, where

the sea doth not ebb above one hundred rods; provided that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels in or through any sea, creeks, or coves to other men's houses or lands. Mass. Col. Ord. of 1641, c. 63, § 3.

This colonial ordinance, (although virtually repealed by the repeal of the charter under which it was passed) is the foundation of the private property in the flats on the shore of the sea, or of any of its arms, coves, or creeks, or wherever the tide ebbs and flows. It is, however, a qualified property in the individual proprietor, subject to the public use; and the "propriety" which the owner of the land adjoining may have and use, and the only one which he can recover at law is such an interest as will not interfere with that use which the public and the owners of adjacent houses and lands possess and enjoy of common right and by the law of nations.

And here we would suggest a doubt whether the "propriety" in flats, thus conferred by the ordinance of 1641, was originally any thing more than a privilege or appurtenance of the "land adjoining," and not an estate which could be severed from it and conveyed by a separate instrument to a separate proprietor, so as to authorize him to commence a real action and obtain a judgment, or writ of possession, to confer on him the exclusive fee without a reservation of the public use. The ordinance of 1641 thus treats it, and speaks of it as a mere "*liberty*," using the expression, "by this liberty." How can such an ordinance have granted the fee in all the shore of the sea and divested the State of all title, without using any words of conveyance, or naming specifically any grantees? It is of itself a mere "liberty." It is true that there are *three obiter dicta* of the Court in Massachusetts, that the flats may be alienated and sold separately from the upland. *Storer* v. *Freeman*, 6 Mass. R. 439; *Valentine* v. *Piper*, 22 Pick. 85; *Mayhew* v. *Norton*, 17 Pick. 357. But in neither of these cases do the Court give any authority or reasons for extending the "propriety" or "liberty" in the flats to any others, than the owners of the adjoining upland, to whom it

is expressly confined by the terms of the ordinance. And although we may by a succession of such decisions in Massachusetts and Maine consider this question as settled, it is difficult to perceive how the Court ever arrived at any such construction.

The defendants then have the right to pass and repass with their vessels and boats over the demanded premises to their wharf.

1st. This right they have by virtue of the conveyance of John and Lucy Nichols to their use in 1790.

2d. They have this right to pass and repass by the common law and the law of nations. Justinian Inst. Lib. 2, c. 1, § 4 and 5; Code Napoleon, No. 538, 650; Sir Matthew Hale, *De jure maris*, c. 4 and 5; *Rex* v. *Smith*, Dougl. 425.

3d. This right they have by prescription, to use these flats as appurtenant to their wharf adjoining; and have at least an easement in the premises, their possession and use for fifty years, raising the presumption of a grant. *Valentine* v. *Piper*, 22 Pick. 83; *Kent* v. *Waite*, 10 Pick. 138; *Tyler* v. *Wilkinson*, 4 Mason, 397; *Doane* v. *Broad street Association*, 6 Mass. R. 333.

W. P. Fessenden argued for the demandant, contending, that by the deed of Nichols and wife to Nathaniel Deering a perfect title, to the extent of four hundred and eighty feet, was conveyed, with covenants of warranty, for the benefit of the owners of the wharf; and that a conveyance of all the right, title and interest of the grantors in all the residue of the flats was made to the grantee for his own individual use and benefit. In aid of his argument he referred to certain principles of law.

The situation of the parties, and of the estate, at the time of the conveyance, may be given in evidence to assist in ascertaining their intention, as expressed in the deed. *Adams* v. *Frothingham*, 3 Mass. R. 353.

To carry into effect the intention of the parties, if not inconsistent with the positive rules of law, is always to be the governing principle in the construction of deeds. And the whole instrument should be taken into consideration, and effect

be given to every part of it, if it can be done. And where there is doubt, the words are to be taken most strongly against the grantor and in favor of the grantee. And if there is then no person in existence to take, any such grant must be void. 1 Shep. Touchstone, 81, 88, 235. Cruise, Title, Deed, c. 23, § 26; Bac. Abr. Grant, 395; 10 Day, 255; *Hall* v. *Leonard*, 1 Pick. 27.

The office of the *habendum* of a deed is to limit and determine the grant. Shep. Touchstone, 75; Cruise, Title, Deed, c. 3, § 50.

The question whether the defendants have a prescriptive right, is not open under the general issue. *Miller* v. *Miller*, 4 Pick. 244. It is inconsistent with the claim to the fee of the land.

But the evidence offered, does not show that the defendants have acquired any right by prescription, but the reverse of it. The use has been common to the demandant and tenants; and to the public, and neither can acquire title thereby. In such case the law considers the possession to be in him, who has the legal title. *Gray* v. *Bartlett*, 20 Pick. 106; *Brimmer* v. *Proprietors of Long Wharf*, 5 Pick. 131.

The opinion of the Court, WHITMAN C. J. having an interest in the subject matter, and taking no part in the decision, was drawn up by

TENNEY J. — On May 31, 1784, Nathaniel Deering and others, the owners of the estate of which James Milk died seized and possessed, by deed of indenture set out a strip of ground extending from the foot of Milk Wharf four hundred and eighty feet towards the channel of Fore River in Portland, and one hundred and six feet easterly, from the easterly side of the street, now called Exchange street, for a wharf. A wharf was afterwards built upon this strip, to the distance of three hundred feet from Milk Wharf, and called Deering's Wharf; and stores were erected on the west side of the same, before the year 1790. After the 26th day of June, 1790, the wharf was extended towards the channel one hundred and

eighty feet or more, further, and the whole wharf has since been called Long Wharf. On the day last named, John Nichols and Lucy his wife, in her right, in consideration of £10, 10s, gave, granted, bargained, sold and conveyed to "Nathaniel Deering, his heirs and assigns, forever, seven eighth parts of a certain gore or strip of flats in Portland aforesaid, and between the flats belonging to said John, Nathaniel and others, and flats belonging to Joseph Holt Ingraham, and which he purchased of the heirs of Capt. Ephraim Jones, deceased, which said strip is in common to the said John and Lucy, and the said Ingraham in the right of his wife Abigail, deceased; the said gore or strip to begin at the lower end of Milk Wharf, so called, and to run four hundred and eighty feet towards the channel.

And the said John and Lucy, in her said right, for the consideration aforesaid, do hereby release to the said Nathaniel, or to any person or persons, that may build any wharf on the western line of said strip of flats and in the continuation of said new wharf and on the line thereof to the eastward, all our right, title and interest to the said gore of flats to the channel, or so far as our right extends, for the use and benefit of the proprietors of the wharf, that may be built as aforesaid." Habendum the said granted premises with the privileges and appurtenances thereof to said Nathaniel Deering, his heirs and assigns, to his and their use and behoof forever; and then are covenants of seizin and warranty to said Deering, his heirs and assigns. The description in this deed embraces the land in controversy. The demandant has the title, which Nathaniel Deering had, and is also the owner of Milk Wharf. Low water mark is between what was called Deering's Wharf and the termination of four hundred and eighty feet from Milk Wharf; and the channel of Fore River is at some distance further below. Nathaniel Deering and the demandant were from the beginning proprietors in the old and the new parts of Long Wharf, and the latter continues to be a proprietor in each. The proprietors of Long Wharf and the owners of stores thereon, have been accustomed since the year 1793, to

use and occupy the flats easterly of the wharf, claimed by the demandant, as flats are usually occupied in a dock in connexion with a wharf, by vessels coming to the wharf to lade and unlade their cargoes, and the proprietors have claimed and collected dockage of all such vessels. And the demandant and his tenants have always used the same flats for the purpose of passing and repassing with their vessels to Milk Wharf, which vessels have laid thereat in the usual manner without paying wharfage or dockage. The proprietors to the extent of three hundred feet, and those beyond have not been entirely the same persons; the latter have by agreement collected the wharfage and dockage on the whole and paid to the several proprietors of the former, each the proportion agreed to be paid, the demandant being one.

The tenants contend, that they, having erected the new part of the wharf soon after the execution of the deed from John and Lucy Nichols, are entitled to the flats in controversy, as the persons to whose use the land described in that deed was granted. The proposition of the demandant, on the contrary is, that the deed conveyed to Nathaniel Deering an estate in fee, to the use and behoof of him and his heirs and assigns forever, in the land described in the writ. This question must be settled by the construction to be put upon the deed. "This must be favorable, and as near to the minds and apparent intents of the parties, as possible it may be, and law will permit; it must be made upon the entire deed, as one part may help to expound another; and if it may be, effect must be given to every word, and none be rejected, if possible, upon a rational exposition, to avoid it; and the words of the deed are to be taken most strongly against him, who speaks them, and most in advantage of the other party. If, however, there be two clauses or parts of the deed repugnant to each other, the first should be received, and the latter rejected, except there be some special reason to the contrary." Shep. Touch. 86 — 88.

At the time of the execution of the deed from John and Lucy Nichols, the parties thereto had in view a strip of flats, and the ground lying between the side lines thereof extending

to the channel of the river, in which the tide ebbed and flowed; consequently a part was below and a part above the line of low water; the upper end of this strip was bounded by Milk Wharf. Whatever right the grantors had in this strip was intended to be conveyed. It is manifest from the language of this deed, as well as of other deeds in the case, that the rights of riparian proprietors to grounds about tide water, and below low water mark, were regarded uncertain and not well defined; they did not understand at that time, what has since been settled, that their title to the land extended no further than to low water mark. We have reason to believe, from the terms of this deed, that the parties considered the title of the owner of flats to reach as far below the margin of the river at low water, as he chose to erect a wharf; and that they had rights still further below superior to those of others in the community, but how great, of what kind, or whether to the channel or not, was not clearly understood.

The premises in this deed contain two descriptions, both having reference to this strip of land. The first when taken alone, is perfect, and indicates the land with such clearness, that no doubt can be entertained in relation to its commencement and termination. It extended from Milk Wharf *towards* the channel four hundred and eighty feet, which was to a line below that of low water, but short of the channel; this was in length coextensive with the ground laid off for a wharf in 1784, by the heirs of James Milk. The other description, in a subsequent and distinct paragraph, is of "said gore of flats," *to* the channel, or so far as the grantors' right extended. The ground referred to in the two descriptions, is not identical; it is quite apparent, that the one was intended to embrace something, which was not included in the other; if it were otherwise, the two parts are repugnant, and the latter must be rejected; on no reasonable construction of the language can it be said, that the extent of four hundred and eighty feet was to be diminished if the grantors had not a title to the whole length thereof; but that the channel of the river was not to be the exterior boundary of the portion below that distance, if

their title did not extend so far as to the channel. The tenants invoke the well known principle, "that whensoever the words of a deed have a double intendment, and one standeth with the law and right, and the other is wrongful and against law, the intendment, which standeth with the law shall be taken;" but this principle is not applicable to the question before us, for this is not a case of double intendment. If the language used indicates clearly the intention of the parties, that intention will stand, notwithstanding the law may prevent its being carried into effect. In the first description of the premises, is an absolute conveyance to Nathaniel Deering in fee; the other contains in its terms a simple release of the grantors' right, title and interest, in language expressive of a doubt of the existence of title thereto; it is true, that it is a release of interest to the said "gore of flats," which is a reference to the whole gore; but when it is considered, that a specific section of the gore had been previously described with clearness and certainty, we do not doubt, that it was the intention only to surrender whatever right still remained in them, not before described, to the gore, extending to the channel of the river. This release was upon the same consideration, which had been expressed in reference to the ground first described; but if the latter description was intended to restrict the former, and to raise an use distinct from that therein named, it would seem that no consideration would be required. It could not be supposed by the parties to the deed, that when a clause was added for the purpose of abridging the rights of the grantee, and limiting instead of enlarging the meaning of the language before used, so that a less interest would pass, a consideration should move from the one deprived thereby of the interest to which he would otherwise be entitled; but if it was intended, that something additional to what was before described, should be conveyed, it was proper, that it should be based upon a consideration. The consideration in the last description being the same as that before mentioned, merely shows, that the consideration for one was not distinct from that of the other. It is evident, that the grantors regarded their title to the por-

tion of four hundred and eighty feet so perfect, that they were willing to convey it with covenants of seizin and warranty; whereas they did not intend that those covenants should apply to the part below. The habendum and the covenants in the deed are inconsistent with the proposition, that the conveyance was to the use of any other than Nathaniel Deering, his heirs and assigns; and although neither can control the premises, when the latter are free from doubt, but upon a question of intention of the parties in reference to the premises, the language used subsequently may be important and sometimes decisive.

If it had distinctly appeared from the deed, that Nathaniel Deering was the grantee for his own and the use of others, clearly designated, whose interest passed to the tenants, on the authority of the case of *Thacher* v. *Omans & al.* 3 Pick. 520, cited by their counsel, and the statute of uses of the 27 of Henry 8, chap. 10, the use and the title might have vested in the tenants; but it may well be doubted, whether the language relied upon by them shows any intention to raise a technical, legal use in any other, than the grantee named, and his heirs and assigns. The language of the premises in the latter description releases to Nathaniel Deering, or any person or persons, that may build, &c. *and for the use and benefit of the proprietors of the wharf that may be built as aforesaid.* It must have been known to all interested at the time of the execution of the indenture of May 31, 1784, and of the deed of June 26, 1790, that the distance of 480 feet below Milk Wharf extended further than to the line of low water, but all this distance was intended by the parties to both instruments to be covered with a wharf; and it was intended to extend so far towards the channel probably, that vessels might lie afloat at low water, near the lower extremity, as well as for other purposes; and there is nothing in the case manifesting, that it was in contemplation or expected, that the wharf would be carried beyond that limit. The space between its termination and the channel and that easterly thereof would certainly be highly beneficial, if not necessary to a profitable use of the wharf, after

its extension, for the accommodation of the owners of large ships, which might come to the wharf. This interval which was in fact a part of the public domain, but to which it was believed by the parties to the deed of June 26, 1790, that the owners of the ground between that and Milk Wharf had some, though indefinite right, was intended to remain open, and connected with the wharf, and under the control of its owners, that vessels might lie with safety, come to that part of the wharf, free from obstruction, and depart at any time, when pleasure or convenience might direct.

It appears, that as far as the wharf was expected to be built, the conveyance was intended to be absolute and in fee to the grantee named; below that it was restricted for the benefit of the wharf, showing the use for which, and not the persons for whom the release was intended. But this restriction, whatever it was, if applicable to private rights, became inoperative, as it had reference to a part of the public domain.

Another ground of defence is the manner in which the flats in controversy have been occupied since the year 1793, entitling the tenants, as they contend, to claim and hold them as their property, so far that they cannot be deprived thereof by the demandant.

By the colonial ordinance of 1641, which is a part of our law, "it is declared, that in all creeks, coves and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the lands adjoining, shall have propriety to the low water mark, where the sea doth not ebb and flow above one hundred rods, and not more, wheresoever, it ebbs further. Provided, that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks or coves to other men's houses and lands." The owners of upland to which flats adjoin may sell the upland without the flats, or the flats without the upland. *Storer* v. *Freeman*, 6 Mass. R. 435. The propriety in flats, under the ordinance, is similar to that acquired in any other property, subject to the rights of the community mentioned in the proviso. So long as they remained open and

free from such erections as stop and hinder the passage of boats, &c. there is reserved for all, the right to pass freely to the lands and houses of others besides the owners of the flats; this includes the right of mooring their vessels thereon, and of discharging or taking in their cargoes. The owner of the flats has no power to take away or restrict this right, while the space is unoccupied. By the erection of permanent structures, such as wharves and piers, which he may lawfully make upon his own flats, he acquires thereby no exclusive right to the portion remaining open, so as to exclude persons from passing and repassing to and from the lands and houses of others. In common with him, the public have the same rights to the open space, which they had before, provided they do not interfere with his permanent erections. They may pass over the ground, occupied in connexion with his wharf, and for the accommodation of those, who come to the wharf, whenever their necessities or their inclinations induce them to go to others' lands or houses, and they have all the privileges of lying upon the flats, when they go or return from the lands of others, that they possessed before the erections.

The demandant has title to the premises claimed by virtue of the documents offered in evidence. The indenture of 1784 gave no title to a space wider than that therein described; he has long been the owner of Milk Wharf, which is accessible from the ocean through a passage over the flats; in the enjoyment of the benefits of Milk Wharf, he and his tenants have used the passage without being subject to any wharfage or dockage from the tenants. The dockage which has been claimed and received by the tenants, from those, who occupied the flats, easterly of Long Wharf, has been for such occupation in connexion with the wharf, to which they came for the benefit which it afforded, and not of those who were passing to and from the land of others. The persons, who thus occupied the flats and paid dockage to the tenants, were in the enjoyment of a right, of which the demandant could neither deprive the owners of the vessels or of the wharf; the former possessed the privilege by the law, which our ancestors brought with

them, and which the ordinance did not take away, but expressly reserved to them. The owners of the wharf received the compensation to which they were entitled, from those who lawfully came to it, to enjoy the use for which it was designed. The demandant was deprived of none of his rights, by this enjoyment by others, and had no power to restrain them, and he lost nothing of his legal title to possession by suffering that which he had not the effectual means to prevent.

The default must stand.

JOHN GAMMON *versus* WILLIAM T. EVERETT.

In an action upon a promissory note, made payable at a place certain and on demand after a specified time, no averment or proof of a demand on the part of the plaintiff is necessary, to entitle him to maintain his suit.

ASSUMPSIT against W. T. Everett, one of the makers of a note of which a copy follows: —

"Harrison, April 11, 1837. For value received we jointly and severally promise to pay John Gammon or order, forty dollars on demand after one year from this date, at McWain's Mills, so called, in Waterford, with interest.

"William T. Everett,
"Hiram Everett."

At the trial in the District Court, GOODENOW J. presiding, the plaintiff read the note in evidence to the jury, and contended that he had supported his action thereby, without further proof. The Judge ruled, that it was incumbent upon the plaintiff to prove a demand of payment of the note, at the maturity thereof at McWain's Mills; and, as the plaintiff offered no such proof, ordered a nonsuit. The plaintiff filed exceptions.

J. S. Keith, for the plaintiff.

D. Dunn, for the defendant.

The opinion of the Court was by

WHITMAN C. J.—The question raised in this case is whether

a note of hand, made payable at a place certain, and on demand after a specified time, can be declared upon, without averring a demand at the place, and after the time named. We have decided that no such averment is necessary, in the case of a note payable at a particular place on demand. *McKinney* v. *Whipple*, 21 Maine R. 98; and it has often been decided in this country, that no such demand is necessary, in case of notes payable at a particular time and place. *Carley* v. *Vance*, 17 Mass. R. 389; *Bacon* v. *Dyer*, 3 Fairf. 19; *Walcott* v. *Van Santvoord*, 17 Johns. R. 248; *Huxton* v. *Bishop*, 3 Wend. 13. A different doctrine, nevertheless, after much vacillation, has at length been established in England. 2 Brod. & Bing. 165. But in this country it is believed, that the decisions, in reference to that point, have been uniform.

It has been argued in the case at bar, that the stipulation to pay at a certain place, and on demand, after a specified time, presents a case not within the principle of our decisions; that, in such case, the debtor cannot know when to make payment, or to be prepared therefor; and that the time when the debt is payable is not fixed till the time of a demand made after the specified time had elapsed; and that the statute of limitations would not begin to run till after such demand. To us, however, it seems, that the distinction is not well grounded. After the specified time had elapsed it was no otherwise than a note payable at a particular place on demand, and would come within the principle established in *McKinney* v. *Whipple*, before cited. The inability of the debtor to foresee when a demand would be made arises from the terms of a contract, which he has voluntarily made. His agreement was, according to the import of its terms, to be ready at any moment, after the specified time of payment had elapsed, to pay the amount due. This he could not well calculate to do without furnishing himself with the means of performance at the expiration of the specified term of credit, and keeping the same by him. If this would be a hardship it would be one of his own creation, of which he could not justly complain. The debt was due after the term of credit had expired; as much

so as if the note in question had been made payable on demand, without any designation of either time or place. The bringing of the action therefore was a demand; and according to the opinion of the Court, in *Caldwell* v. *Cassady*, 8 Cowen, 271, and *Huxton* v. *Bishop*, before cited, if the promisor was ready to pay at the time of such demand it might be pleaded in bar of additional damages and costs.

Exceptions sustained: New trial granted.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF YORK,

ARGUED AT APRIL TERM, 1845.

INHABITANTS OF NORTH BERWICK *versus* COUNTY COMMISSIONERS OF YORK.

The County Commissioners have power under the Revised Statutes, (c. 25, § 34,) to approve and allow of a town way, as laid out by the selectmen, leading from one town road to another town road and passing through the land of the applicant under his possession and improvement, if the town shall unreasonably refuse or delay to approve thereof.

As a petition for a writ of *certiorari* is addressed to the discretion of the Court, the writ will not be granted on account of errors in mere matter of form. The Court, therefore, will not grant such writ, where there is an omission to state upon the record of the commissioners, that the refusal of the town to confirm the doings of their selectmen was unreasonable, when the application to the commissioners stated that the refusal was unreasonable, and where it does not appear that the laying out of the road was inexpedient or injudicious.

PETITION for a *certiorari* to quash the proceedings of the County Commissioners in laying out and establishing a road within the town of North Berwick, leading from one road to another. The petitioners to the County Commissioners for the road, owned and occupied farms through which the road passed. The facts appear in the opinion.

Hubbard, for the inhabitants of North Berwick, said, that by the Stat. 1821, c. 118, the County Commissioners, or their predecessors, were authorized to act in all cases of town and

private ways. By the act of 1839, c. 367, this power was restricted to one single case, that of a way to a lot of land, on which the petitioner actually lived, which did not adjoin upon any road; when the commissioners were authorized to give him a way from his land to the highway, if the town unreasonably refused it. By the Rev. Stat. c. 25, this power was enlarged so as to embrace all lots of land which did not adjoin upon any road, whether the petitioner dwelt upon the lot or not, if under his improvement.

The present case is simply this. The selectmen of North Berwick laid out a town road from one county road to another, which the town refused to accept, whereupon certain persons through whose land the road passed, made application to the County Commissioners to interfere, and they did so, and laid out the road as laid out by the selectmen. The commissioners had no right to interfere in the matter under the Rev. Stat. c. 25, § 34. The words *to* and *from* are words of exclusion. *Bradley* v. *Rice*, 13 Maine R. 198. Unless this is the true construction, the commissioners would have as unlimited jurisdiction as under the Stat. of 1821, for no way can be laid out which will not pass through the land of some one. Where were to be the *termini* of the way, under the statute of 1839, was settled in the case *Pettengill* v. *Co. Com. Kennebec*, 21 Maine R. 377. The only difference in this respect between the act of 1839 and of the Revised Statutes is, that in the former the way was to be from the land to the road, and in the latter from the road to the land.

The commissioners had no jurisdiction in this case, because they have not adjudged the refusal of the town to accept the road to be unreasonable. This is clearly fatal to the proceedings. 1 Fairf. 24.

Hayes, for the petitioners to the County Commissioners for the road, contended that the commissioners were authorized by the Revised Statutes to lay out a road, when the town unreasonably refused, in all cases where the land of the applicant did not adjoin upon any road, without regard to the termination of such road. That is matter of judgment and discretion.

It is immaterial, whether it stops at the land of the applicant, or proceeds farther. The object of the statute was to prevent the towns from having exclusive jurisdiction in all cases where the land of the applicant did not adjoin upon any road.

The petition to the County Commissioners does state, that the town unreasonably refused to accept the road as laid out by the selectmen. This gives the commissioners jurisdiction to go on and act, and determine the matter. The statute does not require, that they should so adjudge.

The opinion of the Court was by

WHITMAN C. J. — The object of this petition is to have certain proceedings of the commissioners, in reference to the location of a town way in North Berwick, quashed. The road had been located by the selectmen of that town, and, by the town, had been refused to be approved and allowed. On the application to the County Commissioners by three individuals, alleging said way to lead from land, under their possession and improvement, to a certain highway or road; and that the refusal of the town to approve and allow it, was unreasonable, the County Commissioners established it.

It is now contended, that the County Commissioners had not jurisdiction in the premises. They took cognizance of the matter, it may be presumed, supposing themselves to have a right so to do, under c. 25, § 34, of the Revised Statutes, which is to the effect, "That if any town shall unreasonably refuse or delay to approve and allow any town or private way, laid out or altered by the selectmen thereof, and to put the same on record, any person aggrieved by such refusal or delay, if such way lead from land under his possession and improvement to any highway or town way, may" petition, &c. It is insisted by the petitioners here, that unless the termini of the road were at the land of the petitioners, under their possession and improvement, and at some other road, the County Commissioners had no jurisdiction of the subject matter; and the provision before recited is attempted to be assimilated to that of the statute of 1839, c. 367; the language of which was, that,

"unless said town or plantation shall refuse to lay out a road, for any person or persons, from some town or county road to the lot or lots of land, on which such person or persons may live," &c. the County Commissioners shall not have power, &c. And the case of *Pettengill* v. *The Co. Com. of Kennebec*, 21 Maine R. 377, is relied upon as an authority to show, if the similitude exists, that the County Commissioners, in the case before us, had not jurisdiction. But the supposed similitude is very far from being apparent. The provisions in the two acts are essentially different. The act first cited is an enabling statute; and the other was a prohibitory or restraining statute. The first is, that, in case of the laying out of a private or town way by selectmen, and the unreasonable refusal of the town to approve and allow the same, the commissioners may proceed, &c. The latter was that they should not lay out a road in any town, unless in cases in which it (such town) should refuse to "lay out a road, for any person from some town or county road to the lot or lots of land on which such person or persons may live." By the former the commissioners, on application of a party aggrieved, setting forth, that the road laid out led from land under his possession and improvement, without any restriction as to where else it might lead from, were authorized to proceed. If it led from his land to another highway or road it is all that is required. The latter confined the commissioners to the refusal to lay out a way from another road to the lot or lots, &c. clearly showing, that there must be a termination at the lot or lots, on which the applicant, for their action, lived. But the language of the former is such as to embrace the case of a road leading by the land of an individual to another road. It would seem to be altogether immaterial from whence it came if it led from the land of the applicant, under his possession and improvement, to another road. The provision is wholly silent as to its being a way of absolute necessity; a way without which the individual could have no access to his land. If such had been in the contemplation of the legislature it would have been easy, and, one would think, a matter of course for them so to have expressed themselves.

It is evident, therefore, that the allegations in the petition preferred to the County Commissioners presented a case completely within their jurisdiction. That being the case it becomes a matter, addressing itself to the sound discretion of this Court, as to whether a *certiorari* should be issued or not. Proof is expected, in such cases, of some error, other than in a mere matter of form. One ground insisted upon is, that the commissioners have not directly adjudged of record, that the refusal of the town to confirm the doings of their selectmen was unreasonable. But it was so alleged in the petition, under which they acted; and after final judgment we must understand, that allegations duly and necessarily made, were satisfactorily proved; although the proof may not be set forth in the record. No evidence appears in the case tending to show that the laying out of the road was inexpedient or injudicious. And, on the whole, we think the prayer of the petition for *certiorari* should not be granted.

MARK PEASE *versus* THURSTON P. MCKUSICK *& trustee.*

If the plaintiff, after the person summoned as trustee had disclosed, files an allegation, or plea, under the provisions of Rev. Stat. c. 119, without stating therein any specific facts, that the conveyance of certain chattels, therein mentioned, by the debtor to the trustee, was made in fraud of the plaintiff's rights as a creditor, and therefore void; and the trustee replies, that the chattels mentioned by the plaintiff in his allegation are identical with those referred to in his disclosure, and that the conveyance thereof was not fraudulent as to the creditors of the defendant; and the plaintiff rejoins, that he is ready to prove by facts not stated or denied by the trustee in his disclosure, that the conveyance of the chattels was fraudulent and void; and the trustee demurs generally — the plaintiff shows no right to recover, under that statute, against the trustee; to enable him to hold the trustee charged, the allegation must be as distinct and specific as the proof expected to be offered in their support.

Such rejoinder, showing a reliance upon proof to be offered of new matter not stated or referred to in any manner in the allegation, is a departure from such allegation, and is bad; and the error may be taken advantage of on general demurrer.

A STATEMENT of the pleadings in this case will be found in the opinion of the Court, and need not be repeated.

Clifford & Ayer argued for the trustee, contending that the rejoinder was a departure, because it introduced new matter not before stated, or in any manner referred to. 2 Wils. 96; 1 Wils. 122 ; 4 T. R. 504; 2 Saund. 84, note 1; 14 Johns. R. 132 ; 1 Chitty's Pl. 140 ; 20 Johns. R. 153 ; 6 Mass. R. 57 ; 16 Mass. R. 1 ; Co. Lit. 304, (a.)

But without regard to the mode of pleading, the facts stated by the plaintiff are not sufficient in substance to enable him to prevail, on general demurrer. Rev. St. c. 119, § 33 ; 8 Pick. 470. The mode pointed out by the statute, and that alone, must be pursued. 15 Johns. R. 188 ; 1 Saund. 134, note 4 ; 10 Johns. R. 397. This has not been done. If the replication is bad, which we deny, we have a right to go back to the first fault, the insufficient plea or allegation of the plaintiff.

Howard and *Jameson*, for the plaintiff, cited Rev. St. c. 119, § 33, 69, and contended that the allegation or plea of the plaintiff was sufficient, and that the rejoinder merely affirmed the matter of the plea, without introducing any new fact.

But were the rejoinder bad, we must go back, to the first fault, and this is in the replication. The counsel contended, that the replication of the trustee was bad in law, and contained no sufficient answer to the plaintiff's plea; and that that plea was good.

The opinion of the Court was by

TENNEY J. — Noah McKusick, who was summoned as trustee of the principal defendant, made a disclosure, which the plaintiff's counsel do not contend should charge him. The plaintiff then files an allegation, without stating any specific facts, that the conveyance of certain chattels, therein mentioned, by Thurston P. McKusick to Noah McKusick was made in fraud of the plaintiff's rights as a creditor, and therefore void. The trustee replies, that the chattels mentioned by the plaintiff in his allegation are identical with those referred to in his disclosure, and that the conveyance thereof was not fraudulent as against the creditors of the principal de-

fendant. The plaintiff rejoins and says, "that he ought not to be precluded from having the said Noah adjudged trustee of said Thurston, because he alleges and is ready to prove by facts not stated or denied by said Noah in his disclosure," &c. that the conveyance of the chattels was fraudulent and void. To this rejoinder the trustee files a general demurrer, which is joined.

The rejoinder shows a reliance upon proof to be offered, of new matter, which is not stated or referred to in any manner in the allegation filed by the plaintiff. This, by a well known rule of pleading, is a departure from the allegation, and may be taken advantage of by general demurrer. *Larned* v. *Bruce & al.* 6 Mass. R. 57; Nels. Abr. 638; 4 T. R. 504; *Stearns* v. *Patterson*, 14 Johns. R. 132.

But if the plaintiff had at first stated all which is contained both in his allegation and rejoinder, it would have been bad upon general demurrer, as being in substance insufficient. "The answer and statements sworn to, by any person summoned as trustee, shall be considered as true, in deciding how far he is chargeable, until the contrary is proved; but the plaintiff and trustee may allege and prove other facts not stated or denied, by the supposed trustee, which may be material in deciding the question." Rev. St. c. 119, § 33, amended by the act. of 1842, c. 31.

After the disclosure, pertinent evidence may be introduced by the plaintiff and trustee; but the former cannot show by direct proof, that any statement of the trustee in the disclosure is untrue, nor can the latter adduce direct evidence of confirmation of facts disclosed by him. But before "other facts" can be proved, they must be alleged; and to enable the plaintiff to hold the trustee charged, the allegation must be as distinct and specific as the proof expected to be offered in their support. This is necessary to secure the rights of the trustee; he should be able to know, whether the facts to be shown are such as are not stated or denied in his disclosure, or whether in his opinion they are relevant to the question, that he may, if he pleases, demur to the sufficiency of such

facts; or have an opportunity to offer repelling or explanatory evidence. In the case before us, there was nothing in the allegation or the rejoinder, which gave to the trustee any information of the facts, relied upon by the plaintiff to show, that there should be a judgment against the trustee.

Rejoinder adjudged bad.

CHARLES MOULTON *versus* MARK E. JOSE.

The general rule is, that whenever an officer is guilty of any act, under color of his office, directly affecting the rights of parties not named in his precept, they have a remedy against him; while if he omits the performance of any duty resulting from a precept in his hands, those alone who are parties thereto, or immediately affected thereby, can maintain any action against him therefor.

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.

A surety in a poor debtor's bond cannot maintain an action against the officer for neglecting to return the execution whereon the arrest of the principal was made, with the bond, into the clerk's office from which it had issued, within the time prescribed by law.

And it would seem also, that the principal in the bond could not support an action for such neglect.

If a surety in such bond, before the condition had expired, applied to the officer for information as to its date, and the officer stated to him, as the date, a time later than the true one, the surety cannot maintain an action against the officer in consequence of such erroneous statement, unless he knew it to have been false, or made it with an intention to deceive.

It furnishes no ground of exception, if a judge at a trial states what he should do under a certain state of circumstances, but which an alteration of circumstances precludes him from doing.

The granting, or refusing to grant, a new trial by a District Judge, because the verdict is alleged to have been against the evidence, is matter of discretion, and not the subject of exceptions.

EXCEPTIONS from the Western District Court, GOODENOW J. presiding. Case against the defendant, as a deputy sheriff of the county of York.

After all the evidence was before the jury, the purport of which appears sufficiently in the opinion of the Court, the

counsel for the plaintiff requested the Judge to instruct the jury, that he was entitled to their verdict, under the second count, if they believed from the evidence, that the defendant did not return the execution and bond to the clerk's office, and that he gave false information to the plaintiff as to the date and time of expiration of the bond: — and further — requested the Judge to instruct the jury, that if they believed from the evidence, that the affirmation of the defendant, as to the date and expiration of the bond, was made as of his own knowledge, and that it was false, then, even if the defendant did not know whether it was true or false, it would have all the elements, and draw with it all the consequences of a fraudulent representation.

The Judge refused to give such instructions, saying that the facts in the case did not call for them; and did instruct the jury, that in addition to proof of such neglect of the defendant to return the execution and bond, he must prove, that the defendant made the false affirmation, knowing it to be false, or with an intent to injure and deceive the plaintiff.

The verdict was for the defendant, and the plaintiff filed exceptions, setting forth therein all the testimony given at the trial; and also filed a motion to set aside the verdict as against evidence.

Codman & Fox, for the plaintiff, argued in support of these among other positions.

The instruction, that the neglect of the defendant to return the execution and bond to the clerk's office, according to the provisions of the statute, gave no right of action either to the judgment debtor, or to the plaintiff, his surety, was erroneous. The law required a return thereof, not only for the benefit of the creditor, but also of the debtor and his surety. Rev. Stat, c. 148, § 38. The law requires the return of a precept with the doings of the officer; and all persons injured by a neglect so to return, are entitled to their remedy. The provision that the bond shall be returned for the benefit of the creditor, is merely, that he may have the use of it, and does not take away any rights of others. An action may be brought by any one

affected by a false return, or neglect of return, although he may not be a party to the suit. 9 Mass. R. 393; 10 Mass. R. 470; 7 Greenl. 80; *Sexton* v. *Nevers*, 20 Pick. 454; *Norton* v. *Valentine*, 15 Maine R. 39.

The instruction given to the jury, that the plaintiff was not entitled to recover, without proving, not only that the defendant made the false affirmation, but that he knew it to be false, or made it with an intention to deceive the plaintiff, was erroneous. *Stone* v. *Denny*, 4 Metc. 151; 18 Pick. 95.

Chisholm, for the defendant, contended that all the rulings and instructions of the District Judge were correct, and that there was no error in refusing to give the instructions requested.

The action cannot be maintained by virtue of the provisions of Rev. Stat. c. 148, § 38. That section provides only for the creditor, and as to all others, it is as if no such provision existed.

Independent of statute provisions, the action cannot be maintained.

Although the language of some cases would seem to imply, that one who was injured by such neglect, though neither a party or privy to the process, might maintain a suit against the officer, yet, it is believed, that the officer cannot be liable, either upon authority or principle. The rule will be found to be, that for official neglect, the officer is liable only to the parties to the process wherein the neglect occurred, to wit, the plaintiff and defendant, and to them only. Malfeasance, or positive wrong, including false return, is the only species of official misconduct from which the law presumes an injury can arise to persons other than parties to the process. *Harrington* v. *Ward*, 9 Mass. R. 251; *Bank of Rome* v. *Mott*, 17 Wend. 554. The cases cited for the plaintiff, and others cited in those cases, were commented upon, and the conclusion deduced, that they did not conflict with the position taken on the part of the defendant.

The instruction requested was rightly refused. 2 Metc. 99; 19 Maine R. 375; 22 Maine R. 246.

It was not the duty of the officer to furnish the debtor or his surety with the contents of the bond, or with the time within which performance might be made. He was not a party to it, and they were, and were bound to know these things themselves. The officer was not bound to give such gratuitous information; and if he did do it, and happened to have a wrong recollection of what they ought to know, and which he could not be expected to recollect, he is not liable therefor. The plaintiff should have trusted to his own recollection, and not to that of the defendant.

The opinion of the Court was drawn up by

WHITMAN C. J. — This action is instituted against the defendant for a misfeasance as a deputy sheriff; and for making to the plaintiff a false representation of certain facts, with an intention to deceive, and cause him to be defrauded, he being a surety in a poor debtor's bond, taken by the defendant, upon an arrest of the principal on execution. The complaint against the defendant, as an officer, is, that he did not return the execution, and bond so taken, with a statement of his doings by virtue of the execution, into the clerk's office, from which it had issued, within the time prescribed by law; so that the plaintiff and his principal could see when the time would expire, within which the debtor was bound to disclose, or go into prison, or pay the debt, by reason of which the debtor was prevented from ascertaining the time within which to take measures to save the forfeiture of the penalty of his bond, in consequence of which he failed of so doing.

The misrepresentation alleged is, that the plaintiff and his principal, before the time for performance of the condition of the bond had expired, applied to the defendant for information as to the date of the bond, and that he wilfully stated it to be some days later than it in fact was, whereby they were deceived as to the true time within which the condition of the bond might be performed; which induced the delay of performance, until it had become too late; and, moreover, that he falsely affirmed, that he had duly returned said execution,

when in fact he had not. By reason of all which the plaintiff had been rendered liable to pay, and had paid a large sum in discharge of the debt due from his principal.

The action comes before us upon exceptions taken to the rulings and opinions of the Judge in the District Court; who there ruled, that the action could not be sustained in favor of this plaintiff, against the defendant, as an officer, for malfeasance in reference to his doings upon the execution; and not for a misrepresentation, unless it was wilful, and intended to deceive or entrap the plaintiff. The questions are, were these rulings materially erroneous. The cause has been argued quite at length, and with considerable ingenuity.

The gravamen of the plaintiff's complaint is, that he and his principal were wrongfully prevented, by the misconduct of the defendant, from ascertaining the true date of their bond, whereby they were induced to delay the performance of its condition, till it had become too late to do so. The first question, (and one much dwelt upon by the counsel in argument,) is, has the plaintiff a right to avail himself of the misfeasance of the defendant in not seasonably returning the execution. In support of the affirmative, the case of *Sexton* v. *Nevers*, 20 Pick. 454, is confidently relied upon. That was the case of the vendee of an equity of redemption, against the sheriff for defective proceedings in a levy, by reason of which the title in the vendee had failed. In that case Mr. Justice Morton laid down the law to be, that, for the "breach of these, or other duties in the service of an execution, the officer is answerable to others injuriously affected by his conduct, as well as to the parties to the original judgment:" and instanced the case of other attaching creditors, as decided in *Rich & al.* v. *Bell*, 16 Mass. R. 294, and *Whitaker* v. *Sumner*, 7 Pick. 551, and 9 *ib.* 308. On the other side, the case of *Harrington* v. *Ward*, 9 Mass. R. 251, is relied upon with equal confidence, as showing that "a sheriff is answerable for his negligence in the service of process, in civil actions, to none but the plaintiff or defendant in such action." And *The Bank of Rome* v. *Mott*, 17 Wend. 554, is supposed to be to

the same effect. It is there said, that, "before a party can bring an action for negligence, he must show a legal duty to himself;" and that "it is not enough, that, in the careless discharge of duty to one, the sheriff's neglect may glance off, and incidentally and remotely work an injury to another."

To reconcile these authorities it should be observed, that the first has reference to acts directly injurious to others, and the two latter, of neglects not immediately affecting others, and not of positive acts. It may not be going too far to say, that, whenever a sheriff is guilty of any act, under color of his office, directly affecting the rights of parties, not named in his precept, they have a remedy against him; while, if he omits the performance of any duty resulting from a precept in his hands, those alone, who are parties thereto, or immediately affected thereby, can maintain any action against him therefor. The omission complained of in the case at bar is one of non-feasance arising from negligence. The plaintiff was no party to the execution, which the defendant omitted to return. He, however, had signed a bond, which it was the duty of the defendant to return with the execution. But to whom was he answerable for neglecting to return it? By the statute, c. 148, § 38, it is provided that the bond shall be for the benefit of the creditor. How was the plaintiff injured by its not being returned to the clerk's office? His ground is, that he had a right to find it there, in order to afford him an opportunity to inspect it, and ascertain its date. But how was he injured by the want of such inspection? He had no duty to perform by way of saving the penalty. He could not have surrendered his principal, as is supposed by his counsel in argument. The Revised Statutes provide only that the debtor may surrender himself, and go into close jail. *Woodman* v. *Valentine*, 24 Maine R. 551. The plaintiff, therefore, had no direct interest to be subserved by having an opportunity to inspect the bond. The principal, alone, was bound to the performance of any act necessary to save a forfeiture of the penalty of the bond. He alone, then, if either, was entitled to an opportunity to inspect the bond. The plaintiff could, by the want of such

an opportunity, be affected, but contingently and remotely, by the neglect of the defendant in not returning the bond to the clerk's office in due season.

But if the principal were the plaintiff in this action, we are not to be understood as holding, that he could be considered as having any ground of complaint. He had executed the bond with the condition annexed to it. He was to be expected to know what he had done, and especially the liabilities he had assumed. He had six months in which to do and perform one of three several and simple acts, in order to save a forfeiture. It was for him to note the time, and bear it in mind, and conduct accordingly. If a bond be given to perform covenants, is the obligee bound to exhibit it to the obligor for inspection for any purpose subsequently to its execution? Surely not. It might be unkind for the obligee to refuse such an inspection; but clearly the obligor has no right to demand it. The bond in this case was taken for the benefit of the creditor. The officer who took it was under no obligation to the obligors to place it any where, with a view to afford them an opportunity to inspect it.

As to the other branch of the plaintiff's ground of claim against the defendant, viz. — the false representation, it seems to be clear, from what has already been observed, that the plaintiff has no cause of complaint on account of what the defendant said in reference to the return of the execution and bond into the clerk's office. If the plaintiff has sustained any injury under this head it is from the defendant's misstating the true date of the bond, and thereby inducing the principal in the bond to delay performance of its condition till the time of performance had elapsed. But, if he and his principal had knowledge of the true date of the bond, and were bound to bear it in mind, it may be questionable, at least, whether they can with propriety complain of having been deceived in regard to it. The plaintiff, especially, having nothing to do, personally, with the performance of the condition of the bond, can scarcely be deemed to have a right to complain of having been deceived with regard to the time within which the condition

was to be performed. There would not seem to have been any privity of contract or obligation between him and the defendant. The plaintiff was but a surety for his principal; between him and whom, there was, at least, an implied contract that the principal should indemnify and save him harmless. The privity of contract and obligation was between them two. It is believed it would be really a novelty for the plaintiff to be allowed to sustain this action under such circumstances.

But the action was not put upon this ground in the Court below; we will therefore leave it, and proceed to an examination of the ruling of the Judge, to which the exception was taken, on the subject of misrepresentations. There was no question as to the fact, that the defendant did state to the plaintiff, that the date of the bond was the thirteenth, instead of the eleventh of the month; and that the plaintiff's principal was thereupon induced to delay performance of the condition of his bond till it was too late; and that the plaintiff, his surety, was thereupon compelled to pay a portion of the debt to the creditor. And the plaintiff contended, that the defendant's statement was positive, and as of his own knowledge, when he knew it to be untrue; and, therefore, that the judge should have directed the jury to find against him; but the judge ruled, that the defendant was not responsible, unless the misrepresentation was wilful, and with an intention to deceive the plaintiff. The question is, was this correct.

The plaintiff in support of his position relies with great confidence, upon the case of *Stone* v. *Denny*, 4 Metc. 151, and cases there referred to. That case contains an elaborate review of the authorities on the subject of false representations. But the conclusion to which the Court came in that case is scarcely in accordance with the position taken by the plaintiff here. Mr. Justice Dewey, who delivered the opinion of the Court, says, that he "had supposed it to have been settled, by a long course of decisions, that such actions could only be maintained, when the false representation has been intentional;" the party making it "either knowing it to be false, or what would be equally fraudulent in law, knowing

that he was affirming as to the existence of a fact, about which he was in entire ignorance." Whether the defendant made the assertion complained of in this case, knowing it to be false, or without good reason for supposing that he knew the fact to be as stated, are necessarily questions for the consideration of the jury. If they could find that he knew it to be false, or that he knew he had no knowledge about it, their verdict should be against him. In commenting on the case of *Page* v. *Bent*, 2 Metc. 371, the learned Judge, in the case above cited, clearly intimates an opinion, that, to render a defendant liable, intentional wrong must be clearly seen to exist. And he does the same in commenting upon the case of *Lobdell* v. *Baker*, 1 Metc. 193. The affirmation of a fact as true of his own knowledge, when the affirmant knew it to be false, or had no reason to suppose that he had any knowledge about it, would be plenary evidence of an evil design. But if it should appear that he had such reasons for supposing the fact to be as stated by him, and that he had knowledge as to the existence of it, and that the assertion, though false, was the result of an innocent mistake, there would be no intentional wrong done, and of course no good cause of action afforded. It was for the jury, in this instance, to ascertain how the facts were in each of these particulars, and they seem to have found, that the defendant was free from any intentional wrong. They considered, doubtless, that it did not appear, that the defendant had been instigated by any motive of interest or prejudice to give erroneous information; that he did not assert the fact to be as stated by him, otherwise than as he found it so entered on his minute book, in which the entry, without any sinister design, might have been made through mistake; and that he might well suppose he knew how the fact was, though he was under a mistake in regard to it. The defendant produced his book, alleging it to be the one to which he referred, when he made the false representation; and by consent of the plaintiff it was suffered to go to the jury; and there was evidence tending to identify it as the book to which the defendant recurred to enable him to state the date of the bond; and no question

was made but that it was entered there as of the thirteenth, instead of the eleventh of the month. This also might well tend to satisfy the jury, that his assertion as to that fact, was from sheer mistake. The instructions, therefore, in the terms proposed could not with propriety have been given; and the instruction given was not materially erroneous.

Another ground of exception is, that, when the defendant produced and offered in evidence his book, though it was ruled out by the Judge, yet, that the Judge ruled, "that the defendant's counsel would have a right to argue to the jury upon its being objected to and rejected." If the plaintiff meant to insist upon this objection, by way of exception to the ruling of the Court, he should not have, subsequently, permitted the book to go to the jury. The Judge had only said what he should permit, if the book were not admitted. The book being admitted he ceased to have occasion to permit any comment upon its exclusion. He did not therefore do that, which, if he had done, the plaintiff supposes might have been a ground of exception. But we think it very clear, that we cannot sustain exceptions to what a Judge may say he should do, under a certain state of circumstances, but which an alteration of the circumstances precluded him from doing.

It is not understood, that the question, whether the refusal in the Court below to grant a new trial was wrong or not, although embraced in the exceptions, is now intended to be insisted upon. It is undoubtedly very clear, that we could not revise its decision in that particular. The granting of new trials at common law is matter of discretion, and not subject to exceptions.

Exceptions overruled;
Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF OXFORD,

ARGUED AT MAY TERM, 1845.

JOHN WELCH *versus* ISAIAH WHITTEMORE *& al.*

The distinction between the actions of trespass and trespass on the case having been abolished by statute, the mortgagee of personal property, where there was in the mortgage a stipulation that the mortgagor should retain the possession until default of payment, but with a condition, that "if the same or any part thereof shall be attached at any time before payment by any other creditor or creditors of the mortgagor, then it shall be lawful for the mortgagee to take immediate possession of the whole of said granted property to his own use," may maintain trespass against an officer for attaching such mortgaged property in a suit against the mortgagor, and carrying it away.

TRESPASS for taking and carrying away and converting to their own use a horse, wagon and harness. Whittemore, as a deputy sheriff, and the other defendant, as his servant, justified under an attachment of the same articles as the property of William F. Welch. The facts appear in the opinion of the Court.

There was evidence offered by the defendants tending to prove, that the mortgage bill of sale to the plaintiff was fraudulent as to the creditors of William F. Welch, and by the plaintiff tending to show, that it was *bona fide.*

The counsel for the defendants contended, that the general

property was in W. F. Welch; that he was in the actual possession thereof, and that at the time of the attachment, he had the right of possession; and that this action of trespass could not be maintained; and requested the Court to give the jury the following instructions: —

1. That if they believe, that William F. Welch was in possession of the property attached, at the time of the attachment, and that the right of possession of the property at the time was in said William, and also that the general property was then also in him, that this action of trespass could not be maintained.

2. That the general property being in William F. Welch, there was an attachable interest; and if the jury believed, that he was in possession, and having the right of possession, the officer had the right to attach the property, and his subsequent refusal to deliver the property could not make his original lawful act a trespass, or make the defendant a trespasser by relation.

Shepley J. presiding at the trial, declined to give the instructions requested.

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

Fessenden, Deblois and *Fessenden* argued for the defendants, contending, that the plaintiff, as mortgagee, had not the possession nor the right to the possession at the time of the attachment; and therefore could not maintain this action of trespass. The plaintiff's right to take possession did not exist until after the attachment. A demand by the plaintiff, afterwards, could give the plaintiff no right to consider the original taking a trespass. Chitty's Pl. § 167, 176; 1 T. R. 480; 8 Johns. R. 432; *Ingraham* v. *Martin*, 15 Maine R. 373; *Freeman* v. *Rankin*, 21 Maine R. 447; 2 Pick. 121; 3 Pick. 255.

The statute abolishing the distinction between trespass and trespass on the case, applies only to actions on the case for consequential damages, and not to actions of trover.

Codman & Fox, for the plaintiff, contended that the action of trespass, properly speaking, could be maintained, and cited 22 Maine R. 234; 18 Maine R. 127; 15 Maine R. 48.

But if trespass could not, case could have been. 18 Maine R. 87; 16 Pick. 462.

All distinctions between trespass and trespass on the case are abolished by statute. Rev. St. c. 115, § 13.

The opinion of the Court was drawn up by

TENNEY J. — The right relied upon in support of this action is derived from a mortgage of the goods in question from William F. Welch to the plaintiff for the security of the payment of a promissory note, which had not arrived at maturity at the time of the alleged taking by the defendants. The mortgage provides, that until default of the mortgager, to pay the note according to its tenor, he may retain possession of the property and use and enjoy the same; "but if the same or any part thereof, shall be attached at any time before payment, &c. by any other creditor or creditors, of the said William F. Welch, then it shall be lawful for the said John Welch, his executors, &c. to take immediate possession of the whole of said granted property, to his and their own use." The defendants justify the taking by virtue of the authority of Whittemore as a deputy Sheriff, and a writ of attachment in favor of Brown against the said William F. Welch. After the taking, complained of, the plaintiff demanded of the defendants the goods taken, which were refused to be delivered. It is insisted by the defendants that the action of trespass cannot be maintained.

It is well settled, that by a mortgage of personal property without an agreement, that it may remain with the mortgager, the other party acquires the right of immediate possession; and if it be taken on mesne process, without first paying or tendering payment of the debt secured thereby, in favor of another creditor, against the mortgager, such taking is a trespass upon the possession of the mortgagee. *Paul* v. *Hayford & al.* 22 Maine R. 234; Rev. St. c. 117, § 38; Amendment to the Rev. Stat. of 1842, c. 31, § 12. The right of immediate possession

being in the mortgagee in the absence of any agreement to the contrary, that right is limited no farther than the intention of the parties, as manifested by the instrument, requires.

The mortgage in this case being *bona fide*, the evident object of the parties thereto, was to give to the plaintiff security for his debt, without depriving the debtor of the use of the property; but the ordinary right of a mortgagee to take possession of the property at pleasure, was not intended to be abridged by the interference of any other creditor. As it was the privilege of the parties, to stipulate that the plaintiff should have entire control, till the redemption of the goods, they could make such restrictions as they pleased; if the mortgage was silent on the subject of possession, the defendants would, on every principle, be liable to an action of trespass; can they be less so, when it was specially provided, that such an attachment at the time it should be made, should give the right to the plaintiff to take immediate possession? The attachment and this right were to be simultaneous. The law will not say that the attachment is legal, when it can give no right to the officer, who makes it, to hold possession of the property, and can create no lien for the security of the debt of the creditor. By the construction to be put upon the instrument, the taking by the defendants, was an injury to the possession of the plaintiff secured to him therein.

It has been repeatedly held in Massachusetts, that trespass upon the case can be maintained for an injury to the reversionary interest of a mortgagee in personal property, when he has no right to immediate possession. *Ayer* v. *Bartlett*, 9 Pick. 156; *Forbes* v. *Parker*, 16 Pick. 462. By the statute of this State of 1835, c. 178, § 1, the distinction between actions of trespass and of trespass on the case is abolished; which provision is also incorporated into the Revised Statutes, c. 115, § 13.

Exceptions overruled.

JABEZ C. WOODMAN *versus* BETSEY SEGAR.

Before the testimony of the subscribing witnesses to a deed can be dispensed with, it must be made to appear, that, if alive, they are both out of the jurisdiction of the court; that they are incompetent; or that diligent search has been made for them without success.

Where the testimony of neither of the subscribing witnesses to a deed of land can be obtained, proof of the handwriting of the grantor is admissible, without first proving the handwriting of the witnesses.

WRIT OF ENTRY. The demandant claimed under a levy upon the premises as the property of Arnold Powers, Nov. 28, 1842. The tenant claimed the same under said Powers, by a conveyance from him to E. C. Bartlett, dated Feb. 4, 1835, and from Bartlett to her. The demandant denied, that this latter deed was duly executed, and contended, that if proved, the deeds were fraudulent and void as to creditors.

The tenant offered in evidence a deed from Bartlett to her, dated June 19, 1843, purporting to have been executed in the presence of Charles Ewell and Robert Vose as subscribing witnesses, and to have been acknowledged in the County of Norfolk and Commonwealth of Massachusetts before said Vose, as a Justice of the Peace. The counsel for the tenant, who resided in the County of Oxford, testified, that he had made inquiry of individuals in the County of Kennebec, and in other places, and of all persons he thought might know any thing respecting the subscribing witnesses to the deed, and did not, and could not learn, that any such persons had ever resided in this state; and that he had reason to believe, that if the subscribing witnesses were living, they resided in Massachusetts. The demandant proved, that Bartlett, although residing in Massachusetts, had visited the town in the county of Oxford in which the tenant lived since the commencement of this suit, and remained there for several weeks. The tenant then offered to prove the handwriting of Bartlett. The demandant objected, that such proof was inadmissible, unless the tenant first produced a subscribing witness, or proved the handwriting of one. SHEPLEY J. presiding at the trial, ruled that proof of

the handwriting of Bartlett, under these circumstances, was admissible. A verdict having been returned for the tenant, the demandant filed exceptions to this ruling of the Judge.

Woodman, pro se, contended that the tenant had introduced no evidence, sufficient to authorize the admission of the testimony received by the Judge, on objection made. There was no evidence, that sufficient inquiry had been made, to dispense with the production of the subscribing witnesses. The opposing party is entitled to the benefit of the examination of the subscribing witnesses as to other points. There is no difficulty in obtaining the testimony of such witness, by deposition, in other States of the Union, and it should be done. Nor did the counsel make a full inquiry, whether the witnesses could be found within the State. 1 Stark. Ev. 322, 334; 5 Cranch, 14; 4 East, 54; 9 Johns. R. 136; Overton, 255; 1 Greenl. 61.

The handwriting of the witnesses should have been proved, or the inability to do so shown, before proof of the handwriting of the grantor was admissible. 17 Maine R. 65; 1 Greenl. 61; 7 T. R. 260; Dougl. 73; 1 Bay. 255; 2 Bay. 481; 2 McCord, 531; 2 East, 183.

Howard & Shepley, for the tenant.

Where the attesting witnesses to a deed do not reside within the State, and are not found within it at the time of trial, the deed may be proved by showing the signatures to be genuine. 1 Phil. Ev. 421; 1 Greenl. 60; 11 Mass. R. 309; 1 Greenl. Ev. § 575; 13 Wend. 178.

Proof of the handwriting of the grantor, in such case, is more satisfactory, than of the subscribing witnesses to a deed; and is admissible, both on authority and principle. *Valentine* v. *Piper,* 22 Pick. 90.

The opinion of the Court was drawn up by

TENNEY J. — The tenant offered the deed of Ephraim C. Bartlett to herself, which the demandant contended was fraudulently obtained, and required proof of its execution. The deed purports to have been witnessed by one Charles Ewell and also by one Robert Vose, who took the acknowledgment

thereof as a justice of the peace in the County of Norfolk in the Commonwealth of Massachusetts. The tenant's attorney testified without objection, that he made inquiry of individuals in the County of Kennebec and in other places, and of all persons, who, he thought, might know any thing respecting the subscribing witnesses to said deed, and that he did not know, and could not learn of any such persons having ever resided in the State. The case finds, that Ephraim C. Bartlett resided in Massachusetts. Upon the production of this proof, the tenant was permitted to offer secondary evidence of the genuineness of the handwriting of the grantor, against the objection of the demandant.

The first question presented is, whether secondary evidence was admissible.

Before the testimony of the subscribing witnesses to an instrument can be dispensed with, it must appear, that they are both out of the jurisdiction of the Court; *Prince* v. *Blackburn*, 2 East, 250; *Homer* v. *Wallis*, 11 Mass. R. 309; *Sluby* v. *Champlin*, 4 Johns. R. 461; are incompetent; or that search has been made for them without success. *Cantiffe* v. *Septor*, 2 East, 183. And the same degree of diligence in the search is required as in the search for a lost paper. 1 Greenl. Ev. § 575.

The grantor having resided in Massachusetts, when the deed in question was acknowledged, and where one of the witnesses must have lived, renders it probable, that the deed was executed there, and that the other witness also had his residence in the same place. The degree of proof, that the necessary search was made for the attesting witnesses, must be left in some measure to the discretion of the Judge at the trial; and it would be unreasonable to require so full evidence, where there was little or no reason to suppose, that the witnesses had a residence in the State, as when there was no suggestion, that they were out of the jurisdiction of the Court. The proof, that the witnessess to the deed were not to be found within the reach of the process of the Court, was as full as could be required.

2. Was it proper to permit the tenant to offer the secondary evidence of the handwriting of the grantor in the deed, instead of that of the subscribing witnesses?

It was formerly held, that when the testimony of a subscribing witness could not be obtained, and secondary evidence was admissible, proof of the handwriting of the witness was required, since it is to be presumed, that the witness would not have subscribed his name in attestation of what did not take place. 1 Stark. Ev. 341. It has also been held in some instances, in such cases, that proof of the signature of the party as well as of the witness should be proved. *Hopkins* v. *Graffennid*, 2 Bay. 187; *Oliphant* v. *Taggart*, 1 Bay. 255; *Corneil* v. *Bickley*, 1 McCord, 466. But the latter requirement has not been general. *Mott* v. *Doughty*, 1 Johns. Cases, 230; *Hamilton* v. *Marden*, 6 Bin. 45. By other decisions proof of the signature of the party to the instrument, having an attesting witness or witnesses, who could not be obtained, has been deemed sufficient. The Court say, in reference to a promissory note with a subscribing witness not to be obtained, where proof of the maker's signature was allowed, in *Homer* v. *Wallis*, 11 Mass. R. 309, "but as the instrument in question is good without a subscribing witness, we do not think this strictness necessary; however it might be in relation to deeds or other instruments under seal, when something more is necessary to be proved, than the mere signature of the party." It is said, in 1 Phillip's Ev. 421 and note, that when, after diligent inquiry, nothing can be heard of the subscribing witness, so that he can be produced himself, nor his handwriting proved, the execution may be proved by proving the handwriting of the party to the deed; and when the subscribing witness is out of the jurisdiction of the Court, and no person to be found within its jurisdiction, who can prove their handwriting, evidence of the handwriting of the party is sufficient. In the case of *Valentine* v. *Piper*, 22 Pick. 85, it is said, "that when the attesting witnesses are not within the jurisdiction of the Court, proof of the handwriting of the party is a species of proof, which has often been admitted in this

Commonwealth, and is more direct and satisfactory, than that of the handwriting of the witnesses; and it was pronounced sufficient.

In the case at bar, it was in evidence, that it could not be ascertained that either of the subscribing witnesses to the deed ever resided in this State, and there was nothing tending to show, that any one living in the State, had knowledge of their handwriting; and it would often, if not generally, be a fruitless attempt to prove negatively, that there was not evidence to be found within the jurisdiction, of the handwriting of attesting witnesses, who it appears, never lived within the State. On principle and authority, the ruling of the presiding Judge was proper, and the

Exceptions are overruled.

ABIGAIL STEVENS *versus* JEFFERSON OWEN.

The wife, by joining in a deed of warranty with her husband, does not release her right of dower in the premises conveyed, unless there be apt words to express such intention on her part. The words, "in token of her free consent," inserted in the conclusion of such deed, are not sufficiently expressive of such intention to bar her of her dower.

If land be contiguous to and in any manner used with an improved estate, as for fuel, fencing, repairs, pasturing, &c. it forms no exception to the common law principle that the widow is entitled to dower in all the lands of which her husband was seized in fee during the coverture.

Where the husband, during the coverture, was seized in fee of a five acre lot of land, "partially improved," and "partly covered with bushes and unfenced," at the time of his conveyance thereof, *it was held*, that the widow was entitled to dower in the whole lot.

THE action was of dower, in which the tenant pleaded a release of dower, and also that there were no rents and profits to the estate, wherein dower is claimed, during the coverture, the same having been in a wild and uncultivated state. At the trial, before SHEPLEY J. the marriage, death, seizin of the husband, under whom the tenant claims, during coverture, and a seasonable demand of dower upon the tenant, were admitted.

The tenant then read in evidence, a deed of warranty from Thomas Stevens, late husband of the demandant, dated May 1, 1827, to Amos Phillips, the tenant's grantor, conveying a tract of about five acres of land, of which the demanded premises are a part. The conclusion of that deed was as follows: — "In witness whereof, I, the said Thomas Stevens, together with Abigail my wife, in token of her free consent, have hereunto set our hands and seals this first day of May, in the year of our Lord one thousand eight hundred and twenty-seven." And the deed was signed and sealed by said Thomas Stevens and by the demandant.

The tenant then offered to prove, that the land in which dower is now demanded was in a wild and uncultivated state, during the seizin of said Thomas, and at the time of his conveyance; that although not covered with trees, the same was covered with bushes and unfenced, and did not, during said seizin, yield any rents, profits, or income whatever, although another part of the five acre lot described in the deed was partially improved; and that the land wherein dower is now claimed would now yield no income, if the same had remained in the condition in which it was at the time of the conveyance thereof from said Thomas Stevens to said Phillips.

The presiding Judge rejected the evidence. And thereupon a default was entered, with the consent of the tenant, to be taken off, if in the opinion of the whole Court, the demandant was barred of her dower by her so joining in the deed, or if the testimony offered and rejected should have been received.

S. May, for the tenant, remarked, that the deed in question was one of very many written by the same person, a surveyor, wherein the words intended as a relinquishment of dower were the same as in this. The question then is an important one.

The demandant released her claim to dower in the same deed with her husband to Phillips. He advanced the following among other reasons for this position.

In 1631, the Colony of Massachusetts Bay, ordained, that the widow should be entitled to dower in the lands whereof

her husband was seized during the coverture, unless she had barred herself by her *act* or *consent* signified in writing under her hand. Ancient Charters, 99, c. 37. In 1697, it was provided, that the widow should have her dower, unless she shall have *legally joined with her husband in the sale.* An. Chart. 304, c. 48, § 2. In 1784, the legislature of the State of Massachusetts passed an act in relation to dower, which remained in force until the acts of 1821, c. 36, and c. 40 of the State of Maine, were in force. The statutes in the States of Massachusetts and Maine on this subject are substantially alike. In chapter 36, § 2, it is provided, that nothing in the act contained shall bar a widow of her dower, "who *did not join with her husband* in such sale or mortgage, or otherwise lawfully bar or exclude herself." And the provision in the "act concerning dower," c. 40, § 6, is, that the widow shall be entitled to dower in all lands of which her husband was seized during the coverture, "except where such widow, *by her own consent*, may have been provided for by way of jointure prior to the marriage, or where she may have relinquished her right of dower by deed under her hand and seal." Such was the law when this deed was made, and when the demandant's husband deceased. These statutes all regard the wife as having a legal capacity to contract in relation to her real estate, and as having power to give her consent in writing under her hand, or by her deed, in which her husband joins, for the sale of her estate, or for the extinguishment of her rights. When, therefore, the wife joins with her husband in a deed, she is as much bound by the words, so far as they relate to her, as her husband is as to those relating to him. That the intention of the parties is to govern, is as applicable to her as to him. Wherever the words in the deed clearly imply an intention to relinquish her dower on the part of the wife, she is thereby barred of her right to claim it. Stearns on Real Actions, 289; *Catlin* v. *Ware*, 9 Mass. R. 218; *Lufkin* v. *Curtis*, 13 Mass. R. 223; *Leavitt* v. *Lamprey*, 13 Pick. 382; *Learned* v. *Cutler*, 18 Pick. 9. The intention of the wife is to be gathered from the words of the deed. In this case, the deed

was a warranty, that the land was free from all incumbrances, and the wife signs and seals the deed, and gives her *free consent*, that the land should be thus conveyed. She must have expected and intended to relinquish her claim to dower in the premises conveyed. If she did not execute the deed for that purpose, what was her motive in so doing? An inchoate right of dower is an incumbrance on land. *Porter* v. *Noyes*, 2 Greenl. 22; *Jones* v. *Gardner*, 10 Johns. R. 266; *Shearer* v. *Ranger*, 22 Pick. 447. He contended, that the case of *Leavitt* v. *Lamprey*, when attentively examined, was in his favor rather than opposed to him.

It is well settled, that the widow is not entitled to one third part of the land; but to such part only as will yield one third part of the rents and profits, which the whole yielded at the time of the alienation. 9 Mass. R. 218; 1 Pick. 21; 15 Mass. R. 164. There were no rents or profits arising from this land, and from its condition there could not have been, while the demandant's husband was seized thereof. The demandant therefore was not entitled to dower in the premises; and the testimony offered was erroneously rejected.

Howard & Shepley and *Washburn*, for the demandant, considered it to be very clear, that she had not released her claim to dower by executing the deed to Phillips with her husband. The mere signing and sealing the deed of the husband by the wife, does not convey her right of dower, without some apt words of conveyance, clearly indicating such intention. The mere declaration of "assent" or "free consent," of the wife to a conveyance by her husband does not take away her right of dower. *Catlin* v. *Ware*, 9 Mass. R. 218; *Lufkin* v. *Curtis*, 13 Mass. R. 223; *Leavitt* v. *Lamprey*, 13 Pick. 382. The last case cited was considered to be directly in point.

The testimony offered at the trial was rightly excluded by the presiding Judge.

The proof offered, admitted that another part of the five acre lot was partially improved at the time of the conveyance, which of itself entitles the widow to dower in the whole lot.

By dividing up the lot into several parcels, and conveying them to different persons, the right of the widow to dower in the whole cannot be taken away. She cannot join the several tenants in one suit, but must proceed against them severally. *Fosdick* v. *Gooding*, 1 Greenl. 30.

By the common law, a widow is entitled to dower in all the land of which the husband was seized during the coverture, with certain exceptions not applicable here. Some innovations have been made by the decisions in Massachusetts. The case of *Conner* v. *Shepherd*, 15 Mass. R. 164, cited for the tenant, applies in its terms only to "a lot of wild land not connected with a cultivated farm." The only ground and reason for exempting wild land from dower are, that by the principles of the common law, the estate of the dowress in such lands would be forfeited, if she were to cut down the trees. But where the land is susceptible of improvement and of yielding profits, whether improved so as to produce them or not, without injury to the inheritance, the widow is entitled to dower.

Deblois replied for the tenant.

The opinion of the Court was drawn up by

WHITMAN C. J. — The first question presented is, as to the construction to be put upon the language used by the demandant in the deed made by her and her husband to the tenant. The deed, on the part of her husband, conveys the premises in fee, with a general warranty. She, in the conclusion of it, says, "in token of her free consent" she signs and seals it. This is supposed by the tenant to import a relinquishment of dower; and, if this was not intended to be the effect of what she did, it will be difficult to understand why she should so have executed the deed. It was otherwise an unmeaning and useless ceremony. Her husband had no other reason for having her seal and signature to the deed.

But this mode of barring wives of their right of dower has been looked upon with some jealousy. It was unknown to the common law; and is supposed to have crept into use from a misinterpretation of an ancient statute. *Powell & ux.* v. *M.*

& B. Man. Co. 3 Mason, 347. It has, therefore, been considered, that the language used by the wife, to bar her of her right of dower, should be explicit, so that she could not misunderstand its import. Very little, if any thing, is to be left to inference. Stearns on Real Actions, 289; *Catlin* v. *Ware*, 9 Mass. R. 218; *Lufkin* v. *Curtis*, 13 *ib.* 233; *Leavitt* v. *Lamprey*, 13 Pick. 382; *Learned* v. *Cutler*, 18 *ib.* 9; *Hall* v. *Savage & ux.* 4 Mason, 273.

Mr. Justice Wilde, in *Learned* v. *Cutler*, in delivering the opinion of the Court, remarks, that the wife "must not only join with her husband in a deed of conveyance of the land, by executing the deed, the deed being made by him, but the deed must contain apt words of grant or release on her part." It is very evident in the case at bar that the deed contains no such apt words. It contains only her consent to the execution of the deed.

In *Hall* v. *Savage & ux.* the language of Mr. Justice Story, is to the same effect. It was in reference to these words in a deed executed by the wife, "I agree in the above conveyance," which are certainly as cogent to prove a relinquishment of dower as those in the deed of the demandant. Agreeing to a conveyance is certainly equivalent to a free consent, especially when, as in this case, it is not stated to what the free consent has relation. This learned Judge expresses himself as follows, "The rule of law appears to me to be plain, that the wife cannot release her dower except there be apt words to express such intention. Doubtful words ought never to be construed to have such an effect."

The other point relied upon in defence is, that there were no rents and profits derivable from the land at the time it was conveyed, and, therefore, that the demandant was not dowable thereof. This is predicated upon several decisions in Massachusetts, New Hampshire and Maine, that a widow is not dowable of wild lands, remote from, and not occupied with improved lands; and the reasons given for such a decision are supposed to be applicable to this case; one of which reasons is, that, from such lands, no rents and profits are deriv-

able. The better reason, upon which those decisions must mainly depend, has reference to their being in such a state, that they could not be made productive of any income without the commission of waste thereon. To assign dower, therefore, in such lands would be useless. If such lands had on them, as is sometimes the case, extensive natural meadows, which could be used to advantage, without the commission of waste, it remains to be decided that they would or would not be subject to dower; unless the provisions of the Revised Statutes can be considered as settling the question.

It should be borne in mind, that, at common law, the widow is entitled to have one third part of the lands of which her husband had during coverture been seized and possessed in fee, and as of freehold, set off to her use during life. 4 Kent, 35. But, in seeming derogation of this general principle, our courts have introduced a modification to the effect, that dower shall be assigned according to the rents and profits of the estate; and, hence, that lands in a wilderness state, and not used in connection with improved estates, and not being productive of rents and profits, are not subject to dower. This is the extent to which our decisions have gone. *Conner* v. *Shepherd*, 15 Mass. R. 154. If land be contiguous to, and in any manner used with, an improved estate, as for fuel, fencing, repairing, pasturing, &c. it forms no exception to the common law principle. It must be presumed, in such case, that there are rents and profits therefrom accruing, to which a right of dower would attach.

The report of the case by the Judge, who presided at the trial, shows that the demand is of dower in a part of a five acre lot of land, partially improved. The proposition in defence was to show, that the particular part of it, in which dower in this action is demanded, was overrun with bushes, and was not productive of rents and profits. But land may be cleared of bushes without committing waste, and thereby be rendered productive; and land covered with bushes is oftentimes useful for pasturage. The proposed proof was therefore rejected, and we think very properly. To admit of such proof,

under such circumstances, would be the introduction of a further modification of the common law principle, not warranted by any former decision, and manifestly in violation of the just rights of those entitled to dower.

The default must stand, and judgment be entered thereon.

RICHARD GAGE *& al. versus* HARRIET D. WARD.

A conveyance of land was made, and at the same time a mortgage was given back by the grantee to the grantor to secure the consideration; the first grantor was indebted to the demandant on a note for an amount less than the mortgage held by him, and, three years afterwards, by an arrangement between all the parties, at the same time, the first mortgage was discharged by the mortgagee on receiving his note to the demandant and the balance in money, and the first grantee made a mortgage of the same premises to the demandant to secure the payment of the amount of the note thus given up; *it was held*, that the widow of the mortgagor, who was his wife when all these conveyances were made, was entitled to dower in the premises.

WRIT OF ENTRY. From the agreed statement of facts it appeared, that on October 31, 1835, E. L. Osgood conveyed a tract of land, including the demanded premises, to Jonathan H. Ward, then husband of the tenant, but now deceased; that at the same time Ward mortgaged back the same land to Osgood to secure the consideration therefor; that afterwards, on Oct. 26, 1838, Osgood was liable as surety on a note to the demandants for the sum of $1047,59; that he agreed with Ward to receive the last mentioned note of him in part payment; that Ward agreed with the demandants to procure the discharge of Osgood's mortgage and give his own note and mortgage of this land to them for the amount of Osgood's note held by them; that these arrangements were carried into effect on the same day, Osgood's mortgage having been discharged on receiving the note whereon he was liable, and the balance thereof, in money from Ward; that Mrs. Ward, the tenant, did not give any release of her right of dower; and that after the decease of her husband and before the com-

mencement of this suit, the demanded premises were assigned to the defendant, under a commission from the Probate Court, as her dower in the land conveyed by Osgood to her late husband, and by him to the demandants.

Howard & Shepley argued for the demandants, and contended that the tenant was not entitled to dower in the premises. The note and mortgage to the demandants was for a part of the same consideration of the note and mortgage to Osgood, and one was a mere substitution for the other at the same time. The seizin of the husband in each case was but instantaneous, and the widow was not entitled to have claimed dower in the land as against Osgood, and is not as against the demandants. Co. Lit. 31, (b); Cruise, Dower, § 18; *Holbrook* v. *Finney*, 4 Mass. R. 566; 15 Johns. R. 462; 2 Gill. & J. 318; *Clark* v. *Munroe*, 14 Mass. R. 351; *Small* v. *Proctor*, 15 Mass. R. 495; *Bird* v. *Gardner*, 10 Mass. R. 364.

Chase, for the tenant, said that these conveyances were transactions between different persons, and that the fact that they took place at the same time, could not vary the rights of those having an interest in the estate. If one purchases land and sells it to another, and the conveyances are executed at the same time, it does not take away the claim to dower of the wife of the first grantee. *Stanwood* v. *Dunning*, 14 Maine R. 90.

But here the husband of the tenant was seized of the premises for three years, and the tenant's claim to dower was perfect against all but Osgood. When that mortgage was discharged, her right was paramount to any claim whatever.

The demandants claim under the late husband of the defendant, by a conveyance made during the coverture. They are estopped to deny his seizin. *Kimball* v. *Kimball*, 2 Greenl. 226; 9 Johns. R. 344.

The opinion of the Court was drawn up by

WHITMAN C. J. — The defendant claims as tenant in dower, as the widow of Jonathan H. Ward, deceased, to whom the

premises demanded were conveyed, on the thirty-first day of October, 1835; and who, on the same day, re-conveyed the same in mortgage to secure the purchase money. Thus the title stood until the twenty-sixth day of October, 1838, when the aforesaid mortgage was cancelled. Before it was discharged it had been agreed, that the deceased should convey the same premises in mortgage to certain individuals, to whom the deceased's grantor was indebted, in satisfaction in part of the debt, which the deceased owed him, and to secure the same amount to those individuals; and the conveyance was made accordingly; and, at the same time, the former mortgage was cancelled. The question now raised is, was the deceased so seized during his life, that the defendant was entitled to dower in the premises.

It is contended, that the deceased was never seized, except for an instant; and, therefore, that the defendant was not entitled to dower. Numerous authorities are cited by the counsel for the plaintiffs to show that such was the case. But they do not appear to us to apply to such a state of facts as the case exhibits. The mortgagor is seized against all the world, the mortgagee only excepted. Against him he has but a right of redemption; and of this his widow would be dowable, as our courts have repeatedly decided. A mortgage is but an incumbrance, which may be removed. It might be removed by a widow, she being dowable of an equity of redemption; and the whole estate would be held by her till she was reimbursed for all she had paid, over and above her share of the incumbrance. The moment an incumbrance is removed, the estate is held the same as if no incumbrance had ever existed upon it. When the first mortgage was discharged, therefore, the first instantaneous seizin, as it was against the mortgagee, was converted into a continued seizin against him, as it was before against all the world besides.

Those, claiming under the last mortgage, as are the plaintiffs here, have no connexion with the former mortgage. They are strangers to it. It is, as to them, as if it never had existed. They cannot, therefore, set it up, whether cancelled or

not, to defeat the defendant's claim of dower. As against them the deceased was seized from the time he took his deed. The arrangement that was made in reference to the exchange of securities can have no bearing upon the point at law; and the courts in this State are not vested with power to take cognizance of it in equity, if there were any ground for so doing.

Judgment on the nonsuit.

SAMUEL THOMPSON, *plff. in review, versus* SAMUEL HAZEN.

Under the Stat. 1838, c. 53, a person who is not allowed by law to collect his dues for medical or surgical services as a regular practitioner, cannot recover compensation for medical or surgical services, unless he shall have obtained a certificate of his good moral character, in manner prescribed by that statute, *previously* to the performance of the services. It is not sufficient, that it should have been obtained prior to the commencement of the suit therefor.

Nor can such person recover payment for such services under the provisions of Rev. Stat. c. 22, § 2, by having obtained a medical degree, in manner provided by that statute, *after* the performance of the services and *prior* to the commencement of a suit to recover the same.

THIS was a review of an action commenced by Hazen against Thompson to recover the sum of $29,45, alleged to have been rendered as a physician and surgeon. The precise time when, does not appear, but the services were rendered sometime between the first day of September, 1840, and the first day of August, 1841.

The parties agreed upon a statement of facts; from which it appeared that the services charged were performed; that Hazen attended two courses of medical lectures at Hanover and at Brunswick, in 1839 and 1840; that since the performance of the services and before the commencement of the original suit, Hazen has received from the selectmen of the town where he then resided, being a different one from that in which he lived when the services were rendered, a certificate that it had been satisfactorily proved, that Hazen was a person of good moral character; and also that he received from the

Medical Institution at Brunswick, in this State, a medical degree, his diploma being in the common form and bearing date September 1, 1841.

This statement was made in the District Court; and the parties there agreed, that if the plaintiff was entitled to recover, that the defendant should be defaulted; and if not, that the plaintiff should become nonsuit; and that either party might appeal.

A. R. Bradley, for the original defendant and plaintiff in review, contended that under the provisions of the St. of 1838, c. 353, the original action could not be maintained. The obtaining of the certificate is a condition precedent to the right of the plaintiff to "collect," or obtain payment for services as a physician and surgeon. A subsequent proceeding, cannot relate back to the commencement of an action, so as to make that a right of action which was not so, at its commencement. *Jackson* v. *Hampden*, 20 Maine R. 37; *Clark* v. *Peabody*, 22 Maine R. 500.

The St. of 1838, is repealed by Rev. St. c. 22, and another takes its place. This last statute affects the remedy only, and is retrospective in its operation. It includes all services of the nature described, for all past time; and in exact terms requires the certificate to be before performance of service. *Hewett* v. *Wilcox*, 1 Metc. 154; *Bigelow* v. *Pritchard*, 21 Pick. 169.

The object of these statutes was to guard against the evil effects of unskilful practitioners, and men of bad character. A man may acquire skill afterwards, and obtain a diploma, or may change his character or place of abode, and obtain a certificate. But this does not prove that the person was a suitable practitioner years before. Neither the certificate nor the diploma, obtained afterwards, will aid the plaintiff in his suit. The qualification to practice must exist at the time of the practice, and no after proceedings can enable him to recover payment.

Hammons, for the original plaintiff, remarked that the legislature had been continually enlarging the right of persons to re-

cover payment for medical services, and adverted to the acts upon the subject prior to the St. of 1838, c. 353. Under this latter statute, as well as under Rev. St. c. 22, § 2, the plaintiff seeks to recover.

In the absence of all statute provisions, Hazen would have a right at common law to recover. *Hewett* v. *Wilcox*, 1 Metc. 154.

The question then is, whether the certificate of good moral character from the selectmen is, under the second section of the Stat. of 1838, which was read and which is given in the first paragraph of the opinion of the Court, is a condition precedent to the performance of the services, or to the recovery of payment therefor. He contended, that it was sufficient, if the certificate was obtained prior to the commencement of the suit. No qualification as to skill is required and it is immaterial whether the certificate was a month before or after the performance. The moral character is of greater importance in the conduct of the man in the recovery of payment, than in the performance of services. The language of the statute plainly shows this to be the meaning. The word "*first*" must refer to the word "collect," and to nothing else without destroying the sense of the section; and the word "*resides*," is used, and not *resided*, as it would have been under any other construction. So the use of the word "*is*," confirms this view. The statute is remedial, restoring a right which had been taken away, and should be construed liberally; it is in derogation of the common law, and should be construed strictly.

The St. 1838 is repealed, it is true, as has been said, but the remedy is saved by the second section of the repealing clause. *Treat* v. *Strickland*, 23 Maine R. 234.

The original plaintiff is entitled to recover under the Rev. St. c. 22, § 2. It provides, that the disqualification to recover payment for services performed, shall not apply "to any physician or surgeon, who has received, *or may hereafter receive* a medical degree at some public institution within the United States." The original plaintiff had received a medical degree before the commencement of the suit.

The opinion of the Court was drawn up by

TENNEY J. — The statute of 1831, c. 489, provided, that no person, who should thereafter commence the practice of physic and surgery in this State, should be entitled to maintain any action or suit to recover a compensation for services rendered by him as a physician or surgeon within this State, unless he should have received a medical degree at some public institution within the United States, where degrees in medicine and surgery are usually conferred; and where at least the same qualifications are required as at the Medical School in this State; or have been licensed by the Censors of the Maine Medical Society. The first section of the statute of 1838, repealed the first section of the previous act; and the second section provided, "that no person other than those who are now by law allowed to collect their dues for medical services, shall be allowed to collect pay for any such services by him alleged to have been performed, unless he shall first obtain a certificate from the selectmen of the town, where he resides, that it has been satisfactorily proved, such person is of good moral character."

Did the legislature intend by the act of 1838, that those who had performed medical services prior thereto, without the qualification required by the act of 1831, should be enabled to enforce their contracts express or implied for such services, by having the certificates of the selectmen referred to? If the statute of 1838, had the retrospective operation contended for, it also had reference to medical services to be rendered after its passage. No distinction is made in the terms used in the act, between those, who had performed services before, and those who should render them after the statute. If the disability was removed thereby from the former, it was unnecessary that the latter should obtain the certificates in order to compel payment, till after the services. On this construction a good moral character was a prerequisite to the collection of a debt contracted, but was not required for the performance of the services, which created it. By this interpretation of the law, the object of the legislature was to give means to col-

lect debts arising at a time, when creditors were unable to enforce the payment thereof, rather than to guard the public against impositions, which otherwise might be practiced upon it by persons of immoral habits; for after the existence of the law, those who were entitled to such certificates could obtain them with the same facility before they should perform medical services as afterward.

It cannot be doubted, that it was the policy of the statute of 1831, to discourage from entering upon the practice of medicine and surgery, persons, who were deficient in professional knowledge and skill. The subsequent statute removed impediments before existing; but its authors were careful, that human health and life should not be exposed without some restraint, by being committed to the charge of the unprincipled and vicious, so long as the law should remain in force. It could not have been intended that persons destitute of the moral qualification required, should have full opportunity to enter professionally the families of the worthy, but unsuspecting, be admitted to the secrets, which the sick chamber must often entrust to them; and afterwards, by a real or pretended reformation, or by a removal to a distant part of the State, where their former character might be unknown, obtain their certificates, and then resort to the law for the collection of their debts for such services.

It is insisted in behalf of the original plaintiff, that by the rules of grammatical construction, the term *first* obviously refers to the words, *allowed to collect;* and that the words *resides* and *is*, being in the present tense, are consistent only with the construction contended for. The section is wanting in legal accuracy and precision. Nothing is said in reference to *suits at law or other legal proceedings*, to compel payment for medical services, of those who do not obtain certificates of good moral character from selectmen. The literal import of the language denies to such the power to *receive* payment, without suit, or even after judgment; for the word *collect* of itself is not synonymous with a commencement of a legal process. But it cannot be supposed that any thing

else was intended, than to deprive those, who had not the qualification, of the ordinary legal remedies. Independently, however, of the obvious intention of the legislature, the construction contended for, must be admitted to be the more natural and proper one, but the word *first* may refer to the preceding words, *alleged to have been performed*, which would render the whole in harmony, one part with the other. The succeeding words *resides* and *is* are used in reference to the time when a certificate is obtained, and whether it be before the service or the commencement of a suit are equally proper.

Again, it is contended, that the original plaintiff is entitled to recover by the Revised Statutes, c. 22, § 2, which provides, that the restriction in the foregoing section shall not apply to any physician or surgeon, who has received, or may hereafter receive a medical degree at some public institution, within the United States where such degrees are usually conferred, or may have been licensed by the Censors of the Maine Medical Society. The original plaintiff did not possess either of the qualifications mentioned in this section at the time the services sued for were performed, but he has been thus qualified since, and before the commencement of this action. Persons having the degree or license referred to, before or after this law took effect, are equally entitled to recover for their professional services, rendered subsequent to the receiving of such degree or license; but it cannot admit of the construction, that such qualification can entitle them to recover for labors previously performed and at a time when they may have been totally destitute of all medical or surgical knowledge, skill or experience.

The statement of facts in this case discloses satisfactory evidence, that the original plaintiff was in fact properly qualified to perform the services, which it is admitted he rendered; and there is reason to apprehend that the other party is resisting an equitable claim; but as it is not supported by the evidence of qualification in the one, who makes it, which the statute requires, it cannot be upheld.

Original plaintiff nonsuit.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF LINCOLN,

ARGUED AT MAY TERM, 1845.

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

Under our form of execution, the officer must necessarily proceed, first to arrest the body, or to seize the goods, or to levy on the lands, and cannot proceed simultaneously in each form; and the proper proceedings in either mode would operate, *prima facie*, as a satisfaction of the debt.

By the common law, when the debtor has been arrested and imprisoned, and a return thereof has been made upon the execution, the precept has performed its office, and its legal life and efficiency has been destroyed.

The Stat. 1835, c. 195, § 12, provided, that the release of the debtor from his arrest or imprisonment, under the provisions of the act, should not impair the right of the creditor to his debt; and the Stat. 1828, c. 410, provided a remedy for restoring life to the execution, when the debtor has been released from his arrest or imprisonment before the return day of the execution had arrived — that "the creditor, by procuring the sheriff or jailer to certify a true copy of such permission or certificate upon such execution, may cause the same execution to be levied on any real or personal estate of such debtor." But without such certificate the execution is then inoperative, and a levy upon real estate under it is void.

Where no such return had been made on such execution prior to a levy upon land under it, and no application had been made in behalf of the creditor to the sheriff or jailer for that purpose before the levy was made, as the defect did not arise from any omission or defect in not making a full and perfect return of all acts which an officer had performed or caused others to perform, but from a neglect to have an act performed necessary to give efficiency to the execution, the requisite certificate cannot be permitted to be made afterwards by way of amendment.

WRIT OF ENTRY. To support their action, at the trial, before SHEPLEY J., the demandants introduced in evidence a

judgment and execution in their favor against Christopher Benner, and a levy upon the demanded premises. It appeared that on Jan. 8, 1841, the execution was issued; that on Feb. 3, 1841, Benner was arrested upon it by an officer and committed to prison; that on the 22d day of the same February, Benner took the poor debtor's oath before two justices of the peace and of the quorum, and was discharged from imprisonment; and that on the twenty-fourth day of the same month, the return day of said execution not having arrived, the same was levied in due form of law upon the demanded premises. There was no return on the execution excepting of the arrest and commitment of Benner and of the proceedings in making the levy.

The tenant claimed under a deed of the premises from Benner prior in point of time to the levy; and this deed, the demandants contended, was fraudulent and void as to them, being prior creditors.

The tenant objected to the levy, because the body of Benner, the debtor, had been arrested on the execution, and there was no return of any officer thereon certifying that the debtor had been discharged; and therefore, that there was no authority to levy under that execution. The demandants then made a motion for leave for the proper officer to amend the returns on the execution, so as to bring the case within the provisions of the statute of 1828, c. 410. It was not made to appear, that any officer was directed or requested to make such return prior to the levy. The tenant objected to the granting of such amendment.

The presiding Judge, for the purpose of settling this question before a trial of the others, overruled the motion; and the demandants filed exceptions.

The case was very fully argued by

Ruggles & Bulfinch, for the demandants — and by

J. G. Reed and *M. H. Smith*, for the tenant.

In their arguments, the *counsel for the demandants* cited *Buck* v. *Hardy*, 6 Greenl. 162; *Howard* v. *Turner*, *ib.* 106;

Spear v. *Sturdivant*, 14 Maine R. 267; *Means* v. *Osgood*, 7 Greenl. 148; *Avery* v. *Butters*, 9 Greenl. 16; *Eveleth* v. *Little*, 16 Maine R. 374; *Colby* v. *Moody*, 19 Maine R. 111; *Hearsey* v. *Bradbury*, 9 Mass. R. 95; *Campbell* v. *Stiles*, *ib.* 217; *Wood* v. *Ross*, 11 Mass. R. 271; *Ingersoll* v. *Sawyer*, 2 Pick. 276; *Clapp* v. *Watson*, 8 Pick. 450; Stat. 1828, c. 410, § 3; Stat. 1831, c. 520, § 4.

The counsel for the tenant, in their arguments, cited Dane, c. 184, art. 11, § 8; Stat. of Mass. (Metc. Ed.) vol. 1, 169; Rev. Stat. of Maine, c. 115, § 9, 10; Rev. Stat. c. 148, § 60; Stat. 1828, c. 410; Stat. 1831, c. 520; Rev. Stat. c. 94, § 44; 7 Greenl. 146; *Williams* v. *Amory*, 14 Mass. R. 20; *Brinley* v. *Allen*, 3 Mass. R. 561; 6 Mass. R. 40; 14 Mass. R. 286; 16 Mass. R. 65; 1 Metc. 130; 15 Maine R. 153.

The opinion of the Court was drawn up by

Shepley J. — The demandants recovered judgment for a debt due to them from Christopher Benner in April 1840, and sued out a pluries execution thereon on January 8, 1841, by virtue of which Benner was arrested and imprisoned on February 3, 1841. He was discharged from his imprisonment by taking the poor debtor's oath on February 22, 1841, and on the 24th day of the same month, by virtue of the same execution, a levy was made upon the lands of the debtor. The tenants, having received a conveyance of the land from Benner before the levy was made, resist the title of the demandants, and insist, that their levy was void, it having been made by virtue of an inoperative precept. The demandants, while they insist, that their levy was legally made, have filed a motion for leave to have the proper officer make such a return upon the execution as may bring their case within the provisions of the third section of the act of February 26, 1828, c. 410.

According to the English practice the judgment creditor may sue out a writ of capias and of *fieri facias* at the same time, but he cannot use them both at the same time. *Miller* v. *Parnell*, 6 Taunt. 370. An arrest and imprisonment of the

body by the capias was not, properly speaking, a satisfaction of the debt at common law, yet it was so far regarded as such, that when connected with a release or discharge of the debtor, it amounted to plenary evidence of satisfaction. *Tanner* v. *Hague*, 7 T. R. 420; *Blackburn* v. *Stupart*, 2 East, 243. So when sufficient goods be taken on the *fieri facias* the debtor is discharged. *Mountney* v. *Andrews*, Cro. Eliz. 237.

Our execution appears to have been framed by a combination of the English forms of an execution against the body, against the goods and chattels, and against the lands. The creditor was not thereby enabled to proceed against his debtor simultaneously under each form, and to distress him by an attempt to collect the debt in two or three different modes at the same time. He could not do so, for the officer must necessarily proceed first to arrest the body, or to seize the goods, or to levy on the lands; and the proper proceedings in either mode would operate *prima facia* as a satisfaction of the debt. In this case there had been such proceedings by virtue of the execution issued on Jan. 8, 1841, before the levy, as might result in a satisfaction of the debt. The debtor had been arrested and imprisoned, and a return thereof had been made upon the execution. The precept had performed its office, and by the common law, its legal life and efficiency were destroyed. In *exparte Knowell*, 13 Ves. 192, the Lord Chancellor held, that the debt was discharged by the imprisonment and discharge, by virtue of his certificate, of a bankrupt debtor, who had been arrested on execution after the commission had issued; and that no debt existed, which could be proved under the commission.

It is insisted, that the rule of the common law, which regards the debt as satisfied, and the life of the precept as destroyed, should not be received as the law at this day in our community, when an arrest and discharge of the body rarely produces a satisfaction of the debt. There might be reason for asking the Court to declare, that the rule had ceased to be operative, because the reasons, upon which it was founded, have ceased to exist, if the legislature had not interposed and

provided a remedy by statute for the evils apprehended by its continued existence. This having been done, it becomes unnecessary and improper for the Court to attempt to provide in some other mode for the consequences, which might otherwise have resulted from an arrest and discharge of the debtor. The twelfth section of the act then in force for the relief of poor debtors, c. 195, provided, that the release of the debtor from his arrest or imprisonment, under the provisions of the act, should not impair the right of the creditor to his debt, but that it should remain in full force against the property of the debtor. And the act of the 26th February, 1828, c. 410, provided a remedy for the destruction of the life of the precept by such proceedings. Thus the whole change in the common law, designed by the legislature in consequence of such proceedings, had been made by statute. The provision for restoring life to the execution was, that when the body had been arrested and discharged "by the written permission of the creditor, or on the certificate of two justices of the quorum, who allowed the oath, and the day of return of said execution not having arrived, the creditor by procuring the sheriff or jailer to certify a true copy of such permission or certificate upon such execution, may cause the same execution to be levied on any real or personal estate of such debtor in the same manner, as he might have done before the arrest and commitment of such debtor."

The creditor in this case had not procured such a return of the discharge of the debtor to be made on his execution; and it does not appear, that he had applied to the sheriff or jailer for that purpose before the levy was made. It is insisted, that the defect may be now supplied. But the sheriff or jailer, by making a return of such discharge upon it, as of a date subsequent to the levy, could not impart to it the necessary efficiency at the time of the levy. And how can he now make such a return as of a date anterior to the levy, and do it under the sanction of his official oath, when in fact no such duty was then entrusted to, or imposed upon him, or attempted to be performed by him? It could not be considered an

amendment, for he had not then performed or attempted to perform any such duty. The cases cited would not authorize such a procedure. One class of them would authorize an officer, to whom a precept had been entrusted for service, to amend a defective or informal return, or even to make a new one, that it might state truly and fully all the acts, which he had performed or caused others to perform. The amendment in the case of *Howard* v. *Turner*, 6 Greenl. 106, by which the person, who had sworn the appraisers, was allowed to make known the character, in which he performed the act, only made his certificate correspond to the fact, for he had administered the oath as a justice of the peace. Another class of cases shew, that judicial writs and precepts may be amended by causing them to be made into such a form as they should have had, when issued. This has been done on the principle, that it was the duty of the clerk by law, or by the order of the Court, to have issued them in a particular form. And the Court will always cause its clerk to supply his own defects, or correct his own errors. Such was the case in the 3d Greenl. 29, where the seal had been omitted to be affixed to an execution. And the case of *Campbell* v. *Stiles*, 9 Mass. R. 217, where a writ of review, being a judicial writ, was amended by inserting a direction to the sheriff of the county, who had served it. The amendment made in the case of *Hearsey* v. *Bradbury*, 9 Mass. R. 95, by inserting a direction to a constable, who had served the writ, appears to have been allowed on the ground, that "it was but a matter of form." In the present case the act to be performed was essential to the life of the precept. The amendment in the case of *Clapp* v. *Watson*, 8 Pick. 449, permitting the captain of a company of militia to insert the time, when he administered the oath to his clerk, only made the certificate declare the whole truth in relation to the transaction. And such in principle were the cases of *Avery* v. *Butters*, 9 Greenl. 16, where the certificate was amended by causing it to state, that the clerk took as well as subscribed the oath; and of *Colby* v. *Moody*, 19 Maine R. 111, where the justices

were allowed to amend their certificate, so that it might state, what oath was actually administered.

The case of *Commonwealth* v. *Hall*, 3 Pick. 262, was more like the present. The statute required, that the clerk of a company of militia should be appointed by a certificate on the back of his warrant as sergeant. There was a certificate on the back of it, that he had been sworn as clerk, but no certificate of his appointment. It was proposed to amend by making such a certificate, but it was not permitted.

The defect in the case does not arise from any omission or defect in not making a full and perfect return of all acts, which an officer had performed or caused others to perform, but from a neglect to have an act performed necessary to give efficiency to the execution.

Exceptions overruled.

JOEL HOWE *versus* SIMON HANDLEY *& al.*

Where an indenture is entered into between an insolvent debtor on the first part, two trustees on the second part, and several creditors of the insolvent, on the third part, containing the same covenants on the part of the trustees, but having these words inserted therein — "It being expressly declared and agreed, that they, the said party of the second part, shall be answerable only for their individual receipts, payments and wilful defaults, and not otherwise" — if the trustees are liable in any way for neglecting and refusing to collect and pay over certain demands, assigned by the indenture, they are, in an action at law, only liable to be called upon separately, by several actions.

THE action was covenant broken on an indenture made and concluded on the 28th day of June, 1837, by and between the plaintiff of the first part, the defendants of the second part, and creditors of said Howe, who signed and sealed said indenture, of the third part.

The action was opened for trial before SHEPLEY J. and came before the whole Court on exceptions to his ruling. And in order to present the case reserved, the exceptions state, for the full Court, the following extracts are made from said inden-

ture, to wit: — "Now this indenture witnesseth, that the said Joel Howe, in consideration of the premises and five dollars, paid him by said Simon Handley and John Hussey, the receipt whereof is hereby acknowledged, doth grant, bargain, sell and convey unto the party of the second part, their executors, administrators and assigns, all the said Howe's lands, tenements and hereditaments, goods, chattels, merchandize, debts and sum and sums of money due, owing or belonging unto the said Howe, and all securities had, taken and obtained for the same, and all his right, title and interest in and to the same, a schedule of which is to be annexed as soon as may be; to have and to hold the same, with the appurtenances to them, the said party of the second part, upon the special trusts, nevertheless, that the said party of the second part shall forthwith take possession and seizin of the premises, and within such convenient time as to them shall seem meet, by public or private sale, for the best price that can be procured, shall convert all and singular the premises into money, and as soon as possible collect all and singular the debts and sum and sums aforesaid, and after deducting the costs and charges of the trusts before mentioned, shall pay and apply the money arising therefrom in manner following: — that is to say, that the said trustees shall pay and discharge, in equal proportions, the respective debts of all the creditors who shall have signed and sealed these presents; and in the second place, after the full satisfaction and discharge of all the debts last above mentioned, out of the residue, if any, shall pay all other creditors of said Howe, in equal proportions; and in the last place, shall pay over the surplus, if any, to the said party of the first part, his executors, administrators or assigns.

"And the said Joel Howe, in furtherance of the premises, doth hereby make, constitute and appoint the said party of the second part, his true and lawful attorneys, irrevocable in his name or otherwise; and upon and for the trusts aforesaid, to ask, demand, recover and receive, of and from all and every person or persons, all and singular the goods, chattels, wares and merchandize, debts, sum and sums of money and demands,

due, owing or belonging unto him, and upon all receipts and delivery in the premises, due acquittances and discharges in his name or otherwise, to make, execute and acknowledge, and in default of delivery, or payment in the premises, to sue, prosecute and implead for the same; and to compound and agree for all or any part thereof, as they may see meet, and upon such composition, or other agreements, to make due acquittances and releases; and also for all or any of the purposes aforesaid, to constitute one or more attorney or attorneys under them, the said Simon Handley and John Hussey.

"And the said party of the second part do hereby covenant with the said party of the first part and with all and every of the creditors parties hereto of the third part, that the party of the second part shall and will well and truly execute and perform all and singular the trusts hereby in them reposed, and in and concerning all matters and things relating to the said trusts, interests and purposes, herein contained, shall and will act in the execution of the said trusts to the best of their discretion and judgment.

"It being expressly declared and agreed, that they, the said party of the second part, or other, the trustee, or trustees, under this indenture, shall be answerable *only* for their individual receipts, payments, and wilful defaults, and not otherwise, and that they shall receive a reasonable compensation for their services."

Then follows a provision, that if the assignees shall decease, or become unable to execute the duties of the trust, that the creditors, or the major part of them, may appoint others in their place.

The plaintiff also read and put into the case another indenture between all the parties to the first, wherein, after reciting that the parties of the third part "did receive from said assignees, and divide among themselves, the sum of twenty-three hundred and ninety-two dollars, and there are now certain demands, claims, lands and other property, which have not been collected, sold, nor the proceeds paid over to said creditors," in consideration of a further sum paid by Howe to the

creditors, Handley and Hussey, the party of the second part, with the assent of the creditors, "do hereby assign, release and make over to the said Howe, for his own use and benefit forever, all their right, title and interest in and to all property, lands, claims, notes, accounts and demands which were assigned by said Joel Howe to said Handley and Hussey for the use and benefit of said creditors," then remaining unsold or uncollected.

Before the case was opened for trial, the defendants had pleaded the general issue, with a brief statement of performance, and that if liable, they were not liable jointly, but severally only. And the plaintiff had assigned as breaches of the covenants contained in the indenture, "the neglect and refusal of the defendants to collect and pay over, agreeably to said trusts, the four following demands, assigned by said indenture, to wit: —

"One demand	against	John W. Chapman,	for	$57,82
"	"	"	W'm P. Harrington,	"	86,94
"	"	"	John L. Reed,	"	65,95
"	"	"	Nath'l Adderton,	"	16,72."

"The presiding Judge having ruled, that the plaintiff was not entitled to a joint judgment, a nonsuit was entered, with leave to take off the same, if in law a joint action can be maintained; the only question reserved for the full court being, whether the defendants were liable severally only or jointly." It was to this ruling of the Judge, only, to which the exceptions were taken.

H. C. Lowell, for the plaintiff, said, that in giving a construction to the indenture, the whole instrument is to be taken together, and all its parts be made to harmonize, if it can be done.

The conveyance of the property was to both of the defendants jointly. The language is strong, that they shall collect the debts jointly, and do every act, indeed, jointly. The language will not authorize a several action in any act whatever, in relation to the property conveyed to them. This very action is, and must necessarily be, brought on their joint covenants

that they will collect the debts, and on their omission so to do. It is difficult to perceive, how a separate action could be maintained upon this indenture. He contended, that the true construction was, that the defendants were jointly liable for all omissions, and all defaults whatever, excepting when money has come into the hands of one of them separately, or where the liability arises from wilful, intentional defaults and misconduct. The ground of this action is a mere neglect of the duty they have jointly covenanted to perform. It was, besides, the duty as much of one as of the other to collect these debts; and it is not apparent how one can be guilty of this neglect, unless both are. If the duty was discharged by either, it would necessarily be performed by both. The action, then, is rightly brought against both.

This is the only question before the Court. But if it be said, that the remedy was by bill in equity, the reply is — first, that when this suit was brought, the law did not extend to a case like this; and second, that a complete remedy existed at law upon the covenants contained in the indenture.

E. Smith, for the defendants, said that he, too, considered the law to be clear, that the whole indenture should be taken into consideration in giving it a construction; but in so doing, the true construction is, that the liability under it is several, and not joint. To show that he was right, he examined and commented upon the various parts of it.

Where the obligors or covenantors contract severally, although in the same instrument, the remedy is by a several suit, and by that alone, although the parties may stand in the same relation. 5 Coke, 23; Croke Eliz. 408, 470, 546; *Collins* v. *Prosser*, Dow. & R. 112, (8 Com. L. R. 183); 1 Chitty on Pl. 31, 34. The Court will not take cognizance of distinct liabilities of different persons in one suit. Where two or more covenantors contract, as trustees, to act for the benefit of creditors, without any stipulation in terms, that they shall be only severally liable, still from the nature of the contract, they are holden only liable severally, each for himself. 4 Pick. 518. Although that case was in equity, it is equally in

point, for the rules of construction of instruments are the same in equity as at law.

In the present case, however, in the assignment itself, it is clearly stated, that the liability shall be merely several, by the following clause, inserted to remove all doubts: — "It being expressly declared and agreed, that they, the said party of the second part, or other the trustee or trustees under this indenture, shall be answerable *only for their individual* receipts, payments, and wilful defaults, *and not otherwise.*"

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

SHEPLEY J. — The defendants were the trustees in a deed of assignment made by the plaintiff as an insolvent debtor for the benefit of his creditors. They assumed and had partly executed the trust, when the property not disposed of, was reconveyed to the plaintiff by an agreement between him and those of his creditors, who had become parties to the assignment. This suit is against both the trustees to recover damages for an alleged neglect and refusal to collect and pay certain demands assigned to them. One of the defendants is known to be an attorney, part of whose regular business it is to collect debts for others. The other is not an attorney. Trustees are often designedly selected from men engaged in different kinds of business, that the knowledge and skill of each in his own business may be made useful in the execution of the trust. In such cases it is usually well understood by all parties, without any express agreement to that effect, that each trustee will attend only to that part of the business, to which he has been accustomed. An attorney would not in such cases be expected to be active in making arrangements for the disposition of merchandize and lumber. Nor would a person accustomed to such business be expected to attend to the collection of debts, when one of the trustees was an attorney. It could not in such cases be expected, that one trustee should be responsible for the diligent attention of another to that part of the business, of which he had little or no know-

ledge, and of whose faithful attention to his business he would be very illy qualified to judge. The law does not therefore ordinarily hold trustees responsible for the conduct of each other in the management of the trust property. They are separately and not jointly liable for any default or unfaithfulness; unless they have expressly agreed to be jointly liable, or have performed some act jointly, or have in some mode given countenance to, or aided another in, the alleged default.

In the case of *Churchill* v. *Hopson*, 1 Salk. 318, Lord Chancellor Harcourt stated the "rule of law to be, "if two trustees join in a receipt, and one receives the money, he only, that receives shall be liable." Such was stated to be the law in the case of *Fellows* v. *Mitchell*, 1 P. Wms. 81. And such appears to be the settled doctrine without further variation, than to hold the receipt to be *prima facie* evidence of a receipt of the money by both, subject to be rebutted by proof, that it was received by one. *Monell* v. *Monell*, 5 Johns. Ch. R. 283. In the case of *Leigh* v. *Barry*, 3 Atk. 584, such was stated to be the law, when there were no negative words in the deed creating the trust. The provisions of the deed of assignment are not stated in the report of the case of *Ward* v. *Lewis*, 4 Pick. 518, but it was there stated as a general proposition, that "trustees are liable only for the money, which they have actually received;" and the trustee, who had not received any of the property, was not charged. In the case of *Worth* v. *McAden*, 1 Devereux & Battle's Eq. 199, it appears to have been held, that a trustee was chargeable with money, which ought to have come to his own hands, or which passed through them, or which had been wasted or misapplied by his co-trustee with his concurrence. But a mere neglect to withdraw money from the hands of a co-trustee was not considered to be such a concurrence as to make him chargeable.

In deeds of assignment *inter partes*, each party, often including more than one person, usually enters into the same covenants. To prevent such joint covenants from having the effect to impose upon the trustees a liability more extensive than the law would impose, and greater, than the parties in-

tended, the best forms of such deeds of trust contain some clause, substantially like the one found in this deed, to declare, that their liability shall continue to be several and not joint. And such clause is often used to limit their liability more strictly, than it would be by law. Hence such a clause is found in this deed. And it should receive a construction which will effectuate the design of its introduction. It is not perceived, that full effect can be given to all the words contained in the clause without limiting the liability of the trustees to an individual and sole liability. The clause is in these words. "It being expressly declared and agreed, that they, the said party of the second part, or other the trustee or trustees, under this indenture, shall be answerable only for their individual receipts, payments, and wilful defaults, and not otherwise; and that they shall receive a reasonable compensation for their services." This language plainly states, that they shall not be otherwise answerable, than for their individual receipts, payments, and wilful defaults. The argument, that they are solely liable for these, and that they remain jointly liable for their joint receipts and payments, and for other neglects and defaults, than those denominated wilful, is attended with this difficulty; that it wholly overlooks and disregards the words, "and not otherwise." The effect of which words is to declare, that they shall not be answerable otherwise, that is, in any other manner, than individually, for their receipts, payments, and wilful defaults. Such a construction, as is insisted upon, cannot be made without a violation of the rule of law, which requires, that full effect should be given to all the language of a deed, if it be possible; or without a departure from the plain and obvious meaning of the language by some forced construction. There is no occasion for any other than a literal construction for the purpose of securing to the plaintiff all his just rights. If there have been joint receipts of money, which is not alleged, both the trustees cannot have the custody of it, and each may be held accountable for that portion of it, which he has. And each may also be separately answerable for that held by the other, if he have in any manner countenanced any improper

detention or misapplication of it; for he would then be guilty of a wilful default. It might be difficult, in certain cases, to procure and introduce testimony in an action at law to prove, that a particular trustee had received the money. If so, the objection does not reach the rights of the parties. It applies only to one remedy; and that one is by no means the most appropriate. For it would seem to be more suitable to call upon the trustees to account for the property by a bill in equity, so that they might have an opportunity to state the manner, in which they had managed it. In such a mode of seeking redress, there would be found little difficulty in ascertaining all the facts in relation to the receipt of money. It would be attended by this advantage, that all the trustees could be called upon by one suit, and yet each be made separately liable for his own proceedings. In case of improper payments made by them jointly, the default must, in the sense of the law, be wilful; and each would be liable separately. If it were the pleasure of the parties to make the trustees liable only for their "wilful defaults," and not for other and less culpable omissions and neglects of duty; the Court can have no just right by a strained construction to make them otherwise liable. It is not unreasonable, that trustees who undertake the performance of such trusts, should insist upon being liable only, for what are denominated wilful defaults. Prudent men, who are diligent and attentive to their own business, may at times allow those of their debts, which are not payable at any particular time, to remain so long uncollected, that they would, after their debtors have become less able to pay, charge themselves with neglect. For such neglect a trustee, who is not expected to neglect his own business by devoting his whole time to the execution of a trust, may properly refuse to be made liable. He would be but claiming the same protection by a stipulation in the deed, which Lord Hardwicke, in the case of *Knight* v. *the Earl of Plymouth*, 3 Atk. 480, said, the law would afford him without it. He is reported to have said in that case, "if there was no *mala fides*, nothing wilful in the conduct of the trustee, the Court will always favor him."

And in case of *mala fides*, or gross neglect, the trustee would be liable as for a wilful default. Mr. Maddock, in his treatise on the principles and practice of the Court of Chancery, says, "a trustee is only answerable for fraud or gross neglect, which is equal to fraud." 2 Mad. 121. In the case of *Pybus* v. *Smith*, 1 Ves. Jr. 193, Lord Chancellor Thurlow said, "You cannot affect the trustees with more, than they actually received without wilful default." Mr. Justice Story, after an examination, says, the result would seem to be, "that where a trustee has acted in good faith in the exercise of a fair discretion and in the same manner, as he would ordinarily do in regard to his own property, he ought not to be responsible for any losses accruing in the management of the trust property." 2 Story's Eq. § 1272. And that he would seem to be "bound only to good faith and reasonable diligence, and, as in case of a gratuitous bailee, liable only for gross negligence." ib. § 1268. By the insertion of a provision for their reasonable compensation, it could not have been intended to increase their liability, or to change the law in relation to it; especially when the same clause appears rather designed to restrict it.

Whatever may be the true construction of the deed of assignment in this case, the trustees, according to the authorities, can be liable in this action only for such an omission to collect the debts claimed, as would amount to culpable negligence; and such negligence would in law be considered a wilful default. *Shepherd* v. *Towgood*, 1 Tur. & Russ. 379. In that case the defendants were trustees under a deed of assignment, made by insolvent debtors for the benefit of their creditors. One of the assignors, by a marriage settlement, was entitled to the interest accruing on a certain sum of money during his life. The trustees had omitted to collect it for a long time. The bill, among other alleged defaults, charged this to be gross negligence and a breach of trust. The answer of one of the trustees stated, that the trustee under the marriage settlement, from whom the interest should have been collected, had deceased, that there had been negotiations with her executors respecting it; other excuses were offered for the

omission, and it was stated, that a suit had finally been commenced to recover it, but it admitted, that it had not been collected. The trustees were held to account further, but were made liable only for losses occasioned by their wilful neglect or default. The decree stated, that the creditors were entitled to a further account of the effects of the assignors, "which, without the wilful neglect or default of the said John Towgood and John Ingram, or either of them, might have been received or possessed by them or either of them." A master was appointed to take the account with instructions "not to take over again or disturb any account, which has been already taken by him, farther or otherwise, than may be necessary to let in any charges of wilful neglect or default, which the plaintiffs in this cause may be able to substantiate." It does not appear from the report of that case, that the liability of the trustees was regulated by any provision in the trust deed.

If the trustees in this case are liable for neglecting and refusing to collect and pay the debts, as alleged in the declaration, they are only liable to be called upon separately in an action at law, and as for a wilful default; and the nonsuit should be confirmed.

WATERMAN F. KEENE *versus* NATHAN CHAPMAN.

Where a surveyor of highways was required by the selectmen of a town to put a road therein, then lately laid out and running through land of the plaintiff, in a condition to be traveled with safety and convenience; and, in doing it, he and those acting under his direction, took for the purpose, from the plaintiff's land lying contiguous to the way, "not planted nor inclosed," a quantity of stone, necessary for the proper repair of the road; an *action of trespass quare clausum* cannot be maintained against the surveyor, or those acting under him; such act being authorized by Rev. Stat. c. 25, § 72, and the remedy for compensation being in a different mode.

TRESPASS *quare clausum* for breaking and entering into the plaintiff's close in Bremen, subverting the soil, and carrying away stones, &c.

It appeared that the plaintiff had been for many years in possession of a tract of land used as a pasture, through which there had been a traveled way, although gates or bars had been kept across it.

The selectmen of the town, on the petition of several of the inhabitants of the town, on the 26th of February, 1842, laid out a town road on a line covering the old way, and made report of their doings. This road was accepted by the town at a meeting of the inhabitants on December 22, 1842, an article having been inserted in the warrant to call the meeting to see if the town would accept that road.

The defendant was a surveyor of highways within the town of Bremen, but not of the district wherein this road was. The surveyor of the district was present, however, at the making of the road. He was called by the plaintiff, and testified, that the road was made under his direction, and that the defendant worked with him upon the road; and that the rocks were taken under his direction, and were necessary for building the road. The selectmen of the town directed them to make use of these rocks in constructing the road. They were taken from land of the plaintiff not covered by the road, but near to it. The town had voted, that a sum of money should be expended in making this road, and the defendant had been appointed to see to the expenditure. The land was used only as a pasture, and there was no fence separating it from the road laid out by the selectmen and accepted by the town.

At the trial before Shepley J. these facts appeared on the part of the plaintiff; and he offering no further evidence, the presiding Judge was of opinion that thereupon the action could not be maintained. The plaintiff then consented to a nonsuit, which was to be taken off, and a new trial granted, if that opinion should be found to be erroneous.

Hardy argued for the plaintiff, citing Rev. St. c. 5, § 9, and c. 25, § 64.

Kennedy argued for the defendant, citing 1 Pick. 417 and 1 Shepl. 250.

By the Court, at the same term of the argument.

The defendant was a surveyor of highways in the town of Bremen: and, as such, was required by the selectmen of that town to put a certain piece of road therein, then lately laid out and running through the plaintiff's land, in a condition to be traveled with safety and convenience. Accordingly he, with some other individuals under him, proceeded to accomplish the work. In doing it, he, or the men under him, and as must be presumed with his approbation, as nothing appears to the contrary, took for the purpose, from the plaintiff's land, lying contiguous to the way, and unplanted and uninclosed, a quantity of stone, which we understand is the trespass complained of. This the statute, c. 25, § 72, authorized him to do. He, therefore, cannot have been a trespasser in doing it. The plaintiff's remedy for compensation is against the inhabitants of the town, as provided for in the same section. A nonsuit having been entered judgment must be entered upon it.

Moses Call *versus* Hiram Chapman.

The right to have one demand set off against another, in this State, is wholly regulated by statute.

In a suit by an indorsee against the maker of a promissory note, indorsed when over due, the latter is not entitled, by the Rev. Stat. c. 115, to set off in payment thereof a note given by the promisee to a third person, and by him indorsed to the defendant.

Assumpsit by the plaintiff as indorsee of a note given by the defendant to Hiram C. Cox. The parties agreed upon a statement of facts, from which it appeared, that the note declared upon, dated Dec. 23, 1841, payable on demand, was indorsed to the plaintiff "after Dec. 16, 1842, and before March 27, 1843."

The defendant filed in set-off a note given by Cox, the payee of the note declared upon, to one Glidden, and by the latter indorsed to the defendant, dated June 30, 1842, payable on demand.

This suit was commenced on March 27, 1843. The only question in the case was, whether the defendant had the right to have the set-off allowed.

Ruggles, for the plaintiff.

J. S. Abbott, for the defendant.

The opinion of the Court was drawn up by

SHEPLEY J. — This suit is brought by the indorsee of a promissory note against the maker, made by the defendant on December 23, 1841, and payable to Hiram C. Cox, or order, on demand. It does not appear to have been indorsed and delivered to the plaintiff before February 18, 1843. The defendant filed in set-off a promissory note made by Cox on June 30, 1842, and payable to John Glidden or order on demand, and by him indorsed to the defendant.

The question presented for consideration is, whether the defendant may thus pay his note by purchasing one due from his promisee and having one set off against the other.

The right to have one demand set off against another is wholly regulated by the Revised Statutes; and when and in what manner it may be done is prescribed by c. 6, § 115. It is contended, that mutual demands may be set off by the provisions of the twenty-fourth section; and that these notes are mutual demands, because the defendant became the owner of the note made by Cox, while Cox held the note made by the defendant, and that the plaintiff being the purchaser of a note over due must take it subject to all the equities between the original parties. These positions might be admitted, if all mutual demands were allowed to be set-off by the provisions of that section. But the set off of such demand is only to be made "as provided in the following sections." Those sections must therefore be examined to ascertain the rights of the parties. The manner, in which the demand is to be filed and the notice given, is regulated by the two next sections. The twenty-seventh section provides, that the demand must be founded upon a judgment or upon a contract express or implied.

The twenty-eighth section provides, that no demand shall be set off unless for the price of real or personal estate sold, or for money paid, money had and received, or for services done, or unless it be for a sum liquidated, or one that can be ascertained by calculation. And as the note filed by the defendant could be proved under a count for money had and received, it is contended, that the set-off is authorized by that section. The language is negative only, providing, that no demands unless of that description shall be set off, not positive, that all of that description may be. That it was not designed to give a party the right to have a set-off made in all such cases is apparent; for the twenty-ninth section provides, that "no demand shall be set off, unless it was originally payable to the defendant in his own right, except as hereinafter is provided." This language is plain and positive, that the demand must be payable to the defendant in his own right, or it can be set off only as provided in the sections following the twenty-ninth. The thirtieth section provides, that any demand assigned to the defendant with notice to the plaintiff of the assignment, before the action was commenced, may be set off, "if the plaintiff shall at any time have previously agreed to receive it in payment, or part payment, of his demand, or to pay the same to the defendant and not otherwise." It is contended, that the note purchased by the defendant must be included by the last clause, because the maker by agreeing to pay it to the order of Glidden agreed to pay it to the defendant. But it certainly cannot be included by a literal interpretation of the language, for that requires, that the plaintiff, not the maker of the note, should have agreed to pay it to the defendant. If the maker had been plaintiff, it does not appear to have been the intention to permit the set-off without a special agreement on the part of the plaintiff to receive it in payment, or to pay it to the defendant. For there can be no doubt that such was the intention respecting demands not negotiable, and the statute makes no distinction between those, which are and which are not negotiable. The same language is applied to all, and doubtless with the same intention. If there had been a design

to make a distinction in this respect between negotiable and other demands, it would probably have been plainly stated. Especially as the right to set off negotiable paper, obtained by purchase to satisfy a debt due from a defendant, had not unfrequently been presented for consideration. It is not perceived, that any of the subsequent sections can vary the rights of the parties.

Defendant to be defaulted.

MARY CROOKER *versus* MOSES APPLETON.

Where a notice is issued on the day of the date of the writ, and served upon the defendant on the day of the service of the same writ, there being no evidence as to which service was in fact first made; and the defendant attends at the taking of the deposition and takes part in the examination of the deponent; he cannot at the trial deny that he had sufficient notice.

Where the alleged authority of an agent is by parol and for a specified purpose, the principal may prove the nature and extent of the agency by the agent, unless otherwise disqualified.

When the question is, whether the agent did or did not exceed the authority given to him as agent, he is equally liable to the losing party, if he exceeds his powers, for the damage done thereby; and is a competent witness without a release.

An agent was sent by the plaintiff with a note in her favor against the defendant, with authority only to receive a sum of money thereon and return the note, but in fact he received the money and made an arrangement with the defendant, in pursuance of which he gave up the note and received certain other papers; the agent carried the money and papers to the plaintiff, who "took the money and was displeased with the papers, saying she was cheated out of the money;" *it was held*, that this was not a ratification of the acts of the agent.

And *it was also held*, that it was not necessary that the plaintiff should first return those papers to the defendant, to enable her to maintain an action to recover the amount due on the note.

THE writ contained a count upon a promissory note, made by defendant, and payable to the plaintiff; and a count for money had and received.

The plaintiff read the depositions of George Clark and Francis J. Clark. They were objected to by the defendant. Nathaniel Groton, for the plaintiff stated, that after the depo-

sition of F. J. Clark was taken, he verbally notified the defendant to produce the note; that he said he had it, and should not, or would not produce it any where. This was objected to as not sufficient notice. The defendant produced a copy of a notice served on him by an officer, appearing to have been issued on the day of the date of the writ, and to have been served on him the day of the service of the writ, to attend the taking of F. J. Clark's deposition. The defendant submitted to a default, which was to be taken off and a new trial granted, if the plaintiff, on this testimony, or so much of it as may be legal, is not entitled to recover.

The foregoing is the whole report of the case, saving that the depositions of George Clark and F. J. Clark were to be made a part of the case. The substance of them, as they were understood by the Court, appears in the opinion.

Wells and *Tallman* argued for the defendant. The points made in argument are given in the opinion of the Court.

On the second point, they cited Rev. St. c. 133, § 2, 3.

On the third, they cited 1 Greenl. Ev. § 417; 10 Pick. 135.

On the fourth, Story's Agency, § 244; *Newhall* v. *Dunlap*, 14 Maine R. 180; *Junkins* v. *Simpson*, ib. 364; 8 Pick. 9; 7 Metc. 173.

Groton and *J. S. Abbott* argued for the plaintiff.

The opinion of the Court was drawn up by

TENNEY J. — The deposition of George Clark being admissible and uncontradicted, proves, that the defendant gave his note to the plaintiff, in March or April, 1836, for her interest in another note given by certain persons for real estate, she making a discount of about thirty dollars in the exchange; that the defendant afterwards informed the deponent that the makers of the note, which he purchased of the plaintiff, had failed, but that he had received security for their note. The testimony of Judge Groton shows, that after the service of the writ in this action, he, as the agent of the plaintiff, notified the defendant to produce at the trial his note to

the plaintiff, which the defendant admitted he had, but said he should not produce it. It appears by two papers introduced in the case, signed by the defendant on May 10, 1843, that he held a note running to himself signed by David Page, Peter Page and Henry Tucker, taken for the note purchased of the plaintiff, on which was a balance due the plaintiff of about $234, which he promised to pay to her when collected. It may be justly inferred from these facts, that the note in suit was taken and retained by the defendant upon the delivery of the papers of the tenth of May, 1843, without full payment thereof in money. The deposition of Francis J. Clark is offered to show that such was really the fact, and the manner in which the exchange took place; that the exchange was without her authority, knowledge or consent; and that she had never ratified the transaction. This deposition shows, that he was employed by the plaintiff to carry the note, which is described therein, to the defendant, and receive thereon a certain sum, and return the same to her, and for this purpose only; but instead of confining himself to the duty intrusted to him, he gave up the note to the defendant, and received the papers dated the 10th of May, 1843; which papers and the money he carried to the plaintiff; that she took the money and was displeased with the papers, saying she was cheated out of the money.

The deposition of Francis J. Clark was taken subsequent to the service of the writ in this action, a notice having been served upon the defendant, the same day the writ was served, that the deposition would be taken at the time and place therein mentioned. When the deposition was taken, the defendant was present, and proposed questions in cross-examination. A default was entered at the trial, subject to the opinion of the Court upon questions of law, which might be presented.

It is insisted that the action cannot be maintained upon the evidence, which is legally admissible, and the following propositions are made by the defendant's counsel. 1st, That the secondary evidence of the contents of the note declared on, was improperly allowed. 2d, That the deposition of Francis

J. Clark, was not legally taken, as it does not appear, that an action was pending, when the notice of caption was given. 3d, That Francis J. Clark is incompetent as a witness. 4th, That if the deposition is legally admissible, a ratification of his doings by the plaintiff is shown thereby. 5th, That before the commencement of the action, the plaintiff should have returned to the defendant, the money received by Francis J. Clark and the papers signed by the defendant and dated May 10, 1843.

1. The 35th rule of this Court requires, that when written evidence is in the hands of the adverse party, no evidence of its contents can be admitted, unless previous notice to produce it on trial shall have been given to such adverse party or his attorney. Notice was given to the defendant previous to the trial to produce the note, which he had, and which was not produced; secondary evidence was not excluded by the rule, and by implication was admissible.

2. Rev. St. c. 133, § 10, provides, that in taking depositions, the justice of the peace or notary may give verbal notice to the adverse party, and that shall be deemed sufficient. The justice who took the deposition of F. J. Clark certifies, that the defendant was duly notified and was present; the deposition itself shows that the defendant himself was present and took part in the examination. It cannot with propriety be denied, that the defendant was legally notified.

3. Was Francis J. Clark a competent witness without a release? The question of competency is raised upon disclosures in his own testimony, which shows that he was the agent of the plaintiff for a special purpose. It has always been deemed an exception to the general rule of evidence, that an agent may prove his own authority, if it be by parol. Greenl. Ev. § 416. It follows, that the nature and extent of the agency may be proved in the same manner. There are cases in which the agent is incompetent as a witness for his principal; as in an action, in which the principal is defendant, and the question is whether the agent has in the *execution of his agency*, been guilty of some tortious act or carelessness to the

injury of the other party, and in respect to which he would be answerable over to his principal; if the latter should fail, the record could be admitted to show the amount of damage though not necessarily the liability. Ib. § 394. And in cases, when a verdict in an action in which the principal is plaintiff, would place the agent in a state of security for his own acts, or neglects, he is precluded from testifying for his principal. Ib. 396. When, however, he is equally liable to either party, and is equally indifferent in point of interest, whichever way the verdict may be, he is clearly a competent witness. *Ilderton* v. *Atkinson*, 7 T. R. 480; *Lawber* v. *Shaw*, 5 Mason, 241; 1 Phil. Ev. 100; *Bayley & al.* v. *Ogden*, 3 Johns. R. 399. In the case last cited, in reference to the competency of the agent, who was allowed to testify, the Court say, "If he exceeded his powers, he stood indifferent between the parties, as he would at all events be liable to the losing party, whichsoever it might be, for the injury done by the excess; and if he did not exceed his power, he was liable to neither. *Fancourt* v. *Bull*, 1 Bing. N. C. 681.

In the case at bar, there is no question made whether the witness was guilty of any wrong, or negligence in the performance of the duties of the agency, but whether he had power to make the exchange of papers with the defendant. It was a question, whether he exceeded his agency or not; and if he did, he would be liable to the losing party for the damages done thereby.

4. Is there evidence, that the plaintiff ratified the acts of the agent, so far as they exceeded his power? The money, being received by her direction, was taken by her, but she was displeased with the papers and said she had been cheated. This could not be an acquiescence in his doings.

5. The papers taken by the witness in exchange for the note in suit, were unauthorized by her, and if left with her, were not received as valid and obligatory; it would be unreasonable, that she should be required to be at trouble or expense to return them. The money received was less than her due, and it would be useless for her to return it, for the

purpose of recovering judgment immediately afterwards for the same.

The default must stand.

THOMAS LOTHROP *versus* AMBROSE ARNOLD.

By the Rev. Stat. c. 138, and the additional act to amend that chapter, April 7, 1845, either party may file exceptions to any decision of the District Court accepting or rejecting a report of referees; and the judgment of that Court in accepting, rejecting or recommitting a report of referees, is deemed so far a matter of law as to be subject to revision in the Supreme Judicial Court, with discretionary power to accept, reject, or recommit the same according to the equity of the case.

An officer is not authorized by virtue of a precept against one person to take and sell the property of another, unless he has so conducted himself as to forfeit his legal rights; but the officer must ascertain at his own risk, being entitled to require indemnity in doubtful cases, that the property to be taken and sold is the property of the person against whom he has a precept.

An officer may lawfully take personal property owned by tenants in common by virtue of an execution against one of them, and sell the interest of that one, and deliver the property to the purchaser; but he cannot lawfully sell the share of the other tenant in common, and he would by such an act become a trespasser, so far as it respects that share of the property.

The general rule is, that tenants in common must join in an action to recover damages for an injury to the common property; but where there is no joint injury, and the tenants in common are not jointly interested in the damages, the remedy may be by a several action.

But in such case if the action is several, when it should have been joint, and there is no plea in abatement, the objection cannot be taken upon a hearing upon the merits.

TRESPASS to recover the value of an ox wagon, a double harness, a sleigh and a horse. The defendant admitted the taking, and justified it as an officer, on executions against John Lothrop, as whose property he had seized and sold the same.

This action was referred in the District Court to three referees. Their report was as follows: — "Pursuant to the foregoing rule, we have met at the office of E. V. in Union, on the sixth day of February, 1845 — the parties were in

attendance with their counsel — and having heard the parties, their evidence and arguments from day to day, till the eighth day of said February, and having maturely considered their respective pleas, proofs and arguments, we have determined, and this is our final award and determination in the premises, that the property in the wagon mentioned in the plaintiff's writ was in said John Lothrop and the plaintiff jointly, and that the plaintiff's interest in the same was worth twenty dollars; that the property in the harness was in the said John and the plaintiff in equal shares, and the plaintiff's interest in said harness was worth $2,00; and that the property in said horse and sleigh was in said John Lothrop. And it is our further determination, that the said Arnold was not notified, that the plaintiff had a joint interest in the wagon and harness, and that the said Arnold is justified in seizing and selling the same, as alleged in his brief statement; and it is our further determination, in order for a final settlement between the parties, that the said Arnold shall not be liable to the plaintiff for any money arising from said sale, and shall recover of the plaintiff half the costs of reference, taxed at $52,16, in the whole, and also one half of the defendant's cost of Court, to be taxed by the Court. And that sum shall be in full of all matters above referred." This report was signed by all the referees.

On the return of the report into Court, the plaintiff made several objections in writing to the acceptance thereof. After a hearing of the parties, REDINGTON, the presiding District Judge, at February Term, 1845, accepted the report, and the plaintiff excepted thereto.

H. C. Lowell, for the plaintiff, contended that the defendant was liable in this form of action. A seizure and sale by a sheriff of the whole of a chattel on an execution against a co-tenant will make him a trespasser *ab initio* as to the other. *Melville* v. *Brown*, 15 Mass. R. 82; *Weld* v. *Oliver*, 21 Pick. 559; *Walker* v. *Fitts*, 24 Pick. 194.

The referees exceeded the power given them by the rule of reference; and therefore the report should not be accepted, and the rule should be discharged. 6 Conn. R. 569; 2 Story's Eq. §

1253; *Bean* v. *Farnham*, 6 Pick. 274; *Boston Water P. Co.* v. *Gray*, 6 Metc. 168. The statute recently passed, authorizes the Court to discharge the reference, as well as to order a recommitment.

The rule should be discharged because, as was contended, the referees had misapprehended the law, and made an unjust and unreasonable award, as well as gone out of the authority given them.

Ruggles, for the defendant, said that the referees do not open the law for the revision of the Court. They had power to decide the law as well as the facts, and they have done so. This is conclusive of the matter, as no fraud is pretended. Case cited for the plaintiff from 6 Metc.; *Preble* v. *Reed*, 17 Maine R. 169.

The referees have not exceeded their power. They had full and complete authority, so far as this action is concerned. They had a right to disregard the form of action. And they merely say, that they have decided upon the merits, and intended to include the value of the articles, the amount the property sold for, and not merely damages for removing the property from one place to another.

But the referees decided rightly. The action cannot be supported by one tenant in common against a stranger. All the tenants must join in an action to recover damages.

The opinion of the Court was by

Shepley J. — This case is presented by a bill of exceptions taken to the acceptance of a report of referees. This was formerly regarded as a discretionary power, and the exercise of it as not subject to a revision, in this mode. *Walker* v. *Sanborn*, 8 Greenl. 288. By the Revised Statutes, c. 138, § 13, it is provided, that either party may file exceptions to any decision of the District Court accepting or rejecting a report. And by the additional act of April 7, 1845, to amend that chapter, it is provided, that the judgment of the District Court in accepting, rejecting, or recommitting, the report of referees shall be deemed so far matter of law as to be subject upon

exceptions thereto to revision in the Supreme Judicial Court, with discretionary power to accept, reject, or recommit, the same according to the equity of the case.

The plaintiff brought an action of trespass against the defendant for taking and selling a wagon and harness and other property. The defendant admitted and justified the taking and selling as an officer, by virtue of certain executions in his hands for service against John Lothrop. The action having been referred a report was made to the District Court, in which the referees have stated, that the wagon and harness were the property of the plaintiff and of John Lothrop jointly; that the defendant was not notified of the plaintiff's joint interest in them; that he was justified in seizing and selling them; and that he should not be liable to the plaintiff for any money arising from the sale of them.

Two objections have been presented to the plaintiff's right to recover for the value of his interest in the property.

The first is, that the officer was not notified, that the plaintiff was a joint owner of the wagon and harness, before they were taken and sold. An officer is not authorized by virtue of a precept against one person to take and sell the property of another. He must ascertain at his own risk, that the property to be taken and sold is the property of the person against whom he has a precept. And he is not in doubtful cases obliged to take it without a full indemnity. The owner of property, against whom he has no precept, is not obliged to notify him before he will be entitled to maintain an action against him for taking and selling his property, unless he has so conducted with his own property as to forfeit his legal rights.

One tenant in common of personal property cannot be considered as having conducted, improperly or forfeited any of his legal rights, by allowing another tenant in common to have the possession and use of the property. The plaintiff may have so conducted with his own property as to prevent him from recovering for its value; but the report does not so state, and the Court is not advised of any such state of facts.

The other objection is, that the plaintiff alone cannot main-

tain an action of trespass to recover for the value of his share of the property. The officer might lawfully take the property by virtue of an execution against one of the tenants in common, and sell the interest of that one, and deliver the property to the purchaser, who would become a tenant in common with the other owner. But he could not lawfully sell the share of the other tenant in common, and he would by such an unlawful act become a trespasser, so far as it respects that share of the property. The general rule is, that tenants in common of personal property should join in an action to recover for an injury, because the injury is joint, and they recover joint damages. But the injury is not joint, when the share of one tenant in common has been lawfully taken and sold, for as it respects that one, the justification is complete. The tenants in common do not suffer a joint injury, and they are not jointly interested in the damages to be recovered. *Melville* v. *Brown*, 15 Mass. R. 82.

If the law had required in this case, that both the tenants in common should have joined in the action, as the defendant has not pleaded in abatement, he could not make the objection upon a hearing on the merits. *Addison* v. *Overend*, 6 T. R. 766.

The state of facts, as presented by the report, are such as to induce the Court to recommit it, that the referees may have opportunity for further consideration.

Report recommitted.

WILLIAM GARDINER *versus* JACOB P. MORSE.

All fraudulent acts and all combinations, having for their object to stifle fair competition at the biddings at auction sales, are unlawful.

Where the parties agreed, that if the defendant would not bid upon a note against the plaintiff, at an auction sale which was to be had thereof as part of the effects of a bankrupt, that the plaintiff would discharge a demand in his favor against the defendant, *it was held*, that such agreement was unlawful and void.

THE parties agreed upon a statement of facts, from which it appeared that in December, 1843, the defendant was in

debted to the plaintiff on account in the sum of $37,50; and still remains so, unless the same is discharged on the following state of facts. One Perry, a bankrupt, held a note against the plaintiff of about $200, which in December, 1843, was advertised to be sold at auction by the assignee of Perry. Gardiner then agreed with Morse, that if the latter "would not purchase the note, or bid upon it, so that Gardiner might be enabled to buy it in cheaper, he would, in consideration of the same, give up and discharge in full his said debt against said Morse." Morse did not purchase or bid upon the note at the sale.

If the agreement was legal and binding, and discharged the account of the plaintiff against the defendant, then judgment was to be entered in favor of the defendant. If the agreement was illegal and did not discharge the debt, then the defendant was to be defaulted.

Randall, for the plaintiff, said the true principle was, to consider void any bargain or agreement which tended to prevent competition at auction sales, or to cause the property sold to command a less price than otherwise it would. He contended, that the promise of the plaintiff, in this case, was void both for want of consideration, and as against the policy of the law. He cited *Howard* v. *Castle*, 6 T. R. 642; *Bexwell* v. *Christie*, Cowp. 395; *Jones* v. *Caswell*, 3 Johns. Cas. 29; *Thompson* v. *Davis*, 13 John. R. 112; *Doolin* v. *Ward*, 6 Johns. R. 194; *Wilber* v. *How*, 8 Johns. R. 444; *Fuller* v. *Abrahams*, 6 Moore, 318; *Gulic* v. *Ward*, 5 Halst. 87; *Piat* v. *Oliver*, 1 McLean, 295.

Sawyer & Sewall, for the defendant, contended that the agreement was valid, and that the demand in suit was discharged thereby.

The consideration was sufficient. Chitty on Con. (3d Am. Ed.) 7; 2 Kent, 463 to 466. If the defendant had purchased the note, he might have availed himself of it to pay this debt by way of set-off. Rev. St. 117, § 1.

The defendant is entitled to judgment, unless the agree-

ment was a fraudulent one; was against public policy, and operated injuriously upon Perry's rights; or was a fraud upon the creditors of Perry; for they are the only parties that ought to complain. *Condly* v. *Parsons*, 3 Ves. 625; *Smith* v. *Clark*, 12 Ves. 477; *Steele* v. *Ellmaker*, 11 Serg. & R. 86; *Bramlet* v. *Alt*, 3 Ves. 620; Chitty on Con. 227, and note; 2 Kent, 538; *Miller* v. *Campbell*, 3 Marsh. 526; *Jenkins* v. *Hogg*, 2 Const. R. 321; *Crowder* v. *Austin*, 1 C. & P. 208; *Phippen* v. *Stickney*, 3 Metc. 384.

The plaintiff has been equally guilty, if any wrong has been committed, and cannot now derive a benefit from it.

The opinion of the Court was drawn up by

WHITMAN C. J. — This case is submitted to us upon an agreed statement of facts. No question is made but that the cause of action accrued, and still exists, as set forth in the writ, unless discharged in the manner set up in the defence. One Josiah B. Perry held a note against the plaintiff for a much larger amount than the demand sued for. Perry became bankrupt, and his effects were about to be sold at auction for the benefit of his creditors; among which was the note against the plaintiff. The plaintiff, wishing to purchase his note at as low a rate as possible, agreed with the defendant, if he would not buy it, or bid for it at the auction, that he (the plaintiff) would "give up and discharge in full" the demand now sued for. The plaintiff contends that his promise so made was nugatory; that it was an agreement to do that which tended to the injury of the creditors of Perry, by lessening the competition among the bidders at the auction; and thereby preventing the obtaining so much for the plaintiff's note, as it might otherwise have sold for. He cites a number of authorities, certainly entitled to great weight in favor of his position. The defendant, on the other hand, insists, that the contract is obligatory; and cites, also, quite a number of authorities to maintain his position. The authorities are, certainly, somewhat in conflict upon the subject.

It must be admitted that fairness, in whatever is connected with auction sales, should be encouraged. Vast amounts of property are, and must continue to be disposed of, at such sales. It is a mode of proceeding necessarily resorted to in the execution of the decrees and determinations of courts of justice. The object in all cases is to make the most of property that fairly can be made of it. It is the policy of the law, therefore, to secure such sales from every species of undue influence. To allow bidders to buy off each other, which is but a species of bribery; and so to combine to prevent a fair competition as that a sale may be rendered iniquitously fruitless, cannot be admissible. Whenever, therefore, it shall become apparent, in legal proceedings, that claims are set up, founded upon such practices, Courts should set their faces against them. We must take care nevertheless, not to confound such cases with those which have their origin in pure motives, and are of no evil tendency; as where articles are set up at auction of great magnitude and value, to purchase which would be beyond the means of many classes of buyers. The formation of reasonable companies, and the joining together of two or more individuals, with a view to a division of the article between them, or to hold it in common, might, in many cases, become necessary, andtend greatly to the promotion of an advantageous sale. The true rule, upon the summing up of all the authorities seems to be satisfactorily deduced by Mr Justice Dewey, in delivering the opinion of the Court, in *Phippen* v. *Stickney*, 3 Metc. 384. It is, that all "fraudulent acts, and all combinations having for their object to stifle fair competition at the biddings, with the design of becoming the purchasers at a price less than the fair value of the property," are unlawful. That such was the character of the agreement relied upon in defence we cannot doubt.

Defendant defaulted.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF KENNEBEC,

ARGUED AT JUNE TERM, 1845.

FRANCIS M. ROLLINS *versus* MOSES TABER.

It is generally true, that if one of two joint contractors pays money, for which they may have made themselves jointly liable, an implied undertaking on the part of the other is inferred, that he will reimburse his co-promisor for the one half of the amount so paid. But if the debt were originally due from some third person, and the security had been given therefor by the co-promisors in consideration of funds furnished by him, sufficient for the purpose, with which it was agreed the debt should be paid, and such funds had been entrusted to the management of him who had been compelled to pay the amount in discharge of the joint promise, and he had not been careful to appropriate the funds according to agreement, no promise could be implied, that he should be reimbursed for any portion of the amount he might have been compelled to pay on the joint contract.

Where co-promisors, being assignees of the property of an insolvent man, give their note to a third person, as such assignees, in payment of a debt before due from their assignor, with a reliance for the means of paying it upon the funds in their hands by virtue of the assignment, specially appropriated for that purpose, equity would consider the assignees as substituted for such third person in reference to such funds, and the law could not consider them otherwise.

If one has an interest merely in the question, as he may stand in a similar condition as that of the party calling him, he is a competent witness.

ASSUMPSIT for money paid, laid out and expended.

The action was submitted to the decision of a referee, subject to the right of either party to have the referee report to the

Court such questions of law, as might be raised in the case, to be decided by the Court.

The plaintiff proved, that on June 3, 1834, a note was made to the Central Bank by the plaintiff, the defendant and one Mower, as the assignees of one Dow, for $3,200, payable in sixty days; that upon this note at August Term, 1840, of the District Court, the bank took judgment against all the signers for $857,93, debt, and $9, costs of suit, for the balance then due; and that the execution issued upon that judgment was, on Sept. 15, 1840, duly levied upon land of the plaintiff. This action was brought against the defendant for a contribution.

It appeared from the report of the referee, that this note was given to pay two drafts of $1500 each, drawn by the plaintiff and indorsed by the defendant and John G. Fitch, on Franklin Dow, and by him accepted, and which had become the property of the Central Bank.

It also appeared from the report, that the defendant resisted the plaintiff's claim on these grounds — that Dow, on May 21, 1834, had executed to Rollins, Taber and Fitch, a bill of sale of certain property to secure them for their liability for him on certain notes and drafts, including the drafts above mentioned, but no delivery of the property was shown; that on the same day, Dow executed a general assignment of the same and other property, including a quantity of leather partly tanned, to Rollins, Taber and Mower for the benefit of his creditors, which was also executed by them and by certain creditors of Dow, and wherein it was stipulated, that the assignees should turn the property into money, and "first pay to the Central Bank two drafts for $1500 each, now held by said bank, drawn by the said Rollins, accepted by said Dow, and indorsed by the said Taber and Fitch, and pay all costs and charges concerning the same, so as fully to indemnify all the parties thereto;" that Dow, Fitch and Mower testified, that it was intended to take the place of the other instrument, to which Fitch assented, because the drafts in the Central Bank were first to be paid, and the referee was satisfied, that it was so

intended; "that the plaintiff, by the agreement and consent of his colleagues, became the acting assignee, and as such received the property assigned, and in that capacity disposed of the property; and that his subsequent management thereof was as acting assignee under the general assignment." Dow and Mower were called by the defendant as witnesses, and were objected to on the part of the plaintiff as incompetent from interest. They were admitted by the referee. It was also proved, that the plaintiff, as acting assignee, was enjoined by his colleagues to adhere to this preference.

The referee then stated the manner in which the plaintiff received funds from the property assigned, and the times when they were received, and concluded as follows: —

"He is satisfied, that the plaintiff is chargeable with available funds, from the property assigned, wherewith to have paid the Central Bank. That until that debt was paid, he had no right to detain funds for his own debt, or for other debts, which were subsequent, according to the assignment.

The counsel for the plaintiff raises the following points, which are given in his own language.

1. The defendant, being a co-promisor in the note to the Central Bank, is liable to an action for contribution; but for the same reason that no action will lie by one of the assignees against another, for liabilities incurred as assignee, the defendant cannot avail himself of any such liability in defence of this action. The objection, in reason and principle, is the same, whether the party seeks an accountability in one form or the other. It is an attempt to evade the principle, by obtaining the same result in a different way.

2. Dow having made a specific provision for the two drafts in the Central Bank, previous to his general assignment, that fund should first have been exhausted, and until the defendant has proved an application of all that fund, he cannot resort to the provision made in the general assignment.

3. It is a legitimate inference from the fact, that such specific provision was thus made, that Rollins, Mower and Taber relied upon that provision, and assumed the debt personally

upon the strength of it. By doing which, they acquired a new relation to the creditor and between themselves, which was independent of the assignment. Styling themselves assignees in the note, does not change that relation, but is only *descriptio personarum.* Whether they have a right to reimburse themselves out of the property assigned is another question.

4. If Dow's assignment was invalid, for being conceived in fraud, and consummated in something worse, it is wholly unavailable to either party in an action at law. *In pari delicto, melior est conditio possidentis.* It was fraudulent, if made to cover the property, and was not designed to be carried out, according to its terms. [By the referee: — Dow's assignment was not proved to have been fraudulent before the referee.]

5. But if the assignment was originally valid, there was a subsequent abandonment of it, by not proceeding to sell the property according to its directions, by suffering Dow to retain the property real and personal in his own hands, and to manufacture the hides assigned, into leather, *there having been no stipulation therefor in the assignment*, using the bark assigned for tanning stock not assigned, [leather belonging to others not assigned, was tanned with the same bark,] by permitting Dow to appropriate debts and other property to his own use, by Dow paying debts himself provided for in the assignment, which he would not and could not have done, if the property assigned had not been restored to him, by paying the drafts to the Central Bank in a way different from the directions in the assignment, &c., &c., &c. Whether it was good management or not, it was a departure from the directions of the assignment by all concerned, and they are now precluded from requiring a strict conformity to these directions.

6. But the plaintiff does not necessarily ask for any modification of his liability. By taking up the drafts in the Central Bank and giving their own note, the assignees did thereby first pay the two drafts to the bank, within the meaning and terms

of the assignment, and it was not less a payment, because made by their note instead of money. It was a literal and virtual compliance, so far as every body but themselves were concerned, with the directions of the assignment. A new contract was made, differing in form and in the time of performance, and the old concern was relieved from the debt.

7. But if this note had still continued to be the debt of the assignees, and they liable as such, by giving a new note on time, the other debts being then due, a precedence is voluntarily given to the other debts, and the defendants cannot now insist on the priority of the Central Bank.

8. If the assignees have a right to reimburse themselves for money paid to the Central Bank, it is a right common to them all; and neither Taber, nor Mower, has a right to require Rollins, to secure property for him. Mower has secured himself, by retaining property in his hands, and if Taber has not, it is not our fault.

9. Nathan Mower was not a competent witness, because the necessary consequence of charging Rollins is to discharge himself from his accountability to Dow and the creditors, who are parties to the assignment, for the same property.

10. Franklin Dow was not a competent witness for the defendant, because the effect of charging the plaintiff is to increase the assets, and consequently the amount of surplus which is to go to him, and particularly the property now retained by Nathan Mower.

The award of the referee is made, subject to the opinion of the Court upon the points raised. Submitting to their revision, he finds that the defendant never promised, in manner and form, as the plaintiff has declared against him; and he accordingly awards that the defendant recover of the plaintiff, costs of Court, to be taxed according to law, and costs of reference taxed at twenty-seven dollars and sixty-eight cents."

H. A. Smith, for the plaintiff, contended, that the giving the note to the bank, "as assignees," was a mere description of the persons, and matter of form only, and would apply as well to the first as to the second assignment; that in giving

the note, the parties acted independently of the assignment, and the only relation between them, so far as that note was concerned, was that of co-promisors, and as such each was liable to him who paid the whole for contribution, and went into an examination of the facts stated by the referee upon which he relied; that they assumed this liability upon the strength of the previous assignment to them of property to pay the drafts; that it was no part of their duty as general assignees, to assume the debts personally, and, therefore, in giving the note, they acted as individuals, independently of the assignment, and not as assignees; that the plaintiff was willing to account for all the property he had received, if they would allow all his disbursements, but that they objected to this because the note to the bank was not first paid; that the defendant could not avail himself of the provisions of the assignment in this action; that an assignee could not be made to account to his co-assignee in an action at law; that the defendant should not be allowed to avail himself, as set-off, of claims which could not be made the subject of an action by him; that the principle was the same whether the party sought an accountability in one form or another; and that the accountability of one as assignee could not be set off against the liability of the other as co-promisor. He argued in support of the several positions taken before the referee; and cited *Hays* v. *Jackson*, 6 Mass. R. 149; *Amory* v. *Francis*, 16 Mass. R. 308; *Aldrich* v. *Cooper*, 8 Vesey, 382.

Emmons, for the defendant, said that it was unnecessary to examine particularly the questions of law, which had been raised at the hearing before the referee by the counsel for the plaintiff, and urged in the argument here. The *facts*, stated in the report of the referee, which were adverted to by the counsel, furnish a sufficient answer to most of them.

The report shows, as matter of fact, that the first assignment was given up, and abandoned; and that Fitch, one of the parties to it, gave his assent to this course, on the ground, that the drafts on which he was liable, were first to be paid

out of the property assigned by the second instrument. To divert the funds to other objects would have been a fraud upon him on the part of the assignees. All the arguments of the plaintiff's counsel, based on the supposition that the assignees acted under the first assignment, or gave the note in consideration of it, are wholly irrelevant.

The facts show, also, that the plaintiff acted, in collecting and receiving the funds, under the general assignment, and he was bound to appropriate the money received in accordance with its provisions; and that he was enjoined by his colleagues to adhere to this preference of first paying the Central Bank. He cannot deny, therefore, that he received the funds for that purpose.

The facts, also show, that before the suit was commenced, which was the foundation of the proceedings under which the levy was made, the plaintiff had received funds more than sufficient to have paid that demand. It was his duty to have paid the money to the bank. The levy of the execution upon the plaintiff's real estate, was but a compulsory payment of the very note which he was bound in duty and in law to have paid voluntarily from the funds in his hands. The conversion of the proper funds for that purpose to his own use, or the misappropriation of them to other purposes, and paying the note out of his other property, could give him no legal or equitable claim against the defendant for contribution.

The objections made to the competency of the witnesses are groundless. This decision could not be used for or against them. An interest in the question goes only to the credibility, not the competency of a witness.

The opinion of the Court was drawn up by

WHITMAN C. J.—The plaintiff and defendant, and one Mower, were co-promisors in a note, made by them to the Pres. D. & Co. of the Central Bank, for a large sum of money, of which, at the August Term of the District Court, at Augusta, in 1840, the sum of $857,93, was found to be due; and judgment was then rendered therefor, with costs of

suit, taxed at nine dollars, against the promisors; and execution thereon was subsequently issued, and levied upon the property of the plaintiff. He now seeks to recover of the defendant the one third part thereof.

It is generally true, that, if one of two joint contractors pays money, for which they may have made themselves jointly liable, an implied undertaking on the part of the other is inferred, that he will reimburse his co-promisor for the one half of the amount so paid. But if the debt were originally due from some third person, and the security had been given therefor by the co-promisors, in consideration of funds furnished by him, with which it was agreed the debt should be paid, and such funds had been intrusted to the management of him, who had been compelled to pay the amount in discharge of the joint promise, and he had not been careful to appropriate the funds according to agreement, no promise could be implied, that he should be reimbursed for any portion of the amount he might have been compelled to pay on the joint contract. The defence, in this case, is, that the plaintiff has been furnished with such funds, and has omitted to apply them as had been agreed.

Whether such was the fact or not was submitted to a referee, by rule of Court, by consent of parties, to be ascertained; and he has reported in favor of the defendant. The reference, however, was with a reservation as to any questions of law, which might arise in the investigation, which were to be, by the referee, reported for the consideration of the Court.

The questions of law made by the counsel for the plaintiff, and reported by the referee, are numbered from one to ten inclusive; and certainly savor very much of subtilty, and an over nice attempt at shadowy distinctions. The first would seem to be rather a *felo de se.* It is, that co-assignees cannot recover of each other for any liability, either as such assignee, may incur; and yet the plaintiff's claim is founded upon such a liability. The three co-promisors were the assignees of the estate of one Dow, and had given the note, on which the action against them was founded, as such assignees. Some of

the other questions are predicated upon an assignment, or assignments, made previously to the one under which the plaintiff acted; and upon obligations supposed to arise out of them. But nothing can be more manifest than that those previous assignments were all waived by and merged in the one under which the plaintiff acted. One other of the questions relied upon is, that, as the co-promisors gave their joint note to the bank for the debt in question, before due from their assignor, they thereby paid it, and so that Dow's funds, in their hands, were thereby released from the priority attached to them, by the assignment, for that debt; and, thereupon, that the other creditors of Dow were let in to claim them. But the assignees had given their note, as such assignees, and, unquestionably, with a reliance, for the means of paying it, upon the funds in their hands, by virtue of the assignment, specially appropriated for that purpose. Equity would consider them as substituted for the bank, in reference to such funds, and the law could not consider them otherwise. And, moreover, there is not any pretence that the other creditors of Dow ever attempted, upon any such ground, to interfere with the funds assigned.

Two of the questions made were, as to the competency of witnesses admitted to testify before the referee, viz: the co-assignee, Mower, and the assignor, Dow. But it is difficult to see upon what ground they should have been excluded. The decision in this case could not be used for or against either of them. It is not apparent that Dow could be affected, even remotely, by it, in any event. Mower may be considered as having an interest merely in the question, as he may stand in a similar condition as that of the defendant; but this could not affect his competency.

Report accepted.

CHARLES SCUDDER *& al. versus* DAVID YOUNG, JR. *& al.*

In equity, the Court can grant relief only *secundum allegata et probata;* and under the prayer for general relief, it can give such relief only, as the case stated in the bill and sustained by the proof will justify.

Where, therefore, the bill contains no allegation not applicable to a bill seeking relief on the ground of a fraudulent conveyance of real estate; and the proof fails to establish the fraud alleged; the Court cannot reach an equitable interest growing out of property conveyed without fraud, and grant relief on that account under the general prayer therefor.

BILL IN EQUITY. The substance of the bill, answers and proof is stated at the commencement of the opinion of the Court.

F. Allen, for the plaintiffs, said that on the whole they had concluded to acquiesce in the report of the master, and therefore moved that the report be accepted, and that a decree be passed to carry it into effect.

Evans, for the defendants, objected to the acceptance of the report; and in his argument in support of his objection, cited 3 Barb. & H. Eq. Dig. 28, 32; 3 Paige, 478; 6 Johns. R. 564; 1 Cowan, 734; 4 Johns. C. R. 281; 3 Rand. 263; 5 Munf. 314: 16 Peters, 195; 2 Howard, 383; 23 Maine R. 182; Mitf. Pl. 38; 5 Ves. 485; 13 Ves. 114.

Allen, in his argument in favor of the acceptance of the report, cited 8 Greenl. 373; 2 Shepl. 453; 4 Johns. R. 536; 20 Pick. 337; 3 Sumn. 466.

The opinion of the Court was drawn up by

SHEPLEY J. — This bill among other things alleges, that David Young, Jr. and William R. Babson, composing the firm of Young and Babson, during the years 1837, 8 and 9, purchased goods of the plaintiffs to the amount of between two and three thousand dollars; that suits were commenced against them in February, 1840, on which their real estate was attached; that judgments were obtained in October, 1841; that on December 20, 1841, the right of David Young, Jr. to redeem a

dwellinghouse and lot in Gardiner, was sold on execution and purchased by the plaintiffs for $800; and that the executions were returned unsatisfied for the remainder; that David Young, Jr. on May 14, 1838, with the intent to defraud his creditors, conveyed certain estates described, situated in Augusta, to his father, David Young; that on May 18, 1839, he received a conveyance of William B. Grant of the house lot in Gardiner; and at that time mortgaged the same to him to secure the payment of the purchase money, amounting to $700; that these conveyances were ante dated as of May 1, 1838; that Young, Jr. had erected a valuable dwellinghouse on that lot out of the avails of the property purchased of the plaintiffs; that on May 20, 1839, before his equity was sold to the plaintiffs, he had fraudulently conveyed this estate to his father, who on September 11, 1839, had fraudulently conveyed the same with other property to another son, Joseph Young.

The prayer of the bill is, that the defendants may be required to convey the house and lot in Gardiner to the plaintiffs; that they may be ordered to pay the amount still due to the plaintiffs; and for general relief. The proof has been taken, and the case, by agreement of the parties, has been submitted to a master to report the facts proved, and to state the result to which they would lead him. His' report, substantially, negatives the fraud alleged in the conveyances, except in that from David Young to Joseph Young; and finds, that the conveyances from David Young, Jr. to David Young were made to secure the latter for liabilities, which he had assumed for the benefit of the former; that the amount received for the property so conveyed appears to have been more than sufficient for the discharge of all such liabilities; and that a balance, unless further proof should be admitted to reduce it, amounting to the sum of $597,74, would remain to be accounted for by the defendants, David and Joseph Young.

The counsel for the plaintiffs contends, that they are entitled to a decree to have that balance paid to them in satisfaction of their debt. This is resisted by the counsel for the defendants.

It must be admitted, that according to the report of the master, the plaintiffs have failed to prove the case, as it was alleged in their bill. They cannot be entitled to a decree for a conveyance of the house and lot in Gardiner; or to the proceeds of any property conveyed by David Young, Jr. in fraud of his creditors, for no such property is found to have been conveyed. Can they be entitled to a decree by virtue of the prayer for general relief to have any equitable interests or choses in action, which could not be reached by the ordinary process of law, applied to the payment of their debt? No doubt a creditor may, after he has exhausted his remedy at law, by what is denominated a creditor's bill, containing the necessary averments, reach, in a Court having a general jurisdiction in equity, such equitable interests and choses in action of his debtor. If this were such a Court, this is not such a bill. It contains no allegations not appropriate to a bill seeking relief upon the ground of fraud. The proof fails to establish the fraud alleged. The Court can grant relief only *secundum allegata et probata.* Under the prayer for general relief it can give such relief only, as the case stated in the bill and sustained by the proof will justify. *Hiern* v. *Mill,* 13 Ves. 119; *Hobson* v. *McArther,* 16 Peters, 195.

It is necessary to adhere to the rule, that the rights of parties may be properly protected. If a friend of a debtor should take a conveyance of his property in good faith, to secure himself only for liabilities assumed for him, and should in a bill in equity be charged with having taken the conveyance to defraud creditors, while framing his answer and procuring his proofs, his attention would be directed only to the disproof of the alleged fraud. He would not be called upon by such a bill to state or prove, what disposition he had made of the property conveyed to him, or whether it had proved to be more than sufficient to indemnify him. He might to a certain extent more or less fully, and perhaps in some cases fully, exhibit it by the answer and proofs introduced to refute the charge of fraud. What was designed for one purpose might also accomplish another; but it would be unsafe and unjust

for courts of justice to conclude, that a full and perfect account had been thus exhibited, and that another purpose not necessarily brought into consideration, while repelling the charge of fraud, had been perfectly accomplished. In this case the master does not allow the defendants, David and Joseph Young, the benefit of all payments, which they allege, that they have made to indemnify themselves. And very properly does not on the ground, that the proof is too general and vague. And this would be entirely correct and just, so far as they are concerned, if the bill had been framed so as to call upon them to make an exhibit and state an account of the amount received by them from the property conveyed to them, and of the manner, in which they had disposed of it. As it was not so framed, they ought not to be expected or required to do more than fully answer and disprove the allegations contained in it. And could not reasonably be expected to make such proof of each sum paid, and of each act performed, and the expenses attending it, as would be required in answer to a bill framed suitably to call for it. So careful was Chancellor Kent to preserve the rights of parties, that he would not allow guardians to be made chargeable for moneys not collected by them, on a bill charging certain acts of misconduct and neglect, because no such neglect of omitting to collect debts was charged in the bill. *Smith* v. *Smith*, 4 Johns. Ch. R. c. 286. This bill does not appear to have been framed, nor the answers to have been made, nor the proof to have been taken, with any view to reach equitable interests, which had come to the hands of the defendants, David Young and Joseph Young, derived from the property of David Young, jr. without fraud. It is not probable, that such an aspect of the case was presented to the mind of either counsel, until after the testimony had been taken. Before those defendants could in any Court be properly charged for the balance found by the master, they should be afforded an opportunity to state and prove an account of receipts, payments and expenditures, under a bill framed with the necessary averments to call for and to admit such exhibits and proofs. As there are no such averments in

this bill, it is not necessary to consider whether this Court would have jurisdiction of such a case.

Bill dismissed with costs for the defendant.

William Mathews *versus* Samuel Bowman.

In an action to recover a fine for neglecting to attend a company training, under the militia act of 1834, where the writ was without any date showing the time when it was sued out, the magistrate at the trial had power to permit the plaintiff to amend his writ by inserting the time when it was in fact issued.

If the declaration in such action alleges, that the defendant "was legally warned to appear" at a certain time and place by order of the commanding officer of the company, "armed and equipped according to law for the purpose of inspection, review and military discipline," it is unnecessary to allege also, that the meeting of the company was in obedience to a regimental order.

And it is not bad in substance, if it be alleged in the declaration that the company was called out by the commanding officer thereof, "for military duty and discipline," when the statute gives him power only to call out the company, "to be trained and disciplined."

An amendment may be allowed by the justice, authorizing the insertion of the capacity in which the person claiming to have been the commanding officer of the company, acted as such.

A copy of the order of the Governor and Council establishing a militia company — a copy from the town records of the assignment of limits of the company by the selectmen of the town, under Stat. 1832, c. 45 — and a copy from the office of the Adjutant General, showing that the limits of a certain company in a regiment, now designated by a particular letter of the alphabet, and the one before mentioned were identical — were held to be competent and sufficient evidence to prove the organization of the company, its limits and its attachment to that regiment.

If an officer of a militia company does not attempt to perform any of the appropriate duties of his office, and has been discharged because he had removed to a great distance from his command, and the discharge is retained by the officer to whom it was sent for delivery because the person for whom it was intended could not be found, the office is vacated without such delivery.

If a person be elected an officer of a company of militia, and his commission be made out and transmitted to the adjutant of the regiment, but not delivered to the officer elected, and returned to the office of the Adjutant

General, and the office declared to be vacant by the Commander in Chief; the person so elected is not an officer of the company, having power to act as such.

Militia *rosters*, being required to be kept by sworn officers, are competent evidence to prove the time when commissions and discharges were delivered to the persons for whom they were intended.

An order made out and signed by a Lieutenant Colonel commanding a regiment of militia, detailing an officer to take command of a company destitute of commissioned officers, but not delivered over until after the Lieutenant Colonel had been elected and commissioned as Colonel, is nevertheless a valid order.

Parol evidence is admissible to prove the resignation or discharge of a sergeant of a company of militia.

It is sufficient, if such detailed officer sign an order to warn the company as commanding officer of the company, without stating the source of his authority, or what commission he held.

The roll of the company, on which his name is found, made out after such detailed officer took the command, is evidence of the enrolment of a private in the company, without the production of any previous roll, or orderly book of the company.

If the roll of a company is twice called, and the absence of a private is noted at the second call only, this furnishes *prima facie* evidence of the absence, and without countervailing proof is sufficient. And if the absence be noted on a list used at the time, and afterwards that list is put in a more permanent form by the same person, it does not impair its validity.

The statute of 1837, c. 276, § 2, authorizing the commanding officer of a regiment of militia to detail an officer to train and discipline a company which has been without commissioned officers for the term of three months, is not unconstitutional.

THIS was a writ of error brought by Mathews to reverse a judgment against him before a justice of the peace, in an action originally brought by Bowman against him to recover a fine for non-appearance at a regimental review, he being, as was alleged, a member of the D company of militia in the second regiment, first brigade, and second division of the militia of this State, or east company of militia in the town of Waterville, and liable to do militia duty therein. Bowman was the lieutenant of another company of militia, and was detailed to train and discipline this company, because it was without commissioned officers; and in that character brought his action of debt to recover the penalty alleged to have been

incurred by Mathews by neglect of duty as a member of the D Company.

It is believed, the points decided may be sufficiently understood from the errors assigned and from the opinion of the Court, without giving the long record of the justice.

Mathews assigned the following fourteen errors, as reasons for reversing the judgment of the justice.

And the said Mathews says, that in the records and proceedings aforesaid and in the rendition of judgment thereon there is manifest error in this, to wit: —

First. Because said justice allowed the plaintiff to amend his writ by inserting a date to the same.

Second. Because said justice allowed the plaintiff to amend his writ by inserting in the declaration the authority by which he assumed to be commanding officer of said company.

Third. Because said justice decided that the statute approved March 28th, 1837, c. 276, by authority of which the said Bowman assumed to act, does not conflict with the constitutional right of the citizen soldier to choose his own company officers, as provided in article 7th, section first, of the constitution of this State, and that the said Bowman could maintain his said action without proving that the electors of the D Company had ever refused and neglected to choose officers when ordered so to do.

Fourth. Because said justice decided that it was not necessary for said Bowman to set forth in his declaration that the colonel of said regiment ordered the regimental review, for non-appearance at which the said Mathews was sued.

Fifth. Because said justice decided that the papers, which were introduced at the trial, were legal and sufficient evidence to prove the organization, arrangement, and limits of the east company of militia in Waterville, and also to prove that said company is the D company of militia in the second regiment, first brigade and second division of the militia of Maine, as alleged in the said Bowman's writ, to wit: —

A copy of an order of the Governor and Council of the State of Massachusetts, dated February 24th, 1803.

Also a copy from the town clerk's office of Waterville of the record of assignment of the limits of the east company of militia in Waterville by the said town, dated April 9th, 1836.

Also a copy of the limits of the D company of militia in Waterville from the office of the Adjutant General of Maine.

Sixth. Because said justice admitted the rosters of said division, brigade and regiment as legal evidence to prove that said D company had been without officers three months before the detailing order was issued by said Lieutenant Colonel Bartlett.

Seventh. Because said justice decided that the discharge of John Skinner, as captain of said company, issued by the Governor and deposited in the hands of the colonel of the regiment and never delivered to said Skinner, vacated his office as captain of said company.

Eighth. Because said justice decided that an order by the Governor, dated August 14th, 1839, Numbered 75, and declaring the commissions of Aaron W. Smith, as captain, and Watson F. Jones as ensign of said company, vacant, was a legal discharge of said Smith and Jones from the said offices in said company to which they had been respectively chosen and commissioned.

Ninth. Because said justice refused to allow the said Mathews to prove that said Smith and Jones were residing within the limits of said company at the time the adjutant of the regiment made the representation on which said order, numbered 75, declaring their said commissions vacant was made by the Governor.

Tenth. Because said justice admitted illegal evidence to prove the discharge of James Hasty, jr. as serjeant and clerk of said company.

Eleventh. Because said justice decided that the detailing order issued by Bartlett to Bowman was properly signed by Bartlett as Lieutenant Colonel of said regiment, and that Bowman was thereby legally detailed to the command of said company.

Twelfth. Because the said justice decided that it was not

necessary for the said Bowman to set out in the company order, directed to the warning officer, requiring him to notify the members of this company to do duty, nor in the notice or warning to the privates, the delegated or detailed capacity by virtue of which he assumed to be commanding officer of said company.

Thirteenth. Because said justice decided, that it was not incumbent on the said Bowman, in order to prove the enrollment of said Mathews, to produce or prove the requisition made upon the selectmen of the town of Waterville to return a roll of the members of said company, nor to produce the roll returned by the selectmen, nor to produce the record of the roll of said company; and that it was not necessary for him to produce the orderly book of said company to prove the meeting or mustering of said company.

Fourteenth. Because said justice admitted improper evidence to prove the absence of said Mathews at said training.

The case was fully argued in writing, by

Moor, for the plaintiff in error, and by

Noyes, for the original plaintiff.

As the interest in militia cases has much diminished since the repeal of the act of 1834, c. 121, the cases arising under that statute have been compressed by the reporter, as much as possible. The arguments of the counsel cannot be given in this case without a departure from this rule.

The *counsel for the plaintiff in error* argued in support of the objections taken in the assignment of errors.

In support of his argument on the first point, he cited Stat. 1834, c. 121, § 45; Stat. 1831, c. 63; *Bell* v. *Austin*, 13 Pick. 91; *Bailey* v. *Smith*, 3 Fairf. 196; 2 Johns. R. 190; *Steward* v. *Riggs*, 9 Greenl. 53; 3 Wils. 341; 2 Saund. on Pl. & Ev. 964; Buller's N. P. 195; 7 T. R. 6; 2 B. & P. 157; 10 Pick. 45; 19 Pick. 377; 3 Mass. R. 209; Rev. Stat. c. 115, § 9, 10; 1 Metc. 555.

As to the 4th. 1 Chitty's Pl. 405; 2 Saund. 305, note 5; 2 Saund. Pl. & Ev. 850; 13 Johns. R. 428; 3 Wils. 318; 2 W. Black. 842; 5 East, 244; *Heald* v. *Weston*, 2 Greenl. 348.

On the 6th. Stat. 1837, c. 276; *Gould* v. *Hutchins*, 1 Fairf. 150.

On 7th. *Lovett, Pet'r*, 16 Pick. 84.

On 8th. *Cutler* v. *Tole*, 3 Greenl. 83; *Gould* v. *Hutchins*, 1 Fairf. 153; *Howard* v. *Folger*, 3 Shepl. 447.

On the 10th. 2 Fairf. 32; 18 Maine R. 290.

13th. Stat. 1837, c. 276; *Cousins* v. *Cowing*, 23 Pick. 208; *Gleason* v. *Sloper*, 24 Pick. 181.

The *counsel for the defendant in error* said that it was not necessary for him, in arguing for the defendant in error, to follow the order indicated in the assignment of errors, but would adopt the following arrangement.

1. The exceptions to the proceedings and decisions of the justice, pertaining to the writ and declaration, furnish no cause for reversing the proceedings.

Under this he cited *Converse* v. *Damariscotta Bank*, 3 Shepl. 431; *Parkman* v. *Crosby*, 16 Pick. 302; *Bragg* v. *Greenleaf*, 2 Shepl. 395; *Robinson* v. *Folger*, 5 Shepl. 206; *Johnson* v. *Farwell*, 7 Greenl. 370.

2. Nor is there cause for reversing the judgment on account of the objections pertaining to the establishment and limits of the D company. Here was cited *Avery* v. *Butters*, 2 Fairf. 406.

3. The evidence was sufficient to prove the right of the original plaintiff to command the D company at the time alleged in the writ. 15 Johns. R. 208; *Lovett, Pet.* 16 Pick. 86; *Hill* v. *Fuller*, 2 Shepl. 121; 11 Johns. R. 158.

4. The acts of Bowman in calling out the company were legal, and the proof of delinquency on the part of Mathews sufficient. *Hammond* v. *Dunbar*, 24 Pick. 180; Stat. 1834, c. 121, § 21; *Rollins* v. *Mudgett*, 4 Shepl. 340; *Hill* v. *Fuller*, 2 Shepl. 125; *Robinson* v. *Folger*, 5 Shepl. 206.

The Stat. 1837, c. 276, under which the defendant in error acted, was constitutional. *Cousins* v. *Cowing*, 23 Pick. 212.

The opinion of the Court was drawn up by

Tenney J. — This is a writ of error to reverse a judgment of

a justice of the peace rendered against Mathews, the plaintiff in error, to recover the penalty for absence from a meeting of the company to which he is alleged to belong, for inspection, review, and military discipline, on the 18th of September A. D. 1841, brought by the defendant in error as commanding officer of the D company of infantry in the 2d regiment, 1st brigade and 2d division. Several questions are presented, some of which are in matters of form, others are of substance.

1. When the writ was returned, it was destitute of a date and the justice allowed it to be amended by inserting the date which from the evidence was according to the truth. This amendment we think properly allowed. Cases have been cited, showing that parol evidence is admissible to prove the date of a writ to be erroneous; and that the error may be corrected by amendment. It is true no reference has been made to a case where there was no date in the writ, but in all, there was no apparent defect in this respect. In the case, however, of *Trafton & al.* v. *Rogers*, 1 Shepl. 315, the day on which the writ purported to have been made was the Sabbath, which was certainly as great an irregularity, as being wanting in a date. The teste of a writ has been regarded as mere form, where the constitution required, that all writs issuing from the Court should be tested by the first Justice thereof. *Hawkes* v. *Kennebec*, 7 Mass. R. 461. In *Pepoon* v. *Jenkins*, Coleman, 55, a writ, which had not the signature of the clerk of the Court, to which it was returnable, was capable of being amended, by the clerk's putting his signature thereto after it was returned. A writ omitting to set out the day on which the neglect took place, and did not aver, that the defendant unnecessarily neglected to appear, was held to be properly amended. *Robinson* v. *Folger*, 5 Shepl. 206. In *Bronson* v. *Earl*, 17 Johns. R. 65, it is said, it is the intention and act combined which in fact constitutes the commencement of the writ.

In the case at bar, it was in evidence that the writ was seasonably purchased out, for the purpose that it might be served, although not put into the hands of the officer till after the

lapse of forty days from the time of the alleged neglect. The forms of writs prescribed by statute require dates, but an accidental omission of a date can be supplied with as much propriety as to allow any amendment in matter of substance. An amendment of the return day, and changing the seal from that of one Court to another have been denied. These cases are distinguished from the one now under consideration. Here the writ was in truth made at the proper time, but in the cases referred to, the wrong return day and seal, were in and upon the writ. Jurisdiction did not attach to the Court.

2. The writ did not set out originally the order of the commanding officer of the regiment, directing the regimental review. It is not denied, that the meeting of the company was in obedience to a regimental order; such an order was exhibited in proof at the trial. The writ alleges that the defendant in the original action "was legally warned to appear"——"armed and equipped according to law for the purpose of inspection, review and military discipline." There could be no "review" unless under an order of the commanding officer of the regiment; and the averment that the warning was legal embraces as well the authority by which the meeting of the company was required, as the manner of notice.

3. It is contended that the writ is wanting in the proper form, by alleging that the company was called out by the defendant in error "for military duty and discipline," when the statute gives him power only to call out the company "to be trained and disciplined." We think it cannot be doubted that military duty and such training as the statute refers to may be similar; and when the commanding officer is vested with the authority of a "captain" he did not exceed his powers in calling out the company for "military duty."

4. The amendment, allowed by the justice, by inserting the capacity in which the defendant in error claimed to be the commanding officer of the company, was clearly proper.

5. Was there legal and sufficient proof of the organization of the company, and that it was attached to the regiment, brigade and division named in the writ? The deposition of the

Adjutant General of Massachusetts and the copy annexed thereto, show, that on the petition of the field officers of the 2d regiment, 2d brigade, and 8th division, "the town of Waterville was divided into two companies, viz: that all the privates in the eastwardly part of said town easterly of a line drawn precisely two miles from the river Kennebec from north to south, to form a new company," &c. The organization and arrangement of the militia, as it was at the time of the adoption of the constitution of the State, was to continue till the Governor and Council should otherwise order. Stat. 1821, c. 164, § 6. By the act of 1832, c. 45, § 9, the selectmen were to define the limits of companies and make return to the offices of town clerks, and by the statute of 1836, c. 206, § 1, selectmen were required to perform the same duties as those enjoined by the act of 1832, and also to make return to the Adjutant General's office. These returns of the selectmen are made by the statute conclusive evidence in all prosecutions for non-performance of military duty. Under both the above-named acts, the selectmen of Waterville performed their duties, as appears by the copies of the town clerk, and of the Adjutant General of this State. The case shows the fact, that the limits of the D company in Waterville are identical with those of the company formed by the order of the Governor and Council of Massachusetts in 1803. There is no order in the case showing at what time this company became attached to the 2d regiment, 1st brigade and 2d division, or that the number of the brigade and division was changed; but by the copy from the Adjutant General's office, it does appear, that the D company in Waterville is attached to the 2d regiment 1st brigade and 2d division, and therefore subject to the authority of the officers thereof.

6. Was it shown by the proper evidence, that the company had been destitute of any commissioned officer for the term of three months, before the detailing order, under authority of which, the defendant in error claims to have been the commanding officer thereof? This is denied, and it is contended that Skinner, who was commissioned Sept. 13, 1839, never

having received his discharge, which is dated April 30, 1840, and put into the hands of the Colonel of the regiment, who did not deliver it because of the removal of Skinner from the State to parts unknown, was still the captain of the company.

If a military officer assume to act under his commission, his acts do not cease to be valid, by the transmission of his discharge to the commanding officer of the regiment. A delivery to the officer, to be discharged is in such case necessary to give the order of discharge effect. But if he does not attempt to perform any of the appropriate duties of his office, but "has removed from out of the limits of his command to a distance, which in the opinion of the Major General renders it inconvenient for him to discharge the duties of his office," and the discharge is retained by the officer to whom it was sent for delivery, because the latter is unable to find the officer discharged, it is otherwise. No one can object to the effect of the discharge, if the one directly interested do not. The construction contended for by the plaintiff in error would often lead to perplexing results. A company might in reality be destitute of officers, and be unable to supply the defect.

Again, it is said, if Skinner was discharged, Smith and Jones having been chosen captain and ensign since, are to be considered officers of the company. They were, it appears, duly elected, their commissions made out and transmitted to the adjutant of the regiment, and were afterwards returned to the Adjutant General's office, and the offices declared vacant by the commander in chief. These persons have never claimed their commissions, or power to exercise the duties appertaining to their offices respectively, which they were chosen to fill. It is contended, that they have not been discharged in either of the modes pointed out in the statute. From the evidence, which is not objected to, this could not be done. They were never commissioned, and could in no legal sense be regarded the officers of the company, so far as to prevent the application of the statute, which requires, that an officer shall be detailed to train and discipline the company.

7. Another error assigned is, that rosters, from which some

of the facts relied upon in the prosecution of the action were shown, were incompetent evidence. The officers required to keep rosters are recording officers, sworn to do their duty as such. The word roster is used instead of register, and comprehends a list of all military officers, connected with the regiment, brigade or division, and is to be kept as are records of "orders and official communications." It is from such a registry that many important facts can alone be proved. Commissions and discharges may not be proved by a roster, their existence may be shown by the commissions and discharges themselves, or by the records thereof in the Adjutant General's office; but at what time they were delivered to the individuals entitled thereto must depend upon rosters, as the highest species of evidence of such facts. If they were not intended to be evidence, it is not apprehended for what purpose they are required to be kept by such officers and with such formality. There was no dispute relative to any commission or discharge in the case at bar, but the controversy was touching their effect.

8. It is insisted, that the detailing order to the plaintiff in the original action, not having been delivered till after the officer, who executed it, was elected to a higher office, which he accepted, conferred no power over the members of the company. At the date of the order, Lt. Col. Bartlett was unquestionably the highest officer connected with the regiment, and consequently was required to issue the order. It was then valid, and did not cease to be so, by Bartlett's promotion. It was delivered in pursuance of the original intention of the officer, who signed it. It was similar to a commission issued under the authority of one Governor and delivered by his successor.

9. The plaintiff in error contends, that when the action was commenced, and when the alleged delinquency happened, James Hasty, jr. was the clerk of the company, and that he alone could institute the suit; and that evidence allowed to prove that Hasty was not clerk was contradictory to the warrant, and inadmissible. If such was the effect of the evidence

it was incompetent; the warrant and the certificates thereon were conclusive of the facts therein stated. The evidence to prove a discharge or resignation is not required to be in writing, and the parol evidence for this purpose was admissible, and satisfied the justice, though in some respects contradictory, that Hasty, not being liable to do military duty, declined to act as clerk, and the papers in the case show, that another was subsequently appointed to fill the office. This may properly be considered a resignation by Hasty, and acceptance thereof by the commanding officer of the regiment.

10. The company order to Asa Irvin to warn the plaintiff in error, and others, was signed by Bowman, as "commanding officer of the D Company of infantry, 2d regiment, 1st brigade and 2d division," and it is objected that the order does not describe the capacity in which said Bowman claimed to be commanding officer of said company, and that the notice was according to the order. Bowman was the commanding officer of that company by the detailing order, for the purpose of training and disciplining its members, and he had the same power and authority as he would have had, if he were the captain thereof. Stat. 1837, c. 276, § 2. It was no more material that the order should state the source of his authority, than if he was commissioned as the captain.

11. The roll prepared by the defendant in error was the only one introduced at the trial as proof of the enrolment of the plaintiff in error; and it is insisted, that the justice erred in not requiring the roll prepared by the assessors of the town, on the call of the commanding officer of the regiment, from which the one introduced was prepared. The roll from the assessors was for another and distinct purpose, and might often be very different from that which would bear the existing members of the company afterwards. The statute of the United States of 1792, and of this State of 1834, require the commanding officers of companies to enrol the persons liable to perform military duty. It is immaterial from what source the knowledge necessary for the performance of this duty is derived. A roll previously prepared may be one legitimate

source. The roll produced was competent evidence. *Cousins* v. *Cowing*, 23 Pick. 208.

12. The evidence introduced of the absence of the plaintiff in error was competent. The roll was called by the direction and in the presence of the commanding officer, and the absences noted at the time, known by him to be correct, and afterwards reduced to a more permanent form by himself. The objection, that the absence of the defendant was noted at the time of the second call instead of the first is not well sustained. No time is prescribed when the roll shall be called, nor is it required that there shall be but one call thereof. The absence at the second call is *prima facie* evidence of such a delinquency as that complained of; and without countervailing proof, is sufficient.

13. But a more important question is presented. The plaintiff in error denies to the defendant in error all authority as commanding officer of the company to which it is alleged he belongs; and this because the statute of 1837, before referred to, § 2, is in contravention of the constitution, art, 7, § 1 and 2; by which members of companies are secured in the privilege of electing their captains and subalterns, and in case of neglect or refusal, those officers are to be appointed by the Governor. The proposition, in other words, is, that companies cannot be trained and disciplined by compulsion, excepting by the officers chosen by a majority of the members of each company or by those who are appointed by the Governor.

Companies may have been and undoubtedly were sometimes destitute of commissioned officers, without the fault of any one. No man was compelled to accept the office of captain or subaltern. Numerous elections may have taken place, and no one elected have chosen to take the honor tendered. The want of commissioned officers may have arisen from the fault of the commanding officer of the regiment, brigade or division in failing to transmit or issue the necessary orders. Such orders were required to proceed from those, over whom the company have no direct control. If they neglected or refused to elect, the Governor might, for a reason sufficient or

not, delay the appointment. These impediments to the election or appointment of captains and subalterns may have abridged the rights of those affected thereby. One or more of such causes may have rendered a company destitute of any commissioned officer for a long time. Were soldiers therefore to receive no benefit from military training and discipline; were they entitled to be relieved from the burden, if they considered it such, arising from the performance of military duty; or what was more important, was the State to be deprived of the service of the militia to an unlimited extent, in a time of her greatest need, because companies had no captains or subalterns; or was the nation to lose the advantage to be obtained from the training of such companies, when by her laws, all able bodied citizens within certain ages, with a few exceptions, were to be at all times ready for actual service? Such a construction as that contended for by the plaintiff in error would give to the object intended by this part of the constitution to be secured, less importance than the manner, by which it was to be obtained.

No one could have been a captain or subaltern excepting in some of the modes pointed out in the constitution. But it does not follow, that the members of a company destitute of those officers were not the subjects of military discipline. Every company was attached to some battalion, or regiment, or brigade, or division, and was subject to the direction of the respective officers thereof. It is contended that to give effect to this statute would have placed in the hands of superior officers, the actual appointment of captains and subalterns, and thereby have taken away the privilege secured by the constitution to the citizen soldier. If the want of company officers arise from the neglects, or faults of other officers of superior rank, the latter were amenable to the laws, and like all offenders against their provisions, were subject to trial and punishment. A law is not to be pronounced unconstitutional, because its abuse and perversion proves injurious to individuals or to the public.

The establishment of the truth of the plaintiff's proposition

must have introduced an essential change in the military proceedings, at meetings of battalions or regiments, in the arrangements, which it was necessary to make, soldiers were often placed under the command of the captains and subalterns of companies, to which such soldiers did not belong. Death, resignation, removal, or other causes might have taken from a company all its commissioned officers, at a time when training and discipline were essential to the defence of the country or public tranquillity. For various purposes detachments of a limited number of the officers and privates of the militia may have been ordered to hold themselves in readiness at all times, to repair to the post where their services were needed. The construction contended for, would require, in order that such detachments should be legal, they should be made by entire companies, which would be unreasonable, and not contemplated by the framers of the constitution. These consequences, which would result from the doctrine advanced, would have been subversive in a great degree of the object sought in the constitution; but the statute in question was carrying out the manifest intention of its authors, that the militia should be efficient for the purposes intended.

Judgment affirmed.

THE STATE *versus* HENRY L. CROWELL.

As the licensing board are not a court of record, and are not required by Rev. Stat. c. 36, to keep a record of all their proceedings, and as the license itself, signed by the members of the board, is delivered to the person licensed, and is the evidence that the license has been granted to him; it is not necessary on the part of the State, on the trial of an indictment under that statute for selling brandy, &c. by retail without license, to prove that the accused had no license. If he would avail himself of that defence, it is incumbent on him to prove that he was licensed.

CROWELL was indicted as a common seller, at retail, of rum, brandy, &c. without license.

At the trial before REDINGTON, District Judge, the County Attorney requested the Judge to rule, that if Crowell would

rely upon his having been licensed, it was incumbent on him to prove it.

With a view to have the law upon this point settled, the Judge ruled, that it was not incumbent on the government to prove that the accused had not a license; and instructed the jury, that as Crowell had not attempted to prove, that he was licensed, they might consider that he was not.

The verdict was guilty, and exceptions were filed by Crowell.

Whitmore, for Crowell, said, that the selling of brandy, &c. without license constituted the offence, and the burthen of proof was upon the government to show, that the license had not been granted, or no offence was made out. The fact, whether licensed or not, is not particularly within the knowledge of the accused. The town records are open to all alike, and the town officers knew, whether they did or did not grant one in this case. The town is in fact the party, and the officers of the town are made, by the statute, the prosecutors. They have the records, and should have produced them. Rev. Stat. c. 36, § 19, 21; 1 East, 649; 2 Campb. 654; *Com.* v. *Thurlow*, 24 Pick. 381.

Moor, Att'y Gen'l, said, that the rule was well established, that matters of defence need not be proved on the part of the government. In the present case it was alleged, that the respondent did sell without a license, and the fact is to be presumed to have been so, unless the proof to the contrary is brought forward in defence. 1 Chitty's Pl. 231; Rosc. Cr. Ev. 65; 5 M. & Selw. 206; 3 Burr. 1476; *State* v. *Whittier*, 21 Maine R. 341; Greenl. Ev. § 90, 91.

The case of *Com.* v. *Thurlow*, in which it was held that it was necessary for the government to prove, that the accused had no license, is not an authority for the defence. In that State the licenses are granted only by the County Commissioners, who have a clerk, and keep a record of all their proceedings. Here there are no records kept by the licensing board. The license is given to the person licensed, and he alone can prove that he has one.

The opinion of the Court was by

TENNEY J. — The Judge of the District Court instructed the jury, "that it was not incumbent on the government to prove that the defendant had not a license."

The authorities upon the question here presented are not in perfect harmony; much of the seeming conflict, however, may arise from the want of a clear distinction between the necessity of the *negative averment* in the declaration or indictment, and the *proof* in support of such averment. The general rule is, "that when a person is required to do a certain act, the omission of which would make him guilty of a culpable neglect of duty it ought to be intended, that he has duly performed it unless the contrary is shown." *Williams* v. *The East India Company*, 3 East, 192; *Hartwell* v. *Root*, 19 Johns. R. 345; Greenl. Ev. § 80. But in civil or criminal prosecutions for a penalty for doing acts, which the statutes prohibit, excepting by those, who are licensed therefor, no such presumption arises; and where the subject matter of the negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by the other party, "as for selling liquors, exercising a trade, or profession, and the like." Greenl. Ev. § 79. Mr. Starkie, in his treatise on Evidence, Vol. 1, page 376, says, "Upon a penal action for sporting without qualification, it is incumbent on the defendant to prove his qualification; and in Vol. 2, page 627, "It seems in an action and also in an information, before a magistrate, it is unnecessary to adduce evidence, to negative the defendant's qualification." *Rex* v. *Turner*, 2 State Tr. 505. It is said by Lawrence J. in *Rex* v. *Stone*, 1 East, 653, "As to the mode of proof, by which the charge is to be sustained, I see no reason why the fact committed by the defendant should not *prima facie*, be sufficient, at least so as to throw the *onus* upon him, of proving that he was qualified to do it." Where a party, before a justice, admits the trading as a hawker and pedler, it is incumbent on him to prove, that he had a license. *Rex* v. *Smith*, 3 Bur. 1475. *The Apothecaries* v. *Bentley*,

1 Ry. & Mood. 159, was a case where there was the averment in the declaration, on the 55 Geo. 3, c. 194, that the defendant practised as an apothecary, *without having obtained such a certificate as by the said act is required;* it was held, that the *onus probandi* that the defendant had obtained his certificate, lay with him and not with the plaintiff. In *Spieres* v. *Parker*, 1 T. R. 141, Lord Mansfield says, "it is a settled distinction between a proviso, in the description of the offence, and a subsequent exemption from the penalty under particular circumstances; if the former, the plaintiff must, as upon actions upon the game laws, aver a case, which brings the defendant within the act; therefore he must negative the exceptions in the enacting clause, though he throw the burden of proof upon the other side."

It is insisted for the defendant, that as the penalty for a violation of Rev. Stat. c. 36, is for the benefit of the town where the offence is committed, and as licenses are granted by the selectmen, clerk and treasurer of each town and are required to be recorded, the proof in support of the negative averment is not peculiarly within the knowledge of the accused; and *Commonwealth* v. *Thurlow*, 24 Pick. 381, is relied upon in support of this proposition. In Massachusetts, the Court of County Commissioners have the power of granting licenses to innholders, retailers, &c. excepting in the county of Suffolk. Rev. Stat. of Mass. c. 47, § 17. The clerk of the Judicial Courts in each county is also the clerk of the Court of County Commissioners, ib. c. 88, § 1, and is required to record the proceedings of all the Courts of which he is clerk, and has the care and custody of all the records, papers, &c. § 5. In that Commonwealth, the authority to retail ardent spirit, &c. is the order of the Court of County Commissioners; the record of that Court is the evidence of that order, and without the record, the legal proof does not exist; and it can be proved by the clerk and his records, whether there was or was not a license granted; and that proof is equally accessible to the government and the accused. In this State, the selectmen, clerk and treasurer may license under their hands, as many persons of

good moral character, &c. to be innholders, victualers, and retailers, &c. Rev. Stat. c. 36, § 1, and the clerk shall make a record of all licenses granted, § 4. This board are not required to keep a record of their proceedings; the license itself, signed by the members of the board, is the evidence of qualification, and is delivered to the person licensed. The record of this license is a very different matter from the record of the proceedings of the Court of County Commissioners in Massachusetts, and is secondary evidence of authority to do the acts therein mentioned, as much as the record of a deed of real estate in the county registry is secondary evidence of the contents of such deed. The license unrecorded, is a protection against the penalty prescribed in the statute for retailing without it. It is the best evidence, and is peculiarly within the knowledge of the person holding it. In the case of *State* v. *Whittier*, 21 Maine R. 341, the authorities were examined and proof of the negative averment was held unnecessary; the reasons for that decision apply with equal or greater force to the case at bar.

Exceptions overruled.

CYRUS WESTON *versus* WILLIAM DORR.

Where an officer attaches goods, and takes a receipt for the redelivery thereof on demand, or payment therefor, and leaves them, without removal; if he has the power to retake the property by virtue of the same precept without the consent of the owner or the receipter, which may well be doubted; he must, in order to preserve the attachment, retain the control thereof himself, or by his servant, or have the power of taking immediate possession. If the possession is abandoned, the attachment is dissolved.

If the receipter has become the *bona fide* purchaser of the same goods, subject to the attachment, and has taken possession thereof, he does not forfeit his rights thereto by suffering the officer to take possession of the same, without resistance, by virtue of another writ against the same debtor, put into his hands after the purchase; nor by taking the receipt, when handed to him by the officer, without any agreement or understanding in relation thereto, and immediately thereupon offering to the officer to restore the receipt to him.

If all the goods are taken into the possession of the officer as attached by virtue of the second writ, but a part only are returned on that writ as attached, the officer is liable for the portion of the goods not returned, as well as for the rest, without any previous demand by the owner.

Where the goods of one man are attached and taken by an officer on a writ against another person, and afterwards again attached and taken in the same manner on a writ in favor of a different creditor, a release by the owner of all claim to damages in consequence of the second attachment, in consideration of its relinquishment, has no effect upon a suit to recover damages caused by the first taking.

Where goods are tortiously taken by an officer, he is liable to the owner for all the damages sustained thereby.

TRESPASS, *de bonis asportatis*, against the defendant, as late sheriff of the county, for the acts of Erastus W. Kelly, as his deputy.

The facts, in relation to the property in the goods and the taking thereof, are given in the opinion of the Court.

The taking of the goods by Kelly, for which this action was brought, was on the 16th of June, 1841. At the trial, before WHITMAN C. J. it appeared, that on Aug. 19, 1841, two writs against Wing, one in favor of Wetherell & Whitney, and the other in favor of Wetherell, Whitney & Co. were put into the hands of Kelly for service, and he returned thereon an attachment of these goods. On March 3, 1842, the plaintiff gave a writing of which the following is a copy. "I hereby

relinquish and release all claim I may have upon the sheriff or his deputy, or any of the parties to the actions hereafter named, in consequence of certain attachments upon certain goods made August 19, 1841, on two writs, one in favor of Wetherell & Whitney and one in favor of Wetherell, Whitney & Co.; said attachments having been made by E. W. Kelly, dep'y sh'ff. — Meaning, however, to retain and preserve all my rights against the sheriff in consequence of an attachment made in June last.

"March 3, 1842. Cyrus Weston."

The defendant contended, that the said Kelly had a right to take said goods on the said 16th of said June, and that he had a right to retain the whole of said goods a reasonable time, until he could make the necessary separation, no separation in fact having been previously made, and that the transactions which took place between said Kelly and said Weston, on the evening of the said 16th, were a waiver of any claim which said Weston had on said goods, and authorized said Kelly to take possession of said store, by taking the key thereof, and that the attachment and taking the key aforesaid, under the facts aforesaid, was not a taking of the goods in the store, except what are mentioned in the schedule, so as to make the defendant liable in this action; and requested the Court so to instruct the jury.

The Judge instructed the jury, that if the sale was *bona fide*, the acts aforesaid constituted a taking of all the property and goods in the store; and that the plaintiff was entitled to recover the value of the goods and property in the store belonging to him at the time of said taking, deducting the amount of said Sturtevant's execution and all fees thereon.

The defendant also contended, that said release was a bar to the plaintiff's suit. But the presiding Judge instructed the jury, that said release was to be laid out of the case and to have no effect.

There was evidence tending to show fraud in said sale by Wing to Weston, and evidence to the contrary, which was submitted to the jury, and a verdict rendered for the plaintiff.

A motion was made by the defendant to set aside the verdict, and an abstract and statement of the evidence was drawn up under the motion for a new trial, because the verdict was against the evidence.

May, for the defendant, contended, that the verdict ought to be set aside, not only because it was against evidence, but also because it was against law in several particulars.

The plaintiff waived any claim he might have had to the goods, and consented that Kelly might take them, or any portion of them, in pursuance of the receipt; and therefore there could be no action of trespass for the portion so taken.

If the plaintiff did not assent to the attachment on the 16th of June, Kelly had a right to reseize and attach them. The possession of the servant or receipter was the possession of the officer. If the plaintiff acquired any claim to the property by virtue of his purchase, it was subject to the attachment in favor of Sturtivant, and he was bound by his contract with Wing to pay off that claim and remove that attachment. This he did not do, and the attachment remained in force until the goods were taken and sold on the execution by another officer. *Carr* v. *Farley*, 3 Fairf. 328; *Nichols* v. *Patten*, 18 Maine R. 231; *Waterhouse* v. *Smith*, 22 Maine R. 337.

But if Weston did not assent that Kelly should retake the goods, and if Kelly had no right to take them by force of the receipt, still the taking was not an official act for which the sheriff is responsible. 4 Mass. R. 60; 7 Mass. R. 123; 3 Greenl. 373; 18 Maine R. 277. The taking of a receipt by a deputy sheriff is for personal security; an act in which neither the parties, nor the sheriff, have any interest. An attempt to enforce it is not an official act. *Clark* v. *Clough*, 3 Greenl. 357.

As to the goods not attached, the taking of the key and shutting the store did not amount to a tortious taking. They were not separated from the residue, and the officer had the right to a reasonable time for the purpose of doing it. *Bond* v. *Ward*, 7 Mass. R. 123; *Sawyer* v. *Merrill*, 6 Pick. 478.

The rule for assessing damages, in the instruction to the

jury, was an erroneous one. By it, the deduction of the Sturtivant execution was not from the amount of goods sold, and sold properly on that execution, but from the amount which the jury estimated to be the value of the goods at the time of the taking; thus throwing the whole loss arising from the sale upon the defendant.

The plaintiff cannot recover, because he has released the defendant by his release of March 3, 1842. The plaintiff might release a trespass to a portion of the goods, and not to the residue; but it is difficult to conceive how he could release a portion of an entire trespass to the same goods without releasing the whole. Co. Lit. 232 (a); 4 Adol. & Ellis, 675; 2 Brown, C. R. 164.

Wells, on the same side, cited 8 N. H. R. 255; 16 Mass. R. 181; 11 Pick. 519; 13 Pick. 338; 24 Pick. 89; 9 Mass. R. 288; 16 Pick. 25; 24 Pick. 196; 15 Pick. 40; 11 Mass. R. 219.

Vose, for the plaintiff, stated the facts, as he understood them, and said, that notwithstanding the attachment Wing had a perfect right to sell these goods, and the plaintiff had the same right to purchase them, as he would have had, if he had not given a receipt for them. *Denny* v. *Willard*, 11 Pick. 525; *Knap* v. *Sprague*, 9 Mass. R. 258. Sturtevant's attachment, before made, might remain good; but the sale would as effectually transfer the property, as to the attaching officer, and all other persons, as if no attachment had been made, subject to that attachment only, if it had not been abandoned.

The jury have found, that the conveyance was made, *bona fide*, and the property delivered, before any interference with it by Kelly on June 16, 1841.

The officer had no right, after that conveyance, to take these goods; and in so doing he became a trespasser. The officer had taken a receipt for the property, and suffered it to go back into the hands of the debtor, and the attachment on the goods was dissolved.

The requested instruction was properly withheld. It re-

quested the Judge to assume the province of the jury, and instruct them that a fact was proved, when no such proof had been made.

There is no ground for saying, that the officer, Kelly, did not so take the goods, as to make him liable, unless he could hold under his attachment on the 16th of June. He turned the owner out of the possession of the goods and kept him out.

It was considered, that the law was too well settled to need the citation of authorities, that the value of the property at the time of the taking was the measure of damages, in an action for the property.

The actions commenced in August were settled by the parties, and the plaintiff agreed in consideration thereof to claim no damages in consequence of the taking under those writs, and so the paper says. This could have no effect on the present action for an entirely distinct trespass. But the paper itself says in express terms, that it is not to affect this suit.

Wells replied for the defendant.

The opinion of the Court was drawn up by

Tenney J. — This is an action of trespass, alleged to have been committed by E. W. Kelly, a deputy of the defendant. Kelly having attached certain goods described in a schedule annexed to his return upon a writ in favor of one Sturtivant against John O. Wing, the owner thereof, on the 11th June, 1841, and having kept the same by his servant without removal, till the 14th of the same month, took a receipt of certain goods of the value of $300 signed by the plaintiff and one Benson, and thereupon delivered up all the goods, and left the plaintiff in possession of the store. Wing and the plaintiff the same day commenced taking an account of the goods, which they completed on the 16th of June, and the plaintiff became the *bona fide* purchaser thereof, agreeing to pay, as a part of the consideration, the debt to Sturtivant. On the same day, after the purchase, the plaintiff, Wing and others being in the store, Kelly informed the plaintiff, that he had a writ in favor

of Samuel Parsons & al., against Wing, and said he must take the goods; the plaintiff replied, "Well, they are all here;" and Kelley handed him the receipt, which the plaintiff took and put in his hat, and told Kelly he had purchased the goods; Kelly replied, that he "supposed that was the fact, but he acted under instructions, was indemnified and must go ahead; the plaintiff told Kelly he had better take the receipt which he refused to do; but took the key of the building, the goods which had been attached, and others being there, and locked up the store; and made return upon the writ in favor of Parsons & al. of the goods before attached, subject to the former attachment; the plaintiff left the store and made no objection to the course taken by Kelly. Sometime afterwards, all the goods in the store were returned by Kelly as attached upon writs made upon two other debts against Wing, which were subsequently settled by the notes of the plaintiff and Wing, the creditors having made a discount in consideration of a release to the defendant of all liability on account of the attachment upon these two writs. The store in which the goods were, was owned by Kelly, who had leased the same by parol to Wing. Neither Wing nor the plaintiff had been notified to quit the store previous to the attachment upon the writ of Parsons & al. or to remove the goods. The goods mentioned in the schedule, were sold upon the execution issued upon a judgment recovered by Sturtivant in his action against Wing and return thereof made. A bag of wool, which had been left in the store by the plaintiff to be sold before the first attachment, was in the store, when Kelly took possession on the 16th of June.

The Judge instructed the jury, that if the sale from Wing to the plaintiff was *bona fide*, the foregoing facts constituted a taking of all the goods in the store, and the plaintiff was entitled to recover the value thereof at the time of the taking, deducting the amount of Sturtivant's execution, and all fees thereon.

To preserve an attachment of property, like that in contro-

versy, the officer who made it must retain the control thereof himself or by his servant, or have the power of taking immediate possession; if the possession is abandoned, the attachment is dissolved. *Nichols* v. *Patten*, 18 Maine R. 231; *Waterhouse* v. *Smith*, 22 ib. 337. It may well be doubted, whether the officer can retake such property, after he has delivered it up, on receiving security for its redelivery, or the payment of its value, without the consent of the owner or the receipter; the officer is interested only to have the means of satisfying the judgment, which the attaching creditor may recover. On a fair construction of such instruments, as the receipts usually given for property attached, is it the understanding of the parties thereto, that before judgment, the officer can take possession of the property, unless the assent of the owner or receipter is first obtained, especially, if there be no suggestion, that the latter is not of sufficient ability to make indemnity? To give him this power would certainly allow him to disregard the spirit of his contract, and expose the property often to a ruinous sacrifice. The promise of the receipter is to do one of two things, and like other contracts of the kind the election is with him. In *Robinson* v. *Mansfield*, 13 Pick. 139, the Court hold the lien created by an attachment discharged, and the obligation of the receipter substituted for the goods. In *Carr* v. *Farley*, 3 Fairf. 328, C. J. Weston says, "a wanton and unnecessary interference is not to be encouraged." But if the receipter and the owner of the goods attached consent that they may be taken, the officer cannot be a trespasser.

In the present case Kelly having had possession of the goods in the store, under attachment, by his servant, from the 11th to the 14th June, and then having *delivered them up*, on the promise of two persons to redeliver them on demand, or pay their value, must be considered to have abandoned the possession, and permitted them to go to whomsoever they belonged; the receipters could not be the servants of the officer in the same sense as was the one who held the possession previously, after the attachment, and they held no different relation to the officer, than that of receipters, where the pro-

perty is permitted to go back to the hands of the debtor. Here it did go into the hands of the debtor by the permission of the receipters, for immediately after, by the sale, he was exercising the most important acts of ownership and dominion over it. The plaintiff afterwards succeeded to all the rights of Wing, by the purchase and possession of the goods. *Knapp* v. *Sprague*, 9 Mass. R. 258; *Denny & al.* v. *Willard*, 11 Pick. 525.

The exceptions disclose no evidence of a demand by Kelly of the goods on the evening of the 16th June, that they might be held for his indemnity for his return thereof upon Sturtivant's writ; but on the other hand announced that it was his duty and intention to attach them upon another writ; he did not take possession upon what he treated as a voluntary surrender of the goods by the plaintiff, but on being notified by the latter of his purchase, he expressed his knowledge of that fact, but said he "acted under instructions, was indemnified and must go ahead." When the receipt was handed to the plaintiff and taken by him, it was in consequence of no agreement or understanding, so far as the case finds, that the goods were to be delivered, or the receipt cancelled; at the same time the plaintiff offered to return the receipt as a subsisting contract. The return of the goods upon the second writ, under the date of the 16th of June, shows they were taken by the officer for that purpose, and not for his indemnity for his liability on the first writ. The submission of the plaintiff to the acts of Kelly, done in obedience to his instructions, his indemnity and supposed duty, cannot prejudice his claim; remonstrance would have been unavailing, and resistance criminal.

The taking complained of by the plaintiff was one entire act, and was declared by Kelly, and shown by the defence, to have been upon the writ in favor of *Parsons & al.* v. *Wing*; the plaintiff was dispossessed of all the goods, and because a part only were returned upon the writ, the defendant cannot escape liability.

The store being the property of Kelly cannot be a protection to the defendant. If the plaintiff had no right to continue in the occupation, the goods having been rightfully deposited in the store, he was entitled to a reasonable time, after notice, within which to remove them, which was not allowed. *Ellis* v. *Paige*, 1 Pick. 43. But the officer gave no such reason for excluding the plaintiff and shutting the store, but one altogether different.

The wool was taken by Kelly as much as any of the goods in the store, and he was not excused, because the plaintiff held it by a different title, from that of the other goods.

The release given by the plaintiff to the defendant was for a distinct and subsequent act of the deputy sheriff; it was specially agreed, that it should have no effect upon the claim prosecuted in the present suit, and the instruction of the Judge was fully authorized, that the jury would disregard entirely the release.

The rule of damages was correct. The taking proved, was not one, which the officer was authorized to make, but was tortious, and the defendant was liable for all the injury occasioned thereby.

The question of fraud was one peculiarly within the province of the jury to settle. There was evidence sufficient to authorize the finding upon this point, standing uncontradicted; and that of a controlling character was not so conclusive as to warrant the Court to disturb the verdict.

Exceptions and motion overruled.

ELIJAH GROVER *versus* JOHN DRUMMOND.

Where the tenant granted to the demandant "a certain lot of land situate on my home farm in W. on the west side of the road," containing twenty acres, "the said lot to contain one acre in such shape as the said (demandant) may choose," and "said one acre is supposed to contain a ledge of limestone or marble;" and at the time of the conveyance there was upon the twenty acres a ledge of limestone or marble, and at a distance therefrom a dwellinghouse, barn and other buildings; *it was held*, that the demandant had no right so to locate his acre, as to include a ledge of limestone and marble, and from thence to run a narrow strip of land to the buildings, and include within his one acre lot the land on which the buildings stood.

If the prevailing party summon witnesses to prove certain facts under the direction of his counsel, yet if the testimony they would have given on the trial be inadmissible, and therefore rejected, he will not be allowed to tax their travel and attendance against the other party in his bill of costs.

THIS action was a writ of entry, demanding a tract of land in Winslow, containing one acre, in an irregular form, on which stood a dwellinghouse, barn and other buildings. The case came before the Court upon the following report of the trial before WHITMAN C. J.

This is a real action wherein the demandant claimed one acre of land as set forth in his writ. The general issue was pleaded. In order to make out his title to the demanded premises, the plaintiff introduced a deed, dated the 25th of March, 1837, from the defendant, purporting to convey to him "a certain lot of land situate on my home farm in Winslow and on the west side of the road leading to Augusta, to be selected by said Grover or his assigns any where on my said farm west of said road, and if the location of the lot of land should be at a distance from said road, a good and sufficient passage way from said road to the place where said lot may be selected, and never obstructed by me or my heirs or assigns, the said lot to contain one acre, in such shape as said Grover or his assigns may choose, all to be according to my bond to John Reed of Clinton, dated Oct. 1836, reference thereto being had, will fully appear, said one acre is supposed to contain a ledge of limestone or marble." He further proved that

on the 2d of July, 1841, he caused the acre of land described in his writ to be run out by a surveyor, and notified the defendant, that he claimed that acre as the one conveyed to him by the deed aforesaid. The defendant, in order to prove that a particular acre of land different from the one described in the plaintiff's writ, and containing the ledge of limestone or marble, offered to prove by parol that at the time the bond aforesaid was given, the said Reed, the obligee in said bond, took specimens in the presence of the defendant, from the ledge on the acre of land delineated on the plan hereto annexed, and therein described as the one on which the executions against Grover were levied; and that when he (Reed) sold said bond to the plaintiff, which was in Feb. 1837, he showed said specimens to the plaintiff, and told him from what ledge they were taken, and that the plaintiff replied, he knew where the ledge was, and had seen it as he passed the road. That afterwards, in October, 1837, the said Reed called on the plaintiff to pay the notes which he had given him for the assignment of said bond, and the plaintiff refused to pay, saying that the ledge aforesaid was not so good as he expected, and that he got little or no value by his deed; that said ledge is the only one of limestone or marble of any value known on the land of the defendant west of the road, and that this ledge is considered valuable, and to be worth four or five hundred dollars. That the acre as run out by the plaintiff and as delineated on said plan, contains only a small ledge of limestone which is in the end of said last mentioned acre in the brook, and is of very inferior quality, and of little or no value; that the remainder of the acre so run out contains no limestone or marble, but includes the defendant's house and other buildings which are worth ten or twelve hundred dollars; all which testimony the Court ruled to be inadmissible. The defendant, in order to show a selection by the plaintiff under the deed aforesaid of the acre of land containing the ledge of limestone and described on said plan as the one levied on, introduced a copy of a levy of an execution against the plaintiff, dated the 4th Nov. 1837, and duly recorded, and proved that the plaintiff within one year after

said levy paid the amount due on said execution to the defendant, and thereby redeemed the land from the levy. The defendant further introduced the copy of the levy of another execution against the plaintiff on the same acre of land as that levied on as aforesaid, dated 25th of April, 1840, which last mentioned levy has not been redeemed. It is agreed that if the evidence offered by the defendant as aforesaid, and excluded by the Court, was admissible, a new trial is to be granted; otherwise a nonsuit or default is to be entered according to the opinion of the Court, upon the evidence as reported in the case. The writ and copies of the levies above mentioned are to be referred to and made part of this report, but need not be copied, and also the bond from Drummond to Reed.

The plan, referred to in the report of the case, was not among the papers which came into the hands of the Reporter. It seemed to be the understanding of the parties at the argument, that the acre of land demanded, had been so selected as to include a small limestone or marble quarry, and from thence to extend in a narrow strip to the dwellinghouse, and there include the house, barn and other buildings within the limits of the acre.

Boutelle and *Noyes*, for the tenant, after adverting to the facts in the case, contended that the presiding Judge erred in excluding the testimony offered. It is always competent to show by parol evidence the situation and circumstances of the premises conveyed, at the time of the sale. We do not contend for the right to alter or control the deed, but merely to show, that the location of the quarry, referred to in the deed was well known, and especially to the parties, and what quarry was then intended by that term; and to show what buildings were upon the premises, and where situated. 7 Wheat. 7; 14 Maine R. 233; 15 Maine R. 109; 3 Stark. Ev. 1021, 1047; 6 Pick. 460; 13 Pick. 261; 4 Metc. 438.

The demandant, on receiving his deed and before any selection, had such an interest in the twenty acres as could be conveyed by deed, or be taken by the levy of an execution.

4 Dane, 9; 7 Greenl. 96; 13 Maine R. 337; 16 Maine R. 60; 12 Pick. 534.

If the demandant did not locate his acre of land within a reasonable time, his power to make the location was at an end; and the other party had the right to make the selection. 12 Pick. 120; 3 Stark. Ev. 109. Until the selection was made the parties were tenants in common, and so this action cannot be maintained. The levy of the execution on a particular acre, different from that demanded, as the property of the demandant, was a selection by him; and being acceded to by the tenant, was good, either as a selection or as a partition of the tenancy in common. 22 Pick. 316.

The demandant is estopped to deny the location of the land as described in the levy. The right to levy upon the demandant's interest in the land, involved the right to locate, or select; and the demandant was as much bound by the levy, as he would have been by a deed. And by redeeming the levy, the demandant assented to that location, and was bound by it. 19 Pick. 445; 18 Pick. 88; 24 Pick. 115; 16 Maine R. 146.

Where a party has so conducted himself, as to lead another into a reasonable belief of a fact, he is estopped to deny the fact afterwards. 21 Maine R. 130; 5 Metc. 478.

The demandant was bound to make the selection in a reasonable manner. He was to take a lot of land including the quarry, in a reasonable shape. He was not at liberty to destroy the residue of the land by running strips through it, or running a passage way from the quarry to the buildings, and so including them within the acre, as he has done.

Moore, for the demandant, contended that the deed gave him the right to select the acre any where within the prescribed limits, and in any shape, that he chose. But if he was bound so to make his location as to include a lime quarry, he had done it.

In giving a construction to a deed, every part is to be looked at, and the meaning is to be ascertained from such

inspection. 19 Maine R. 115; 22 Maine R. 350. The Court will not look out of the deed, save where there is latent ambiguity. 2 Stark. Ev. 545. The evidence offered, therefore, is inadmissible.

The language of the deed is as broad as could be written. It gave the demandant the right to select his acre at any time, and in any manner, he chose, within the twenty acres. And he was at perfect liberty to select land covered with buildings, if he preferred that course. But, as before remarked, he has made his selection so as to include a limestone quarry, and so every part of the deed is complied with. The right of selection of the acre by Grover was a part of the description of the land, about which there can be neither doubt nor question.

The estate which passed by the deed of Drummond to Grover was a tenancy in common in the proportion of one acre in twenty, until the selection of the acre was made. A levy, therefore, upon a specific portion of the estate was wholly void, and could not affect the rights of any one. The creditor did not pretend to make any selection, and had no interest in the land to enable him to do it. If he could acquire this right by a levy, he should have extended his execution upon the undivided share, and then have made his selection. 9 Mass. R. 34; 12 Mass. R. 348.

The partition was, by the terms of the deed, to be made by the demandant "any where on my said farm," "to contain one acre, in such shape as the said Grover, or his assigns, may choose." Drummond had nothing to do with the partition; and when the land was selected and run out, and notice thereof given to the tenant, the partition was completed, and the demandant became sole seized of the particular acre so selected. There was no time fixed in the deed when the selection should be made, and a delay to do it immediately was no waiver of the right of the grantee to do it. The tenant did not attempt the exercise of any supposed right of selection arising out of the delay, and the exercise of the right by the demandant before any claim by the tenant to do it, was certainly sufficiently early.

The rights contended for by the demandant, are not only given to him by the plain and explicit language of the deed, but are warranted by decided cases of the highest authority. He cited *Jackson* v. *Livingston*, 7 Wend. 136, as directly in point; *Corbin* v. *Jackson*, 14 Wend. 619; 4 Wend. 58; 6 Cowen, 706; 5 Cowen, 371; *Burghardt* v. *Turner*, 12 Pick. 538; and *Dygert* v. *Matthews*, 11 Wend. 35.

On a later day at the same term the opinion of the Court was given orally by TENNEY J.

The Judge first stated the facts and read the descriptive part of the deed; and then remarked, that to aid in giving a construction to a deed, parol evidence might rightly be introduced, to show the location and actual appearance of the land at the time of the conveyance, but was inadmissible, to show the sayings or doings of the parties, or either of them for that purpose.

The levies of the executions were upon a specific portion of the twenty acres, before any location of the acre had been made, or attempted to be made by any one. And the levies were void, and could not affect the rights of either party.

It is said in argument, that the delay of more than four years in making a selection of the acre, shows such laches on the part of the demandant, as destroys any right he might have had to locate his acre. We are inclined to think, that an unreasonable delay on the part of the demandant in making the selection, would amount to a waiver of his right, and leave the parties to settle the controversy in the mode pointed out by law; but on this point we give no opinion.

The decision of this question must be based upon the construction to be given to the deed, on an inspection of the whole of it, with the aid of such facts as are legally before us. True it is, that a conveyance of the twenty acres of land with a pertinent description of the boundaries thereof, would carry the buildings with the land, although not named in the deed. Buildings, however, are not land, but pass as fixtures. That is not the inquiry here, but whether the demandant has a right so to locate his acre of land as to run out and include

the buildings. The right given in the deed was to select "a certain lot of land, situate on my home farm in Winslow," containing in the whole twenty acres, "to contain one acre, in such shape as the said Grover may choose," "said one acre is supposed to contain a ledge of limestone or marble." The demandant claims the right so to make his selection, as to take in a ledge of limestone or marble, although not the principal one upon the premises, and from thence to run a narrow strip of land to connect the quarry with the buildings, standing at a considerable distance therefrom, and include the land, whereon they stand, within the acre. Such could never have been the understanding of the parties. And we are of opinion, that the law gives the demandant no right to select "the lot of land" in that manner. His title to the demanded premises, therefore fails.

According to the agreement of the parties, the demandant must become nonsuit.

NOTE BY THE REPORTER. — At the June Term of this Court, 1846, Drummond presented a petition of which a copy follows: —

"To the Hon. the Justices of the Supreme Judicial Court.

"The said Drummond represents, that the aforesaid action against him was heard and finally determined at the June Term last of this Court, and judgment rendered in his favor for his costs; that for the trial of said action at Nisi Prius, he, by the advice of his counsel, summoned witnesses to prove facts which he was advised were material to his defence; that on opening the case to the jury and on his offering to prove said facts by the witnesses summoned as aforesaid, it was ruled by the Court, that the facts so offered to be proved were inadmissible and the testimony was rejected; that in making up his costs he taxed the travel and attendance for the witnesses, which were allowed by the clerk, but on an appeal from the decision of the clerk to the Judge presiding, at the October Term last past of this Court, the said Judge decided that the costs of said witnesses could not be allowed, "because their testimony was not received, not being legal testimony." He therefore prays the Court here, that the costs of said witnesses may be allowed to him."

After a hearing of the counsel for the parties, it was said by the Court, that although the witnesses were summoned to prove certain facts under the direction of counsel, yet if the testimony they would have given on the trial was illegal and inadmissible, and therefore rejected, the expense of their attendance should not be taxed in the bill of costs against the other party.

The taxation of the travel and attendance of those witnesses was disallowed.

Noyes, for Drummond.

Moor, for Grover.

Francis M. Rollins *versus* Prince B. Mooers.

When the owner of a dwellinghouse, having a right of entry therein, but in which the plaintiff had recently been dwelling, and which he and his family had then left, finds the doors open and no one in the house, he may lawfully enter into the possession thereof, remove what furniture there was therein belonging to the plaintiff, in a careful manner, and store it safely near by for his use; and the owner may afterwards lawfully retain the possession thereof, thus acquired.

It is not necessary to the validity of an extent of an execution upon land, under Stat. 1821, c. 60, § 27, that the land set off should be described by measure and by monuments. It is sufficient, if it be so described, "that the same may be distinctly known and identified." Inconvenience in ascertaining the boundary, if it be susceptible of ascertainment, can form no objection to the levy.

Where the officer certifies, that the appraisers of land set off on execution were indifferent and discreet men, the return is conclusive of that fact, when the validity of the extent is in question. The remedy, if any there be, for an erroneous certificate in that respect, must be sought against the certifying officer.

In the absence of any proof on the part of the grantee of the payment of the consideration for a conveyance of land, other than that it was so expressed in the deed, a jury are authorized to infer, that the conveyance was fraudulent and void as to creditors of the grantor, on proof that he was at the time of the conveyance embarrassed and indeed insolvent; that it was a conveyance of all his real estate; that it was to two individuals, neither of whom wanted the estate for his own occupation; that both grantees were sons-in-law of the grantor; and that he was permitted to continue his occupation afterwards as before the conveyance.

If a conveyance be made to secure for the grantor and his wife a maintenance from the grantee, it is fraudulent and void as to prior creditors of the grantor.

At the trial, before Whitman C. J. after the examination of many witnesses, and the introduction of deeds and copies of levies of executions, it was agreed, that upon that testimony and those papers, or such portion thereof as should be considered legally admissible, the Court should have the liberty to draw such inferences as a jury might draw, and enter such judgment in the premises, as they should determine to be proper. The testimony of the witnesses, and copies of the papers, appear at length in the report. What was proved in the case, in the view taken of it by the Court, appears in the opinion.

H. A. Smith argued for the plaintiff, contending, among other grounds, that the defendant, at the time of the alleged trespass, had no right of entry into the premises; and that even if he had such right, he had no right to enter forcibly, as he did, and expel the plaintiff from the possession by force. At the time of the levy of the executions, the plaintiff had no such title as could be taken on execution. He had but the title of a mortgagee. The counsel examined the title which the plaintiff once had, and the title of his lessors to the premises. He also contended, that if there was any title to the premises in the plaintiff, which could have been taken by the levy of an execution, that the levies, under which the defendant claimed title, were fatally defective, and were wholly void. The grounds of objection are noticed in the opinion.

Wells, on the same side, cited 2 Shepl. 58; 8 Shepl. 138; 2 East, 183; 4 East, 55; 1 Phil. Ev. 412; 12 Mass. R. 439; 14 Mass. R. 245; 4 Mass. R. 702; 21 Pick. 283; 1 Greenl. 89; 1 Shepl. 25; 16 Mass. R. 1; 9 Mass. R. 92; 8 Greenl. 284.

Bradbury, for the defendant, contended, that each of the four levies, under which the defendant claimed, was valid in law; and replied to the argument for the plaintiff.

In support of his general position, applicable to all the levies, that the description of the land in the return was sufficient, if the land was so described, that a person could by reasonable diligence ascertain its location, he cited 6 Greenl. 127 and 162; 12 Pick. 142.

In support of his position, that the conveyance from the plaintiff was fraudulent and void as to creditors, he cited 4 Greenl. 195; 1 Dane, 668; 19 Pick. 231.

Wells, for the plaintiff, replied.

The opinion of the Court was drawn up by

WHITMAN C. J. — This is an action of trespass *quare clausum.* The general issue is pleaded, and a brief statement filed setting up soil and freehold in the defence. As there is no

question as to the identity of the close the brief statement is unnecessary. Soil and freehold might be given in evidence under the general issue.

The plaintiff, to establish his title to the *locus in quo*, introduced a lease made to him, in December, 1841, by Harrison A. Smith; and a mortgage made of the same, in 1821, by Otis N. & Howard H. Getchell to Jane Smith; and an assignment thereof by Jane Smith to the plaintiff; and by the plaintiff to H. A. Smith, in December, 1841; and also a release of all right and title to the same to H. A. Smith, by Howard H. & Marietta Getchell, to whom the right of redemption, under Otis N. & Howard H. Getchell, was supposed to belong, made on or prior to December 8, 1841. The plaintiff also introduced a deed from himself, purporting to convey in fee simple, with covenants of general warranty, the *locus in quo* to H. A. Smith, and George C. Getchell, bearing date May 11th, 1840.

The acts relied upon as constituting the trespass were, that, at or about the time stated in the declaration, the defendant, with two others, went to a dwellinghouse, situated on the *locus in quo*, in which the plaintiff had some time previously been dwelling, and from which he had removed, and finding the doors open, and no one in the house, they removed what furniture there was there, belonging to the plaintiff, in a careful manner, and stored it safely near by, for his use; and afterwards kept possession of the house, and of the *locus in quo*.

The defendant claims under four levies, in behalf of different creditors, made by virtue of executions against the plaintiff, upon and covering the *locus in quo*, as the property of the plaintiff; the debts in which executions, accrued before the 11th day of May, 1840, the levies being afterwards, and the attachments having been made, in two of the suits before that day, and in the other two, some short time afterwards; and the attachments and levies in each case having been made before December, 1841. The defendant deduces title under these levies to himself, anterior to November, 1842, by deeds duly recorded.

The plaintiff first contends, that the defendant, upon the foregoing state of facts, had no right of entry into the *locus in quo;* or if he had, that he entered in an unlawful manner. But it is perfectly clear, if the defendant had a right of entry, that he entered peaceably. The plaintiff and his family had left the house; and the doors were open; and in removing the furniture from it as little damage was done as consisted with the right to acquire the entire use and control of the house. The question, then, is, had the defendant a right of entry into it?

The plaintiff contends that the levies were void; that they should have set off the estate, in the language of the statute, "by metes and bounds." This, he contends, means by measure and by monuments. And alleges that the westerly line, particularly, of the parcel set off to the Central Bank, is not described; the language in reference to which is, "thence westerly, on said Hamlin's north line, and on the north line of land occupied by Thomas Greenlow, to a stake at a point from which, running north thirty-two and a half degrees east, will strike the road eight rods and nine links west of the northwest corner of the Methodist meetinghouse lot." This, it is insisted, is not a running by metes and bounds. But we do not feel the force of the objection. It is to be presumed that the road is a monument well known, and easily ascertained; and the northwest corner of the Methodist meetinghouse lot is ascertainable. These being known, the point by the road, eight rods and nine links from the northwest corner of the meetinghouse lot, must of course be ascertainable; and the point of compass from thence being given to the land occupied by Greenlow, will give the westerly side line of the lot set off, with as much precision as is ordinarily practicable. The object of the legislature doubtless was, that the description of land set off should be such as would identify it. Certainty to a common intent, as to such particulars, was all that could have been intended. That which can be rendered certain is in law considered as certain. The lots in our townships are often known and designated by numbers. If set off on exe-

cution by such numbers it would be a setting off by metes and bounds; for it would be presumable that the metes and bounds were well known, or easily ascertainable. It would be no more certain, if it were said, that it was bounded by lots numbered, &c. on the different sides. These views are much strengthened by the language of Mr. Justice Weston, in delivering the opinion of the Court in *Buck* v. *Hardy*, 6 Greenl. 162. He says, "By metes, in strictness, may be understood the exact length of each line, and the exact quantity of land in square feet, rods or acres. It would be going too far to require, that this should be set forth in every levy. The legislature intended the land should be described with such certainty that there could be no mistake as to its location." Moreover, the words "metes and bounds" may have found their way into the statute of 1821, c. 60, § 27, by way of distinguishing land to be set off in severalty, from that to be set off in land held by the debtor in common with other persons. Both descriptions of land are to be found in the same section as liable to be taken in execution. This supposition may be regarded as well supported by the language of the Rev. Stat. c. 94, § 7; especially as the object of those statutes, in a great measure, was to simplify and render more plain the provisions in the law as it stood before. That section provides, that "the nature of the estate appraised, whether in severalty or undivided, a fee simple or less estate, in possession, reversion or remainder, shall be described, either be metes and bounds, or such other mode, that the same may be distinctly known and identified." Under this provision it would be quite evident, that any mode of describing the estate set off, that would be sufficient to identify it in a deed of conveyance, would come within its purview; and it may well be doubted if the same might not be said with reference to the former provision. It is difficult to perceive how it could have been ever intended, that any thing more than certainty to a common intent should be requisite in such cases.

A question is made, also, as to the setting off of two other portions of the *locus in quo*. The boundaries on three sides

of these are given; and then each is said to be bounded on the other; the one containing precisely seven acres, and the other precisely eight and an half acres; both together comprising all the land the debtor owned between the two other parcels set off; the one being butted on the one, and the other on the other, of those two parcels. The three side lines, and precise quantities of each being given, it could not be very material to the plaintiff, who was the debtor, where the creditors make their divisional lines. But they would be holden to such a divisional line as would give to each his proportion of the whole; and so that it should run as nearly parallel with the two opposite side lines as the form of the land would admit of. In this way certainty might be arrived at; and a boundary between them be ascertained; and so a setting off by metes and bounds would be established. If the boundary of the land of any other person were referred to, there might be some difficulty in ascertaining where it was; still it would be a setting off by metes and bounds within a reasonable construction of the statute. Inconvenience in ascertaining the boundary, so that it be susceptible of ascertainment can form no objection to it. This objection of the plaintiff's cannot be sustained.

It is next objected to one of the levies, that one of the appraisers was attorney to the creditor therein. How this appeared, the case, as made up and furnished to the Court, does not show. The officer has certified that they were indifferent and discreet men; and having so certified, it must be believed to be true. The remedy, if any there be, for such an erroneous certificate, if damage accrues from it, must be sought against the officer who may be responsible for the correctness of it.

The levies being unexceptionable, we now come to the consideration of other grounds, upon which the plaintiff seems more confidently to rely, to defeat their operation. The first of these is, that he had no such estate in the *locus in quo* as could be levied upon; that he was but a mortgagee; or in the condition of one; and that the mortgage, under which he

held, had not been foreclosed; and, if so, according to numerous decisions, his estate could not be taken by a levy; that this right, as mortgagee, he had assigned to his lessor, Smith, who had obtained, as he insists, a release of the right of redemption; thereby making him the owner of the estate in fee. If the facts thus set up by the plaintiff can be considered as established, we might find it difficult to avoid coming to the conclusion assumed by him as to their effect.

But it appears that the plaintiff had been in the undisturbed occupation of the close described in his writ, for more than seventeen years; that he had erected a large house thereon; and had disposed of portions of the mortgaged premises, by deeds of general warranty, and in fee; and finally had made the deed, conveying the residue, as before stated, in fee. By these acts he held himself out to the public, and certainly to his grantee, Smith, as the absolute and unconditional owner of the estate. Of all this, Smith, whose wife was the daughter of the plaintiff, was of course well knowing when he took the assignment of the mortgage from the plaintiff; and he was, moreover, informed by Howard H. Getchell, when he took the release of the equity of redemption from him, that he had no claim to the mortgaged premises. These circumstances were surely sufficient to place Smith upon his guard as to the supposition, that the plaintiff stood in the condition of a mere mortgagee, without foreclosure; he himself, in 1840, when he took an absolute and unconditional deed from him, as before stated, having treated him as the absolute owner of the estate. He knew, besides, when he took the assignment, that the whole of the estate conveyed to him and Getchell, whose wife was another daughter of the plaintiff, in 1840, had been levied upon by the plaintiff's creditors as the absolute property of the plaintiff; for the levies were all then matters of record. The plaintiff was of course conusant of all these facts. What then must be believed to have been the object of the plaintiff in making, and of his lessor in accepting, the assignment of the mortgage? Can it be reasonable to doubt, that it was with a hope, that it might enable them to avoid the levies?

But, with regard to the plaintiff's absolute title to the premises levied upon, the evidence does not stop here. After he had been notified to produce a deed, made to him by Howard H. Getchell, in 1825, releasing the right of redemption to the mortgaged premises, evidence was given, which we think was clearly admissible, showing indubitably, that he had such a deed. We think, therefore, that there cannot be the slightest doubt, that the plaintiff, from that time was the absolute owner of the mortgaged estate in fee; for it appears that Otis N. Getchell, the other original mortgagor, had, in 1823, conveyed his right therein to Howard H. Getchell, so that Marietta Getchell had no pretence of right thereto, which made Howard H. Getchell's release to the plaintiff perfectly effectual.

We come now to another ground relied upon by the plaintiff in support of his action. The deed he made, in May, 1840, to his sons-in-law Smith and Getchell, having been prior to the attachments made in the suits of the Neguemkeag Bank and Ticonic Bank, in pursuance of which two of the levies were made, he insists, that those levies were void, as against Smith and Getchell; and so that his lease from Smith, confirmed by Getchell, will enable him to maintain his action. But it is insisted, on the part of the defendant, that the deed to Smith and Getchell was fraudulent and void as against those creditors. It appears that their debts accrued before that deed was made; that the plaintiff was then greatly embarrassed, and indeed insolvent; it was a conveyance of all his real estate, so far as appears, whereby his creditors might be defrauded; it was to two individuals, neither of whom, so far as appears, wanted the estate for his own occupation; and both were his sons-in-law; and he was permitted to continue his occupation afterwards as before. These circumstances are recognized as badges of fraud. Newland on Contracts, 372; *Jackson* v. *Mather*, 7 Cowen, 301; *Gunn* v. *Butler*, 18 Pick. 248. By the agreement of the parties we are authorized to draw such inferences from the facts proved and legally admissible as a jury might. From this evidence a jury, in the absence of any proof on the part of the plaintiff of the payment of the consideration ex-

pressed in the deed, would be legally authorized to infer that the conveyance, as against those creditors, was fraudulent. The plaintiff offered no such evidence; or any evidence whatever, except the recital in the deed made by himself, of the actual payment of any consideration for the conveyance. The deed recites that eighteen hundred dollars had been paid as the consideration for making the conveyance.

In *Hildreth* v. *Sands*, 2 Johns. Ch. 35, the Chancellor says, "the defendant has put the deed upon the fact of a fair purchase, for an adequate price; and to that test the inquiry must be confined. A deed brought forward as founded on a valuable consideration cannot be set up as a gift or voluntary conveyance. The party is bound by the consideration alleged. There is no doubt of this rule." And cites 2 Vesey, 625, and Sch. & Lef. 501. Evidence was introduced, however, by the defendant, tending to show that the deed was made by the plaintiff to secure a maintenance, from the grantees, of himself and wife during their lives. This evidence consisted, as the case shows, of an admission made by him to that effect. If this were the consideration for the deed, even if it were admissible for the plaintiff to prove it, it could not avail him. *Jackson* v. *Carter*, 9 Cowen, 73.

Plaintiff nonsuit.

STEPHEN STARK *& al. versus* THOMAS SMILEY.

It is a well established rule of construction of wills, that no form of words will constitute a condition precedent, when the intentions of the testator, to be collected from every part of the will, clearly indicate a different purpose.

Where it was the intention of the testator, that the devisee should, immmediately upon his decease, enter upon the enjoyment of the estate devised to him; where some of the provisions in the will, made for the support of other persons, were to be derived in part from the estate and furnished by the devisee; where the performance of some of them were of a contingent character, and it was uncertain whether they would ever be required; and where the performance of the conditions enjoined by the will would have been impossible without the enjoyment of the estate; *it was held*, that the duties to be performed by the devisee were not conditions precedent to the vesting of the estate; although the will concluded by saying, that "therefore, as soon as the devisee shall have paid all the lawful demands against my estate and the aforementioned sums to my children, and otherwise have fulfilled this my last will and testament, he shall by this instrument be entitled to said real estate, to have and to hold the same to him and to his heirs and assigns for their use and benefit forever."

WRIT OF ENTRY. The demandants, at the trial before WHITMAN C. J. introduced a deed from I. Redington, assignee in bankruptcy of the tenant, to them, dated August 15, 1843, of all the right, title and interest of the tenant in and unto the demanded premises "by virtue of the last will and testament of Thomas Smiley, father of the said Thomas Smiley, the bankrupt;" also the proceedings in bankruptcy, authorizing the sale by the assignee; and also a copy of the last will and testament of Thomas Smiley, father of the bankrupt, duly proved and allowed in August, 1816, of which the following is a copy: —

"Know all men by these presents, that I, Thomas Smiley, of Winslow, in the County of Kennebec, Gentleman, do by this my last will and testament grant, sell and convey to Thomas Smiley, Jr. all my real estate consisting of land in Winslow and Clinton, in the County of Kennebec, likewise the saw mill in said Winslow, and the privileges thereunto belonging upon conditions, reserving as follows: —

"*First.* — The southeast room and chamber, the north bed-

room in the chamber, and one half of the privileges to the kitchen, said rooms to be finished at the expense of the said Thomas, Jr., as soon as is convenient, and shall be the residence of Ruth W. Smiley, my wife, as long as she shall live or wish to make the same her home, provided, however, she shall not be entitled to receive any family into the above mentioned rooms to live with her, and shall also have necessary room in the cellar.

"*Second.* — And that Ruth W. Smiley, my wife, as aforesaid, shall the remainder of her life be maintained without hard labor, she shall therefore be entitled as follows; — 1st. To fifteen bushels of bread kind ready ground; — 2d. To have two cows kept summer and winter; — 3d. To have one hundred pounds beef and one hundred pounds pork; — 4th. To have three pounds tea and three pounds of coffee of a good quality; — 5th. To have twelve pounds sugar and four gallons molasses; — 6th. To have a sufficient quantity of garden sauce; — 7th. To have one fifth part of the apples growing on the trees now bearing; — 8th. To be at all times provided with water and suitable wood in such quantity as shall be necessary, all of which shall be provided yearly and at such times as shall be necessary and shall be entitled to a horse to ride as much as is convenient. As a person in the decline of life is subject to sickness, it is my earnest desire, that she at all times should be provided with all the necessaries of life, and that her declining years be made as comfortable as possible. — And to you, Thomas, should you live to undertake the important duty of taking care of your aged mother, I trust you will, with divine assistance, gratify the wishes of a kind father, that after his body is consigned to the silent tomb, and could the part that never dies look down upon you it might see you following the example of the just, and with the fortitude of the good man behold you leading those with whom you have to do a most happy and agreeable life. And further, to your mother, it is my will, that she have the disposal of the sum of two hundred dollars that was left her of her father's estate, to be paid you out of my estate.

And to Joel C. Smiley, as he has two years of his time, one horse worth fifty dollars, and at sundry times I have paid about one hundred and seventy-eight dollars for him, and settled an action commenced against him by Polly Young, worth fifty dollars; it is my will, therefore, that he have the sum of five dollars, to be paid him in one year after my decease. And to Hannah S. Libby, the sum of seventy-five dollars to be paid in the following manner, twenty-five dollars in one year after my decease, twenty-five dollars after her mother's decease and twenty-five dollars in one year after the decease of William Richardson and wife; and to Ebenezer Woodsum, twenty-five dollars in one year after my decease; and to Betsey H. Shorey the sum of sixty dollars, thirty dollars in one year and thirty dollars in two years after my decease; and to Samuel P. Smiley, the horse which he now has, worth sixty-five dollars, the remainder of his time till twenty-one, and twenty-five dollars in one year after my decease; and to Park Smiley, the remainder of his time till twenty-one years and five dollars in one year after my decease; and as there is the sum of about four hundred dollars of debts to be paid out of my estate, it is therefore my will, that the time of one year be allowed (unless they be discharged before my decease) for them to be paid in before any of the above mentioned sums shall be paid to my several children. And to Sally Smiley, four sheep and to have them kept summer and winter, and after her mother's decease, should she live unmarried, also one cow kept summer and winter, and shall have a right to dispose of the calves and lambs; likewise the use of the southeast chamber and north bed room in the chamber, and privilege of baking, washing and cooking in the kitchen, should she wish, proper cellar room, all which she shall retain while unmarried and no longer, but should she ever be married she shall receive the sum of thirty dollars; and to Sidney and Seneca Smiley it is my will and I do therefore by this instrument give, grant unto them their heirs all my real estate in the town of Sidney and County of Kennebec, consisting of about fifty acres of land and known by the

south half of the McNeil lot, and bought by me of David Smiley, to have and to hold said land by them their heirs forever, for their use and benefit, and further, should any unavoidable accident happen to any of my children, so that they should be unable by labor or otherwise to support themselves, it is my will that they receive support from my estate while unmarried, and no longer, but shall have a right to a home should they wish or at any time be unwell, so as to need assistance while unmarried, by making reasonable compensation, is their condition such that they can, therefore as soon as Thomas Smiley, Jr. shall have paid all the lawful demands against my estate, and the aforementioned sums, to my children and Eben'r Woodsum, or to their and his heirs, and otherwise fulfilled this my last will and testament, he shall by this instrument be entitled to all my real estate and the privileges thereunto belonging, in the towns of Winslow and Clinton, in the County of Kennebec, and the saw mill in the town of Winslow, to have and to hold the aforementioned real estate to him and his heirs for their use and benefit forever; and I now profess to be in possession of all my mental faculties. I do hereby appoint Thomas Smiley, Jr. of Winslow, in the County of Kennebec, to be executor of this my last will and testament."

The parties agreed, that the following statement of William Stratton should be admitted as evidence.

Thomas Smiley, the tenant, went into the possession of the premises upon the decease of his father, and has continued in the occupancy and improvement thereof, treating the same as his own; that he has cultivated the farm and carried on the saw mill; that the saw mill was burned down, and he rebuilt it; that the witness knew, that for several years after the decease of his father the tenant's mother lived with him in the house on the farm, but that he was not able to testify whether or not, more recently, she had or had not lived with him.

It was admitted by the parties, that the mother of the tenant died at the house of Samuel Smiley, on June 20, 1843.

It was agreed that the full Court, upon consideration, might enter such judgment, or order such proceedings in the prem-

ises, as they shall determine to be proper, they being authorized to draw such inferences from the testimony as a jury might draw.

Bradbury, for the demandants, contended that the conditions were a mere charge upon the estate, and not conditions precedent to its vesting in Thomas Smiley, the devisee and bankrupt. The devised estate, therefore, passed to the assignee, and was by him conveyed to the demandants.

Whether acts to be performed by the devisee are conditions preceding or subsequent to the vesting of the estate in him, does not depend upon the particular location of the words, or upon any particular expressions taken separately, but upon the intention of the parties, to be ascertained by examination of all the provisions in the whole instrument. The intention should be carried into effect, although it should require some departure from the language of some particular clause. The acts to be performed are to be considered as conditions subsequent, unless such performance necessarily must precede the enjoyment of the estate. 4 Kent, 125; 2 Black. Com. 154; Co. Lit. 218; 1 Salk. 170; 1 Hill. Abr. 247, 248; *Howard* v. *Turner*, 6 Greenl. 106; *Currier* v. *Earl*, 1 Shepley, 216; *Morton* v. *Barrett*, 9 Shepley, 257; *Sayward* v. *Sayward*, 7 Greenl. 210; 5 Pick. 524; 3 Peters, 374; 1 Bac. Abr. 642; 7 Mass. R. 229; Stearns on Real Actions, 22, 23, 73; 6 Maine R. 42.

The various provisions of the will were then examined, and the conclusion drawn therefrom, that it must necessarily have been the intention of the testator, that the tenant should immediately, upon proof of the will, enter into the occupation of the estate, and should forthwith proceed to the performance of many of the onerous conditions, while others were not expected, and indeed could not be performed for many years afterwards. Many of them were of such a character, that the possession and enjoyment of the estate were necessary to the performance thereof.

N. Weston argued for the tenant — and remarked in his argument, that the title of the demandants depended upon the

question, whether the tenant, at the time when he was decreed to be a bankrupt, had any interest in the estate demanded under the will of his father. And this depends upon the question, whether that estate was devised to him subject to conditions precedent, or subsequent.

The construction to be given to the will is not affected by subsequent events, but depends upon the state of facts as they existed the day after the probate thereof. The condition in relation to the widow of the testator, had not been performed at the time of the bankruptcy, for she was then alive; and one of the legacies was not to be paid until her decease. If these were conditions precedent, the estate had not vested in Thomas Smiley, the tenant. After referring to the various provisions of the will, it was said, that the estate was charged with many of these provisions; and that it was the duty of the tenant, as executor of the will, independent of any interest he had as devisee, to enter into the possession and occupancy of the estate in that capacity.

It was for the testator to determine what he would require before the estate should vest in the devisee, and the time when he should be entitled to it. The lawful intention of the testator is the law of a will. What he makes precedent, cannot be construed to be subsequent. The devisee is to have the estate when he has fulfilled the terms of the will, and by necessary implication, then only.

Whether a condition should be regarded as precedent, or subsequent, depends not upon the technical language of a deed or instrument, but upon the nature of the subject matter or transaction, and the intent thence deducible. *Acherly* v. *Vernon*, Willes, 153; *Hotham* v. *East India Co.* 1 T. R. 645.

And if this is true as to other instruments, it is emphatically so with regard to a last will and testament. Cruise's Dig. Title 38, c. 16, § 1.

The intention expressed in the will must be considered as the true meaning of the testator, however absurd or improper the conduct might be, in requiring it. *Bertie* v. *Falkland*, 2 Vern. 332.

He contended, however, that in this case, not only that it was the clear intention, that the estate should not vest in the tenant, as devisee, until all the conditions had been performed, but that in making them conditions precedent, he had acted wisely in carrying into effect his intention of providing for the family. He intended to have the homestead remain in the hands of his executor as a family residence, not liable to be taken from him until he had fulfilled all the trusts to his mother and other members of the family.

The opinion of the Court was drawn up by

SHEPLEY J. — The premises demanded formerly comprised a part of the real estate of the father of the tenant, and were by his will, executed in the year 1816, devised to the tenant, who has occupied the same since the decease of his father during that year. Upon his own application the tenant was decreed to be a bankrupt, on December 13, 1842. His assignee, on August 15, 1843, sold at auction all his right, title and interest in the premises derived from the will of his father; and conveyed the same to the demandants, who were the purchasers.

In defence it is contended, that the tenant did not acquire any interest in the premises by virtue of the devise, that having been made upon condition precedent, and not performed.

By the first clause in his will the testator devised the estates demanded to the tenant "upon conditions, reserving as follows." He proceeded subsequently to make provision for the support of his widow, and for some of his children while unmarried, and for the payment of his debts; and gave legacies or made devises to his other children, and to one other person named. And concluded by saying, "therefore as soon as Thomas Smiley, Jr. shall have paid all the lawful demands against my estate and the aforementioned sums to my children and Ebenezer Woodsum, or to their and his heirs, and otherwise fulfilled this my last will and testament, he shall, by this instrument, be entitled to all my real estate and the privileges thereto belonging, in the towns of Winslow and Clinton in the

County of Kennebec, and the saw mill in the town of Winslow, to have and to hold the aforementioned real estate to him and his heirs for their use and benefit forever."

Whatever may be the literal import of this language, it is a well established rule of construction, that no form of words will constitute a condition precedent, when the intentions of the testator, to be collected from every part of the will, clearly indicate a different purpose. This rule should be allowed full operation, in cases like the present, in which it is apparent, that the will was written by some person not learned in the law, and not accustomed to the use of language to distinguish between conditions precedent and subsequent.

There can be no doubt, that it was the intention of the testator, that the devisee should, immediately upon his decease, enter upon the enjoyment of the estate. Nor any doubt that some of the duties to be performed as a condition of that enjoyment, were not expected to be performed until very many years afterward. This is shown by the very particular provision made for the support of his widow, to be derived in part from the estate, and furnished by the devisee. From the provision made for a daughter, while she remained unmarried, to be derived from the same source, and furnished by the same person. From the provision made for the support of any of his children in the same manner, while they continued unmarried, if they should, by any unavoidable accident, be unable to support themselves. Some of these duties were of such a contingent character, that it was uncertain whether performance would ever be required. To perform all the duties enjoined by the will, as a condition precedent, would have been impossible.

To obviate this difficulty the counsel for the tenant contends, that he held the estate and received the income "as executor charged with the trusts." It was not however upon the executor as such, that performance was imposed, but upon the devisee of the estate, from which the means of performance were to be derived. If the devisee had refused the trust of executor, or for good cause had been deprived of it, the obliga-

tion to perform, would not have been less imperative upon him.

The tenant being entitled to the estate upon performance as a condition subsequent, and having, so far as appears, performed the conditions for more than twenty-five years, must be considered as having acquired the title against all persons, who have not a right to enforce the performance of some duty imposed upon the devisee with a charge upon the estate.

Tenant defaulted, and
judgment for demandants.

CHARLES HEATH *versus* JOSEPH WILLIAMS.

In trespass *quare clausum*, where the plaintiff is in possession of the land, and brings his action for an injury thereto, and on the trial each party sets up title to the land, the burthen of proof is on the defendant to make out, that the title is in himself. If each party shows an independent title thereto precisely equal in strength to that of the other, the defendant fails.

Priority of appropriation of the water of a stream confers no exclusive right to the use of it. A riparian proprietor who owns both banks of a stream, has a right to have the water flow in its natural current, without any obstruction injurious to him, over the whole extent of his land, unless his right has been impaired by grant, license, or an adverse possession for more than twenty years.

The common law affords the owner of land a protection against the flow of water back upon his own land to the injury of his mill by the acts of another, without showing any priority of appropriation, or statute provision to aid him. And failing to obtain relief from the continuance of such an injury without it, he may lawfully enter upon the land of the person causing the injury, and remove, so far as necessary, the obstruction which occasioned it; unless his title to the water power which he claimed should prove to be defective, or his full right of use should prove to be impaired.

A mortgagee, while he permits the mortgagor to retain the possession, can have no just cause to interfere, or to complain, if the mortgagor be found making improvements upon the estate; and his rights cannot be impaired by his neglect to do so.

While one continues to occupy land as the tenant of another, he will not be permitted to deny the title of his landlord; but after that relation ceases to exist, his rights to the land are not impaired thereby.

THE action was trespass *quare clausum*, and was referred by a rule from this Court to a referee, who made a general

report, that the plaintiff had not sustained his action, and that the defendant should recover costs of Court and costs of reference. The referee then proceeded as follows. No copy of the plan, or of either of the deeds referred to in the report, was found among the papers which came into the hands of the reporter.

The plaintiff's counsel having specially requested that the legal points arising in this suit may be presented for the determination of the Court, the following exhibit of the case is hereby presented.

This is trespass *quare clausum.*

The plaintiff owns a lot of land, and claims that it is the lot colored red on the plan. But its southern boundary is disputed by defendant.

The strip in controversy is painted yellow on the plan. The defendant is in possession of the south lot, claiming it as his own. The dividing line was brought into question. There was much testimony. The plaintiff proved his title by evidence which seemed incontrovertible. The defendant proved his, by evidence equally satisfactory and convincing. The proofs were so balanced, that the referee had no other means of deciding which of the parties owned the "disputed territory," than by resorting to the inquiry, "*on whom rested the onus probandi?*" This he supposed to be on the defendant, and the result was, that he decided defendant had not proved his title. If, in law, the onus is on the plaintiff, then the plaintiff has failed to prove his right to the strip.

The means which the Court will have for deciding this point will appear hereafter.

Upon the foregoing grounds, the referee proceeded to examine the other part of the case, acting on the assumption that the plaintiff owned the debatable strip, and it will hereafter be spoken of as being a part of plaintiff's lot.

Plaintiff owns a tannery mill, which with its flume and the western end of the dam, are on his own land. Eastern end of the dam is on defendant's lot. This mill and dam were built between 1829 and 1833.

A removal by defendant of the part of the dam which stands on his land would destroy the use of plaintiff's mill.

Defendant has a clothing mill on the stream above plaintiff's dam. It is fed by a dam, which with its predecessor on the same site has stood more than 20 years, prior to the alleged trespass. There has been no abandonment of this privilege.

In the summer of 1842, the parties were operating their respective mills. Plaintiff permitted the water, held by his dam, to rise so high as seriously to impede the operation of defendant's mill. Defendant frequently requested plaintiff to let the water off, so that the back-flow should not injure him. This was not done. Defendant notified plaintiff that he should let the water off, by hoisting plaintiff's gate or in some other way, unless plaintiff himself should do it. But plaintiff forbade him to do so. Defendant for that purpose undertook to hoist plaintiff's gate, but was not able to. He thereupon removed two or three planks from plaintiff's flume, and let the water off, doing no greater damage than was necessary to remove the back-flow from his mill. That act is the trespass sued for in this action.

To justify that act, defendant relied on his title, as above mentioned, to the land on which the flume stands; and the flume stands on the disputed strip. As above stated, the referee considering the onus of proof to be on defendant, decided that point against him. If the onus was on plaintiff that point is to be decided against *him.*

Defendant next contended that, as his mill and dam were the oldest he had a right of priority to the water, and might lawfully break the flume as he did.

Referee was of this opinion, unless the legal principle was controlled or rendered inapplicable by other considerations belonging to the case.

Plaintiff thereupon contended, that as he owned the land on which defendant's dam was built, he might remove that dam, and in that way destroy the use of defendant's mill; and that if he might destroy that use in *that mode,* he might also do it by back-flowing from the lower dam; inasmuch

as it must be quite immaterial to defendant, by which of two modes the damage to his mill should happen.

If this should be conceded as a true principle, the referee thought it might be difficult to sustain this action; because *defendant* by removing that part of the *lower* dam, which is on *defendant's* land, might in like manner defeat *plaintiff's* mill. And as to the mode of producing that effect, it could make no difference to plaintiff whether it was done by defendant's removing the portion of the dam which is on defendant's land, or by breaking the flume, as was in fact done.

There may possibly be some question how much, if any, of the upper dam is on the plaintiff's land. His deed makes his west line to run *fifteen rods*, to the stream, thence by the north line of the south (defendant's) lot, to the starting point. By the plan it appears that said west line, whether it stop at the margin of the stream, or at its centre, or be continued to any other point, in the same direction, will not strike said north line of the south lot, by several rods.

Very probably, however, the construction of the deed may be such as to make plaintiff's west line pass down by the centre of the stream, so as to strike said north line in that direction.

Such a construction would place the east half of the upper dam on plaintiff's land, and, (unless for its antiquity,) he might be justified in removing it.

On this hypothesis, plaintiff might by removing his part of the *upper* dam impede the use of defendant's mill. Could he therefore, lawfully, impede it by back-flowing from the *lower* dam?

In this connection, the antiquity of the upper dam is to be taken into the account.

Plaintiff denies defendant's title to the south lot and claims that he is the owner.

It was mortgaged in 1829. The mortgagor conveyed his right to Spaulding in 1831, by a deed of quit-claim, duly recorded. The mortgagor had the possession, and Spaulding continued in possession for a few years, by the mortgagor under him.

In 1831, Spaulding purchased (adjoining) north lot of the *mortgagee.* Thus the *possession* of both lots was united in Spaulding. The dam was built while that possession continued, the mortgagee being present and making no objection. Between 1835 and 1837, the mortgagee hired and used plaintiff's mill, under Spaulding's assignee.

In 1835, the mortgagor, notwithstanding his conveyance in 1831 to Spaulding, relinquished in writing on the back of the mortgage, to the mortgagee his right of redeeming, and, for that consideration solely, the mortgagee gave up to him the notes then due, no part of which has ever been paid. There were four notes, the last of which became payable in 1833. At the same time (1835) the mortgagor, who till then had occupied both lots, under Spaulding, left the town, and the mortgagee went into possession and occupation of the mortgaged lot, and he and those claiming under him have continued that possession and occupation to the present time.

Defendant has the mortgagee's title; plaintiff has all the rights which belonged to Spaulding in both lots.

The mortgagee never gave any discharge of the mortgage, other than by giving up the notes to the mortgagor in manner above stated. No one claiming under Spaulding has brought any bill in equity or other process, to obtain possession of the upper lot. Defendant contends, that the giving up of the notes under those circumstances did not defeat the mortgage, and that, as the mortgagee went into actual possession of the mortgaged lot in 1835, (which was after the pay day of the notes,) the mortgage was foreclosed in 1838; or at least that he, the defendant, being the assignee of the mortgagee, and being in actual possession, is to be deemed to hold that possession rightfully, as against the plaintiff who is the assignee of the mortgagor.

On the other hand, the plaintiff insists that, as he is the assignee of the mortgagor, who after his assignment took up the notes as aforesaid and destroyed them, the mortgage became inoperative and void, so that plaintiff's title became perfect.

The referee held, that the mortgage was not defeated by the

acts of 1835, the notes never having been paid; and that defendant's possession of the upper lot was rightful. Plaintiff contended, from the abovenamed unity of possession, and, the mortgagee's acquiescence in building the dam partly on the mortgaged lot, and his subsequent hiring of the plaintiff's mill, which is fed by that dam, it results in law, that the plaintiff's mill is entitled to the prior right of the water.

The referee held otherwise, on the ground that the dam was built on the mortgaged lot by those who were in possession under the *mortgagor* as they might lawfully do. But that when the mortgagee afterward took posession, he took it freed from all arrangements made by the mortgagor, &c. And that the hiring of the plaintiff's mill, for a year or two by the mortgagee could not operate such a grant or license to continue the dam, as would take away from defendant, his priority to the right of water.

The following documents are to be referred to. The Plan. Deed, Potter & al. to Small, 1829. Mortgage back of same date. Small to Spaulding, 1831. Potter to Spaulding. 1831. Spaulding to Otis, 1835. Potter to Small, 2d, 1841. Small, 2d to defendant, 1842. Otis to plaintiff, 1842.

The referee's intention was, upon the foregoing facts and the documentary evidence, to decide the action on legal principles.

If the Court shall be of opinion the above written award is in accordance with those principles, the said award is to stand.

If the Court, however, shall think the plaintiff entitled to recover, the award is hereby made that the plaintiff recover the sum of $25, damage, and costs of Court to be taxed by the Court and costs of reference.

Full and able arguments in writing were furnished to the Court by

Otis, for the plaintiff — and by

G. W. Batchelder, for the defendant.

The opinion of the Court was drawn up by

Shepley J. — This is an action of trespass *quare clausum*, brought to recover damages for an injury done to the flume

leading water to the plaintiff's tannery. The defendant admitted, that he removed some planks from it to let the water run off, and contended, that he had a legal right to do so; first, because the flume was upon his land; and secondly, because the plaintiff's mill dam caused the water to flow back upon the wheel of his clothing mill, situated on a branch of the same stream.

The action was referred to the Judge of the Middle District Court, who made a report against the plaintiff's right to maintain the action. He also presented with his report certain deeds of conveyance, facts, and questions of law, for the consideration of this Court, and an alternative report in favor of the plaintiff, if the Court should be of opinion, that he was entitled to recover.

The report states, that the plaintiff's dam caused the water to flow back so much as to seriously impede the operation of the defendant's mill; and that he, after requesting the plaintiff to let the water flow off, so that it would not injure him, removed the planks from the flume, doing no greater damage, than was necessary to remove the water, which was injurious to his mill. The plaintiff owned a lot of land, and contended, that it extended southerly so far as to embrace the land, on which his flume had been built. The defendant claimed to be the owner of a lot of land adjoining it on the southerly side, and contended that his land extended northerly so far as to include the land under the flume. The referee, without a detail of the testimony introduced before him to establish their respective claims, states, that "the proofs were so balanced, that the referee had no other means of deciding, which of the parties owned the disputed territory, than by resorting to the inquiry, on whom rested the *onus probandi*. That he supposed it to be on the defendant, and the result was, that he decided, that the defendant had not proved his title." The counsel for the defendant insists, that this conclusion was incorrect. The plaintiff appears to have been in possession of the land, on which the flume was erected, for several years. That possession was sufficient to enable him to maintain his

action against any one, who could not show a superior title, or some legal right to enter upon it. The defendant, failing to show a superior title, could not justify his acts on the ground, that the flume was upon his land.

The report further states, that "defendant has a clothing mill on the stream above plaintiff's dam. It is fed by a dam, which, with its predecessor on the same site, has stood for more than twenty years prior to the alleged trespass." That the plaintiff's dam and mill were built between the years 1829 and 1833. That the defendant next contended "that as his mill and dam were the oldest, he had a right of priority to the water, and might lawfully break the flume, as he did. Referee was of this opinion, unless the legal principle was controlled or rendered inapplicable by other considerations belonging to the case."

The cases cited in the arguments of counsel decide, that priority of appropriation of the water of a stream confers no exclusive right to the use of it. A riparian proprietor, who owns both banks of a stream, has a right to have the water flow in its natural current without any obstruction injurious to him over the whole extent of his land, unless his rights have been impaired by grant, license, or an adverse appropriation for more than twenty years. The defendant appears to be the undisputed owner of the land on both banks of the stream below his mill nearly or quite to the plaintiff's dam, unless that title shall prove to be defective in the manner hereafter stated. While it is contended, that the plaintiff's "dam and mill were erected with such knowledge and concurrence of the defendant's grantors as amounted to a license," it is not contended, that he has acquired any right by grant or by an appropriation for more than twenty years to cause the water to be flowed back upon the defendant's mill. It is not necessary to decide, whether the defendant had acquired a right to have the water of the stream so used as to prevent its being thereby flowed back upon his mill by an appropriation of it without such an occurrence for more than twenty years, as decided in the case of *Saunders* v. *Newman*, 1 B. &. Ald.

258. Although he could not derive any right from the statute, c. 126, § 2, or from priority of appropriation, yet the common law would afford him sufficient protection against the flow of water back upon his own land to the injury of his mill by the acts of another. Failing to obtain relief from the continuance of such an injury without it, he might lawfully enter upon the land of the plaintiff, and remove, so far as necessary, the obstruction, which occasioned it; unless his title to the water power, which he claimed, should prove to be defective, or his full right of use should prove to be impaired.

The plaintiff attempts to set up a title in himself, or in another, to the lot of land occupied by the defendant. He then claims to be the owner of the dam, from which the defendant's mill derives its supply of water; and therefore infers, that he had a right to deprive him of the use of it.

The facts in relation to the title and the alleged license appear to be these. Amos Potter and Robert Ashford, on July 6, 1829, conveyed by a deed, recorded on March 3, 1831, the southerly lot now occupied by the defendant, to William Small, who on the same day reconveyed it to them in mortgage to secure the purchase money; and on February 22, 1831, conveyed all his interest in it to Calvin Spaulding. Amos Potter conveyed on May 16, 1831, the northerly lot now owned by the plaintiff, to Calvin Spaulding, who entered into possession of both lots and occupied them by his tenants until the year 1835, when Small, who had continued to occupy under Spaulding, executed a release, written on the back of the mortgage to Potter and Ashford, of his right to redeem the southerly lot; and Potter, without any other payment of them, delivered to him the notes given for the purchase money and secured by the mortgage, and entered into possession of the lot. The plaintiff's dam and mill were erected, while Spaulding was thus in possession of both lots, Potter "being present and making no objection." After the mill was built, and prior to the year 1837, Potter hired it and occupied it under Spaulding, who had conveyed both lots to John Otis, on December 26, 1835, by deed recorded on October 11, 1842.

John Otis, on June 6, 1842, conveyed the northerly, but not the southerly lot, to the plaintiff, whose assertion of title to the southerly lot appears to have been made without any foundation. Until Otis, or some person deriving title from him, shall claim that lot on the ground, that the proceedings between Potter and Small amounted to a payment of the mortgage debt, the defendant must be considered as legally entitled to hold it as assignee of the mortgagee. But as he failed before the referee to establish his title to the northerly bound and line, to which he claimed, he must be considered as failing to establish that line in such a manner as to include within the bounds of his lot the dam, from which his mill derives its supply of water. For the present purpose, that dam may be considered as within the bounds of the plaintiff's lot. The conveyance from Potter and Ashford to Small, from whom the defendant derives his title, contained this clause; "and also the privilege of flowing land and erecting dams on any of the adjoining lands, as much as is necessary for the benefit of machines and mills on the premises." This was quite sufficient to entitle Small and those claiming the same title and rights from him, as the defendant does, to maintain that dam to flow the water for the use of the mill. Spaulding, by his subsequent conveyance from Potter, must take his title subject to that right. The plaintiff, deriving his title from Spaulding, can have no superior right, and cannot resist the right of the defendant to obtain a supply of water for the use of his mill.

With respect to the asserted license, it is only necessary to remark, that a mortgagee, while he permits the mortgagor to retain the possession, can have no just cause to interfere or to complain, if the mortgagor be found making improvements upon the estate. His rights cannot be impaired by his neglect to do so. While Potter continued to occupy the plaintiff's mill as the tenant of Spaulding, he could not be permitted to deny the title of Spaulding. After that relation ceased to exist, his rights would not thereby be impaired. The rights of Potter to the water connected with the southerly lot, do not appear to have been impaired by any of these transactions,

and those rights have been conveyed to the defendant. The report of the referee in his favor is accepted.

WEBBER FURBISH *versus* DANIEL WHITE *& al.*

If the grantee of land to which his grantor had no other right than under a bond, afterwards assigned to the grantee, containing an agreement to convey the same on the payment of a certain note, brings his bill in equity against his grantor and the obligor in the bond and a creditor of the obligor who had levied an execution upon the land as the obligor's property, seeking a conveyance of the land to him, he will not be entitled to relief, unless he shows a performance, or tender of performance, of the conditions of the bond before the institution of his process.

THIS was a bill in equity, and was heard upon bill, answers and proof. The substance of the bill, answers and proof, will be found in the opinion of the Court.

F. Allen and *Otis*, for the plaintiff.

Bradbury & Rice, for the defendants.

The opinion of the Court was drawn up by

TENNEY J. — On the 25th day of August, 1824, Benjamin Brown gave to his son, Albert G. Brown, a bond to convey to him a farm in the town of Vassalboro', on the payment of a note of the same date, given by the obligee to the obligor for the sum of $1163,74, payable in six months after demand, with annual interest, upon which note has been indorsed the interest for two years and the sum of $163. On the 8th day of June, 1835, Albert G. Brown contracted in writing with the plaintiff to convey to the latter the same farm, on or before the first day of January next following, and in consideration thereof received certain notes given by Eben. French and Samuel McGaffey. On the 9th of March, 1836, Albert G. Brown assigned the bond of his father to him, under his hand and seal, to the plaintiff, promising therein to pay and take up the note mentioned in the bond of Benjamin Brown. It appears, that the plaintiff went into possession of the farm January 1, 1836, and continued to occupy the same till after

the levy, which Daniel White, the defendant, caused to be made thereon upon an execution issued upon a judgment in his favor against Benjamin Brown, Ephraim Lincoln and Samuel J. Foster, within thirty days after its rendition, the same property having been attached on the original writ, August 22, 1839.

The plaintiff charges in his bill, among other things, that Albert G. Brown stated at the time of the contract for the purchase of the farm, that a deed could be had of his father at any time, when he was requested to execute it, and referred him to his father for that purpose; that he called upon Benjamin Brown, who told him, that he would give a deed to the plaintiff or to his son, whenever requested thereto, and without any reference to any matters betwixt him and his son; that on the first day of January, 1836, Albert G. Brown gave him possession of the farm with the knowledge and concurrence of his father, and that the father and son being called upon again for a deed, they declared that it should be made and sent to him at his residence; that subsequently the said Benjamin promised to make and deliver a deed of the farm to the plaintiff, and a time was appointed therefor, but that no deed was ever given; that before the purchase by the plaintiff of the farm of Albert G. Brown, that divers dealings were had betwixt said Albert and his father, and that in consideration of various payments and dealings between them, the note mentioned in the bond was paid; that the levy was made by the defendant, White, upon the farm, after he was expressly notified that the plaintiff had purchased and paid for it; and that there was an agreement between said White and Benjamin Brown to have the levy made for the purpose of defrauding the plaintiff of his farm, and preventing him from obtaining the title thereto, and enabling Benjamin Brown to have the use of the same.

Benjamin Brown, in his answer, denies, that he ever stated, that he would give a deed to Albert, or to the plaintiff, whenever thereto requested, excepting upon the condition that the full amount of the note and interest should be paid; that so

far from saying that a deed should be made without reference to matters betwixt him and his son, he always told the plaintiff, that he would never give a deed either to him or his son, until the note and interest should be fully paid; denies that the plaintiff went into possession of the farm with his concurrence or knowledge; says he was always opposed to his son's selling the farm; denies that the note has been paid, excepting so far as appears by the indorsements thereon; and says it is now in his hands; admits, that there were dealings between him and his son, but distinctly and positively denies, that any thing was due from him to Albert on account of any such dealings, or that he was ever indebted to his son on account, or in any other way, by reason of any such dealings or payments whatever; denies that there ever was a time, when the whole amount of the note was not due, excepting the indorsements; denies, that there was any understanding or agreement between White and himself to have the levy made by the former, for the purpose of defrauding the plaintiff, or that the same should be for his use and benefit; and that the right of his son under his bond was forfeited long before the attachment by White, a demand having been made upon his son for payment of the note, more than six months prior thereto.

Albert G. Brown and Daniel White, in their answers confirm the statements and denials made in the answer of the other defendant, so far as the subject matter thereof was within their knowledge respectively. And the defendant, White, admitting the levy of his execution as charged in the bill, denies that prior thereto, he had knowledge, that the plaintiff had paid for the farm, nor was he notified or informed of it; but was informed by Benjamin Brown, that the right of his son under the bond was forfeited, that the note was unpaid, and had always said he would never give a deed, till he was paid every dollar, principal and interest.

The plaintiff relies upon the testimony of several witnesses, in support of the charges of his bill. Alden Sturgiss deposes, that before the plaintiff moved upon the farm, Albert told him he had paid for the farm, that the last of the year 1835, or

first of the year 1836, Benjamin Brown said he sold to his son the farm which the plaintiff had purchased of his son, that Albert had paid for the farm, but he could not give him a deed, till he had settled. Hiram Sturgiss deposes, that eighteen or nineteen years before the testimony was given, he was assisting Albert G. Brown to move a barn standing upon the farm, the father found fault, saying it was well enough as it was. The son said, "Father, whose property is this?" the father answered, "It is yours," whereupon the other said, "I shall do as I please with it." At another time, before the plaintiff took possession of the farm, Benjamin Brown engaged the witness to move a certain shop upon what he called Furbish's farm. "Three or four years before the taking of the deposition, Benjamin Brown was complaining to the witness of his poverty, and on being asked if he did not own the Furbish farm, he said "No." Thomas Robbins, Jr. deposes, that Albert G. Brown made important and extensive repairs, upon the buildings upon the farm, and improvements in fences, while he occupied it, and before he sold to the plaintiff, of which his father had knowledge; and before the plaintiff moved upon the farm he heard Benjamin Brown say, his son had paid him for the farm, but was not willing to give him a deed, till he could get a settlement with him, that there had been considerable dealings, and that the son was very loth to settle. It is contended for the plaintiff, that these declarations of the father and son are confirmed by the circumstance, that the former ceased to exercise any control over the farm for many years, and has never claimed to hold the relation of landlord since the bond was executed; that the son was a man of property who spent a large sum upon the farm during his occupancy, and was able to pay the note whenever called upon therefor. Evidence is in the case tending to show, that when the defendant, White, was giving directions to proceed in the levy of his execution upon the farm, he was informed that the plaintiff had bought and paid for it.

The plaintiff seeks a decree of specific performance of the contract, contained in the bond of Benjamin Brown to his son,

Albert G. Brown, and asks that the defendant, White, in whom is the legal title under his levy, be required to convey to the plaintiff the land upon which his execution was extended. The prayer of the bill is founded upon the alleged fact, that the note, the payment of which was necessary, to entitle the obligee in the bond to a conveyance, has been paid. It is not pretended, that unless this has taken place, either by a direct payment, or such a state of accounts and dealings between the obligor and obligee, that there is a balance due the latter equal to the amount of the note, that the plaintiff has equities, which can entitled him to the relief sought. The payment of the note was a condition precedent to the obligation to convey. But it is contended, that the statements of Benjamin Brown as they appear in evidence, being the confessions of the party, who held the note at the time they were made, are of the same validity against the defendant, White, as they would be if made by him, and that these, as well as those of the son, are full upon the question, whether the note was paid. The evidence to show, that payment of the note was made as charged in the bill is not, when taken in connection with every thing having relation to the subject, satisfactory. The statements of the parties to the note appear to have been casual remarks, having no direct reference to any question touching either the note or the bond; indeed, neither are mentioned or alluded to by them; it appears, that in many of the conversations, the witnesses heard a part only of what was said; the deponents seem not to have been in any way interested in the subject matter, concerning which they represent the statements to have been made, so that they would probably fully, and clearly understand the true import of the language used, or recollect after such an interval of time, the precise impression made upon their own minds, especially as they have not reviewed the matter by calling to their remembrance, what was in fact said, until a very recent period. When we take into consideration, the relation, that existed between the obligor and the obligee, it does not appear strange that the former should be willing to permit the latter

to occupy the farm, without payment of the note, especially as the improvements made, together with the farm itself, were probably ample security for its eventual payment with interest. Opposed to the evidence adduced, to show a payment of the note, is the full, clear and distinct denial of payment in any mode whatever, made by both the parties to the note under oath in their answers, which are responsive to the bill, and the existence of the note and its production among the documents in the case. By the allegations in the bill, and depositions of the witnesses, the note, if payment thereof was ever made, must have been paid before the first day of January, 1836; there is nothing in the bill or the proof, tending to show that any account or dealing between the parties to the note, raising a balance in favor of the maker, or any payment, occurred or was made subsequent to that time, which should be applied to diminish the amount. But on the ninth day of March, 1836, the obligee in the bond, made an assignment under seal, which the plaintiff received, and in which the former contracts *to pay and take up the note*, which is now alleged in the bill, to have been entirely paid. It can hardly be conceived, that when that very day, as the plaintiff alleges in his bill, he called upon Benjamin Brown and Albert G. Brown, when together, and the former told him, that if he would wait till a certain day, which was not a month from that time, that a deed should be ready, after having stated that he would give a deed without reference to any matters betwixt him and his son, that Albert G. Brown should promise in the assignment, that he would *pay* and take up the note, or that the plaintiff should have wished that the assignment should contain any such contract. The plaintiff had, the preceding August, received the written contract of Albert G. Brown to convey the farm, by the first of January, 1836, and had made payment of the full consideration therefor. If the note was paid, the plaintiff was entitled by his contract with Albert G. Brown, the bond of Benjamin Brown and the assignment thereof, to a conveyance of the farm early in the year 1836, and it is certainly remarkable that he should have slept upon his rights for

more than six years, and then should have awaked only, when the more vigilant creditor, of the one in whom was the legal title, had taken the land in execution, at a time, when he had no notice, that the equitable and legal title were not united in the same person, though he may have been admonished that the plaintiff had paid therefor.

Bill dismissed, and costs for defendants.

WILLIAM M. HALSTED *versus* JOSIAH LITTLE *& al.*

In a bill in equity wherein the plaintiff sought for the specific performance of a contract for the conveyance of real estate, made between the defendant and one whose interest in the contract the plaintiff had purchased at a sale on execution under the act of amendment to Rev. Stat. c. 94, § 50, which contract provided for the conveyance of one fourth part of a cotton factory upon the payment of certain sums at certain times, and which also contained stipulations for the advancement of money by the execution debtor for the purchase of cotton to be there manufactured, the sale of the manufactured goods, the compensation for these services, and for the services of other owners who were to be employed in conducting the business, these acts, or some of them, to be performed after the payments for the fourth part of the factory should have been made: —

It was held, that the conveyance was to be made whenever the money was paid for the fourth of the factory, although the other stipulations in the agreement might not have been performed on his part: —

That although the defendant might waive any forfeiture by reason of a failure by the other party to make one payment according to the agreement, by an offer afterwards to convey upon the payment of the amount then unpaid, yet that this would be no waiver of the right to insist upon a forfeiture upon failure to make the next payment according to the agreement: —

And that the plaintiff could not avail himself of any balance which might be due to the execution debtor on settlement of the concerns of the parties under the other stipulations in the agreement, in part payment of the sums agreed to be paid for the fourth of the factory, by virtue of his purchase at the execution sale, no appropriation having been made of such balance for that purpose.

BILL IN EQUITY. The defendants, Josiah Little and Ephraim Wood of Winthrop, and Josiah Little of Newbury, were copartners doing business at Winthrop. The parties made the following agreement in reference to the case.

It is agreed between the parties in this case, that it shall be left to the Court to decide, whether Asa Bigelow, Jr. had any attachable interest in the property in controversy at the time it was seized by the plaintiff, as set forth in the bill, which could be made available to the plaintiff under the circumstances of this case. If the Court should decide, that the said Bigelow, at that time, had no attachable interest therein, which could be made available to the plaintiff under the law of this State, as administered either at law or in equity, or that the same has not been acquired by him, the bill is to be dismissed.

But if the Court should decide these points in favor of the plaintiff, it is to be left to the Court to determine, whether the plaintiff, thus succeeding to the interest of Bigelow, is bound to make compensation to the defendants, or either of them, for the damages occasioned to him or them, by the failure or inability of Bigelow to fulfil the stipulations on his part to be performed by the contract of the 15th of February, 1841. If the Court should decide, that the plaintiff was not so bound, or if the Court should be of opinion, that he is bound to make such compensation, it is agreed, that it shall be left to a master to liquidate, upon such principles, as the Court shall prescribe, what sum the plaintiff ought to pay, if any, to entitle himself to the relief sought by the bill.

And it is further agreed, that either party may go into further proof before the master touching the matters to be submitted to him.

The parties reserve to themselves the right, if they shall so agree, under the sanction of the Court to substitute referees to be selected by the parties, in the place of a master.

Upon the report of the master or of referees, if substituted, and upon the bill, answer and proof, it is agreed, that the Court shall make such final decree, as the law and equity of the case, may, in their judgment, require.

It appeared by the bill and answers, that on the 15th of February, A. D. 1841, the said Josiah Little entered into an agreement with one Asa Bigelow, Jr. of the city of New York,

merchant, in the words and figures, or to the purport and effect following, viz:—

"This memorandum of agreement entered into this 15th day of February, A. D. 1841, by and between Asa Bigelow, Jr. of the city of New York, of one part, and Josiah Little of Minot, in the State of Maine, of the other part; witnesseth, that the said Little agrees to sell to the said Bigelow, one quarter part of the Winthrop Factory, with all the personal property of said factory, which the said Little purchased of Benjamin Sewall, as will appear by their agreement, dated the 19th day of December, A. D. 1840, and their further agreement, dated the 1st day of January, A. D. 1841. The said Little on his part, agrees to make the conveyance of said quarter part to said Bigelow, upon his, said Little's, receiving the conveyance from said Sewall; and the said Bigelow is to make the payments for his proportion of the said property in the same manner as stipulated by said Little in said agreement above referred to, and enter into possession of the premises and receive his proportion of profits and rents of said property, and pay his proportion of the expenses attending the operation. It is understood by the parties to this agreement, that the said Little is to retain one quarter and dispose of the remaining half to Josiah Little of Newbury, Commonwealth of Massachusetts, and Ephraim Wood of Lewiston, State of Maine, of the above mentioned property, and the said Little of Newbury and said Wood are to have their proportion of the rents and profits, and be subject to the expenses of operation as aforementioned. It is also further agreed by the parties to this instrument, that the said Bigelow is to make all the purchases of cotton for the operation of said factory, and make sale of all the goods, manufactured except what may be sold by said other parties in the State where the factory is located. The said Bigelow is to make all advances for stock and charge legal interest for all such advances; is to receive 2½ per cent. for all such purchases and sales; the said Little and Wood are to keep an oversight of the operations of the different departments of the factory business at home, and take care of all the estate be-

longing to the company, and make sales of all the goods, which can be disposed of to advantage in the vicinity of the factory, and receive for their compensation the sum of two dollars and fifty cents per day each, and if for the term of one year from the first day of March next, the charges of the said Bigelow for commissions shall amount to more than the amount to be paid to the said Little and Wood, then there shall be an equal division of such overplus, whatever it may be, between said Little and Wood and said Bigelow.

"It is understood by the parties, that the said Bigelow is to be reimbursed for all advances for the factory, by having a sufficient quantity of goods in his hands for this purpose, after the mill shall have gone into operation, and if there should not be sale enough of manufactured goods at the factory to pay the current expenses of the same, the said operators are to draw upon said Bigelow at not less than ninety days, (unless by special agreement, at a shorter time,) and said Bigelow is to be reimbursed by manufactured goods.

"Asa Bigelow, Jr.
"Josiah Little."

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

The very able arguments in writing, furnished to the Court by

Emmons and *May*, for the plaintiff — and by

N. Weston, for the defendants, embracing arguments upon the facts as well as on the law, are too extended for the space allowed for one case; and are therefore omitted.

The opinion of the Court was drawn up by

SHEPLEY J. — By this bill the plaintiff seeks the specific performance of a contract for the conveyance of real estate, made on February 15, 1841, between one of the defendants, Josiah Little of Winthrop, and Asa Bigelow, Jr. That contract provided for a conveyance of one fourth part of the Winthrop factory upon certain terms; and contained stipulations respecting the conveyance of parts of it to the two other

defendants, the advancement of money by Bigelow for the purchase of cotton to be manufactured, the sale of the manufactured goods, the compensation to be made for these services, and also to those owners, who were to be employed in conducting the business.

The plaintiff's title is derived from a seizure and sale of the right of Bigelow to a conveyance of a fourth part of the factory under that contract, by virtue of an execution issued on a judgment recovered by the members of the firm of Halstead, Hains & Co. against Bigelow. The seizure on the execution was made on May 6, 1843, and the sale on June 24, following. The plaintiff became the purchaser, and received a deed from the officer conveying to him the right, which Bigelow had on May 6, 1843, to a conveyance of one fourth part of the factory.

The seizure and sale upon the execution were authorized by statute, c. 94, § 50, as amended; and in c. 117, § 50, it is provided, that the purchaser should have the same remedy to compel a conveyance, as mortgagors have to compel mortgagees to convey to them, on performance or offer to perform the condition of a mortgage.

The first inquiry presented is, what right had Bigelow to a conveyance of one fourth part of the factory on May 6, 1843. Little had made a contract on December 19, 1840, with Benjamin Sewall, for the purchase of the Winthrop Factory; and the terms, upon which it was to be conveyed, had in some respects been varied by a subsequent agreement, made on January 1, 1841. The contract between Bigelow and Little, made on February 15, 1841, referred to it, and contained the following clause. "The said Little on his part agrees to make the conveyance of said quarter part to said Bigelow, upon said Little's receiving the conveyance from said Sewall; and the said Bigelow is to make the payments for his proportion of said property in the same manner as stipulated by said Little in said agreement above referred to, and enter into possession of the premises and receive his proportion of the profits and rents of said property, and pay his proportion of

the expenses attending the operation." The contract between Sewall and Little provided for the payment of $22,000, for the factory, one fourth on March 1, 1841, and the remaining three fourths in one, two, and three years from its date, with interest annually, with satisfactory security, or notes and a mortgage of the estate. The answers admit, that Bigelow paid his proportion of the first installment, except a trifling sum, which does not appear to have been regarded as any objection to his right to have a conveyance of his fourth part. And that the conveyances were made to the other three defendants by the request of Bigelow, because he was not present to execute the mortgage to secure the payment of the other installment. And that the defendants were to hold his fourth of the estate, until they should convey it to him. It could not have been the expectation or intention of the parties, that they should convey it to him, unless he should continue to perform the contract respecting it, as made with Little. It is insisted, that Little would not be obliged to make a conveyance to him, unless he had performed all the stipulations on his part contained in that contract. That a failure on his part to advance money for the purchase of cotton, or to fulfil any other engagement respecting the management of the business, would preclude him from insisting upon a conveyance of a fourth part of the factory, if he had fully and punctually paid for it. It is doubtless true, that Little was induced to agree to sell a fourth part of the factory to him, and the other defendants to embark in the manufacture of cotton goods, in the expectation, that Bigelow would be interested with them, and would advance money to enable them to conduct the business in a profitable manner, to be reimbursed by a sale of the goods. The contract did not, however, make his right to become a part owner of the factory to depend upon his performance of all these expected duties. On the contrary, it provided, that he might become an owner of one fourth upon the precise terms, upon which Little was to become the owner by purchase from Sewall. The stipulations on his part respecting the advancement of money, the sale of the goods, and the

management of the business, were to be performed chiefly, after it was contemplated, that he would be the owner of one fourth of the factory. The answers substantially admit, that he might have become the owner of it as soon as Sewall had made his conveyance, by giving satisfactory security for his proportion of the other installments. The provision authorizing him to enter into possession and receive his proportion of the rents and profits, and subjecting him to the payment of his proportion of the expenses, contained in that clause of the contract, which provides for the payment of one fourth of the estate, is explained by the other provisions. It was not designed to impose it as a burden upon him, that he should do so to be entitled to a conveyance. It appears to have been inserted to give him rights, which he would not have acquired by a conveyance of a fourth part of the estate only; and to have been necessary for that purpose. By his contract with Sewall, Little had become entitled to enter into possession of the factory on the first day of January preceding, and to continue it until the fifteenth day of May following; and such a provision was necessary to secure to Bigelow his share of that interest, and to admit him to be a partner in the business from that time. If the contract would admit of a different construction, it does not appear, that Bigelow did not fully perform all the stipulations contained in it to be performed by him, until after the first installment had been paid, by which he would have become entitled to a conveyance of a fourth part as soon as Sewall had conveyed to Little, by making the security required by the contract for his proportion of the other installments. But his proportion of those installments, which became payable on December 19, 1841 and 1842, he had wholly neglected to pay until May 6, 1843, when his right to a conveyance was seized upon the execution. And he, as early as January 18, 1842, had refused to proceed further in the execution of the contract, alleging that he was unable to do so, when a conveyance of a fourth part was offered and by him declined.

For the plaintiff it is contended, that the defendants have

waived their right to insist upon a forfeiture for these reasons, by admitting that they were ready and willing to convey, after Bigelow had failed to perform, upon his then proceeding to perform. It does appear, that Little, during the session of the District Court in this county, in the month of April, 1842, made a disclosure, as trustee in the suit in favor of *Halsted & al.* v. *Bigelow*, containing the following language. "The said Littles and Wood, are and have been at all times ready to make such conveyance to said Bigelow upon his giving sufficient security to pay his part of the installments subsequent to the first." This would not bind them to continue to waive their rights to insist upon a forfeiture, after another installment had become payable in December following, and an additional burden had been imposed upon them by his neglect to pay his proportion of it. This, however, is not the only difficulty to be surmounted in coming to a conclusion favorable to the plaintiff. When the last installment became payable, on December 19, 1843, he tendered the sum of $2541,51, in performance of Bigelow's contract, and this, with the sum of $2164, alleged to be due from the defendants to Bigelow on account, is said to have been sufficient to pay for one fourth of the factory. How does the plaintiff become entitled to have a sum of money due from the defendants to Bigelow on an account, arising out of their operations as partners in the manufacture of goods, applied in payment for the real estate purchased by him? He obtained no title to it by the seizure and sale of Bigelow's right to a conveyance of real estate. He does not appear to have acquired any title to that balance due on account, by assignment or in any other manner, or any right to discharge the defendants from the payment of it to Bigelow or his assignee. Nor does Bigelow appear to have consented to such an appropriation of it. Nor have the defendants, unless it can be inferred from a memorandum made by Little and probably handed to the plaintiff about the time of his purchase of Bigelow's right. The balance due to Bigelow appears there to have been included in a computation of the amount that would be due from Bigelow to pay for one fourth of the

factory. The memorandum is without signature, and it contains no engagement to receive that balance in part payment for the real estate. It could not be expected, that they would so receive it without obtaining a discharge of it from Bigelow, or some other person authorized to discharge it.

A court of justice, without other proof, would not be authorized to make such an application of it. It is not perceived, that the plaintiff can have even an equitable claim to have it so applied, unless he would insist, as the defendants do, that all the stipulations contained in the contract had reference to the conveyance of the real estate. And in that case he must meet with the additional difficulty, that they have not all been performed. There has been no sufficient performance, or tender of performance, of the contract, to entitle Bigelow or his assignee, to call for a conveyance of one fourth part of the factory.

The bill is dismissed with costs for the defendants.

Warren Loud *versus* Hiram Pierce.

The Bankrupt Act of the United States of 1841, was constitutional, and equally affected debts contracted before its passage, as well as those of a subsequent date; and as well in case of voluntary, as involuntary bankruptcy.

In an action upon a promissory note, where the bankruptcy of the maker is alleged in his defence, and the certificate of discharge is attempted to be impeached on the ground of a prior fraudulent sale of goods to a third person, which he did not include in his schedule of effects, the purchaser is a competent witness.

An omission by the bankrupt to insert some articles of property in his schedule of effects by accident or mistake, is not evidence of "fraud, or wilful concealment of his property," within the meaning of the Bankrupt Act.

It is only to errors in matters of law that exceptions, under Rev. Stat. c. 96, can be taken, at the trial of an action. Suggestions made by the presiding Judge to the jury as to the inconclusiveness of the evidence on a particular point, form no ground of exception.

This case came before the Court on exceptions on the part of the plaintiff, and on a motion for a new trial because the

verdict was against evidence. The motion was not filed until the third day after the verdict was returned, and there was no report of the evidence, other than what appears in the bill of exceptions.

The exceptions, saving the formal part in conclusion, were as follows: —

This was an action on a note of hand, and the defence was a voluntary bankrupt certificate, which the plaintiff undertook to impeach for fraud and wilful concealment of property and rights of property. The defendant's first petition in bankruptcy was dated May 16, 1844.

The plaintiff proved, that there was a great variety of personal property in the possession of the defendant at the time of his bankruptcy, not contained in the schedule rendered by him. The defendant then offered Oliver Prescott, who testified, that he and one Whitehouse were joint mortgagees of all the defendant's personal property, and that some years ago they had a mortgage of his real estate, and finally took an absolute deed, and that they held all this property to secure their debts and liabilities. The plaintiff objected to this witness as interested; but he was admitted by WHITMAN C. J. who presided at the trial. The witness then testified to the above conveyances, and also that when they took a mortgage of personal property in 1839, there was a verbal agreement, that all the farming tools and stock of every name and description, not included in the writing, should be theirs, that all increase of stock, and all other stock and farming tools subsequently purchased by said defendant should be theirs, but that at the time of the defendant's bankruptcy, they had not taken actual possession of said property. The plaintiff then proved, that the defendant had at the time of his bankruptcy a considerable amount of personal property raised and purchased since 1839, and contended that this property did not pass by the agreement to the said Prescott & Whitehouse, but was the property of the defendant at the time of his bankruptcy. The said Prescott further testified, that the reason why all this property was not included in the written mortgage

in 1839, was, that he and Whitehouse did not suppose that any deputy sheriff would attach such small things, and that there was an understanding between them and the defendant, that they would reconvey to him whenever he would discharge them from their liabilities, or pay to him any surplus which might remain upon a sale of the property over and above what might be sufficient to indemnify them, but they could not sell the property for enough to indemnify them. The plaintiff contended that the transactions, at least as to all the property not included in the writings, was fraudulent, and that there was a secret trust to reconvey, which was a right of property still subsisting in the defendant at the time of his bankruptcy, and which he was bound to surrender up.

The Court instructed the jury, that from the testimony of Prescott, they would consider whether it was not reasonable for them to believe, that in the schedule of property furnished by the defendant, he innocently omitted to insert the above articles by reason of his belief that they were absolutely the property of said Prescott & Whitehouse, and if they should so believe, the position assumed as to those items was not sustained. The plaintiff introduced a witness who testified, that in March or April, 1842, the defendant had from five to ten cords of wood hauled out in the road near the witness' house in Augusta, about ten cords in the witness' field, and ten or fifteen cords more in the woods on the Kelsea place in Augusta, from which the residue of the wood had been hauled, and that the defendant hauled this wood to market in June and July of the same year.

The plaintiff contended, that this was a wilful concealment of property, and that there was no defence to it. The Court instructed the jury, that perhaps this testimony was susceptible of explanation, it appearing that the wood was got from the land of another person, it might be, that it was not to be his property till stumpage was paid, or that it was hauled to market upon shares, so that he could not consider himself the owner of it; that to make him guilty of fraud, it should appear, that it was actually his, so that his assignee could be

entitled to it, and that the defendant so understood it. The plaintiff also contended that the word fraud in the brankrupt law did not imply any intention to cheat, or any moral turpitude, but that any act which would prevent an equal distribution of the bankrupt's property, and would contravene the general principles of the law, was within the meaning of the statute. The Court instructed the jury, that the word fraud included a wilful concealment of property, and the wilful concealment of property was a fraud, so that this meant the same; and that unless they were satisfied that there had been a wilful concealment of property by the defendant, they should bring in their verdict for the defendant. The verdict was for the defendant.

To all which rulings, instructions and decisions the plaintiff excepted.

J. Baker, for the plaintiff, among others, made these points.

1. The voluntary certificate of bankruptcy, in this case, is void as a bar to this action. It must have a retrospective operation to furnish a defence. No such operation is given to the law by its terms, and the construction of it must come under the general and well established rule, that all statutes are prospective, unless it be expressly stated in the law to be otherwise. 2 Maine R. 275, *Ken. Pur.* v. *Laboree*; 2 Gall. 105; 3 Dal. 386; 6 Cranch, 87; 16 Mass. R. 215 & 245; 15 Maine R. 134; 13 Mass. R. 116 and 464; 6 Pick. 440; 12 Pick. 572; 5 Hill, 327. The certificate is no bar, also, because this is a case of voluntary bankruptcy, and the law, if retrospective, is unconstitutional. *Sackett* v. *Andross*, 5 Hill, 327.

This point may be properly taken, although not raised at the trial. A point not raised at the trial, if presented on the report, and not susceptible of further proof, may be raised in the argument. 5 Pick. 240; 1 Metc. 450; 18 Johns. R. 559.

2. Prescott was not a competent witness, being interested. He held all the property by a fraudulent conveyance as against creditors, although not so as against the defendant. The facts stated in the bill of exceptions show, that such is the fact.

3. The construction given by the Judge to the words *fraud* and *wilful concealment*, was an erroneous one. It obliterates the word fraud from the statute, making the meaning the same as if this word had not been there. Every clause and word in a statute is to have some force and effect. 22 Pick. 571; 4 Mass. R. 208; 6 Mass. R. 169. Fraud and wilful concealment are distinct things in the bankrupt law, and have been so regarded in the decisions. 5 Law Rep. 187, 213, 256, 292, 399, 459, 460, 461; 6 Law Rep. 264; 7 Law Rep. 130, 289; 2 Howard, 202; 4 Johns. R. 596; 4 Scott's N. R. 165. By the word fraud, in that act, is intended a legal or constructive fraud, as well as where there is an actual design to commit a fraud. 5 Law Rep. 300, 311; 2 Kent, 532; 4 Johns. R. 596; 1 Story's Eq. 261.

4. The articles not in existence, at the time of the sale by the defendant, did not pass by the sale. Chitty on Con. 331; 2 Kent, 468; 8 Pick. 236; 21 Maine R. 86; 6 Law Rep. 347.

5. The instructions of the presiding Judge in relation to the wood were erroneous. And even had they been correct, they were inapplicable to the facts; and on this ground there should be a new trial. 22 Maine R. 113.

6. There should be a new trial because the verdict was against evidence.

McCobb, for the defendant, said that as this case came before the Court on exceptions to the ruling of the Court in matters of law, under the provisions of our statute, and not as a report of the case by the Judge, the only inquiry is, whether the rulings and instructions in matters of law were right. 21 Maine R. 14. There is another fatal objection to the positions of the gentleman. If there had been any thing in them, they do not touch this case, as his exceptions do not show whether the note was given before or after the bankrupt law went into operation.

Prescott had no interest in the event of the suit, and was a competent witness. The assignee of a bankrupt represents creditors of the bankrupt, and if the sale was fraudulent, has

the same right to avoid it as other creditors. 17 Mass. R. 222; 20 Pick. 330. This verdict cannot be used for or against the witness, and if there was more probability that other creditors would interfere, than that the assignee would, it would be but a remote and contingent interest, which goes merely to the credit. 17 Maine R. 267; 21 Maine R. 490. But there is no evidence in the exceptions, that there was any fraud, but the reverse.

No other fraud was pretended, than a wilful concealment; and the inquiry is, whether, as applied to that question, the rulings and instructions at the trial were or were not correct. To constitute a wilful concealment, there must be an intentional design, or fraudulent suppression and misstatement. An omission by mistake or accident is not a wilful concealment. Story J. in matter of Tibbets, 5 Law Rep. 268; Betts J. in matter of Banks, 5 Law Rep. 371; Prentiss J. in matter of Pierce, 6 Law Rep. 262; Sprague J. in matter of Wilson, 6 Law Rep. 272. As applied to the facts in the case, the Judge, by remarking that fraud and wilful concealment meant the same thing, merely said, that there could be no wilful concealment without fraud — that an unintentional omission would not be wilful concealment.

There are at least three fatal objections to the motion for a new trial. The motion was not filed within the time allowed by the rules of Court. There is no report of the evidence, as required both by the rules of Court and by the statute; as what appears in the exceptions is but partial, merely sufficient to raise the questions of law, without giving a fair view of the case. And even taking the exceptions as a report of the evidence, the verdict was right.

The opinion of the Court was drawn up by

Whitman C. J. — It has been so often held, that the Bankrupt Act, of 1841, is constitutional, and equally affected debts contracted before its passage, as well as those of a subsequent date; and as well in case of voluntary, as of involuntary bankruptcy, that it can scarcely be regarded, at this time,

as otherwise than preposterous to contend for any other construction. Besides, no such question was raised at the trial; and now first occurs in argument.

The first question, then, to be considered is, was the witness Prescott, properly admitted to give testimony. It is clear that he had no direct interest in the event of this suit. The action is against Pierce upon a note of hand given by him to the plaintiff. If judgment were recovered, and execution issued thereon, it cannot be foreseen, that it would be levied on any property to which the witness could or would lay claim. And if it were rendered certain, that such execution would be levied upon property, which would be claimed by him, before he could be excluded, the Court would have to decide, that his claim was fraudulent and void as against creditors; and this too in a suit in which he was not a party, which the Court could never undertake to do; for, if it was not so fraudulent, his title could not be in danger of being affected by its being seized on such execution. The interest, therefore, which the witness had was both remote and contingent; and such as could not have the effect to exclude him from testifying.

The defendant, in his defence, introduced his certificate in bankruptcy. This the plaintiff attempted to impeach, as having been fraudulently obtained; and insisted, that the defendant, at the time he became a bankrupt, had property, which he did not disclose, and insert in his inventory, or schedule of property, rendered in the course of the proceedings in bankruptcy; and that, though the omission was by accident or mistake, it was a fraudulent act, within the meaning of the act, § 4; the provision of which is, that the certificate shall be a full discharge, "unless the same shall be impeached for some frand, or wilful concealment of his property, or rights of property, as aforesaid, contrary to the provisions of this act." The Court ruled that such construction was inadmissible, and we think correctly. The statute shows, that to avoid a certificate, one of two things must be established, either that there was fraud, or a wilful concealment of prop-

erty. This proposition, in behalf of the plaintiff, necessarily excludes a wilful concealment of property; for such concealment never can be by accident or mistake. And it will be equally absurd to denominate, what occurs from accident or mistake, a fraud.

It was next insisted that the evidence shew a wilful concealment of property; and this question was submitted to the jury, under certain instructions from the Court, the correctness of which were supposed to be questionable. It was among other things, remarked, that the word fraud included a wilful concealment of property, and that the wilful concealment of property was a fraud, so that the two terms meant the same thing. The counsel for the plaintiff, in his argument, has seized upon this opinion, thus uttered in reference to the case then before the Court, as if it were intended to confound every species of fraud, with the wilful concealment of property, although his position, as applicable to his case, had not the slightest connexion with any other species of fraud. The evidence afforded no other pretence of fraud than what arose from a tendency to prove concealment of property.

To prove a wilful concealment of property, the plaintiff had introduced a witness, who testified, that, in March or April, 1842, the defendant had from five to ten cords of wood, hauled out into the road, near the witness' house, and about ten cords more in the witness' field, and ten or fifteen cords more in the woods, on the Kelsea place, from which the residue had been hauled; and that the defendant hauled the same wood to market in June or July of the same year. In reference to this evidence the Court remarked to the jury, that unless they were satisfied there was a wilful concealment of property on the part of the defendant, the verdict should be in his favor; that perhaps the proof relative to the wood was susceptible of explanation, "it appearing that the wood was got from the land of another person; it might be that it was not to be his property till stumpage was paid, or that it was hauled to market upon shares, so that he could not consider himself the owner of it; that to make him guilty of fraud it

should appear, that it was actually his, so that his assignee could be entitled to it."

In thus assuming it as a fact, that the defendant did not own the Kelsea place, the Court is supposed to have erred. But in assuming a matter as a fact, no error, in matter of law, is presented; and it is only as to such errors that exceptions, under the statute, c. 96, can be taken. This assumption, however, if not well founded, should have weight on a motion seasonably filed for a new trial for a verdict against evidence, as the jury might have been misled by it. But on such motion the whole case should be exhibited as it passed before the jury. Many facts, in trials before a jury, pass for such *sub silentio.* Both parties knowing them to be such they suffer them to pass without notice. A bill of exceptions seldom contains a full report of the evidence offered. Enough, however, does appear in the bill of exceptions in this case to render it presumable, that it was well understood, that there was no pretence, that the defendant owned the Kelsea place. The defendant was a bankrupt, and the attempt was to prove concealment of property; yet no evidence was offered, it is manifest, to prove that he owned that place, and had concealed such ownership. The exceptions render it evident, that his schedule of property, rendered in the proceeding in bankruptcy, was used at the trial. If the Kelsea place had been owned by him, it would either have been found in that schedule, or its not being there would have been used against him. The Judge, therefore, could not have been out of the way in assuming it as an undeniable fact, that the defendant did not own that place.

The suggestions made to the jury, as to the inconclusiveness of the evidence concerning the wood, form no ground of exception under the statute. It was for the plaintiff to make out a case of fraud. The burthen was upon him to do it. If the wood was the defendant's it was for the plaintiff to prove it. Hauling it from the land of another person did not render it conclusive that he owned it. Such other person might have been produced to prove it, if such had been the fact; and, if

such had been the fact, it can scarcely be doubted that he would have been called.

Exceptions and motion for a new trial overruled.

LUTHER REED *versus* GEORGE REED.

The Rev. Stat. c. 105, § 35, which provides, that "in all cases that are contested, either at a probate court of original, or appellate jurisdiction, the said courts, respectively, may, at their discretion, award costs to either party," authorizes only the allowing of costs to the parties to the litigation.

ASA WILLIAMS and others petitioned to the probate court, that a guardian might be appointed over the said George Reed; and after notice and a hearing of the parties the Judge of probate decreed that the applicants take nothing by their application, and that the same be dismissed.

Luther Reed, a son of George Reed, then presented a petition to the Judge of probate, stating that Williams and others had presented said petition, and the proceedings thereon; and further, that he, relying upon their judgment and advice, and in order to save his father from further imposition and fraud, was induced to summon several witnesses, take certain depositions, and incur much expense, amounting to $26,38; that upon the hearing it was made to appear, that said George Reed had been exposed to certain frauds and impositions, which, although not enough to authorize the issuing of letters of guardianship, would not have been disclosed but for the efforts of the petitioner in the procurement of the testimony; and prayed, that he might be allowed to tax the costs against George Reed, and that execution might issue therefor.

After a hearing of these parties, it was ordered and decreed by the Judge of probate, "that the sum of $14,70, be allowed to said Luther for said costs, and that said George Reed be, and he hereby is, ordered and directed to pay said petitioner the said sum of $14,70, as costs accruing upon the application for the appointment of a guardian unto the said George Reed."

From this decision George Reed appealed, assigning as reasons for his appeal: —

1. The Judge of probate has no jurisdiction to award costs in this case, no estate being the subject of controversy, it being a question merely as to the alleged personal disability of said George Reed.

2. The said George Reed being the prevailing party, it is without precedent, that costs should be awarded against him.

3. The award of costs is objected to on the ground of expediency, the complainant being the son of the appellant, and the complaint not being sustained.

N. Weston, for George Reed.

Vose, for Luther Reed.

The opinion of the Court was by

WHITMAN C. J. — It does not appear from the copies furnished us, that the appellee was a party in the contest between Williams and others, and George Reed; and it appears from the argument of the counsel for the appellee, that he was not.

The statute relied upon, Rev. Stat. c. 105, § 35, provides only for allowing costs to parties to the litigation. The decree of the Judge of probate, therefore, should be reversed.

BENJAMIN A. G. FULLER *versus* JOSEPH B. HODGDON.

It is no valid objection to a deposition, taken under the provisions of Rev. Stat. c. 133, that the *interrogatories* therein to the deponent were written by the party, or by his attorney.

Where a note secured by a mortgage has been indorsed by the payee, and the mortgage assigned; and the indorsee, without indorsing the note, by an instrument in writing on the mortgage, conveys all his "right, title and interest in and to the within mortgage and the premises described therein, and also the mortgage note named therein," to the plaintiff; the assignor is a competent witness for the plaintiff, in an action upon the note.

To enable one to recover damages for a false representation, it is essential that there should be some proof, that he has been thereby injured.

It is the duty of a mortgagor in possession, who has conveyed with covenants of warranty, to pay the taxes and prevent a sale of the estate; and if he acquires a tax title by means of a sale for the payment of such taxes, that enures to the benefit of the mortgagee.

ASSUMPSIT on a promissory note, signed by the defendant,

dated May 14, 1836, for $61, payable to one Fiske or his order in three years from date with interest. The action was commenced March 7, 1843. The plaintiff proved the execution of the note and the indorsement thereof by Fiske, "without recourse," on Dec. 13, 1841.

At the trial, before REDINGTON, District Judge, the defendant offered certain depositions, and the plaintiff objected to the admission thereof, on the ground, that the justice before the depositions were taken had certified, that the answers therein were written by him, and had not certified by whom the interrogatories were written. The words were "gave the foregoing deposition which was reduced to writing by me excepting the interrogatories." The District Judge admitted the depositions.

The note was secured by a mortgage; and on Dec. 13, 1841, in the language of the exceptions "Fiske assigned all his right, title and interest in said note and mortgage to Nathaniel Treat, who on July 10, 1843, assigned the same to the plaintiff, the said Fiske indorsing said note, but no indorsement being made thereon by Treat." The defence set up was minority of the defendant at the time the note was given, that the note was void in its inception by reason of its having been obtained by Fiske by means of fraud, in this, "that Fiske at the time the note was given, represented to the defendant, that the deed he was giving (being the consideration of the note) was just as good as a warranty deed, it being a deed of quitclaim. Treat was offered by the plaintiff as a witness, and the defendant objected to his admission, on account of interest. The District Judge decided, that he was inadmissible on the ground of interest.

The facts on the other points sufficiently appear in the opinion. The verdict was for the defendant, and the jury found specially that the note was procured by fraud. The plaintiff filed exceptions.

B. A. G. Fuller, for the plaintiff, contended that the District Judge erred in excluding the testimony of Treat. He had no disqualifying interest in the event of this suit; nor even

a contingent interest. The witness must have an interest in the immediate event of the suit, or in the record for the purpose of evidence, to disqualify him. 2 Stark. Ev. 745, 782; 1 Str. 445; *Blake* v. *Irish*, 21 Maine R. 450; *Lewis* v. *Hodgdon*, 17 Maine R. 267; *Union Bank* v. *Knapp*, 3 Pick. 96; *Plympton* v. *Moore*, 13 Pick. 191; *Burrage* v. *Smith*, 16 Pick. 56; *Webb* v. *Wilshire*, 19 Maine R. 406; *Pillsbury* v. *Pillsbury*, 17 Maine R. 107. The single fact, that Treat might be more likely to avoid a suit by a verdict for the plaintiff, is not sufficient to render him incompetent as a witness. *Jones* v. *Huggeford*, 3 Metc. 515.

The tax deed should not have been admitted in evidence. The grantor should not be allowed to set up a title afterwards acquired in any case; but especially, the mortgagor in possession cannot set up a tax title, acquired under a sale for the payment of taxes during the time, against the mortgagee or his assignee. *Perkins* v. *Pitts*, 11 Mass. R. 130; 3 Bac. Abr. 635.

The counsel also contended, that the instruction in relation to the alleged infancy of the defendant was erroneous; but as there was no decision on these questions, the argument is omitted.

The ruling as to fraud is believed to be clearly erroneous The defendant has been in possession several years after he became of age, and has not been disturbed in the enjoyment of the premises; and has not attempted to show any adverse title, or incumbrance upon the premises. The title was perfect; and there has been no damage or deception. The quitclaim deed was as good as a deed of warranty.

McCobb, for the defendant, contended, that the special finding of the jury, that the note was procured by fraud, authorized the verdict. If the instructions on this matter were correct, the rest is immaterial. The plaintiff cannot be aggrieved by even an erroneous instruction or decision, which occasioned him no injury; and no new trial should be granted in such case. 21 Maine R. 517; 21 Wend. 360; 17 Maine R. 448; 22 Maine R. 395.

If the position above taken is sound, then it becomes immaterial whether the testimony of Treat was rightfully or wrongfully excluded, as it did not touch the question of fraud. But the witness was rightly excluded on the ground, that he had expressly or impliedly warranted to the plaintiff the title to the property in dispute. The rule is thus laid down. "Whether the liability arise from an express or implied legal obligation to indemnify, or to pay money upon the contingency of the suit, the witness is incompetent." 1 Greenl. Ev. § 393; 1 Stark. Ev. 37; 15 Johns. R. 240. He contended, that a warranty, that the note was recoverable, was implied by law; and cited *Abbott* v. *Mitchell*, 18 Maine R. 354; *Cooledge* v. *Brigham*, 1 Metc. 547; 15 Johns. R. 240; 16 Johns. R. 201; Chitty on Bills, (N. Y. Ed. 1830) 143, and cases cited in note 9.

The tax deed was admitted by the Judge, not for the purpose of affecting the title to the land, but only to explain certain acts of the defendant. It was a question of intention merely.

The instructions and rulings on the subject of ratification of contracts of infants, after they become of age, were strictly correct and legal, and well sustained by authority. Authorities were cited in support of this position.

The opinion of the Court was drawn up by

SHEPLEY J. — The first question presented by the bill of exceptions is, whether the depositions of Mary Pratt, John Hitchborn and Lucy Hodgdon, were properly admitted. The objection is, that the statute, c. 133, § 17, requires, that the certificate of the magistrate should state "by whom the deposition was written;" and his certificates, annexed to those depositions, state, that they were "reduced to writing by me excepting the interrogatories."

The fifteenth section of the statute provides, that the deponent, after being sworn, shall be examined "first by the party producing him, on verbal or written interrogatories; and

then by the adverse party, and by the justice or the parties afterwards, if they see cause."

The word deposition, in common parlance and in some clauses of the statute, is often used to designate the document containing the interrogatories, answers, and certificate of the magistrate; while in other sections, it is more appropriately used to designate the narrative of the witness, made under the sanction of an oath, and reduced to writing. Such an interpretation of it, as used in the seventeenth section, as would deprive the parties of the right to examine the witness upon written interrogatories, framed by themselves, would deprive them of rights secured to them by the fifteenth section. These depositions were properly admitted.

The next question presented is, whether the deposition of Nathaniel Treat was properly excluded. It appears to have been excluded on the ground, that the deponent was interested in the event of the suit. The promissory note in suit had been indorsed to him with others, after it had become payable and without recourse, and the mortgage made to secure the notes, had been assigned to him. By an instrument in writing on the back of the mortgage he had, without indorsing the notes, conveyed all his "right, title, and interest, in and to the within mortgage, and the premises described therein and also the mortgage notes named therein" to the plaintiff. It is not necessary to consider, whether, on a sale of the notes without any contract in writing, Treat would have been liable to the plaintiff upon an implied warranty, if he had failed to recover them on account of a plea of infancy made by the defendant. For any such implied contract in this case is excluded by the written one. The plaintiff, if he should thus fail to recover, could not call upon Treat for damages upon any indorsement or implied warranty. He had made none. The law implied none. The plaintiff's only claim must arise out of the written contract, by which Treat had sold and conveyed the notes and mortgage to him. That is only a conveyance of his right, title and interest in and to them, whatever it might be, without any covenant, stipulation, or aver-

ment, respecting their validity. If Treat and the plaintiff had been fully informed of the facts respecting the sale and conveyance of the land by Fiske to the defendant, and of his infancy, when he made the notes and mortgage, and of his subsequent proceedings, and had agreed, the one to purchase and the other to sell only the title, which Treat might have, the assignment or conveyance of them, which was made to the plaintiff, would have been entirely appropriate. Whether they were thus informed or not, their rights must depend upon their written contract. That does not oblige Treat to make good any loss, which the plaintiff may suffer by failing to recover the amount of the notes. He could have no interest in the event of the suit, and his deposition should have been admitted.

The counsel for the defendant insists, that the plaintiff would not be entitled to a new trial on that account, because the jury found on another branch of the defence, that the note was obtained by a misrepresentation respecting the character of the deed, by which Fiske conveyed the land to the defendant. The case states the testimony in relation to this subject to have been, that Fiske represented to the defendant "that the deed he was giving was just as good as a warranty deed;" that it was a quitclaim deed; that there was no evidence, that the defendant had been disturbed, or that any adverse claim to the premises had been made by any one. It does not appear, that there was any testimony in the case tending to prove, that the title conveyed by Fiske to the defendant was not a perfect title, or that the defendant had suffered, or could suffer the least loss or injury by reason of the assertion, that a quitclaim deed of the land was as good as a deed with covenants of warranty. To enable one to recover damages for a false representation, it is essential, that there should be some proof, that he has been thereby injured. The testimony presented in this case respecting the deed, and the representations of Fiske in relation to it, would not constitute any valid defence to any portion of the note.

The privileges and duties of infants were stated in the case

of *Boody* v. *McKenney*, 23 Maine R. 517. But as the testimony may be different on a new trial of this case, it will be of little use to attempt to apply those rules to the testimony as now presented.

It may be useful to observe, that the Court has decided, in the case of *Gardiner* v. *Gerrish*, 23 Maine R. 46, that it is the duty of a mortgagor in possession, who has conveyed with covenants of warranty, to pay the taxes and prevent a sale of the estate; and that if he acquires a tax title, that enures to the benefit of the mortgagee.

The exceptions are sustained
and a new trial is granted.

GILBERT PULLEN *versus* ASA HUTCHINSON, JR.

A declaration so defective, that it would exhibit no sufficient cause of action, may be cured by an amendment, without introducing any new cause of action. The intended cause of action, when defectively set forth, may be as clearly perceived and distinguished from another cause of action, as it would be, if the declaration had been perfect.

In an action founded on Rev. Stat. c. 148, § 49, against one alleged to have aided the debtor in a fraudulent concealment of his property, if the plaintiff would give in evidence a bill of sale of goods from the debtor to the defendant, it does not fall within any exception to the general rule, that instruments in writing should be proved by the attesting witness, if the testimoney of such witness can be had.

A written instrument, not attested by a subscribing witness, is sufficiently proved to authorize its introduction, by competent proof that the signature of the person whose name is undersigned, is genuine. The party producing it is not required to proceed further, upon a mere suggestion of false date when there are no indications of falsity upon the paper, and prove that it was actually made on the day of its date.

All transfers of property made with an intention to defraud creditors, are void as it respects creditors, whether then existing or becoming such subsequently. But a subsequent creditor cannot maintain an action to recover the penalty given by Rev. Stat. c. 148, § 49, against "any person who shall knowingly aid and assist any debtor or prisoner in any fraudulent concealment or transfer of his property, to secure the same from creditors."

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

This was a special action on the case, founded upon the 49th section of Rev. Stat. c. 148, "Of the relief of poor debtors," charging the defendant with knowingly aiding Charity Vance in the fraudulent transfer of her property to him in order to secure the same from her creditors.

With respect to the amendments, the bill of exceptions does not state what they were; but merely states that one was allowed after issue joined, and referred to the different counts in the writ. The copies of the case do not show what they were. The other points, considered by the Court, are given in the opinion, in the precise language of the exceptions, and need not be repeated.

The jury found specially on several points, and among the rest, that "it was with a view to defraud creditors generally, subsequent creditors as well as others, that the transfers were made."

The defendant filed exceptions to the rulings and instructions of the presiding Judge.

Wells and *Morrill*, for the defendant, contended that the amendment should not have been allowed. There was no allegation in the original declaration, that the plaintiff was a creditor of Charity Vance, at the time of the alleged concealment of the property. The Judge allowed the insertion of this allegation, after issue joined, thus introducing a new cause of action, when before there was none.

The rule for the proof of instruments having an attesting witness is, that the attesting witness is to be called, when he is to be had. And this rule applies, whether the question be between the parties to the instrument, or strangers, or whether the instrument be the foundation of the action or collateral. 1 Stark. Ev. 331 and note; 2 Wend. 575; 1 Greenl. 61, note. The ruling on this point, therefore, was erroneous.

The novel doctrine, that in order to give a note of hand in evidence, it is necessary not only to prove the genuineness of the signatures, but also that it was actually made at the time of its date, is too clearly erroneous to require comment.

The principal question is, whether the ruling of the Judge was right, in saying that the Rev. Stat. c. 148, § 49, embraced subsequent creditors. We contend, that it does not.

The bill of sale of the property bears date Aug. 30, 1842. Mrs. Vance was at that time indebted to the defendant, but to no one else. If any offence was committed, it must have been at the time of the sale, Aug. 30, 1842. The offence could not be in abeyance, awaiting upon some future action to render it complete. The law was violated on that day, or at no time. The plaintiff's debt was not contracted until long afterwards, Oct. 25, 1843. At the time of the sale, there was no offence committed, as Mrs. Vance then had no creditors to be defrauded. If fourteen months are to elapse before the character of an act is to be changed from an innocent to a highly penal one, how many years may pass before a man shall know, whether an act of his be innocent or criminal?

By the terms of the statute it is the *debtor* or *prisoner*, who is to be aided in the fraudulent concealment of his property from his *creditors;* and the creditors are then existing ones, and not such as may become so years afterwards.

The arguments on the points not noticed in the opinion of the Court are omitted.

Vose, for the plaintiff, contended that the amendments were wholly unnecessary and immaterial; and therefore, that whether they were properly or improperly allowed, there was no cause for a new trial. But no new cause of action was introduced, and it was a mere discretionary act of the Judge, which cannot be reviewed here by exceptions. 13 Maine R. 307; 14 Maine R. 395; 18 Maine R. 289; 23 Maine R. 221.

The object in introducing the bills of sale was not to establish a title in either party to the property, but to prove an act done. It was not a contract, or instrument between these parties; and falls within the principle of *Ayers* v. *Hewett*, 19 Maine R. 281, that proof by the subscribing witness is not required, if the instrument is *inter alios.*

The best evidence is always to be introduced; and if Mrs. Vance actually owed a sum of money to the defendant at the

time the note bears date, her testimony, that the fact was so, was better evidence, than the mere production of the note. She was a competent witness, and the defendant was bound to have called her to show, that the note was then given, and for an actual debt.

The statute, c. 148, § 49, applies to subsequent, as well as prior creditors of a debtor, keeping his property out of the reach of his creditors for the purpose of defrauding them; and to the person so aiding him in that object. And the Judge, therefore, rightly instructed the jury, that if the defendant received the conveyance with the purpose of defrauding subsequent creditors, he would be liable.

The language of the statute is general, and applies to creditors generally, whether the debts were contracted before or after the fraudulent conveyance. The jury have found, that the sale was made, and received by the defendant, for the purpose of defrauding subsequent as well as prior creditors. Under this statute the same rule applies as in case of voluntary conveyances, in general, made to defraud creditors. These are void as to subsequent as well as prior creditors. 1 Atk. 94; 2 Atk. 60; Comyn's Dig. Covin, B 2. The case, *Clark* v. *French*, 23 Maine R. 221, was considered as directly in point.

The opinion of the Court was drawn up by

SHEPLEY J. — This is an action on the case, founded upon the statute, c. 148, § 49. The counsel for the defendant contend, that certain amendments of the declaration should not have been permitted. A declaration so defective, that it would exhibit no sufficient cause of action, may be cured by an amendment without introducing any new cause of action. This is often the very purpose of the law authorizing amendments. The intended cause of action, when defectively set forth, may be as clearly perceived and distinguished from another cause of action, as it would be, if the declaration had been perfect.

The cause of action in this case, first alleged, appears to have been the violation of the statute, by aiding and assisting

Charity Vance in the fraudulent transfer or concealment of her property, to secure the same from her creditors. The amendments appear to have set forth that cause of action more perfectly, without introducing any new cause of action; and they might properly be allowed by the District Judge, in the exercise of his judicial discretion.

The next cause of complaint is, that two bills of sale of furniture, one made by Charity Vance to the defendant, and the other by the defendant to her, were allowed to be introduced in evidence without proof of their execution by the attesting witness.

The general rule is, as was stated in *Ayers* v. *Hewett*, 19 Maine R. 281, that instruments in writing should be proved by the attesting witness. It was also stated in that case, that it did "not extend so far as to require every such instrument which may incidentally and collaterally be introduced, to be so proved." In that case the instrument introduced was not signed by either party; nor did either party claim any thing by virtue of it. While its admission under such circumstances was authorized, the opinion declared, if the instrument "be the foundation of a party's claim, or if he be privy to it, or if it purport to be executed by his adversary, there may be good reason for holding him to strict proof of its execution. One of the bills of sale admitted in this case purported to have been signed by the adverse party; and by the other it was alleged, that a fraudulent transfer of property had been made to him. It does not appear how the latter came to the possession of the plaintiff, who introduced it. If the defendant had produced it on notice given, after having taken a beneficial interest under it, that bill of sale might have been received without such proof. *Orr* v. *Morice*, 3 Brod. & Bing. 139. But no sufficient reason is presented to authorize a departure from the general rule.

The exceptions also state, that the defendant offered in evidence a promissory note, purporting to be made in March, 1843, by Charity Vance, and payable to himself, for the sum of $71,72; and a letter addressed to him and signed by her,

bearing date in June, 1842. That an objection was made to their introduction, "till it should be shown, that they were in fact made at their dates, or prior to the coming on of this trial. They were rejected." A written instrument, not attested by a subscribing witness, is sufficiently proved to authorize its introduction by competent proof, that the signature of the person, whose name is undersigned, is genuine. The party producing it is not required to proceed further upon a mere suggestion of a false date, when there are no indications of falsity found upon the paper, and prove, that it was actually made on the day of the date. After proof that the signature is genuine, the law presumes, that the instrument in all its parts is genuine, also, when there are no indications to be found upon it to rebut such a presumption. The letter might not have been legally admissible, if the objection had been properly taken.

It is stated in the exceptions, that the debt due to the plaintiff from Charity Vance accrued October 25, 1843; that she conveyed certain household furniture to him by bill of sale, on August 30, 1842; that he reconveyed the same to her by bill of sale on December 19, 1843; and that "at the time of making the bill of sale, Charity was indebted to defendant on account and on a note, which was read. But there was no proof, that she then owed any other person." And also that "the Court instructed the jury, if the conveyance of it was received by the defendant with the purpose of defrauding subsequent creditors, the objection, that the plaintiff was but a subsequent creditor, could not avail."

All transfers of property made with an intention to defraud creditors, are void, as it respects creditors, whether then existing or becoming such subsequently. It does not, however, follow, that the section of the statute, on which this action is founded, was intended to make every person, who should knowingly aid or assist in making such a transfer, liable for double the amount of the property so transferred. The description of persons, who may be so assisted or aided as to occasion the statute forfeiture, must be ascertained from the

words of the statute. Those words are "any person, who shall knowingly aid or assist any *debtor* or *prisoner*," in such a manner as to violate its provisions, shall incur the forfeiture. A person by assisting another, who had then no creditors, to transfer or conceal his property to enable him to avoid the payment of debts to be contracted, might be morally as guilty, as he would be by assisting him to defraud existing creditors; and both might be liable to the charge of a conspiracy with intent to defraud; and yet the statute forfeiture not be incurred, because the statute has not extended that punishment to all cases, in which one person may aid or assist another in making transfers of his property, in fraud of the rights of creditors. The defendant in this case might perhaps have been guilty of assisting Charity Vance, in the concealment of her property, after she became a debtor to others, by detaining her property and claiming it as his own, although he had received it by a fraudulent transfer before she became such a debtor. But the instructions appear to have been applicable only to a transfer by the bill of sale; and could not be justified, unless the statute was designed more effectually to prevent all fraudulent transfers of property. It was originally introduced in an act for the relief of poor debtors, and to prevent debtors or prisoners from making fraudulent transfers of their property, to secure or conceal it from their creditors; and to punish those, who should aid or assist them in it. To make the provision general and applicable to all fraudulent transfers, the statute must receive the same construction, as it would have, if the words, any other person, were substituted for the words, any debtor or prisoner. Such a construction would not be authorized by the language, or by the connexion, in which it was first introduced, or by that, in which it is now found.

Several other points have been presented, which may not arise on a trial, and it is not necessary to enter upon their consideration.

Exceptions sustained,
and a new trial granted.

Simon Page *& al. versus* Samuel S. Smith.

When exceptions from the District Court, in an action of *scire facias* against the defendant as a trustee, under the provisions of Rev. Stat. c. 119, come before this Court, no question is to be considered, unless it be necessarily and clearly presented by the exceptions.

In *scire facias* against one who had been charged as trustee, the facts disclosed in the original process are properly to be taken into consideration with those subsequently introduced in the disclosure on the *scire facias*, in order to determine whether the trustee was rightly chargeable, as well as in reference to the amount, if any, which the plaintiff is entitled to recover of him.

Although as a general principle, there must be a clear admission of goods, effects, or credits, not disputed or controverted, by the supposed trustee, in order to charge him, yet this principle does not apply to a case coming under Rev. Stat. c. 119, § 69, by which the supposed trustee may be charged, "if he shall have in his possession goods, effects or credits of the principal defendant, which he holds under a conveyance, that is fraudulent and void as to the creditors of the defendant."

In determining whether the supposed trustee holds goods, effects, or credits of the principal defendant under a conveyance thereof fraudulent as to creditors, the determination is to be made by the Court as if sitting in equity; the denial of the trustee of any fraudulent design must be allowed the force it would have in an answer to a bill in equity, charging him with the fraud; and if the facts disclosed show the denial to be untrue, he must be adjudged to be chargeable as trustee.

In a case coming under that section of the statute, the ascertainment of the matters of fact, come within the province of the District Judge; and exceptions do not lie to his decision of such matters of fact.

When the conveyance is alleged to be fraudulent, if the circumstances, as exhibited by the disclosures of the supposed trustee, present a case so unlike any thing that would ordinarily occur in a *bona fide* transaction, that it excites strong suspicion of fraud, and the supposed trustee, if in fact innocent, has the means of making his innocence appear quite within his power, and does not do it, it is but reasonable, that the conclusion should be against him.

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

This was an action of *scire facias* against Samuel S. Smith as trustee of Nathan T. Smith. The original action was assumpsit by the same plaintiffs against Nathan T. Smith and the present defendant as trustee, the damages demanded being less than two hundred dollars. In that action the present de-

fendant made two disclosures, and was adjudged thereon to be trustee, at the August Term of the Middle District Court for the County of Kennebec, 1843, the debt being $51,49, and costs $20,11. Execution issued on August 26, 1843; and on Sept. 23, 1843, a deputy sheriff of that County returned thereon that he had made diligent search for the trustee, but could not find him, and had "made a demand on him for the amount of the within execution by leaving an attested copy thereof at his last and usual place of abode." On Oct. 20, 1843, a deputy sheriff of the County of Penobscot, made a return on the same execution, that he had made a demand on Samuel S. Smith personally, and that he had refused to disclose or discover effects of the principal, or to pay the execution or any part thereof. The papers do not show at what time this action of *scire facias* was commenced, but it appears that the present defendant made a disclosure therein at the August Term, 1844, and also an additional one at the same term. The decision of the District Judge was thus recorded. "Upon the several disclosures taken together it is adjudged, that the plaintiff in *scire facias* recover $77,84, that being the amount due on the original judgment."

"To the above adjudication the respondent excepts."

No other questions of law were presented on the papers, excepting such as might be made to appear upon an inspection of the answers.

The questions raised, it is believed, will be sufficiently understood from the opinion of this Court and the arguments of counsel, without copying the long disclosures of the trustee.

The case was argued in writing.

Morrill, for the defendant.

The disclosures show a purchase of real estate by the trustee, of the original defendant in March, 1842, of $2500. Included in this purchase is the sale and assignment of a certain mortgage, made originally to secure about $200.

It will not be insisted, that the trustee is chargeable on account of being the grantee of the principal defendant. The law is well settled, that the grantee of lands, is not liable to

this process; not even where the lands have been fraudulently conveyed. *Howe* v. *Field*, 5 Mass. R. 590; *Russell* v. *Lewis & tr.* 15 Mass. R. 128; 9 Pick. 562.

But it may be supposed, that the trustee holds the assignment of the mortgage, without payment, and therefore fraudulently, as to creditors. This supposition is founded upon the construction, which may, at some time, have obtained, in relation to disclosures of this kind, namely: that it must appear from the disclosure that the trustee is not chargeable. This is not now understood to be the doctrine; and if it ever existed, has been merged in the principle of the case of *Rich* v. *Reed & tr.* 22 Maine R. 28, where the Court held, in order to charge the trustee, "there must appear to be, from the disclosure, a clear admission of goods, effects and credits, not disputed or controverted," &c.

There is, in this disclosure, "no clear admission of goods, effects, &c. in the hands of the trustee, not disputed, or controverted; on the contrary, the trustee states, that $2500, was the price agreed upon, for the real estate and the mortgage, and that he paid that sum in his labor and notes of the original defendant.

2. This *scire facias* is prematurely commenced.

The defendant had the life of the execution within which to pay the original execution; and *scire facias* cannot be maintained until the ninety days have elapsed, and the officer has made his return on said execution, that it is unsatisfied.

Judgment was recovered in the original suit, at the August Term of District Court, and the execution issued the 26th of same month. This *scire facias* was sued out, Nov. 9, following, when the original execution had yet fifteen days to run.

3. *Scire facias* cannot be maintained here, because the goods and effects supposed to be in the hands and possession of the trustee, were not demanded of him, by virtue of the execution within thirty days next after final judgment, and therefore the attachment was dissolved.

A demand upon the trustee, within 30 days next after final judgment, is required by c. 119, Rev. Stat. § 80. Judgment

was recovered, against the original defendant 25th day of August, 1843. On the 23d day of Sept. 1843, Hains, a deputy sheriff for Kennebec County, makes return that on that day he "left a copy of the execution, at the last and usual place of abode of said trustee," in Mt. Vernon in said County. This act of the officer is within the 30 days, but it does not amount to a demand, as required by the statute.

When the trustee is an inhabitant of the State and within the State, the demand on him, by the officer holding the execution, must be personal. See same chapter, § 74. And this mode of demand, attempted by the officer, is provided for in § 82, "when the officer, holding the execution cannot find the trustee in the State."

The return of the officer does not state that he "cannot find the trustee in the State," nor is there any proof, or suggestion even, that he was out of the State, but on the contrary he is shown to be in the State, a few days after, by the return, upon the same execution of Wilson, a deputy sheriff for Penobscot County, where on the 20th of Oct. 1843, personal notice was made on him.

The trustee being within the State, the demand made by Hains was not effectual within § 74; and the demand made by Wilson, was not effectual, because it was not within the thirty days next after final judgment.

But the act of Hains is defective in another fatal point. Section 82 provides, "when the officer holding the execution cannot find the trustee in the State, a copy of the execution may be left, &c. with notice to the trustee, indorsed thereon, and signed by the officer, signifying that he is required to pay and deliver towards satisfying said execution, the goods, effects and credits for which he is liable."

Hains makes return, that he has made demand on trustee, "for the amount of the within execution," "by leaving an attested copy;" whereas he should have made demand, "for the goods, effects, and credits, for which he is liable, by leaving a copy of the execution," together "with notice to the trustee, indorsed thereon and signed by the officer," &c. It

does not appear that any notice to the trustee, was indorsed on the execution and signed by the officer, nor any request to deliver goods, effects, &c.; but the officer returns, simply, that he left a copy of the execution.

It cannot be that so important an omission, designed, as may well be supposed, to apprise the trustee of what is required of him, should be immaterial, and that such an act of the officer, would be considered as constituting a demand, in a case when the trustee cannot be found in the state.

Howe, for the plaintiffs.

The disclosures show that the defendant, when twenty-five years of age, and without property of his own, purchased of N. T. Smith, his brother, whose trustee he is alleged to be, certain real estate, for which he was to pay $2500; and that in payment he set off a claim against said N. T. Smith for labor $450, and the balance was paid by cancelling notes purchased of his brother, Abram Smith, for $1516, the date of which he does not recollect, nor whether they were indorsed by either of the two previous holders. The deed was sent to the Register's office by the hand of his brother Abram, where it was recorded on the day of the date of the deed at 7 o'clock, A. M.

In the first disclosure the defendant refuses to state how he paid Abram for his notes, and for that cause, probably, was charged as the trustee of Nathan T. Smith.

Upon disclosure on *scire facias*, he answers that he gave Abram his own note for $1200, for the notes against Nathan. So that if the sale be *bona fide* Abram sold notes amounting to some $2000, against a man able and willing to pay in real estate, for a note of $1200, against a man not worth a dollar.

The whole transaction, we say, was fraudulent. But it is said, it not being a sale of "goods, effects or credits," he cannot be charged under § 69 of c. 119, Rev. St.

His third disclosure shows a transfer, at the same time of the above, of certain notes and a mortgage, amounting to some $200, for no other and further consideration than is stated

above. This property comes within the intent and meaning of the statute, so clearly comes under its provisions and is so widely different from the case cited by defendant of *Rich* v. *Reed*, 22 Maine R. 28, as to render argument unnecessary.

2d. This writ was not prematurely sued out.

The return of Wilson, deputy sheriff, shows precisely the state of things, set out in § 74, c. 119, Rev. Stat. as the ground of *scrie facias*.

3d. The attachment was not dissolved.

Hains, a deputy sheriff for Kennebec County, the residence of the defendant, returns that he could not find the defendant "within his precinct," beyond "his precinct" he was not empowered to look, nor could he return more.

Nor is his return in anywise defective. The statute prescribes no form for a return, nor any form of indorsement on the copy, but says in substance, that a "demand must be made within 30 days by leaving an attested copy of execution with something indorsed thereon, signifying," &c. The officer returns that he made such demand, and by leaving such copy; but what he indorsed thereon thus significant, he does not return, nor is he required to. The defendant might have shown that indorsement under § 79 of same chapter, and taken the opinion of the Court upon its significancy, the only matter, we apprehend, for the Court to pass upon even in that case.

But this demand was not necessary within 30 days, as see proviso to § 80, by which this attachment was preserved until 30 days after demand made.

But if the attachment was dissolved, it was not for the defendant's benefit; nor can he thus answer to the *scire facias*, save to protect himself from having paid over under a second attachment, or to the original defendant, neither of which is suggested; but on *scire facias*, this defendant expressly answers, that he has paid nothing farther than he paid under the original contract.

The defendant is too late with this objection, never having raised it in the Court below; as appears by the exceptions;

the judgment of that Court being grounded "upon the several disclosures taken together," no other issue being presented.

No attachment of property holds more than 30 days unless in excepted cases, but one whose property is seized upon execution cannot save it by alleging a dissolution of the attachment made upon mesne process. The demand of Wilson and the *scire facias* are tantamount to a subsequent attachment, and the defendant's rights are protected under § 79 of the same chapter, which allows him to "prove any matter proper for his defence," which matter we say is: —

1st. That he had no goods of the original defendant liable to attachment.

2d. That they had been previously attached.

And by the same section the parties are entitled to "such judgment as law and justice require, upon the whole matter appearing," &c. which judgment we ask.

The opinion of the Court was drawn up by

WHITMAN C. J. — The *scire facias* is against the defendant as the trustee of Nathan T. Smith; and comes before us upon exceptions to the adjudication of the District Court, that the defendant, upon his disclosure made in this suit, taken in connection with his disclosure in the original suit, was chargeable to the extent of the amount of the debt due to the plaintiffs from said Nathan. When a cause is thus before us, no question is to be considered, except it be necessarily and clearly presented by the exceptions. One point, upon which the counsel for the defendant has, with much apparent confidence, addressed to us an argument, we think is not open to our consideration. It is, that the property, for which the defendant was adjudged chargeable in the original suit, was not demanded of him within thirty days next after the rendition of judgment therein. This might have been pleaded in bar of the claim upon *scire facias*, or have been introduced by way of disclosure; without which the matter could not have been regularly before the Court. The attention of the Court below could not otherwise be called to the consideration of it. And

no exceptions, clearly, would lie in such case, if it escaped the animadversion of the Court. No allusion appears to have been made to any such question, till introduced in argument in this Court. The Judge below, therefore, did not err in reference to it.

On the disclosure in the original action the defendant was adjudged to be chargeable, and in that adjudication he acquiesced; and cannot, therefore, now be at liberty to complain of it. The facts then disclosed, however, would properly be taken into consideration, with those subsequently introduced in the disclosure in this suit, in order to determine whether the defendant was properly chargeable, as well as in reference to the amount, if any, which the plaintiff was entitled to recover of him.

Upon the original disclosure it would seem, that the defendant here was held to be chargeable upon the ground, that he had in his hands goods, effects or credits belonging to Nathan T. Smith. Yet nothing but real estate then appeared to have been in his hands, belonging to Nathan. Why such should have been the adjudication does not appear. The conveyance was probably deemed to have been designed to effectuate a fraud upon the creditors of the latter. There would seem to have been no other ground upon which, under that disclosure, the defendant could have been held chargeable. That such was the design of the conveyance might well be apprehended from the disclosure. We would not, however, be understood, considering the nature of the estate conveyed, as it then appeared to be, to intimate that we should have held the defendant chargeable. But the case, as finally presented by the additional disclosure in this process, taken in connection with the former, exhibits a much stronger ground for charging the defendant.

It is urged that no one can be charged as trustee in a writ of foreign attachment, unless there appears to be, as held by Mr. Justice Story, in *Picquet* v. *Swan*, 4 Mason, 460, "a clear admission of goods, effects or credits, not disputed or controverted by the supposed trustees, before they can be truly said to have them in deposit or trust;" and that nothing of

the kind appears in this case. As a general principle, the doctrine, as contended for, is correct, and was applicable in the case cited by the counsel for the defendant, of *Rich* v. *Reed & al. & tr.* The supposed trustee in that case was a deputy sheriff, and as such had attached certain goods. The attempt was to make him chargeable as the trustee of a supposed owner, when he had attached them as the property of another person. He did not and could not have been expected to state them to be otherwise than the supposed property of the individual, as whose he had attached them. To such a case the doctrine of Mr. Justice Story well applied.

The case at bar is peculiar. It is supposed to come within the provision of the Rev. Stat. c. 119, § 69. It is there enacted, that "if any person, summoned as trustee, shall have in his possession any goods, effects or credits of the principal defendant, which he holds under a conveyance that is fraudulent and void, as to the creditors of the defendant, he may be adjudged a trustee on account of such goods, effects or credits." This is a new statutory provision. It clearly contemplates, that the Courts shall decide upon examination of a disclosure, made by a person attempted to be charged in a process of foreign attachment, for any goods, effects or credits, conveyed to him by the principal defendant, whether they were or were not so conveyed in contravention of the provisions of the statute of the 13th of Elizabeth, c. 5. If they were, the conveyance, so far as creditors are concerned, is to be held null and void. This determination must be made by Courts, doubtless, as if sitting in equity. The denial of the trustee of any fraudulent design must be allowed the force it would have in an answer to a bill in equity, charging him with the fraud. In either case, if the facts disclosed show the denial to be untrue, he must be rendered chargeable. In such case the doctrine, as laid down by Mr. Justice Story, would be inapplicable.

This case presents somewhat of an anomaly. The Judge in the Court below has not indicated the particular grounds, upon which he considered the defendant chargeable. It is manifest

that he must have been satisfied, that the matters of fact were otherwise than the defendant, by his disclosure, would have them understood to be; and, indeed, it would seem that he must have ascertained, that they were such as would bring the case within the purview of the section of the statute before cited. If so, the ascertainment of the matters of fact, being within his province, and not open to exceptions, the law, as applicable thereto, could not be otherwise than correctly decided; if there were goods, effects or credits embraced in the conveyance from Nathan to the defendant; and such by the last disclosure it appears there were, to an amount greater than was sufficient to pay the plaintiff's demand. It is impossible, therefore, for us to perceive that the Court below erred in matter of law, without which exceptions could not be sustained.

But, if it were competent for us to go into a consideration of the matters of fact, it would be very difficult for us to come to a conclusion, that they were otherwise than we have supposed they were found to be in that Court. Nathan and the defendant were brothers, between whom a confidence may be supposed to have existed. The defendant was only between twenty-four and twenty-five years of age; and manifestly without property, other than he had been enabled to accumulate, after arriving to the age of twenty-one years, from his earnings as a laborer hired by the year on a farm, and in brick making, which he pretends had amounted to $425, clear of expenses. His brother Nathan, it is evident, was much embarrassed. Thus situated, he says, in his first disclosures, he purchased real estate of Nathan, and paid him twenty-five hundred dollars for it, in his claim against him for services, and in four notes he held against him; three of them for five hundred dollars each, which he had purchased of his brother Abram, in December or January next previous, bearing date, he thinks, about 1830. If so dated at the time he purchased them, and when he delivered them up to Nathan, if on interest, they would have amounted to nearly twenty-five hundred dollars. These notes, he says, he purchased of his brother Abram, for

$1250, for which he gave him his note. He says further, that, though these notes, of so large an amount, and of so long standing, had been in the hands of his brothers Abram and Joseph, yet, that he never heard of them till he purchased them as before stated. He says further, that he never consulted Nathan about the purchase of the estate before the day when the conveyance was made. And it appears in his final disclosure, that the consideration of twenty-five hundred dollars, paid by him, instead of its being all for real estate, was in part for two notes, amounting to a little short of two hundred dollars, secured by mortgage, which Nathan transferred to him. These circumstances present a case so unlike any thing that would ordinarily occur in a *bona fide* transaction, that, to say the least of it, should excite strong suspicions of fraud. And when such is the case, if the party implicated be in fact innocent, and has the means of making his innocence appear quite within his power, and does not do it, it is but reasonable, that the conclusion should be against him. Now, had not the defendant the means of proving the transaction to have been free from any taint of fraud, if such were its character?

The statute before cited, § 79, provides, that on the re-examination of any trustee on *scire facias*, "he may prove any matter proper for his defence." The defendant could have examined his three brothers, who were participators in the matters connected with his defence, who, it must be believed, could have given evidence as to every fact having reference to the alleged purchase. Not having done so, if it had been within our province to ascertain the facts, we do not perceive any good reason why we should not have come to a conclusion similar to that to which, we must suppose, the Judge in the Court below had arrived.

Exceptions overruled — Judgment of the Court below affirmed with additional interest and costs.

Isaac Cowan *versus* David Wheeler.

Where a bill in equity is founded upon a supposed trust in the defendant which he has not executed, the Court has no jurisdiction as a court of equity, unless it appears from the bill, that a trust, such as is cognizable, under our statutes, by this Court, in fact existed between the parties.

Trusts, properly so called, do not result from a mere breach of contract, for which the remedy is to be sought by a suit at common law for damages; nor do they embrace cases of conditional contracts of sale, where if the person on whom the performance of the condition rests, fails to perform, without fault on the other side hindering him therein, he is without remedy, although he may have proceeded therein nearly to its completion, unless it be of some matter not of the essence of the contract. Equity cannot aid him to compel the other party to perfect the sale upon terms other than those agreed on. He cannot in any sense of the word be held to be a trustee, so long as he is not in fault.

If the person alleged to be a trustee has funds of the party, on whom the performance of the condition of the contract rests, in his hands for the purpose of performing the condition, it would be a virtual performance of it; and might be the foundation of a bill in equity to compel a specific performance of the contract; but such facts would not authorize the Court to take cognizance of the matter as a trust. A refusal to perform would be but a breach of the contract.

If a letter of the defendant contains an admission that he holds a certain farm as security, with an intimation, merely, that if he can be paid what is due to him from the plaintiff, and be cleared from the liabilities he was under for him, within any reasonable time, he should be willing to convey the property as the plaintiff desired; this does not, in legal contemplation, amount to an admission of holding the estate in trust.

This Court, sitting as a court of equity, cannot compel a party to consent to a new trial of an action decided in the same Court at law.

This was a bill in equity, and came before the Court upon a demurrer thereto.

The abstract of the bill, *Isaac Cowan* v. *David Wheeler*, was as follows.

"Charges, that on the fifth day of December, 1831, plaintiff contracted to purchase a farm in Sidney, called the Barrows farm, to pay $200 down, and to secure the further sum of $814, by notes of hand; that he applied to said Wheeler, who was the brother of Ellis, the wife of said Cowan, to unite with him in giving said notes.

"That the plaintiff paid from his own funds the $200, but desiring to make Wheeler secure, he did, on the fifth day of December, cause an absolute deed to be made of the said farm to the said Wheeler and his heirs, and the said Wheeler, thereupon, and the plaintiff, signed the three notes, to be given therefor for $814, and on the same day Wheeler executed an instrument as follows: —

"Whereas I this day received of John Barrows, Jr. a deed of the farm in Sidney now occupied by Isaac Cowan, passing to Elisha Barrows, Jr. three notes of hand signed by myself and the said Isaac Cowan, for the sum of eight hundred and fourteen dollars.

"The condition of this obligation is, that, provided the above named Isaac Cowan, or his representatives, shall well and truly pay, or cause to be paid, said notes with all interest and costs, I agree and bind myself to convey to Ellis Cowan, by my deed, in manner and form, as conveyed to me by said Barrows, the said deeded farm, with all privileges and appurtenances then belonging to it. "David Wheeler.

"Augusta, Dec. 5th, 1831."

"The plaintiff avers, that he paid all said notes, except the last, which with interest and cost, being $356, was paid by Wheeler in November, 1833. And the plaintiff further avers, that although this sum was paid by Wheeler, he did at the time, and has ever since, in the judgment and belief of the plaintiff, held funds in his hands, belonging to the plaintiff to an equal or greater amount. That Wheeler having assumed other liabilities for the plaintiff, he did not demand the execution of the trust. That in May, 1834, Wheeler being involved in two lawsuits, arising from his transactions with the plaintiff, who was then in the occupation of the Barrows farm, as a recognition of the said Wheeler's legal title thereto, an instrument was executed under the hands and seals of said Wheeler and said plaintiff, whereby Wheeler leased said farm to said plaintiff for one year, and the plaintiff covenanted to pay therefor $100, and all taxes. That in May, 1835, by an indorsement on said instrument it was extended another year.

That said suits having terminated in favor of Wheeler, no further renewal was exacted, and although the plaintiff occupied said farm up to and including 1840, the said Wheeler never claimed rent, until after the plaintiff had commenced a suit at law against him. That although said Wheeler, was well aware that he held said farm in trust, except so far as he might have a lien thereon for security, on the fourth of April, 1840, by writing signed by him and the plaintiff, did agree to submit all claims, payments and liabilities, on account of real estate, claims in equity and personal accounts, to Timothy Boutelle and John Potter; and by another writing by them signed, they agreed to submit to two disinterested persons, to be agreed on, all accounts, claims and demands, in equity, or otherwise, and to meet at John Potter's office to choose the referees and proceed to business, March 31, 1841.

"And the plaintiff avers, that to secure to himself and family his just rights in said farm he was, and always has been anxious, that the transactions between him and Wheeler should be fairly settled, and that he continued to press the said Wheeler to cooperate in such settlement, and on the day of its date, the plaintiff received from said Wheeler the following letter: —

"Waterville, Oct. 3, 1841.

"Mr. Cowan, Dear Sir, In consequence of having company, I was not able to be at your house as contemplated when I saw you, according to your memorandum, and if I understand you rightly, there are certain points, which you wish to be embodied in the rule, (if we have one) the responsibility of which I do not think I ought to assume, being inseparably connected in the same with others, and which I consider unequivocally settled years ago. With regard to the other points, I think they may be settled between ourselves. When I can be cleared of your liabilities, on which I am responsible, and paid what is due me, I should have no objection of deeding the Barrows farm to you or Newton, or any body else you may name, if that adjustment can be made in any reasonable time.

"Yours, very respectfully, David Wheeler."

"And the plaintiff avers, that though he had failed to comply literally with the terms, on which said farm was to be conveyed to his wife, Ellis, yet the foregoing letter contains a new declaration of trust in his favor, grounded on equitable considerations, recognizing what justice, equity and good conscience required at his hands. And the plaintiff avers, that according to his best judgment and belief, it would turn out, upon a just and equitable settlement between them, that there was at that time, had been long before, and ever since has been, a balance in the hands of Wheeler, arising from the funds of the plaintiff more than sufficient to clear all liabilities by him assumed, and reimburse all payments by him made for the plaintiff, including what he has paid on account of the Barrows farm. That ever since the date of that letter, and long before, the plaintiff has been ready and desirous, and has repeatedly offered to make a fair settlement with the said Wheeler, but without effect.

"Wherefore he prays, that the Court may order and decree, that such settlement should be made, and if it should thereupon appear, that said Wheeler is entitled to any further payment on account of said Barrows farm, or otherwise, the plaintiff is ready and hereby offers to pay the same. And he further prays, that the Court would decree that, upon such payment, or without it, if he has already been paid, the said Wheeler should convey said Barrows farm to the plaintiff, as in equity and good conscience he is bound to do.

"And the plaintiff further avers, that with a view to hasten such settlement, he did on the fifth of October, 1841, commence a suit against said Wheeler, upon the balance of an account annexed, which is now pending in this Court; that Wheeler filed an account in offset, claiming among other things seven hundred dollars, for rent of the Barrows farm seven years, thus taking advantage of his legal title, and of his lease aforesaid, against equity and good conscience, to harrass and oppress the plaintiff. And the plaintiff avers, that the rent, use and occupation of said farm is necessarily connected with the trust aforesaid, and cannot be dissevered therefrom without great

injustice. And because in the trial at law, the jury were not competent to take jurisdiction of the trust aforesaid, they allowed his claim for said rent, whereby a verdict was returned for the defendant, instead of the plaintiff.

"And to the end that justice may be done, the plaintiff prays, that the Court would enjoin upon said Wheeler to consent to a new trial in said cause, and to withdraw the said item from his account in offset, that the trust aforesaid, with its proper incidents may by duly inquired into, and disposed of under this bill in equity.

"And the plaintiff prays, that said Wheeler may be required to answer under oath, and for such a decree, as to law, justice and equity may appertain, and for his costs.

"And he avers, that he brings this bill because he has not a plain, adequate and complete remedy at law."

Abstract of the demurrer.

"To this bill, the defendant demurs, and for cause of demurrer shows, that the writing, purporting to have been signed by this defendant, under date of the third of October, 1841, as set forth in the plaintiff's bill, is not in law a declaration of trust; and so the plaintiff has not by his bill made out any case, to entitle him to a decree, with the usual formal averments and allegations."

To this there is a formal joinder in demurrer. —

The case was argued in writing.

Opening argument for the defendant by

Wells.— This is a bill in equity, to which a demurrer has been filed, and in which the plaintiff prays a conveyance of the Barrows farm to *himself;* and that a new trial may be granted in a suit at law of said Cowan against the respondent, in whose favor judgment has been rendered.

1. The agreement to convey to "Ellis Cowan," was made on Dec. 31, upon condition of payment of the notes, with all interest and costs. The notes have never been paid by Cowan, but in 1833, were paid, as the bill admits, in part by Wheeler. Here then is an insuperable bar to the bill. The condition has not been performed.

But said Cowan alleges, "that according to his best knowledge and belief," Wheeler at that time had funds in his hands to an amount equal to what he paid. Men of lively imaginations are generally too sanguine in their belief. This belief is too general and indefinite. There must be full and entire evidence of the performance of the condition. A mere vague belief of it is not satisfactory. The plaintiff should state, in what manner, and what kind of funds, Wheeler held, whether they consisted in money, choses in action, real or personal property; to enable the Court to judge of the performance of the condition. The bill further alleges, that Wheeler, having assumed "other liabilities," Cowan did not demand the execution of the trust. These "other liabilities" must have constituted a good reason for the suspension of his demand. They remain in full force at this time. The action referred to in the bill, embraced every thing, which the plaintiff had against Wheeler, and among other items, Cowan charged Wheeler with a note for $200, which Wheeler gave him, for money paid by Cowan to Barrows for the Barrows farm, as will be seen by the report of the auditor in said action. The charging Wheeler with this $200, looks very much, as if Cowan had no claim upon the farm, and was only desirous to recover back what he had paid. The fact of giving the note for this money indicates the farm to be Wheeler's property. But the balance recovered by Wheeler shows conclusively, that Cowan was his debtor to a large amount. Notwithstanding the jury, as can be proved, allowed to Wheeler for the rent claimed, nothing more than the interest, during the lease, on the money paid by him towards the farm, still there was a balance due Wheeler. Wheeler, therefore, by Cowan's own showing, has paid $556 principal, together with the interest on the whole, for some twelve years, amounting to a sum probably equal to the value of the farm. If it should become necessary, all the payments can be shown. By referring to the action at law, Cowan makes it a part of his bill, and the Auditor's report is a portion of the proceedings. But independently of the $200, the bill admits a note of $356, paid in Dec. 1833,

which, at annual interest, would be more than double that sum, and the action at law shows that no part of this sum has been paid. It is not pretended that it has been paid. The condition therefore has not been performed, and the entire ground for the prayer of the bill fails.

2. And Cowan admits that "he had literally failed to comply with the conditions." How long time shall he have to revive his claim? He must do what he ought to do in a reasonable time. The money paid in Dec. 1833, was due, and Cowan, by leaving it to be paid by Wheeler, lost all claim, which he or his wife had upon the farm. Cowan was to pay to perform the condition, and that must be when the notes were due; by lying by, and compelling Wheeler to pay, the right was lost. But if this were otherwise, the length of time in which the claim has rested, since Wheeler paid the money, must constitute a sufficient answer. Although this transaction related to real estate, it was a mere promise to do an act, and the right of action is barred in six years from the breach; which must be considered as having taken place, when the money was paid by Wheeler. Where courts of law and equity have concurrent jurisdiction, and the action is barred at law, it is also in equity. *Kane* v. *Bloodgood*, 7 Johns. Ch. R. 90, 118. And this is open to objection on demurrer. Story's Equity Pl. § 503, and note 4. Here the party entitled to a bill, has also the right to bring an action of assumpsit. Also, if there are laches, and demands are stale, where there is no limitation, courts of equity refuse to interfere. Story's Com. on Equity, vol. 2, p. 735 and 736.

3. The lease of 1834 and renewal in 1835, afford full evidence of all abandonment of any expectation on the part of Cowan of ever performing the condition. These acts are solemn admissions, under his hand and seal, that the title was in Wheeler. At all events they show, that the condition had not then been performed, and nothing since has taken place showing a performance.

4. The letter of Oct. 3, 1841, can have no effect upon this case. The agreement, previous to the letter, to refer is revoc-

able, leaving the party injured to his action. It is a transaction between Wheeler and Cowan, in which Ellis has no part. Ellis is not a party to any thing contained in the letter, which refers to the previous arrangements in relation to a settlement. Cowan cannot tack this letter to him, on to an agreement to convey to his wife, and thereby claim a trust to himself. If any trust belonged to her by the agreement of Dec. 1831, it still remains her property, and he cannot take it to himself, and consequently cannot maintain this bill. Moreover there is no consideration for any new trust. Besides, the adjustment, to which Wheeler alludes in the letter, is to be made by the parties themselves. A person might be very willing to convey upon an adjustment, which he would make, when he would not consent to do it, upon an adjustment to be made by others acting as referees. Wheeler has never been cleared of his liabilities and paid what is due him; and there is no allegation that such is the fact, except the mere "judgment and belief" of Cowan. Wheeler does not say he would convey to any one, but barely says, he "should have no objection." The amount of it is, if Cowan would do what Wheeler thought he ought to do, Wheeler would have no objection of deeding to Isaac or Newton. Cowan has never done any thing, except to harrass Wheeler with lawsuits.

This letter makes no allusion to the agreement of Dec. 1831, neither confirms it, nor revives it. The tenor of it appears to indicate, that neither party placed any reliance upon it.

5. The request, that the Court would enjoin upon Wheeler to consent to a new trial, in the suit at law, is what the Court has no power to grant. It is *res judicata*, and cannot again be opened to contestation for any causes alleged in this bill. *Emery* v. *Goodwin*, 13 Maine R. 14; *York Man. Co.* v. *Cutts*, 18 Maine R. 210.

Argument for the plaintiff by

N. Weston — The defendant by his demurrer, avers that we have no case, upon our own showing. Upon the demurrer all our averments, which are well pleaded, and whatever is fairly deducible from them, are taken to be true, and no coun-

ter averments or proof whatever are admissible. Of this poor compensation for inevitable delay, the opening counsel has sought to deprive us, by taking the extraordinary course of denying some of our averments, and of endeavoring to avoid others, by averments of his own. The Court are to decide the question now raised upon the bill and demurrer, and no other matter can be foisted into the case. We have averred, that we paid all the notes, given for the Barrows farm, except the last. This the opening counsel denies in argument, although admitted by the demurrer. It is sufficient at present to say, that whatever controversy may be raised upon that point we are prepared to meet, whenever the case comes to proof. We have averred, that when the defendant paid the last note given to Barrows, he had in his hands our funds, to an equal or greater amount. I suppose the counsel would be understood to object to this averment as not well pleaded, because the plaintiff has declared it to be true, *in his judgment and belief.* This would have been implied, if it had not been stated. The plaintiff having been privy to the whole subject matter, did not speak at random. He had materials upon which to form his judgment, and when he distinctly charges a matter against the defendant, upon his judgment and belief, if that is a material allegation, he has a right to an answer, and if not regularly denied, it is admitted. In a demurrer to evidence, all that a jury *might* find from the proof is taken to be true. So is what the plaintiff avers, and none the less so because the ground of the averment is alleged to be his judgment and belief.

With a view to lay a foundation to ask for an injunction upon the defendant, we have made certain averments, in respect, to a suit at common law, now pending between the parties, upon which judgment is not yet rendered. All these averments that are well pleaded, are admitted by the demurrer. The counsel does not object to their form, but he denies some of them, and goes on to state certain calculations, at variance with our averments, which he says were made by the jury. If he would insist, that what we have set forth upon this mat-

ter is false, let him deny it regularly, and we are ready to join the issue and to meet it. But we do trust, that upon demurrer, we are not bound to prove our averments, otherwise that course of proceeding, besides being an unnecessary delay of justice, which is unavoidable, if the defendant will resort to it, has the effect to controvert at once both the law and the fact of our case.

We take it for granted then, that the question is, whether our bill on its face presents a case, calling for equitable relief.

The Court are possessed of our written motion to amend, so that Ellis Cowan, the wife of Isaac, may be received as a party, by being made a plaintiff with her husband. If the Court deem this necessary, as the defendant has delayed us, as we think unnecessarily by his demurrer, as the omission of the wife as a party is not assigned as a cause of demurrer, and as the amendment will not delay the decision of the case, we hope and trust the Court will grant it without costs.

Taking our bill to be true, as admitted by the demurrer, does it present a case entitling the plaintiff to relief in equity? A court of equity looks through form to the real nature of the transaction, upon which a controversy arises. The nature of the subject matter, upon which this bill is based, is sufficiently apparent. The plaintiff had contracted to purchase the Barrows farm, in December, 1831. He was to pay part of the purchase money down, and to give security for the residue. He made the cash payment, and to secure the other payments, he desired to obtain the name of the defendant, his brother-in-law. To secure *him* for signing the notes, the land was conveyed to the defendant, by the procurement of the plaintiff. Upon these facts, which are not controverted but admitted, the defendant held this farm, to secure him for what he had to pay on these notes.

The bill avers, that all the notes, except the last, were actually paid by the plaintiff. It further avers, that though the defendant paid the last, it was from the plaintiff's funds in his hands. No question is made as to the competency of the proof, whether in writing or not. The facts are admitted by

the demurrer. *Second Uni. Society* v. *Woodbury*, 14 Maine R. 281; *Batsford* v. *Keble*, 12 Vesey, 74.

Upon these facts, the defendant held the Barrows farm in trust for the plaintiff. And this independently of the instrument, executed by the defendant, December 5, 1831, promising to convey, upon the condition stated, to the wife of the plaintiff.

That was a mode of executing the trust, appointed by the plaintiff, who furnished the funds, and for whose benefit the trust must arise, upon the defendant's being secured, he holding for security only.

But if the trust was for the benefit of the appointee, and its terms are to be collected from that instrument, coupled with the preceding averments, as the defendant held for security, it is contended, that the time and mode of payment is not of the essence of the contract. The essence was, security and indemnity to the defendant for his undertaking to Barrows. Otherwise on the failure of the plaintiff to pay ever so small a part of either of the notes to Barrows, so that the defendant had to pay it, the plaintiff would forfeit the whole farm.

To show that time is sometimes not regarded in equity as of the essence of a contract, we cite *Radcliffe* v. *Warrington*, 12 Vesey, 325; *Hearne* v. *Tenant*, 13 Vesey, 287.

The bill avers, that the plaintiff made the cash payment and two thirds of the amount, for which credit was given, and that the defendant paid the other third. Holding as he did for security, will equity seize upon this, and subject the plaintiff as a penalty to the forfeiture of the whole farm? If so, it is a misnomer to call it equity.

Equity undoubtedly requires, that upon payment or tender of what the defendant paid, he should convey the land to the plaintiff, or to his wife, his appointee. But if the defendant paid at the time from the plaintiff's funds, this was equivalent to a payment by the plaintiff's hand, and was in fact a literal performance of the condition, or the same thing. If the defendant paid from the plaintiff's funds, he paid as his agent. It was the plaintiff's payment. In this view of the facts, as

the purchase money came from the plaintiff's funds, and as the trust for the wife was of his appointment, if the plaintiff failed to perform in that mode, cannot the plaintiff base upon this failure, in connexion with the other facts, a claim to have the land conveyed to him, the defendant being secured and indemnified, never having in fact paid any thing from his own funds.

But if the trust appointed in favor of the wife is, notwithstanding the plaintiff furnished the funds, irrevocable, and the defendant liable under the instrument executed by him in December, 1831, if the court in that case are of opinion, that the wife should have been made a party, we trust that she may be received as such, under our motion to amend.

We apprehended, however, that upon the facts before referred to, the bill would lie for the plaintiff alone, and we did not join the wife, as it might turn out upon the proof, that the trust established might be one, which would not enure to her benefit.

Assuming that the instrument of the fifth of December had lost its efficacy, and could not be enforced as a declaration of trust, because the condition had not been complied with, it would still be true upon the whole matter, that the defendant held the Barrows farm only as security. The lease set forth in the bill, was merely ancillary to the legal title, and does not change the nature of the trust, nor invalidate the fact, that the defendant held the farm, merely to secure him from loss, for liabilities he may have assumed for the plaintiff. And if written evidence of the trust thence arising was necessary, it is not wanting in this case.

It is not necessary, that a trust should be created in writing. It is sufficient, if proved under the hand of the party to be charged. *Foster* v. *Hale*, 3 Ves. 696; *Movan* v. *Hays*, 1 Johns. Ch. R. 342; *Steere* v. *Steere*, 5 Johns. Ch. R. 1. The precedent matter, showing that the defendant held the Barrows farm only as security, being confessed by the demurrer, no question is raised as to the competency of the proof. But if evidence in writing were necessary, it is supplied by the defendant's letter of the third of October, 1841. Indeed, with-

out the precedent matter, it is deducible from that letter, that he held that farm as security.

He expresses his willingness to convey the farm to the plaintiff, or to any appointee he might name, upon being cleared of the liabilities, he had assumed for the plaintiff, if the adjustment could be made in any reasonable time. This was in truth all we ever desired; all we now desire. The demurrer admits, that we repeatedly offered to make this adjustment. It further admits, that there was at that time, had been long before, and up to the time of filing the bill, a balance of the plaintiff's funds in the defendant's hands, more than sufficient to clear his liabilities.

If the precedent matter admitted by the demurrer, the letter of October, and the admission by the demurrer, that he had a balance to clear his liabilities, and that we have pressed an adjustment, as proposed by the letter, does not make out a case for the plaintiff, it is difficult to conceive what would.

Wells, for the defendant, in reply, said, among other things, that the plaintiff admits in his bill, that he utterly failed to conform to the agreement of December 5; and he failed substantially and entirely. It was not a mere short coming in point of time, but a thorough and radical omission to fulfil on his, or his wife's part, the contract. But time is of the essence of contracts, and cannot be limited or extended to suit the views of any party to a contract. It would be a "misnomer to call it equity," if courts exercising equity jurisdiction, should make contracts for the parties.

The opinion of the Court, SHEPLEY J. concurring in the result only, was drawn up by

WHITMAN C. J. — The plaintiff's bill is founded upon a supposed trust in the defendant, which he has not executed. We must first ascertain whether a trust, such as is cognizable, under our statutes, by this Court, in fact existed between the parties. If not, the bill must be dismissed. The plaintiff, first, sets forth certain transactions which took place between himself and the defendant; and then avers, that they consti-

tuted a trust. He then sets forth a writing, of a subsequent date, in the form of a letter from the defendant, which he avers amounted to a declaration of trust on his part in reference to those former transactions. To the latter, as it would seem, from the abstract with which we have been furnished, the defendant demurs specially; but neither answers, pleads or demurs to the former. Yet the cause has, in technical phrase, been set down for argument, upon bill and demurrer. This is clearly an irregularity. The first part of the statement, which the plaintiff avers amounted to a trust, unexecuted on the part of the defendant, should have been noticed by answer, plea or demurrer. We should be warranted in concluding, that the defendant, by such course of proceeding, intended to admit those allegations, which he has not seen fit to traverse; or, in overruling the demurrer.

But the parties have proceeded in their arguments, without confining themselves at all to the point, which it would seem, they have seen fit particularly to put in issue, to the consideration of the case upon its general merits, as if the whole had been properly put in issue. Upon their having so done it may not be inexpedient for the Court, in the hope that an end may be put to further litigation, manifestly destined to be fruitless in the end, to suggest the impressions made upon our minds, in regard to the condition of the suit.

Trusts, properly so called, do not result merely from a breach of contract, the remedy in which cases is to be sought for by a suit at common law for damages; nor do they embrace cases of conditional contracts of sale. In such cases it is for the person, on whom the performance of the condition rests, to be careful that no delinquency takes place on his part. If he fails to do so, without fault on the other side hindering him therein, he is without remedy; unless it be in some matter not of the essence of the contract, although he may have proceeded therein nearly to its completion. Equity cannot aid him to compel the other party to perfect the sale upon terms other than those agreed upon. He cannot in any sense of the word, be held to be a trustee so long as he is not in fault.

In the case presented, the defendant was answerable, only, upon his contract, according to its terms. His contract is in writing. The Court has no power to vary its terms. His stipulation was, that, if the plaintiff paid certain notes of hand, as they might become due, he would convey a certain estate to the wife of the plaintiff. The bill admits, that the plaintiff did not pay the last of the notes, but that that one was paid by the defendant. Here then there was a breach of the condition, which at law, certainly, absolved the defendant from his obligation to make the conveyance.

But the plaintiff avers, that, at the time of the payment of that note, the defendant had, and ever since has had, "in the judgment and belief of the plaintiff," funds belonging to him to a greater or equal amount; but that, the defendant having assumed other liabilities for the plaintiff, he did not demand the execution of the supposed trust. It is, however, no where averred, that such funds were in the defendant's hands for the purpose of paying said note, nor of what they might or could have consisted. On the other hand, if there were any such funds in the defendant's hands, according to the plaintiff's own showing, they were suffered to remain there for a purpose other than for the payment of the note. If indeed the plaintiff had funds in the defendant's hands for the purpose of paying the note, it would have been a virtual performance of the condition; and by instituting a process in equity, in conjunction with his wife, to compel a specific performance of the contract, the defendant might be compelled to make the conveyance. But such facts would not have formed a case, authorizing the Court to take cognizance of it, as a trust. The refusal to convey would be but a breach of an express contract.

As to the letter of the defendant, before referred to, it cannot be regarded as a declaration of trust. It contains no admission, that the defendant holds the estate in trust, properly so called. The admission, at the utmost, is, only, that he holds it as security; with an intimation, merely, that if he can be paid what was due him from the plaintiff, and be cleared from the liabilities he was under for him, within any reasonable

time, he shall be willing to convey it as may be desired. This might, perhaps, be available to the plaintiff on a bill for specific performance, by way of showing a waiver on account of the want of punctuality of performance on the part of the plaintiff; but cannot amount to an admission of holding the estate in trust, in legal contemplation. To constitute a declaration of trust it should be such as that the party making it must be believed to have intended it as such. Loose and inadvertent declarations are not sufficient for the purpose. *Steere* v. *Steere*, 5 Johns. C. R. 1.

There is a statement in the bill concerning a verdict, which has been returned in a suit instituted by the plaintiff against the defendant, on an account, from which it is inferable, that much, if not all of the controversy between the parties, has, at the instance of the plaintiff, been fully litigated at law; and that the plaintiff was there found indebted to the defendant. If such were the case, there can be no re-examination thereof in equity.

But the plaintiff in his bill prays, that the Court would enjoin upon the defendant to consent to a new trial in the action at law, and that the defendant may be compelled to withdraw certain items in his account in set-off, viz. for the rent of the premises in question. This request is unprecedented and novel. It is that this Court, sitting as a court of equity, should compel a defendant to consent to the new trial of an action decided in the same Court, at law, when it has power at law to grant new trials at discretion, whenever it shall appear that, otherwise, injustice will be done. The bare statement of such a proposition cannot fail to make the impropriety of it manifest. If the plaintiff has attempted at common law to obtain a new trial, and has failed, he is without remedy in equity; if he has not, then, that appropriate course is open to him. In either case he cannot be relieved from the effect of that decision under this bill.

On the whole, it is clear, that this bill should be dismissed with costs for the defendant.

David Wheeler *versus* Marcellus N. Cowan.

Where a written lease was made by the plaintiff to the defendant of certain real estate, to hold for the term of one year, parol evidence is inadmissible to prove, that on the day on which the lease was made, but after its execution, it was verbally agreed between them, that the defendant should occupy the premises until the affairs between the plaintiff and a third person were settled; and that those affairs had not then been settled; although two years had elapsed.

Where the occupant of land has holden the same under a written lease from the owner for the term of one year, and has holden over, after the expiration of that term, for nearly two years, and has neglected to pay any rent therefor, according to the terms of the lease or otherwise, his right to remain in possession will terminate in thirty days after written notice to quit, given to him by the owner; and at the expiration of the thirty days, he will be liable to the process of forcible entry and detainer, under Rev. St. c. 128, § 5.

The parties agreed upon a statement of facts — from which it appeared, that the plaintiff, on March 2, 1844, made a complaint and procured a warrant against the defendant, under the provisions of Rev. St. c. 128, § 5, entitled "of forcible entry and detainer;" that the legal title to the premises was in the plaintiff, and on March 24, 1841, the defendant took of the plaintiff a written lease of the premises for the term of one year, to commence on April 1, 1841; that the defendant can prove by Isaac Cowan, if it be competent for him so to do on objection made thereto, that on the day of the date of the lease and after its execution, there was a parol agreement between the parties, that the defendant should occupy the premises, according to the terms of the lease, until the affairs of the plaintiff and said Isaac Cowan were settled; that the defendant went into possession of the premises on April 1, 1841, and has continued in the occupation since; and that on January 30, 1844, the plaintiff gave the defendant notice in writing, in due form of law, to quit the premises, which he refused to do.

The Court were to draw such inferences from the facts agreed, as a jury might, and render such judgment in the case as the law and facts would authorize.

Noyes argued for the plaintiff, and contended among other grounds, that the testimony of Isaac Cowan was inadmissible, inasmuch as it tended to vary and control a written contract between the parties, related to real estate, and was not to be performed within one year. 1 Greenl. Ev. § 275; 1 Phil. Ev. 493: 17 Mass. R. 571.

But if the testimony be admissible, the process may be maintained, for the defendant would be a mere tenant at will, "whose estate in the premises has been determined," this being before the Revised Statutes were in force, and he would be entitled only to a reasonable time to remove after the termination of the tenancy. 1 Pick. 43; 13 Maine R. 209. And it was determined in the case last cited, that the notice under the statute was a determination of the tenancy, and that the thirty days were the extent of reasonable time for removal. The provisions of Rev. St. c. 95, § 19, respecting three months notice to determine tenancies at will, do not apply here, for the next section expressly provides, that it shall not apply to cases of forcible entry and detainer. But the statute has no retrospective operation. To have such effect the intention must be manifest. 7 Johns. R. 477; 2 Inst. 292; 2 Lev. 227; 4 Burr. 2460; 10 Mass. R. 437; 16 Mass. R. 215. The plaintiff's rights were preserved by the repealing act. *Treat* v. *Strickland*, 23 Maine R. 234. The relations between these parties is not altered by the Revised Statutes, and the process can be maintained.

J. Baker, for the defendant, among other grounds, contended, that the process could not be maintained against the defendant, on such notice, the holding over, without the testimony objected to, being a tenancy at will. 12 Maine R. 246; 4 Kent, 112; 4 Wend. 327; 4 Cowen, 349; 1 T. R. 163; 13 Maine R. 216; 19 Maine R. 383; 20 Maine R. 70. The Revised Statutes were in operation before the expiration of the year, and determined the rights of the parties after that time. By c. 95, § 19, it was necessary to give three months notice, before a tenancy at will was determined, and this pro-

cess was instituted at the end of one month. The following section merely provides, that the thirty days notice under the forcible entry and detainer act, shall be sufficient, and shall not be extended by the former section to three months; and was never intended to destroy the effect of the preceding section. The holding was rightful until the end of the three months, and there must be thirty days wrongful holding before the process can be maintained. 18 Maine R. 264.

He also contended, that it was not necessary, that the Revised Statute should have any retrospective operation, and still have the effect contended for by him. The repealing clause would have exempted any right of action, if the plaintiff had one at the time the Revised Statutes went into operation; but he had none, as the lease did not expire until April, 1842. But had it been otherwise, the remedy must have been according to the provisions of the Revised Statutes. 21 Maine R. 53 and 206.

The opinion of the Court was by

WHITMAN C. J. — By the Rev. Stat. c. 128, § 5, a lessor may proceed as and for forcible entry and detainer, against his lessee, who, after the expiration of his term, unlawfully refuses to quit the premises leased, thirty days notice in writing having been previously given him to do so. The defendant had held the premises in question, under the plaintiff, by a lease in writing, for the term of one year, ending on the first of April, 1842; and had held over ever since. In January, 1844, due notice was given him by the plaintiff to remove therefrom; and, after the expiration of thirty days from the giving of such notice, the defendant remaining still in possession, this process, under the above statutory provision, was instituted. Thus the plaintiff would seem to have made out a case, *prima facie*, within the literal import of the statute.

The defendant in his brief statement, after pleading the general issue, it seems, from the arguments of counsel, for it does not appear expressly in the statement of facts, alleges a right to hold adversely to the plaintiff, as the tenant of one

Isaac Cowan; or if not so, that he holds under a lease from the plaintiff, for a term not yet expired. Both of these grounds, however, would seem to have been abandoned at the trial; and under the general issue, probably, by way of showing that he did not, in the language of the statute, hold over unlawfully, he sets up a tenancy at will under the plaintiff; and, to maintain this ground, first offers to prove, that, on the 24th of March, 1841, the day on which the lease for a year was executed, but subsequently to its execution, it was verbally agreed between the parties, that, after the expiration of the term therein agreed upon, the defendant should continue to occupy the premises, until the affairs between the plaintiff and said Isaac Cowan were settled; and that those affairs had not yet been settled. This evidence was objected to, and was clearly inadmissible — first, because it proposed to prove a contract, not to be performed within one year, and, secondly, because it purported to be a contract in reference to an interest in or concerning real estate, contrary to two of the provisions in c. 136, § 1, of the Rev. Stat. Other objections were insisted upon, but these were sufficient.

The defendant, next, insisted that, by the conduct of the plaintiff, he had been constituted his tenant at will. And for this purpose he relies upon his having been permitted, by the plaintiff, without any demand of possession by him, to remain in possession from the termination of the lease, which was on the first of April, 1842, till January, 1844. This, according to the English common law, would, undoubtedly, constitute him a tenant from year to year. Comyn's Landlord and Tenant, p. 9; *Hollingsworth* v. *Stennett*, 2 Es. Ca. 716. But by the law of this State and Massachusetts, it would constitute him a tenant at will only. *Ellis* v. *Page & al.* 1 Pick. 43. And our Rev. Stat. c. 91, § 30, expressly provides, that "no estate or interest in lands, unless created by some writing and signed by the grantor or his attorney, shall have any greater force or effect, than an estate or lease at will." This must be regarded as reducing, what would otherwise be a tenancy from year to year, to a tenancy at will. And the Rev. Stat. c. 95,

§ 19, provides that such an estate can be terminated by the landlord only, by giving the tenant notice in writing to quit possession; and if the tenant, according to the same provision, has paid rent regularly and promptly, according to the terms upon which he must be deemed to hold, he will not hold wrongfully till after three months from the time of receiving such notice; and, if he has refused or neglected to pay such rent, his right to remain in possession will terminate in thirty days after such notice. Till the happening of one or the other of these events, the tenant, in the language of the act, under which this process is instituted, could not be considered as *unlawfully* refusing to quit possession.

In this case it appears, that nearly two years had elapsed, while the defendant was holding over. When a tenant is permitted to hold over, it is to be presumed, that he does so, as to the payment of rent, upon the same terms as had been agreed upon in the lease. It does not appear, since he has so held over, that he has ever paid or offered to pay any rent. His right, therefore, under the statute, to remain in possession, terminated at the end of thirty days, after he had notice to quit the premises; and, therefore, he held unlawfully, and became subject to this process.

Judgment for the plaintiff.

DAVID WHEELER *versus* BENNETT WOOD.

A tenant at will has an estate which must first be terminated, before he will cease to have a right to continue in possession; and until such termination he does not begin to hold unlawfully, and is not liable as for forcible entry and detainer under Rev. Stat. c. 128, § 5.

Where a lease of a farm was given by the plaintiff for the term of one year, and the lessee underlet a portion thereof to the tenant, who held over after the expiration of the year, but the plaintiff never treated him as his tenant or exacted rent of him; the tenant had no estate under the plaintiff; is a mere tenant at sufferance; and is not liable under the fifth section of the statute "of forcible entry and detainer."

THIS was a process under the fifth section of the statute of

forcible entry and detainer, Rev. Stat. c. 128. The complaint and warrant were dated May 22, 1843.

At the trial in the District Court, it was proved or admitted, that the plaintiff owned the farm in Sidney, called the Barrows farm, and demised the same by a written lease to one Cowan for the term of one year, commencing April 1, 1841. Cowan immediately underlet the house upon the farm to the defendant for the same year, and the defendant entered forthwith into the possession of the house, and continued to occupy it until after the commencement of this process.

On April 15, 1843, the plaintiff delivered to the defendant a written notice to quit the premises. The defendant thereupon inquired how long a time the plaintiff would give him in which to remove. The plaintiff replied, that he supposed the law would give him thirty days; and the defendant then said, that he would not give up the possession until he was obliged so to do.

It is to be considered as proved, if competent for the defendant to prove the same, that the plaintiff has commenced an action of assumpsit against Cowan, now pending in the Supreme Judicial Court, for the rent of the whole of the Barrows farm for the year commencing April 1, 1842, and ending April 1, 1843; and that there is a process of forcible entry and detainer now pending in the District Court against said Cowan on the complaint of said Wheeler, to recover possession of the whole Barrows farm, commenced March 2d, 1844.

The case was then taken from the jury, and the parties agreed to a statement of facts wherein the foregoing appeared, and submitted the same to the decision of the Court, they having the right to draw such inferences as a jury might properly draw.

Noyes, for the plaintiff, contended that this process would lie under the facts appearing in the case. The language of the statute, Rev. Stat. c. 128, § 5, is, that "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, he shall be liable to the provisions of this act."

The estate which the defendant had by the lease, ceased on the first of April, 1842, and after that time he became a tenant at sufferance of the plaintiff. The case comes within the defination of a tenancy at sufferance in the books. 2 Metc. 31; 1 Inst. 57, *b*; 4 Kent, 96; 17 Pick. 105; 1 Shepl. 209.

The relation of landlord and tenant does not arise only from express contract. That relation may exist, where there is a privity of estate, as well as of contract. 9 Pick. 52; 12 Pick. 125; 2 Stark. Ev. 463; 1 Chitty Pl. 116; 1 Saund. 241.

The defendant went in lawfully under one who had a lease from the plaintiff, and held over. He comes within the letter and spirit of the fifth section of the statute.

J. Baker, for the defendant, said that the relation of landlord and tenant must have existed between the parties, or this process cannot be maintained. That relation is absolutely necessary in order to a recovery under the fifth section of the statute. There must be either a privity of contract or of estate.

There is no privity of contract between the lessor and the sublessee. 5 Metc. 343; 14 East, 234; Story's Contracts, 390; Chitty's Con. 275; 4 Kent, 96, 105; 12 Mass. R. 43; 14 Mass. R. 93; 17 Mass. R. 299; *Wyman* v. *Hook*, 2 Maine R. 337; 1 Hill. Abr. 158, § 64.

Nor is there any privity of estate between the lessor and a sublessee of a portion of the estate. Privity of estate arises only in cases of an assignment of the whole interest of the lessor or lessee and for the whole time. This was a mere underletting of a small house on the farm without any land. *Wheeler* v. *Hill*, 16 Maine R. 334; 9 Pick. 52; 4 Kent, 96; 1 Hill. Abr. 125, § 54, 55.

But if there was any tenancy between these parties, it was a tenancy at will, and not a tenancy at sufferance. 12 Maine R. 346; 4 Kent, 112; 4 Wend. 327; 4 Cowen, 349. He was entitled to three months notice to quit, and but one month was given.

The opinion of the Court was drawn up by

WHITMAN C. J. — This process under the Revised Statutes,

c. 128, § 5, is not maintainable by the plaintiff, except the defendant has held under him as lessee, or as tenant at will; the Rev. St. c. 91, § 30, having provided, that "no estate or interest in lands, unless created by some writing, and signed by the grantor or his attorney, shall have any greater force or effect, than an estate or lease at will." The section of the statute, first cited, was, manifestly, designed to enable landlords more expeditiously to oust tenants, who were reluctant to surrender tenements in their possession, after they had ceased to have a right of occupation for any further time. A tenant at will has an estate, which must first be terminated, before he will cease to have a right to continue in possession. Such termination may be brought about by his surrendering his tenancy, or by any act inconsistent therewith; 1 Cruise, 273; or by the decease of either party; 4 Comyn, Estates, H. 7; or by making a lease to another; Co. Lit. 57, a; and by Rev. St. c. 95, § 19, by notice in writing for the purpose, by either party, thirty days at least having elapsed thereafter. Till then the tenant would not begin to hold unlawfully; and could not be liable as for forcible entry and detainer, under the section of the statute first referred to.

But the defendant cannot be deemed to be a tenant at will. While Cowan's lease was in operation, he might be lawfully in the occupancy of a small part under him. When that terminated, and when Cowan himself had nothing but a tenancy at will, he had no power to underlet. Co. Lit. 57, a. It does not appear, that the plaintiff was ever conusant of a holding by defendant under Cowan. He never had treated him as a tenant or exacted any rent of him. He was, then, a disseizor, or tenant at sufferance. He had no estate in the premises; for a tenant at sufferance has none. He is merely not a trespasser, and the landlord, without ceremony, may, at any time, enter and turn him out. If he resisted *manu forti* he would be amenable under another branch of the statute of forcible entry and detainer, but not under the fifth section; for it could not be said that his estate had been determined, for he had none under the plaintiff; nor that he unlawfully

refused to quit the same; for such refusal could not become unlawful until the plaintiff had attempted to enter, and had been resisted.

Plaintiff nonsuit.

ZEBULON SANGER, *Pet'r versus* THE COUNTY COMMISSIONERS OF KENNEBEC.

Where a road extends into two counties, and the majority of the commissioners of both counties, at a legal meeting thereof, under the provisions of Rev. Stat. c. 25, "shall adjudge it to be of public convenience and necessity to lay out such highway," it is not left discretionary with the commissioners of one county, to locate the highway within their county, or not; but it is their duty to proceed and lay it out in conformity to the adjudication.

And if a county or town road has been previously laid out over a part of the same route, it furnishes no sufficient excuse for a refusal to locate the highway there under the adjudication of the commissioners of the two counties.

A private individual can apply to the Supreme Judicial Court for a writ of *mandamus* to courts of inferior jurisdiction in those cases only, where he has some private or particular interest to be subserved, or some particular right to be pursued or protected by the aid of this process, independent of that which he holds in common with the public at large. It is for the public officers, exclusively, to apply for such writ, where the public rights are to be subserved.

If it be the duty of the County Commissioners to locate a road, yet a writ of *mandamus* will not be granted, to command the performance of such duty, on the petition, merely, of one of the original petitioners for the road, who has no greater interest than the rest of the community in procuring such location.

THIS was a petition for a *mandamus* to the County Commissioners of the county of Kennebec.

The facts are stated in the opinion of the Court.

The case was fully argued in writing by

Stackpole, for the petitioner, and by

H. W. Paine, County Attorney, for the County Commissioners, and by

Moor, for the town of Waterville, that town having an interest in the question.

In the argument for the petitioner, the following authorities were cited. Rev. Stat. c. 96, § 6; Rev. Stat. c. 25, § 1, 2, 23, 24, 25; Stat. 1832, c. 42, § 1, 2; Stat. 1836, c. 198, § 2; 2 Pick. 414; 4 Pick. 68; 10 Pick. 244; 16 Pick. 105.

And in the arguments in behalf of the respondents, comments were made upon the same statutes, and these authorities were cited. 10 Pick. 245; 11 Pick. 189; 3 Dallas, 42; 18 Pick. 443; 13 Pick. 225; 1 T. R. 404; Dougl. 526; 17 Pick. 142; 20 Pick. 510; 10 Pick. 374; 18 Pick. 4; 2 Barn. & Ald. 115.

The opinion of the Court was drawn up by

TENNEY J. — Upon the petition of Eben'r F. Bacon and others, for an alteration in the road from the east village in Waterville to Norridgewock, on a route, beginning at the county road in said village, at some point between the Baptist meeting house and Lemuel Dunbar's house, thence proceeding by the route lately viewed by the County Commissioners for the county of Kennebec on a petition for a road from said village to Farmington Falls, to the west end of the bridge near Kenelon Marston's house, thence the shortest practicable and convenient route, to the county road near Job Bates' dwellinghouse, in Fairfield, &c. after due and legal proceedings, the Commissioners of the counties of Kennebec and Somerset, at a joint meeting of the two boards, adjudged "that common convenience and necessity required that the road prayed for in said petition be located and established." The Commissioners for the county of Somerset thereupon duly located the part of the road lying in the county of Somerset, and the Commissioners for the county of Kennebec duly laid out that part of the same road in the county of Kennebec, which lay between the northerly end of Marston's bridge, and the dividing line of the counties of Kennebec and Somerset, and made report thereof at a term of their Court holden December, 1840, and the report was accepted and recorded, and the said road ordered to be established, opened, and made as is prescribed in the report. The residue of the same road never having been located by the

County Commissioners for the county of Kennebec, who afterwards upon a petition therefor, declined to lay out the same, one of the original petitioners for the road makes application for a writ of *mandamus* to the County Commissioners for the county of Kennebec, requiring them forthwith to complete the location of that part of the road lying in the county of Kennebec, which they had omitted to lay out.

The respondents having been duly served with the petition now pending, and having acknowledged the facts therein set forth to be true, move that the petition be dismissed for the reasons following, viz: —

1. Because the County Commissioners for the county of Kennebec completed the location of that part of the road, which lay in the county of Kennebec, and did all which they were required to do by virtue of the adjudication of the two boards of Commissioners of the counties of Kennebec and Somerset.

2. That the prayer of the petition was for a road (a part of it) between Kenelon Marston's and the village of Waterville, "by the route lately viewed" by the Commissioners of Kennebec on a petition for a road to Farmington, and that the Commissioners for Kennebec, on said petition for a road to Farmington, had viewed several routes between said village and said Marston's; it was therefore uncertain which of these routes was contemplated by said adjudication.

3. That the road between Marston's and Waterville village is now a road, located on the petition of Z. Sanger and others by the County Commissioners of the county of Kennebec.

4. That the respondents, on the 8th day of December, A. D. 1843, did locate a road from the village of Waterville, over one of the routes viewed by the County Commissioners for the county of Kennebec, on the petition of Z. Sanger and others.

5. That all the proceedings of the County Commissioners in relation to this road, were closed more than four years before the entry of this petition.

6. That the petitioner for the writ prayed for, is interested

only as other citizens in opening new thoroughfares, and not entitled to the process prayed for.

It is stated in this petition, that the road from the Northerly end of Marston's bridge to the village in Waterville, has never been located by virtue of the petition for the road from Waterville to Norridgewock, and the adjudication of the two boards of Commissioners; this is admitted to be true by the respondents. The statute does not leave it discretionary with the Commissioners of one county, after such adjudication, to locate the road, adjudged to be of common convenience and necessity, or not. Its language is peremptory, that "the Commissioners shall proceed to lay out, alter or discontinue, that part of such highway which lies in their respective counties, in the manner provided. Rev. St. c. 25, § 26.

The petition of Z. Sanger and others was for a road to be laid out and established, on the shortest practicable and convenient route from the east village in Waterville, through West Waterville, Dearborn, Rome, New Sharon, &c. to Farmington Falls. It appears from the records, that the County Commissioners, upon that petition, "finished a full examination of all the routes embraced in said petition," and located the road by courses and distances, and made report, which was accepted and recorded, and the road duly established. On the petition for the road from Waterville to Farmington, it appears by the record that various routes were examined, but it does not appear, that any other route between the west end of Marston's Bridge and Waterville village was examined, excepting the one upon which the road was located; that route being fully and particularly described in the record, it cannot be said with propriety that there is a want of certainty in the road, upon the petition for which the joint board acted and adjudicated.

Does the existence of the road laid out upon the same route under another adjudication, made by the County Commissioners for the county of Kennebec alone, excuse the respondents? The road from Waterville to Norridgewock was entire. The legislature anticipated that thoroughfares extending from one county into another, would be important and necessary; and

were not satisfied to leave it to the separate and independent action and judgment of the Commissioners of each county, in such cases, to lay out the roads in their respective counties. There could be no certainty, that the roads, if made in the different counties, would unite with each other, so that as a whole, they would be such as would meet the public wants; and if not, much expense in making them would prove to be useless. These difficulties are obviated by the statute providing a tribunal, composed of all the County Commissioners of the counties over which such roads are prayed for, and the judgments of such joint board, cannot in any manner be annulled by one of the boards acting separately. After the adjudication of the joint board, the object sought cannot be defeated, excepting by the judgment of the same. The road thus adjudged to be of common convenience and necessity, must be laid out, accordingly; and the commissioners, who are charged by the statute with the duty of carrying such judgment into effect, can no more omit to make the location, than they can discontinue such a road afterwards. The existence of a road on the same route, laid out under authority of the Commissioners of one county only, cannot answer the requirements of the statute; such location is merely carrying into effect the judgment of one board, which could alter the same, without the action of the joint board, and thereby defeat the object of the law.

The fourth and fifth reasons assigned for the motion to dismiss the petition, are unsupported by the facts which the evidence in the case discloses; and it is not necessary to consider what would be the effect of the facts supposed to exist, had they been proved.

This Court have power to issue writs of *mandamus* to Courts of inferior jurisdiction, which may be necessary for the furtherance of justice and the due execution of the laws. R. S. ch. 96, § 5. The statute has not pointed out particularly the cases to which this remedy may be applied; but, as in many other cases, has left it to be determined by the principles of the common law. "This writ is grounded on a suggestion, by the

oath of the party injured, of his own right, and the denial of justice below." 3 Bl. Com. 110. A private individual can apply for this remedy only in those cases, where he has some private or particular interest to be subserved, or some particular right to be pursued or protected by the aid of this process, independent of that which he holds in common with the public at large; and it is for the public officers, exclusively to apply, when public rights are to be subserved. *Rex* v. *Merchant Factor's Co.* 2 B. & Ald. 115. These authorities, which are believed to be in accordance with others upon the same subject, contain the general rule of the common law upon this point. And we are not satisfied, that the mode provided by the statute, to obtain the laying out, the alteration and discontinuance of public roads, which is by petition, which is often followed by proceedings, which are of an adversary character, and are sometimes followed by costs against the petitioners, can take this case from the general rule. The reason given in the original petition, for the location of the road, is that the "public good requires it." And the judgment of the joint board of Commissioners for the two counties is, that "common convenience and necessity require it." Neither the petition for the road, nor that for the writ of *mandamus*, allege any interest of this petitioner to be promoted, or that his rights are in any degree diminished by the omission complained of, more than of any other individual in the community, and he is not shown to have been at any trouble, or incurred any expense or liability by the proceedings upon the original application for the road. However mistaken in their duty the County Commissioners for the county of Kennebec may have been, in omitting to make effectual the judgment of the joint board of Commissioners, and notwithstanding they may be exposed to a peremptory *mandamus* to lay out the remainder of the road, by virtue of an application by a public officer, we think this petition must be dismissed.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF FRANKLIN,

ARGUED AT JUNE TERM, 1845.

THE STATE OF MAINE *versus* THE INHABITANTS OF STRONG.

To sustain an indictment, charging a town with neglecting to keep in repair a *public highway* within its limits, there must be proof of the existence of such a way. It cannot be sustained by proof of the existence of a town or private way.

Proof that a way has been used as a road for more than thirty years, encumbered all the time with gates and bars in the summer seasons, without its having ever been fenced on its sides, is not sufficient to show, that it is a *public highway.*

The one hundred and first section of the twenty-fifth chapter of the Revised Statutes, does not prevent a town from denying the existence of a public highway within its limits, when indicted for neglecting to repair such highway.

EXCEPTIONS from the District Court, REDINGTON J. presiding.

This was "an indictment for neglecting to keep in repair a certain public highway, so called, in said town."

On the part of the State it was proved, that the way had been used as a road for more than thirty years; that it now is, and always has been in the summer seasons, during said term of time, encumbered with gates and bars; that said way never has been fenced out as a road; that within six years next before the finding of the indictment the same highway had been included within the limits of a highway surveyor of the town, and repairs made thereon under his direction.

The presiding Judge instructed the jury, that this evidence, if believed, was sufficient to prove that the way was duly located, so that the town was bound to keep it in repair. The verdict was guilty; and exceptions to the instructions of the Judge were filed in behalf of the town.

Stubbs, for the town, among other grounds, contended that the indictment could not be supported, because it was alleged in the indictment that the road was a "public highway," and the user of the way proved, was a mere private way, across which there had always been gates and bars. This might, perhaps, give individuals the right to use this as their private way, but could not make it a public highway. *Com.* v. *Low*, 3 Pick. 408.

The indictment cannot be maintained, upon this proof, under Rev. Stat. c. 25, § 101. The language of the statute, in this section applies only to the case of injuries to individuals, and not to a neglect to put or keep the road in repair. If it applies to a case like this, the practical operation will be, that a majority of the selectmen of a town, and one surveyor of highways, may lay out a road which the town is bound to keep in repair, in defiance of the majority of the inhabitants of the town and of the County Commissioners. And in this way the owner will lose his land without any means of obtaining compensation therefor.

The *Attorney General*, for the State.

The opinion of the Court, WHITMAN C. J. taking no part in the decision, not having been present at the argument, was drawn up by

SHEPLEY J. — To sustain this indictment, charging neglect to keep in repair a public highway, there must be proof of the existence of such a way. It cannot be sustained by proof of the existence of a private or town way. *Commonwealth* v. *Newbury*, 2 Pick. 56; *State* v. *Sturdivant*, 18 Maine R. 66. It is not therefore necessary to determine, whether the proof would be sufficient to establish a town way.

The proof relied upon to establish a highway is, that it has been used as a road for more than thirty years, and encumbered all the time with gates and bars during the summer seasons, without having ever been fenced on its sides.

Any person is authorized by statute, c. 25, § 97, to remove gates, rails or bars, across any highway, unless they have been placed there to prevent the spread of an infectious disease, or by license of the County Commissioners.

If a public highway should be considered as established by this proof, the effect would be to deprive the citizens, over whose land it passes, of the right to keep up their gates and bars, as they have been accustomed to do for thirty years, unless they could obtain license from the County Commissioners; and to compel them to fence out the way without any compensation, if they would protect their fields. They have not dedicated the way to the public as an open highway; and additional burdens cannot for the public convenience be imposed upon them, without their consent, and without compensation. The citizens have obtained the right to use the way, as they have been accustomed to use it; but in this State, there can be no such public highway, as towns are compelled to keep in repair, created by a partial and limited dedication of a right of way.

Nor can the statute, c. 25, § 101, be considered as preventing a town from denying the existence of a highway, when indicted for neglecting to repair it. That section has reference to indictments and actions to recover damages for injuries received by reason of any neglect to repair the way. When the words, "if on trial of any indictment," are considered in connection with the remaining language of the section, it will be apparent, that they do not comprehend indictments of this description; for the limitation of six years applies equally to the indictment and the action. And the repair must be made within "six years before such injury;" that is, before the injury which is the foundation of the indictment or action. If the statute were considered as applicable to this and other like cases, there would often be found no certain time or event, from which the limitation of six years could be reckoned. For

highways are often found to be out of repair, when no certain time can be fixed upon as the time, when they were first in that condition. The word, *injury*, clearly refers to a private one suffered by some person, and not to the public inconvenience occasioned by the neglect to repair. That an indictment may be found and maintained to recover damages, when the injury occasioned has been the loss of life, is provided by c. 25. § 89. To such indictments reference was had in that section. This indictment cannot be sustained upon the proof presented in the case.

Exceptions sustained and new trial granted.

EPHRAIM WOODMAN *versus* THE INHABITANTS OF THE COUNTY OF SOMERSET.

The County Commissioners, by the statute of 1821, c. 118, had jurisdiction of the question, whether a new county road was or was not opened and made according to the return of its location; and their decision is conclusive until vacated by some legal process or proceeding.

Where the return of the road states, that stone monuments had been set up and marked at the angles of the road, and also gives the courses and distances, and there is disagreement between them and the monuments, the courses and distances may be corrected by the monuments named in the return.

When a road has been laid out by the County Commissioners, and a return thereof has been made, accepted and recorded, and the damages have been assessed and a return thereof has been made and accepted, the proceedings under the original petition are closed and completed. A petition to have the same way opened and made is, therefore, a new process, and not a continuance of the old one.

If the land be in one county at the time when the proceedings in the laying out and establishment of the road and assessment of the damages were closed and completed, and was afterwards included within the limits of a new county, before the damages were paid, the former county is liable for the payment of such damages.

The remedy provided by Stat. 1838, c. 399, in case of a refusal to pay such damages, was an action of debt; and the clerk of the courts for the county had no authority, as clerk, to change the remedy into an action of assumpsit, or to bind the county for its payment, by drawing an order upon the county treasurer for the payment of the damages.

ASSUMPSIT upon an instrument of which the following is a

copy: — "Somerset ss. Clerk's office at Norridgewock, Nov. 13, 1839. To Mark S. Blunt, Esq. County Treasurer.

"Pay to Ephraim Woodman out of the treasury of said county, the sum of one hundred and forty-three dollars and eighty-three cents, for damages awarded him by a jury authorized by the County Commissioners, on account of the location of a road passing through his land in the town of Phillips, on the petition of John L. Blake & others, Oct. Term, 1834, as per order of the County Commissioners, March Term, 1838, when evidence is produced, that the road is opened, that evidence being now produced and on file.

"J. Gould, Clerk."

It appeared in evidence, that on the day of its date, the plaintiff presented the proceedings in relation to the road to Mr. Gould, clerk of the courts for the county of Somerset, and requested an order for the payment of his damages. The clerk objected to giving the plaintiff the order, on the ground, that it had been said that the county of Franklin, and not the county of Somerset, ought to pay the damages. The plaintiff then said that he would see, that the clerk was exonerated from all blame, and would not enforce the order, if the County Commissioners should refuse to pay it. The order was drawn, and presented to the county treasurer on the same day, and payment refused.

The substance of all the facts appearing on the papers is stated in the opinion of the Court. The Court was to decide upon the rights of the parties upon the records and evidence, or such of it as was admissible, and enter a nonsuit or default.

Leavitt, County Attorney of Somerset, for the defendants, objected to the plaintiff's right to recover: —

First. Because the road was not made upon the plaintiff's land where it was located by the County Commissioners.

Second. Because, before the road was opened and made, the territory over which it passes was incorporated into a new county by the name of Franklin; and because, after such incorporation, such proceedings were had by the Commissioners of the new county as made the proceedings in relation to this

road the acts of said new county; and that county should pay the damages, if the plaintiff was entitled to any. The subsequent proceedings should have been proceeded on by the Commissioners of the county of Somerset. The act creating the new county expressly provides, that all unfinished business should be proceeded on and finished in the county where it might be pending.

Third. Because the order on which this suit is founded was improperly drawn by the clerk, without authority; and the plaintiff received it upon a condition, which he has not complied with. His remedy, if any he has against the county of Somerset, is by an action of debt upon the judgment, and not upon this order.

J. Randall, Jr., for the plaintiff, contended that the first objection made to the plaintiff's recovery was groundless, because the competent tribunal, the County Commissioners, had adjudicated upon that question, and decided that the road was made where it was located. The parol evidence to show, that it was not so located was inadmissible. 3 Mass. R. 408; 7 Mass. R. 518 and 496; 8 Mass. R. 146; 1 Greenl. Ev. 565. All proceedings in relation to the location of county roads are to be deemed valid, however erroneous and imperfect they may be, until quashed on a writ of *certiorari*. 2 Greenl. 61. But were the question an open one, permanent monuments are to govern in the location of the road, as well as in a deed of land, in preference to points of compass, or length of lines.

In reference to the second objection, it was said that the proceedings under the original petition, pending in the county of Somerset, were entirely ended, and nothing more could be done under that petition. Any new process, relating to this or any other road within its limits, must be instituted in the county of Franklin when it became a county. The petition to have the road opened is a new proceeding.

As to the third objection, it was said, that when the report was accepted by the County Commissioners, awarding damages to the plaintiff, to be paid, when evidence was produced that the road was opened, there was a sufficient order for the pay-

ment of these damages by the County Commissioners. The plaintiff was entitled to his order as a matter of course, without any restrictions upon him, as to the use he would make of it. Evidence of the use to be made, or not to be made of the order was inadmissible. If the plaintiff had brought his action upon the judgment, the defendants would have successfully resisted that suit by showing a payment by the giving and acceptance of this order. The only question made by the defendants has been, whether the damages should be paid by the county of Somerset or by the county of Franklin. The proceedings were finished, and the damages assessed, while the land was in the county of Somerset; and that county should pay them.

The opinion of the Court, TENNEY J. being an inhabitant of the county of Somerset and taking no part in the decision, was drawn up by

SHEPLEY J. — This suit is upon an order drawn by the clerk of the courts upon the treasurer of the county, directing him to pay to the plaintiff the amount of damages occasioned by the location of a highway over his land.

The first objection to the plaintiff's right to recover is, that the way was not opened and made, where it was laid out. The statute of 1821, c. 118, authorized the court of sessions, whose power was transferred to the County Commissioners, to open and make a new highway upon application therefor, showing, that the town had improperly neglected to do it. In this case an application was made to the Commissioners of the county of Franklin at their session in April, 1839, to have the highway made. A committee was appointed for that purpose, a return of whose proceedings was made at their session in December following, and accepted. That return stated, that the way, which had been laid out over the land of the plaintiff, had been opened and made. It is now proposed to prove by parol testimony, that it was not made on the ground designated by the return of its location. The County Commissioners, having jurisdiction of the subject, have acted upon it, and

caused it to be made a matter of judicial decision and record, that the way has been opened and made according to the return of its location; and this must be considered as conclusive until vacated by some legal process and proceeding. If the parol testimony could be received, it might not show the fact to be otherwise. To avoid uncertainty in the location of highways, the act of March 4, 1833, c. 79, § 4, provided, that in all locations of highways monuments should be erected at the angles thereof. The return in this case stated, that stone monuments had been set up and marked at each angle. The mistake in the return, made in two courses by substituting the number of rods in one course for that in the other, might be corrected by the monuments named in the return and by those set up at the angles.

The jurisdiction of the Commissioners of the county of Franklin in the appointment of a committee to open and make the way is denied, because, as it is said, proceedings respecting this way were pending in the county of Somerset on the last Tuesday of April, 1838; and the fourth section of the act passed March 20, 1838, creating the county of Franklin, provided, that "every petition, process, matter or thing, which on the last Tuesday of April next, may be pending before the County Commissioners in said counties of Kennebec, Somerset and Oxford, shall be proceeded in and settled by said Commissioners." The act of March 17, 1835, c. 168, § 1, provided, that the County Commissioners, after having laid out a highway and made return and record thereof, should order a continuance to be entered until their second regular session, to allow petitions to be filed for an increase of damages. If none were then entered, the proceedings were to be considered as closed. If such petitions were entered, the proceedings were to be further continued, until the damages had been assessed. And when a return of such assessment had been made and accepted, the act declared, that "the record of the proceedings upon the said original petition shall be considered as completed and not before." In this case the return of an assessment of damages by a jury had been made and accepted

by the Commissioners of the county of Somerset, at their March Term, 1838, and they then ordered those damages to be paid to the plaintiff "when evidence is produced, that the road is opened." The proceedings on the original petition were thereby completed; and could not be pending afterward on the last Tuesday of April following. The petition to have the way opened and made, being a new process, was correctly presented and acted upon by the Commissioners of the county of Franklin.

Another objection is, that the damages should be paid by the county of Franklin and not by the county of Somerset. But it has been already shown, that the proceedings on the original petition, by which the plaintiff became entitled to receive his damages, had been completed, and the county of Somerset thereby became liable to pay them at the proper time, before the county of Franklin had any legal existence.

The plaintiff had become entitled to receive his damages by the judgment of the County Commissioners upon the production of evidence, that the way had been opened and made. But the remedy provided by the act of February 23, 1828, c. 399, § 6, in case of refusal to pay, was an action of debt.

The clerk of the courts, for the county of Somerset, does not appear to have had any such authority to draw the order, as would change the remedy into an action of assumpsit, or bind the county by his promise.

The county cannot be considered as the drawer of the order, and the county treasurer having refused to accept or pay it, no action can be maintained upon it against the county.

Plaintiff nonsuit.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF SOMERSET,

ARGUED AT JUNE TERM, 1845.

The State of Maine *versus* Josiah P. Churchill.

If an indictment under Rev. St. c. 36, § 17, allege, that the accused did presume to be a common retailer of the liquors mentioned in that section of the statute, without license, within the time specified, in less quantities than twenty-eight gallons, and that he did sell such liquors to divers persons, without license, within the time specified, but one offence is charged.

On the trial of such indictment, it is not necessary for the prosecuting officer to introduce proof in support of the negative allegation, that such selling was without license. If the accused would defend himself on the ground, that he was licensed, he must show it.

The arguments were by

J. H. Webster, for Churchill — and

Moor, Attorney General, for the State.

The opinion of the Court was drawn up by

Tenney J. — The charge contained in the indictment is, that the defendant, "at New Portland in the county of Somerset, on the first day of August, in the year of our Lord one thousand eight hundred and forty-three, and on divers other days and times between that day and the finding of this indictment, without lawful authority, allowance or permission, and without being duly authorized therefor pursuant to the statute, did pre-

sume to be and was a common seller of wine, brandy, rum, gin and other strong liquors by retail and in a less quantity than twenty-eight gallons, *and the said Churchill during said time did sell wine, brandy, rum, gin and other strong liquors by retail and in a less quantity than twenty-eight gallons at a time.*

It is contended, that the offence charged in the indictment is double; that by the words in italics, the defendant is accused of a violation of the 18th section of the Rev. Stat. c. 36, after being charged in the former part of the indictment with a breach of the 17th section of the same chapter. The cases of *State* v. *Cottle*, 15 Maine R. 473; and *State* v. *Stinson*, 17 Maine R. 154, are not essentially different from the one before us upon the point in question; and it was held in both, that one offence only was charged. In the former of these cases, it is alleged, "and did and then sell and cause to be sold wine, brandy, rum, gin, and other strong liquors *in manner aforesaid*, to divers persons," &c., and in the other, "did then and there *as aforesaid*, sell and cause to be sold," and it is contended therefore, that the words *in manner aforesaid*, and *as aforesaid*, connect the subsequent, with the former part of the allegation; whereas in this case, those words are omitted. The words referred to are unimportant, as the charge is definite without them, and they were probably used for the purpose merely of charging the one accused with a violation of the law, by selling such liquor without license.

The other objection relied upon, that no proof was offered by the government in support of the negative allegation, that the defendant was not duly authorized, cannot be sustained. The question was presented in the case of *State* v. *Crowell*, *ante* p. 171, and upon consideration, such proof was held unnecessary.

Exceptions overruled.

THOMAS LAMBARD *versus* NATHAN FOWLER.

If a deputy sheriff attach goods on mesne process he is bound to keep them, to be taken on execution, until thirty days after judgment in the action, whether he remains in office until that time or not; and the sheriff under whom he acted is responsible for any omission of duty in so doing. And if the sheriff under whom the deputy acted in making the attachment ceases to be in office before judgment is rendered, and the same deputy becomes the deputy of the succeeding sheriff, and the execution, issued upon the judgment, is put into the hands of the deputy for collection within the thirty days, he is bound as deputy of the former sheriff to have the goods ready to be taken on the execution without any other demand; and if he neglect his duty in that respect, the cause of action against the sheriff therefor accrues at the expiration of the thirty days; and the limitation of four years, during which the sheriff is liable for the acts of his deputy, commences running at that time.

Where the declaration, at the time of the commencement of the action, contains but one count, wherein the plaintiff claims to recover against the defendant, as sheriff, solely on the ground of his responsibility for the acts of another person as his deputy, an amendment of the writ will not be permitted, by adding another count, for the purpose of sustaining the action by reason of other and distinct acts of the sheriff himself; although both counts may be intended for the recovery of damages arising from the loss of the same rights.

CASE against Fowler as late sheriff of this county. The writ was dated August 25, 1842. With the general issue, a brief statement was filed by the defendant, setting up the statute of limitations as a defence. The original count in the declaration complained, that the defendant was liable on account of certain acts of his deputy, one Kimball, without claiming to recover by reason of any defaults by Fowler personally. Under a general leave to amend, the plaintiff filed a count, claiming to recover by reason of certain acts, other than those alleged to have been committed by Kimball, the deputy, done by Fowler himself, as sheriff. This amendment was objected to by the defendant as introducing a new cause of action.

The whole of the testimony at the trial, before TENNEY J. was reported; and the parties agreed, that upon the evidence, which should be considered legally admissible, the Court, having authority to draw such inferences as a jury could do, should

enter such judgment by nonsuit or default as the law shall require; and the Court were to determine, whether the amendment was admissible.

The view taken of the evidence by the Court will be found in the opinion.

Wells, for the plaintiff, contended that he was entitled to recover on the first count. The execution was delivered to Kimball on July 6, 1838, and the return day was not until after August 25. Kimball could not be called upon until the return day, unless he had previously received the money. The statute of limitations, therefore, is no bar to our recovery on that count. 9 Greenl. 74; 16 Pick. 387; 3 Mass. R. 289; 4 Shepl. 53.

The amendment should be allowed. The complaint in both counts is for not satisfying the execution out of the property attached; and the act which rendered the defendant liable under that count, was his taking the property out of the hands of Kimball immediately after the attachment. The statute of limitations furnishes no defence against the sheriff's own acts until six years after the acts were done. If the second can properly be filed, there is no defence. *Phillips* v. *Bridge*, 11 Mass. R. 248.

Noyes, for the defendant, said that the amendment set forth a new cause of action, and if so, clearly ought not to be permitted. The argument urged on the other side, that by the statute of limitations, four years operates as a bar to the cause of action in one count, and six years to that in the other, shows that they are not the same. The evidence to support the one count is entirely different from that to support the other, and for this reason also, the amendment should not be allowed. 2 Greenl. 46; 10 Pick. 123; 19 Pick. 176 and 517; 13 Maine R. 87; 18 Maine R. 166.

The first count only is in the writ; and the statute of limitations furnishes a bar to the plaintiff's recovery on that count. Kimball was not bound to keep the property longer than thirty days after judgment. The thirty days must have expired as

soon as the 9th of July, 1838, and the suit was not commenced until August 25, 1842. If the delivery of the execution to Kimball, then deputy of another sheriff, operates in law as a demand, then the four years expired on July 6, 1842. Kimball might be liable until the return day of the execution; but if so, it would be as the deputy of Copeland, and not of Fowler. The liability of the defendant for the acts of Kimball, could not extend beyond the time the deputy was bound to keep and deliver the property attached; at the utmost, not beyond thirty days after judgment. 14 Maine R. 430; 18 Maine R. 125; 16 Maine R. 508.

The opinion of the Court was by

TENNEY J. — When this action was commenced, it was for the recovery of damages alleged to have been sustained by the default of John Kimball, a deputy of the defendant, who was sheriff of this county, in not retaining property attached upon a writ in favor of the plaintiff and William Lambard, his partner, since deceased, against one Robinson. Judgment was recovered against Robinson on June 9, 1838; execution was issued thereon July 5, 1838, and on the next day, when he was a deputy under another sheriff, who had succeeded the defendant, was delivered to the said Kimball. The defendant relies upon the statute of limitations.

"All actions against a sheriff, except for escape of prisoners committed on execution, for the negligence or misconduct of his deputies, shall be commenced within four years, next after the cause of action shall accrue." Rev. Stat. c. 146, § 2.

The return of goods as attached upon mesne process by a sheriff imposes upon him the duty to keep them till the expiration of thirty days after final judgment in the action in favor of the creditor, notwithstanding he may cease to be the sheriff after the attachment. *Tukey & al.* v. *Smith*, 18 Maine R. 125; *Bailey* v. *Hall*, 16 Maine R. 408. And a demand by the creditor, within thirty days after his judgment, of the goods attached, that they may be taken in execution and disposed of by sale, and a failure to deliver them renders him liable; and

the duties and liabilities of deputies are in all respects similar to those of a sheriff; and the latter is answerable for such neglects of the former, if the neglects were of duties devolving upon them when they held deputations under him. *Morton & al.* v. *White & al.* 16 Maine R. 53. If the deputy, who has returned goods attached upon mesne process, receive the execution issued upon the judgment in the same action in favor of the creditor, in season to save the attachment, though he may be a deputy at the time under another sheriff, no other demand of the property is necessary; for he being presumed to have in possession the property attached, is obliged by his duty as an officer to make the seizure; and should he omit to do so, till the expiration of the attachment, in consequence of having suffered the goods to go from his possession and control, he and the sheriff whose deputy he was at the time of the attachment, is responsible to the creditor for the damages sustained; after the attachment is dissolved through the fault of the officer, neither a delay till the return day of the execution, nor a demand for the amount thereof is necessary to make perfect his liability; the creditor cannot, either by demand or the delay, be restored to the right which he has lost; and the cause of action accrues immediately upon the neglect. *Williams College* v. *Balch*, 9 Greenl. 74.

In the case before us, Kimball held the office of deputy sheriff when the plaintiff's execution was delivered to him, and it was in his hands in season to have seized the goods, which he had attached on the original writ; he omitted to make the seizure, because he had permitted them to be removed from his possession before the judgment; and he was liable for that neglect immediately upon the expiration of the attachment, which was on the 10th day of July, 1838. This action was commenced for that cause on the 25th of August, 1842, and was too late.

Under general leave to amend, a new count was filed on the 10th day of September, 1844, which is to be a part of the writ, if properly allowed; the plaintiff's counsel insist that it

is for the same cause of action with the original declaration, which is denied by the other party.

It is true, if a deputy sheriff has been guilty of negligence or misconduct, in his office, by which a debtor or creditor has been injured, an action for such injury may be brought directly against the deputy or the sheriff; and in the latter case the wrong may be charged generally as committed by the sheriff, and on trial be proved to have been done by the deputy, for whose acts, he is answerable. *Walker* v. *Foxcroft*, 2 Greenl. 270. But the reverse of this rule would be absurd. If a new count is for the same acts of the deputy charged in a different form from that originally in the writ, it is for the same cause of action; but if the new counts for other and distant acts, and of the sheriff instead of the deputy, which are not embraced in the charges contained in the first count, it is otherwise, though intended for the recovery of damages arising from the loss of the same rights.

If the two counts are for the same cause of action, it is not easy to perceive that the statute of limitations can apply less to one than to the other. The allegation in the writ in general terms, that the sheriff is guilty of the acts, which are proved to have been done by the deputy, cannot extend the time, within which the action may be brought therefor against the former; the principal can be holden only four years for defaults of the deputy, after the cause of action accrued, whether the writ contains the general charge against him, or the special declaration, that the deputy was guilty.

The new count filed by the plaintiff is for the acts and neglects of the sheriff himself, for which the deputy is in no way officially responsible to him; the other is for the neglects of the deputy alone, for which the sheriff was once liable, upon the proof in the case, to the creditor; and the amendment was unauthorized.

Plaintiff nonsuit.

JOHN H. WEBSTER *versus* JOHN R. CLARK *& al.*

Courts of equity are not tribunals for the collection of debts; and yet they afford their aid to enable creditors to obtain payment, when their legal remedies have proved to be inadequate. It is only by the exhibition of such facts, as show that these have been exhausted, that their jurisdiction attaches.

In a bill in equity, wherein the plaintiff alleges, that his judgment debtor, one of the defendants, has conveyed his real and personal estate to the others in fraud of his creditors, and seeks relief for that cause, if the bill does not allege, that the plaintiff has made a levy upon the land, or any attempt to seize and sell the goods, or that an officer has returned the execution without being able to obtain satisfaction, or such facts as show that the plaintiff has exhausted his remedy at law, the bill will be dismissed, on demurrer thereto, for want of jurisdiction.

THIS was a bill in equity against John R. Clark, Charles H. Clark and Horatio Clark, and was heard on a demurrer to the bill. The allegations in the bill are stated in the opinion of the Court.

H. & H. Belcher argued for the defendants, contending that the bill was insufficient, as it disclosed no ground whereon to ask any remedy of this Court, sitting as a court of equity. Every thing alleged in the bill might be true, and yet the plaintiff might have a full and adequate remedy at law. It is not alleged, that there was any levy upon the real estate said to have been fraudulently conveyed, and no return has been made upon the execution, that property of the debtor to satisfy it could not be found, nor any allegation which negatives a perfect remedy at law. Merely saying that the party has no remedy at law, is matter of form only, and is wholly insufficient to give the Court jurisdiction, without alleging such facts as show that the Court has jurisdiction as a court of equity. In their argument they cited Rev. Stat. c. 96; *Russ* v. *Wilson*, 22 Maine R. 210; *Herrick* v. *Richardson*, 11 Mass. R. 234; *Coombs* v. *Warren*, 17 Maine R. 404.

Webster argued *pro se*. The points made by him are given in the opinion of the Court. He cited Story's Eq. Pl. 24; *Mills* v. *Gore*, 20 Pick. 28; *Clapp* v. *Shepherd*, 23 Pick. 228; *Reed* v. *Cross*, 14 Maine R. 259; Story's Eq. Pl. 350, 365,

403, 416; *Pillsbury* v. *Pillsbury*, 17 Maine R. 107; *Hanly* v. *Sprague*, 20 Maine R. 431; 2 Atk. 235; *Trecothick* v. *Austin*, 4 Mason, 41; 3 Paige, 467; 7 Johns. Ch. R. 144; 1 Sim. 37; 2 Sim. 285; *Gardiner Bank* v. *Hodgdon*, 14 Maine R. 453; *Traip* v. *Gould*, 15 Maine R. 282; *Howe* v. *Ward*, 4 Greenl. 195; *Clapp* v. *Leatherbee*, 18 Pick. 131; *Parkman* v. *Welch*, 19 Pick. 231; 8 Wheat. 229; 8 Conn. R. 190; 2 Pick. 411; 1 Story's Eq. 352; Com. Dig. Covin, B 2.

The opinion of the Court was drawn up by

SHEPLEY J. — The facts stated in the bill, so far as they are important for the decision of the questions presented by the demurrer, may be briefly exhibited. Gibson Smith recovered a judgment against John R. Clark, in January, 1844, and assigned the same by verbal agreement to the plaintiff, to whom the execution had been delivered. Clark had before, in March, 1843, conveyed all his real and personal estate to his sons, the other defendants, in fraud of the rights of his creditors. A certain sum was paid upon the execution, which remains unsatisfied for the balance. Clark made an arrangement to make a set-off and pay it, and thereby occasioned delay and the loss of an attachment made upon the original writ, and then refused to fulfil it; and the plaintiff has been wholly unable to collect the balance, which still remains due. The bill does not allege, that the plaintiff has made any levy upon the land, or any attempt to seize and sell the goods, or that an officer has returned the execution without being able to obtain satisfaction, or that the plaintiff has exhausted his remedy at law. For these reasons the defendants demur.

Courts of equity are not tribunals for the collection of debts; and yet they afford their aid to enable creditors to obtain payment, when their legal remedies have proved to be inadequate. It is only by the exhibition of such facts, as show, that these have been exhausted, that their jurisdiction attaches. Hence it is, that when an attempt is made by a process in equity to reach equitable interests, choses in action, or the avails of property fraudulently conveyed, the bill should state, that judg-

ment has been obtained, and that execution has been issued, and that it has been returned by an officer without satisfaction. *Balch* v. *Wastall*, 1 P. Wms. 445; *Cuyler* v. *Moreland*, 6 Paige, 273; *Reed* v. *Wheaton*, 7 Paige, 663; *Bethell* v. *Wilson*, 1 Dev. & Bat. 610; *Woolsey* v. *Stone*, 7 J. J. Marsh. 302; *Neate* v. *The Duke of Marlborough*, 3 Mylne & Craig, 407. In the latter case, which was fully argued and considered before the vice chancellor, 9 Simon, 60, and before the lord chancellor on appeal, such was admitted to be the settled rule. While on the part of the plaintiff it was contended, that it did not require, that such a bill, seeking to obtain a debtor's equitable interest in a freehold estate should allege, that an *elegit* had been issued. The case was presented on demurrer to the bill, because it did not contain such an allegation; and the demurrer was allowed. It was held, however, not to be necessary to allege, that the writ of execution had been returned; for the reason, that by issuing the writ the creditor seeking such relief in England, had done all, which he could to establish his title without the assistance of a court of equity. But in this State, where a judgment does not create a lien upon the real estate of the debtor, the principle established in all these cases would require, that the creditor should make a levy upon the real estate of his debtor, if he would have the assistance of a court of equity to enable him to obtain satisfaction from the estate itself, which has been fraudulently conveyed, and not from the proceeds of its sale. He must first do all, which the law will enable him to do to obtain a title in the mode pointed out by the statute, and then the Court will assist him and prevent his being injured by the outstanding fraudulent title. It cannot by an original and independent course of its own, afford the means of obtaining the debt from the estate, by causing it to be sold for cash, or by requiring a conveyance of so much of it, as would pay the debt according to some estimate of its own, instead of acting only as an auxiliary to the law, to enable him to obtain satisfaction according to the provisions of the statute. *Henriques* v. *Hone*, 2 Edw. 120. While it will assist a party to make the common law remedies

successful, by vacating fraudulent conveyances, and by removing obstacles, it will not assist a party, who neglects or refuses to use them, when they might be used successfully; and supply their place by others, affording him advantages, which the law does not design to give him. When the debtor has placed his property in such a position, whether it be real or personal, that no common law process can reach it, the Court will according to the course of equity proceedings, make use of its own power and process to assist a creditor to reach such property, that it may be applied to the payments of debts.

The plaintiff contends, that this Court has afforded its aid without requiring such preliminary steps to be taken; but the cases cited for that purpose do not authorize such a conclusion. In the cases of *Gardiner Bank* v. *Wheaton*, 8 Greenl. 373, and *same* v. *Hodgdon*, 14 Maine R. 453, no such question was made. In the first case the creditor was assisted to reach the equitable interests of his debtor in real estate, when he could not reach them by a common law process. In the latter case to reach the avails of personal estate conveyed in fraud of his rights. There was a demurrer to the bill in the case of *Reed* v. *Cross*, 14 Maine R. 259, one reason for which, was, that it did not allege, that the plaintiff had obtained judgment and exhausted his remedy at law; and the demurrer was overruled. The bill, however, among other matters, sought the specific performance of a written contract for the conveyance of real estate. In *Traip* v. *Gould*, 15 Maine R. 82, the bill did allege, that the execution had been returned by an officer in part unsatisfied, and that the estate, which had before been fraudulently conveyed, had since been conveyed by the debtor to the plaintiff, thereby placing him in a position as favorable to receive the assistance of this Court, as he could have been by a levy upon the estate.

In the case of *Gordon* v. *Lowell*, 22 Maine R. 251, the bill alleges, that the execution had been returned unsatisfied. The plaintiffs had not levied upon the estate fraudulently conveyed, and the Court did not aid them, by acting upon the

title to obtain payment from the estate itself, while it did assist them to follow the proceeds obtained by a fraudulent sale, that they might be appropriated to the payment of their debt.

The Court does not appear in any of these cases to have overlooked the rule, which requires a party to do, all which the law will enable him to do, before he seeks its aid to obtain payment from some fund which he cannot reach by the ordinary process of law.

The demurrer is allowed;
and bill dismissed, with costs for defendants.

NATHANIEL WOODMAN *versus* WILLIAM H. BODFISH.

If the debtor has the title to land and a right of entry therein, although he may be disseized at the time, such land, by Stat. 1821, c. 60, is liable to be taken on execution for the payment of his debts; and when the execution is legally extended upon the land, and the proceedings are duly returned and recorded, the creditor becomes thereby actually seized thereof, whoever may be in the occupation; and this seizin will enable him to maintain a writ of entry, or an action of trespass.

As the seizin of the land is transferred from the disseizor to the creditor by the levy, such seizin will be presumed to continue until that presumption is controlled by evidence. The mere continuance of the former disseizor in the occupation, is not sufficient to prevent the creditor from transferring his title, acquired by the levy, to a third person by deed.

Unless the party is himself a creditor, or claims under one, he cannot object that a deed to the other party is fraudulent and void as to creditors of the grantor.

Where a person has a recorded deed of land from the owner thereof, and also a recorded deed of the possessory right thereto from the occupant; and the latter afterwards conveys the land to a third person; the owner will not be estopped from asserting his title thereto, by reason of parol proof that at the time of this latter deed, he stated to the grantee, that the title was in the grantor.

TRESPASS *quare clausum.* The writ was dated June 12, 1841. The defendant admitted the doing of the acts alleged to be trespasses, and justified, because the right of entry and title was in him.

The plaintiff, in support of his action, read in evidence a

deed of the premises from David Gullifer to James Woodman and himself, dated Dec. 22, 1831, and a conveyance by James Woodman to him. The plaintiff proved by the testimony of said Gullifer and John Woodman, that Gullifer had been in the actual occupation of the premises until the time of his deed to Woodman, in 1831, being more than thirty years from its commencement; and that since that time until the time of the alleged trespass, the plaintiff had been in the occupation of the premises.

To show the title to be in himself, the defendant read in evidence a deed of the same premises from Henry Rice to him, dated April 5, 1841; and a levy of an execution thereon in favor of Rice against David Page, as Page's property, in due form of law, on Oct. 30, 1840, the attachment thereof on the writ having been made in 1838. To show, that the title to the premises at that time was in Page, the defendant introduced in evidence a deed from said David Gullifer to Page, dated Feb. 19, 1820; a deed of warranty of a part of the premises from Hancock to Page in 1826; and a deed of warranty of the other part, in 1827, from Williams Emmons. Independent of rights acquired by possession, the title was in Hancock and Emmons at the time of their conveyance to Page.

The plaintiff offered to prove, that the conveyance from Gullifer to David Page "was fraudulent as against creditors, and that it was known to Rice's attorney before the attachment, and to the defendant before he purchased." This was objected to by the defendant. TENNEY J. presiding at the trial, ruled, that the evidence was inadmissible.

The plaintiff offered to prove, that when Gullifer delivered his deed to J. & N. Woodman, in 1831, "David Page informed the grantees, that the title was in Gullifer." This was objected to by the defendant, and the evidence was excluded by the presiding Judge.

The Court were, upon the whole case, to render such judgment, as the legal rights of the parties should require, and were authorized to order a nonsuit or default, or direct the action to stand for trial.

Moor, for the plaintiff, contended, that if the deed from Gullifer to Page could not be impeached on the ground of fraud, still Rice took nothing by his levy, and consequently, his deed to Bodfish was inoperative.

Gullifer had been in possession for thirty years, and conveyed the premises to the Woodmans in 1831 ; and the plaintiff entered into the actual occupation under his deed, and has continued it until the time of the trespass. If the legal title was in Page, he was disseized, and the seizin was transferred to the plaintiff. 5 Mass. R. 344 ; 13 Mass. R. 443. Page had but a mere naked right of entry or of action, and this right could not be taken by the levy of an execution upon the land. The Rev. St. c. 94, § 1, authorizes the levy upon rights of entry into land. But the right to do this did not exist before that time. A levy is a mere statute conveyance.

The counsel contended, that the right was not given by the St. 1821, c. 60 ; and in his argument in support of this point, he cited St. Hen. 8, c. 9 ; 5 Pick. 353 ; 12 Mass. R. 350 ; St. 1821, c. 60. Under that statute a levy could not be legally made repugnant to the principles of the common law.

Nor did the common law authorize such right to be taken by the levy of an execution upon the land. In support of his argument on this point, he cited Co. Lit. 214 (a) ; 4 Kent, 446 ; 2 Black. Com. 311 ; 5 Pick. 350 ; 1 Wend. 502 ; 8 East, 552 ; 10 Mass. R. 131 ; 15 Mass. R. 115 ; Stearns on Real Actions, 52 ; 16 Mass. R. 345 ; 18 Pick. 250 ; 14 Mass. R. 378 ; 2 Pick. 208 ; 13 Mass. R. 54 ; 2 Com. Dig. 131 ; Co. Lit. 222 ; 2 Bac. Abr. 338.

To sustain the levy of Rice would contravene and render nugatory the provisions of the betterment act, St. 1821, c. 47. The owner of the soil could suffer a statute conveyance, and oust the tenant, when the main value of the estate consisted in the betterments.

This is not equivalent to a conveyance with livery of seizin. A levy divests only the seizin of the debtor, and of no one besides. 9 Mass. R. 93 ; 1 Metc. 528. There was no possession in Rice, nor in the officer ; and in order to make a

conveyance by livery of seizin, the person conveying must have possession of the land. 4 Kent, 448.

Nothing passed by the deed of Rice to Bodfish, April 5, 1841, before the Revised Statutes were in force. Rice's levy could give him, at the utmost, a mere momentary seizin; and the case shows, the plaintiff was at the time in the actual occupation under a recorded deed. Rice was actually disseized, if he ever had seizin, and his deed was wholly inoperative.

The presiding Judge erred in rejecting the evidence showing that the deed from Gullifer to Page was fraudulent. First, because notice to Rice's attorney of the frand, before the attachment, was sufficient notice to Rice. And second, because notice to Bodfish was, of itself, sufficient. If he chose to purchase such property, with such knowledge, he must suffer the consequences.

Boutelle, for the defendant, said the Court could not fail to perceive from the evidence and deeds, that the title to the land was in Hancock and Emmons, who conveyed it to Page; and that Gullifer never had any thing more than a mere possessory claim. The title to the land was in Page, without the deed from Gullifer; and his deed transferred the possessory right to Page; and after that time, Gullifer was but the tenant at will of Page, and did not hold adversely. If therefore the plaintiff's counsel had been correct in his law, the facts in the case would have shown the levy to have been valid, for Page, by his tenant, Gullifer, was in the actual occupation, and was not disseized. The levy transferred the seizin and title of Page to Rice, and he could have maintained trespass against the plaintiff at any time, until his conveyance to the defendant; and after that conveyance, Bodfish could have maintained trespass against him. If that be true, it would be absurd to say, that the plaintiff can also, during the same time, maintain trespass against the defendant.

Every presumption of law is in favor of a possession in subordination to the title. 20 Maine R. 223; 6 Metc. 439.

But were the case otherwise, and were it shown that Page was disseized, at the time of the attachment and levy, still he had the undisputed right of entry. Such an estate may pass by a levy. It is wholly unnecessary to inquire what the common law once was on this subject. When this levy was made, the right depended on Stat. 1821, c. 60, § 27, which provides, that when an execution is levied upon land, and returned and recorded, it shall "make as good title to such creditor, or creditors, his or their heirs and assigns, as the debtor had therein." The title to the land and the right of entry passed to Rice, and the officer delivered to him the seizin, as the law authorized him to do. Rice then had title, seizin and possession. 7 Mass. R. 488; 10 Pick. 195; 3 Mass. R. 215 and 523; 4 Mass. R. 150.

The title, seizin and possession were transferred to Rice by the levy, and that was equivalent to an eviction of Woodman by him. After this Woodman was but a tenant at sufferance under Rice, or at best, a tenant at will. There was no such disseizin as would prevent the land from passing by Rice's deed to the defendant. 20 Maine R. 223; 1 Metc. 528.

The plaintiff is a mere stranger, and has no right to contest the validity of Rice's levy. Gullifer had conveyed away all pretence of title to Page, and that deed was recorded. He therefore could derive no title by his deed from Gullifer. 18 Pick. 172.

The deed from Gullifer to Page was on record, and therefore the law presumes, that Woodman had knowledge of it, and that the land belonged to Page. The attachment and levy of Rice, when the record title was in Page, gave him the title to the land, and would have done so, if Page had given a deed previously to a third person, unrecorded and unknown to Rice. To transfer the title from Page to Woodman, by parol proof of the declarations of Page, would not only give such parol declarations a force beyond a deed under the hand and seal of the party, but would operate as a repeal of one of our most useful statutes. Notice to Rice, had it been given, of the parol declarations of Page, could not affect him. Such

declarations could not operate as a deed of the land. But no such notice is proved. A knowledge of a fact by an attorney at law, is no evidence of a knowledge of that fact by the client. 2 Metc. 431 ; 20 Pick. 193 ; 1 Story's Eq. § 409, 410.

The opinion of the Court was drawn up by

TENNEY J. — The records show, that when Rice extended his execution upon the land in controversy, the debtor had the title of David Gullifer, who, being in possession in 1820, conveyed to him, warranting against all those, who should claim from, by or through said Gullifer, in a deed duly registered, and also the title of John Hancock and Williams Emmons, by deeds with covenants of warranty. The levy was made on the 30th of October, 1840, the execution with the doings thereon, was duly returned and recorded in the registry of deeds within three months after the levy; and on the 5th day of April following, Rice executed and delivered a deed of the same land to the defendant. The plaintiff claims under Gullifer by a deed dated Dec. 22, 1831, of the land in question, to him and another; under which the grantees therein named went into possession, and one or both so continued until the levy of the execution, claiming it as their own, and the plaintiff has kept up a fence between the lot and the one adjoining, and also against the road, and has taken the crops, his possession having continued after the levy till the date of the writ.

It is contended for the plaintiff, that at the time of the levy the debtor in the execution was disseized, and the creditor could obtain nothing by the levy. But if the levy had the effect to pass the title from the debtor to the creditor the seizin of the latter was instantaneous only, and gave him no such right, as to enable him to convey to the defendant; consequently the acts complained of in the writ were a trespass upon the plaintiff's possession. It is insisted in support of these propositions, the levy of an execution can give a creditor no rights which he cannot receive by a deed from the debtor; and that by the latter, nothing can pass, while the grantor is disseized. It is true, as the law was at the time of

the levy, the deed alone of a person disseized would not have transferred the title, so as to enable the grantee to maintain a writ of entry in his own name; but a deed delivered upon the land, by the grantor, who at the time, makes an entry thereon having the right of entry, will so far purge the disseizin as to give operation to the deed as a feoffment. *Knox* v. *Jenks*, 7 Mass. R. 488; *Oakes* v. *Marcy*, 10 Pick. 195. After the delivery of a deed with covenants of warranty, from one, who at the time was disseized, an action may be maintained in his name, and a judgment entered, upon the ground that nothing passed thereby. *Walcott & al.* v. *Knight & al.* 6 Mass. R. 418. And this judgment and possession thus obtained, may enure to the benefit of the grantee. The doctrine of the case of *Bartlett* v. *Harlow*, 12 Mass. R. 350, cited for the plaintiff, is inapplicable; the question of the effect of a disseizin in an extent upon the debtor's real estate was not there presented; but it was decided, that an execution against one holding lands in joint tenancy or tenancy in common, cannot be extended on a part of the lands so holden, by metes and bounds; it not being in the power of the owner of such an estate to convey by deed a part of the land so owned, by metes and bounds.

The statute of 1821, c. 60, § 27, provides, that the creditor may levy his execution upon the real estate of his debtor, in the mode therein pointed out, and the "execution being returned with the doings thereon into the clerk's office, and before such return into the clerk's office or afterwards, and within three months, the same shall be recorded in the registry of deeds in the county where the land lies, shall make as good title to such creditor or creditors, his or their heirs or assigns, as the debtor had therein." The disseizin of the debtor does not take away his title, so long as the right of entry remains; it is still his real estate; and by this statute is liable to be taken upon execution in payment of his debts; and it is well settled, that when land is liable to be taken for the owner's debts, and the execution is properly extended, and the proceedings duly recorded, the creditor becomes thereby *actually*

seized, whoever may be in possession; and this seizin will enable him to maintain a writ of entry or an action of trespass at his election. *Gore* v. *Brazier*, 3 Mass. R. 523; *Nickerson* v. *Whittier*, 20 Maine R. 223. Two adverse parties cannot be seized of the same land, at the same time; and if the person who had disseized the debtor, that is the owner of the land, is in possession at the time of, and after the levy, he cannot have the legal seizin by virtue of that possession; the creditor may if he pleases, for the purpose of having his remedy, consider himself disseized by such person, and may maintain a writ of entry, counting on his own seizin; or he may have his action of trespass against him for acts done after the levy. It follows from these principles, that the disseizin before existing, is purged by the levy; and that the continuance of the possession afterwards by the wrongdoer, which was no impediment to the officer in giving actual possession and seizin to the creditor, cannot constitute a disseizin, until its character is so changed, that it amounts to an ouster of the creditor. If the possession is mixed, the seizin is according to the title. The seizin acquired by the creditor is presumed to continue, till that presumption is controlled by evidence; and he can convey his title to another by deed.

It is insisted that this construction of the law will defeat the rights intended to be secured to those having "certain equitable claims arising in real actions," by Stat. 1821, c. 47. That act provides for the appraisement of the value of the buildings and improvements made by those, who have held the land in the manner therein mentioned, for the term of six years and upwards, in actions brought for the recovery of the lands so holden; and those in whom is the title cannot have possession thereof till they have paid the sum at which the buildings and improvements have been appraised; but there is nothing in this act which abridges in any manner the right of the owner of such lands to enter thereon and withhold the possession from those who have held the same for six years, without resorting to his action. If the legislature had intended to prohibit the proprietor from taking possession of lands thus

holden, excepting upon a writ of possession upon a judgment, they could have so provided. But they manifestly did not so intend, for in c. 62, § 5, it is enacted, "That if any person shall make such entry into any lands, tenements or hereditaments, which the tenant or those under whom he claims have had in actual possession for the term of six years or more, before such entry, and withhold from such tenant the possession thereof, such tenant shall have the right of recovering of him so entering, in an action for money laid out and expended, the increased value of the premises by virtue of the buildings and improvements," &c.

In the case before us, if it be true, as the plaintiff contends, that the debtor in the execution was disseized when the same was levied, the title was in him, and the right of entry remained; and by the extent upon the land, the creditor acquired all his title and the actual seizin. There is no evidence of any ouster afterwards, but we must presume, that the creditor held the possession, which he received from the officer; and therefore was empowered to convey to the defendant the title obtained under the levy.

The plaintiff was not permitted to offer proof, that the deed from Gullifer to Page was fraudulent as against attaching creditors. A deed duly executed, delivered and recorded, may pass the title to the grantee, and it may be effectual also against a subsequent purchaser, where it cannot take away the right of an existing *bona fide* creditor, who attaches afterwards. The plaintiff made no offer to prove that the deed of Gullifer to Page was fraudulent, excepting as against creditors; he did not present himself as such, or as claiming under one, and the evidence was properly excluded.

The proof offered, that when Gullifer delivered his deed to the plaintiff, that Page informed the grantees, that the title was in the grantor, was not legally admissible. The title, as disclosed by all the deeds, was in Page, they were on record, and were absolute conveyances; the plaintiff was therefore charged with constructive notice, at least, of their existence. There is no suggestion, that there was any document or record,

which passed the title back to Gullifer. To receive and give effect to such proof, as that offered and rejected, would be an abrogation of the statute of frauds, and allow title to real estate to rest on a very uncertain basis. If Page held a mortgage for security of a debt, such declaration might be evidence of the payment thereof; or, if it turned out, that he had given a deed, which was not recorded, at the time of the delivery of the deed from Gullifer to the plaintiff, and the creditor was informed of the debtor's declaration before the attachment, it would be different. Nothing of that kind is exhibited in the case, and on no principle could the evidence have been received.

Other points were raised, growing out of the evidence introduced by the defendant, and that offered by the plaintiff to control it, and rejected, which it becomes unnecessary to discuss or consider. By the agreement of the parties, a

Nonsuit must be entered.

JOHN H. WEBSTER *versus* JOHN WITHEY *& al.*

If the consideration of the conveyance of land is security for the maintenance of the grantor during life, without any intention thereby to defraud or delay creditors, the conveyance is invalid against prior creditors, but may be good against subsequent ones.

Where a creditor seeks relief by a bill in equity, on the ground, that his debtor has made a fraudulent conveyance of his real estate to the defendant in the bill, if the plaintiff does not allege and show, that he has acquired title to the estate by a levy upon it, or by a conveyance, nor aver that his execution has been placed in the hands of an officer, who has made a return upon it, that he could not obtain satisfaction; he has not entitled himself to come into a court of equity for relief, and his bill will be dismissed.

BILL IN EQUITY. The substance of the bill, answer and proof is stated at the commencement of the opinion of the Court.

Webster, pro se, said that the principle in equity was well established, that if one man purchase land with the money of another, he holds the land in trust for that other. 17 Maine

R. 107; 14 Maine R. 281; 2 Fairf. 9; 16 Maine R. 268; 2 Story's Eq. 443; 1 Wilson, 21.

He contended, that upon the facts he was to be considered as a creditor of Staples prior to the conveyance to Withey; and that as such he was entitled to relief in the mode he had adopted. He cited 3 Fairf. 79; 15 Maine R. 282; 18 Pick. 248; 19 Pick. 231; 4 Greenl. 195; 23 Maine R. 85; 8 Greenl. 373; 3 Mason, 347; 1 Johns. Ch. R. 582; 2 Johns. Ch. R. 405; 2 Story's Eq. 441.

R. Goodenow, for Withey, contended: —

That every fact essential to the plaintiff's title to maintain the bill and obtain relief must be stated in the bill; otherwise the defect will be fatal. Story's Eq. Pl. § 257. Even if the bill be uncertain in these respects, it cannot be sustained. Story's Eq. Pl. § 242.

It does not appear, that the plaintiff has ever made any efficient or stringent exertion to satisfy his judgment by a levy on land, or sale of personal estate, or even that the execution has been in the hands of an officer. He cannot maintain a bill in equity, if he could have obtained satisfaction of his judgment by placing his execution in the hands of an officer.

The plaintiff's demand accrued partly after the conveyance; and in such case, he is to be considered as a subsequent creditor. 4 Greenl. 400; 23 Maine R. 22.

A voluntary conveyance, if this is to be considered such, is valid against subsequent creditors, where there is no intentional fraud; of which in this case there is no pretence. 1 Story's Eq. § 362, and authorities there cited; *Howe* v. *Ward,* 4 Greenl. 195; 18 Pick. 248 and 373; 3 Metc. 63.

Other objections were taken to the right of the plaintiff to maintain the bill, but as they were not considered by the Court, they are omitted.

The opinion of the Court was by

Shepley J. — The material allegations in the bill are; that the defendant, Staples, several years since, entered upon a tract of land owned by Oliver Herrick, and made improvements on

it; that he afterwards paid Herrick for the land and obtained from him a deed conveying it to the defendant, Withey, to preserve it from attachment and levy by his creditors, and to be held in trust for the maintenance of himself and wife during life; that the plaintiff in the year 1843 recovered a judgment against Staples, on which an execution has issued, that remains unsatisfied; and that the plaintiff is wholly unable to obtain payment.

Staples has suffered a default to be entered without filing any answer. Withey in his answer admits, that Staples entered and occupied the land until April, 1841; and that he made improvements upon it. The answer sets forth an agreement then made between them, that Staples should procure a conveyance of the land from Herrick to Withey, who was to maintain Staples and wife during life. It states, that Withey accordingly moved on to the farm and has continued to occupy it; that Staples procured the conveyance from Herrick to Withey, bearing date on July 7, 1841, and delivered it to him on June 20, 1842; when Withey gave to Staples a written memorandum, obliging himself to secure to them a maintenance during life, by a proper instrument creating a lien upon the land, by their performing such work as they were able to do; that Withey repaired the house and continued to maintain them till the Autumn of 1843, when Staples became dissatisfied, and commenced an action upon the written memorandum, which is still pending.

The only proof in the case, is a copy of the plaintiff's judgment against Staples and of the items of account, on which that judgment was recovered.

The prayer of the bill is for such relief, as the Court under the circumstances may be enabled to give, without specifying any particular mode, in which it should be granted. While the counsel for Withey denies, that the plaintiff has presented such a case as to be entitled to any relief.

There is no proof, that the arrangement between Staples and Withey was made with an intention to defraud or delay creditors. The answer denies it, and there is no contradictory proof.

That arrangement would be invalid against the prior creditors of Staples. It may be good against subsequent creditors. The account commenced in the year 1837, and was continued "up to June Term, 1842." The counsel for Withey contends, that a considerable portion of it must be considered as accruing subsequent to the arrangement between Staples and Withey, and that the plaintiff is therefore to be regarded as a subsequent creditor.

There was only a verbal agreement between them, which could not be binding, prior to the delivery of the deed on June 20, 1842. The title then passed to Withey; and it does not clearly appear, that any of the items of charge, for which the judgment was taken, accrued subsequent to that time.

The statement of the account is somewhat loose and informal, and it is not necessary to decide, whether the plaintiff should be regarded as a prior or subsequent creditor; for if he is to be considered as a prior creditor, he cannot be entitled to relief upon this bill. He has not acquired any title to the estate by making a levy upon it, or by any conveyance from any person. His execution has not been placed in the hands of an officer, who has made a return upon it, that he could not obtain satisfaction. Such an allegation with proof, was held to be necessary in the case of *Webster* v. *Clark*, decided at this term, *ante* p. 313, to entitle a creditor to come into a court of equity for relief.

The bill as to Withey, is dismissed with costs.

ABNER COBURN *& al. versus* JOHN WARE.

If a joint note be made by four, payable on time, and before it was payable two of the promissors pay "two thirds of the within note, principal and interest, being their part," and it is thus indorsed thereon, they are not thereby discharged from the payment of the sum still remaining unpaid.

If one of several joint promissors, after a suit against all is pending on the contract, file his petition and obtain his discharge under the bankrupt law of the United States, and plead it, and its validity is denied by the plaintiff on the ground that it was obtained by fraud, a verdict and judgment may be legally rendered in favor of this defendant, and also in favor of the plaintiff against the other defendants.

Where one of several defendants pleads his bankruptcy, an amendment of the writ may be permitted, by striking therefrom the name of the bankrupt defendant.

THIS case came before the Court on the trial of a review of action, brought by John Ware against the plaintiffs in review, Abner Coburn, Philander Coburn, Moses Jewett and Amos F. Parlin, on a joint note given by them to J. M. Pollard, and indorsed to Ware after the note fell due. The note became payable on June 24, 1837, and this indorsement was made thereon at the time it bears date. "Feb. 15, 1837. Received of A. & P. Coburn two thirds of the within note, principal and interest, being their part." Two indorsements were made upon the note, after it became payable as paid by Jewett and Parlin.

The general issue was originally pleaded by all the defend ants. On the trial of the review, the two defendants, Jewett and Parlin, filed pleas, setting forth, that at a certain time, subsequent to the commencement of the process in review, they had severally filed their petitions in bankruptcy and had received their discharges, under the bankrupt law of the United States. To these pleas, Ware replied, that the discharges were obtained by fraud, and issue was joined on these replications.

On the trial, before TENNEY J. no evidence was offered by Ware in support of the allegation in his replications. It was agreed to submit the case for the decision of the Court. If

the Court should be of opinion that A. & P. Coburn were discharged by the first indorsement upon the note, Ware was to become nonsuit; if A. & P. Coburn are not discharged by the indorsement and if the action can be maintained against them without amending the writ, by striking out the names of Jewett and Parlin, the action is to stand for trial.

Hutchinson, for the original plaintiff, Ware, contended that the first indorsement was nothing more than a mere acknowledgment of the payment of two thirds of the amount of the note by A. & P. Coburn, and could not have the effect of discharging them from the payment of the residue of the note. *Tuckerman* v. *Newhall*, 17 Mass. R. 581; *Houston* v. *Darling*, 16 Maine R. 413; *Walker* v. *McCullock*, 4 Greenl. 421.

The action was rightly brought against all the defendants; and now two of them contend, that they have by their own acts, against the wishes of the holder of the note, obtained a discharge. The plaintiff was not bound to notice the discharges until they were pleaded, and then may reply that they are of no avail, because obtained by fraud. If they obtain a verdict in their favor, they will be discharged, but it cannot discharge the other two defendants. 12 East, 664.

Wells and *D. Kidder*, for the defendants, insisted that A. & P. Coburn were wholly discharged by the payment they made and the indorsement thereof upon the note. It was a payment of their part, and of course they were to pay no more, and no action can be maintained against them. *Goodnow* v. *Smith*, 18 Pick. 414; *Shaw* v. *Pratt*, 22 Pick. 305; *Brooks* v. *White*, 2 Metc. 283; *Walker* v. *McCullock*, 4 Greenl. 421.

The law was supposed to be, that if the plaintiff proceeds to trial upon a joint contract, he must recover against all or none. There cannot be a verdict for the plaintiff against a part of the defendants and for the remaining defendants against the plaintiff. Infancy as well as bankruptcy is a personal privilege, which may be waived; and it is well settled, that if the suit be against two, and infancy is pleaded by one,

and the verdict is for him, the plaintiff fails as to both. 1 Chitty on Pl. 32, 33.

The opinion of the Court was by

TENNEY J. — The defendants in the original action, Abner Coburn and Philander Coburn, having paid, before the maturity of the note, two thirds of its amount, "being their part," claim to be relieved from further liability. That they may be discharged from the obligation upon them, arising from their contract, it must appear by unequivocal proof, that they were released; the terms used in the indorsement upon the back of the note are not of this character; an agreement between them, and the one who held the note at the time of the indorsement, that they were not to be called upon for the balance left unpaid, cannot be inferred with legal propriety; it is rather evidence, that it was considered they had paid that, which, as between the signers of the note, they were bound to see discharged.

Can this action be maintained against the two Coburns, without amending the writ, by striking out the names of those, who have pleaded their discharge in bankruptcy?

At common law, if a contract be proved to have been in fact made by all against whom, the suit is brought; yet is not legally binding upon all, on the ground, that one was not liable at the time the contract was entered into, as being under coverture, an infant, &c. the plaintiff would be nonsuited. "But when one of the parties is discharged from liability by matter *subsequent* to the making of the contract, as by his bankruptcy, and certificate, the failure on the trial as to him, on such ground, does not preclude the plaintiff from recovering against the other parties; and should he plead his certificate, *nolle prosequi* as to him may be entered." 1 Chit. Pl. 32 and 33.

In this case, those who have pleaded their certificates were originally liable, and they claim to be exonerated by their discharge in bankruptcy obtained since. It is the privilege of the original plaintiff to contest the validity of these certificates, on the ground that they were fraudulently obtained. Bankrupt

law of U. S. of 1841, § 4. And he has tendered an issue for that purpose, which has been joined. If the other two defendants have not been released, and are still liable upon the note, which is joint and not several, a several action against Jewett and Parlin would abate upon a proper plea; both issues presented can be tried in the present action, and a judgment can be entered upon a verdict in favor of the original plaintiff, upon one of the issues, though upon the other the verdict may be against him. *Gray & al.* v. *Palmers & Hodgson*, 1 Esp. R. 135. But if he chooses to do so, he can amend by striking from his writ the names of those, who have pleaded their certificates.

Action to stand for trial.

ABEL HOXIE *& al. Pet'rs versus* THE COUNTY COMMISSIONERS OF SOMERSET.

A *mandamus* to an inferior court will not be granted, unless the petition alleges facts sufficient, if proved, to show that such court has omitted a manifest duty. It must contain not only the affirmative allegation of proceedings necessary to entitle the party to the process prayed for; but it must also be averred, that other facts which would justify the omission complained of, do not exist.

A *mandamus* to the County Commissioners will not be granted, if every statement in the petition therefor may be true, and yet the Commissioners be in no fault whatever.

And it may well be doubted, whether two or more persons to whom damages have been awarded, severally sustained by them by the laying out of a road across their respective lands, in which they have no common interest, can well make a joint application for a *mandamus* to the County Commissioners, grounded on some alleged omission of duty in relation to such damages.

THIS was petition by Abel Hoxie and Dennis Blackwell for a *mandamus* to the County Commissioners of Somerset. The facts in the case are recited at the commencement of the opinion of the Court.

The case was argued by

Noyes, for the petitioners:—and submitted without argument, by

Leavitt, County Attorney, for the respondents.

The opinion of the Court was drawn up by

TENNEY J. — The petitioners represent, that a highway, described in their petition, commencing at a point in the county of Kennebec and extending into the county of Somerset, was adjudged by the County Commissioners of the two counties, acting jointly, at a session duly called and legally notified, on the 17th day of October, A. D. 1839, to be of common convenience and necessity; and on the 19th day of the same October, the County Commissioners of the county of Somerset ordered the part of the highway which lies in that county, to be established according to law, and located the same in pursuance of the adjudication of the joint board of Commissioners, and made their report the next March Term of the court of County Commissioners; and that there was allowed to the petitioners for their damages, sustained by the location and establishment of said road over and across their land, the sum of twenty-five dollars to one, and the sum of forty-five dollars to the other, which sums were ordered to be paid, when the road should be opened. And it is alleged in the petition, that the County Commissioners, although they have been requested, unjustly neglect and refuse, to order the damages so allowed to the petitioners, to be paid, except, till after the road shall have been made and opened, which has not been done; and they pray for a writ of *mandamus* to the respondents, commanding them to order and direct the damages so allowed to be forthwith paid.

A writ of *mandamus* to an inferior Court will not be granted, unless the petition alleges facts sufficient, if proved, to show that such Court has omitted a manifest duty. It must contain not only the affirmative allegation of proceedings, necessary to entitle the party to the process prayed for, but it must also be averred, that other facts, which would justify the omission complained of, do not exist.

The statute of 1835, § 1, provides, "that after the County Commissioners shall, upon petition therefor, have laid out or altered any highway or town way, and shall order their return thereof to be recorded, they shall also cause to be entered of

record, that the original petition, upon which their proceedings are founded, is continued and to be continued until their second next regular session to be holden thereafter, and all persons or corporations aggrieved by the decision of the County Commissioners in estimating damages, shall present their petitions for redress, at the first or next regular session, and if no such petition be then presented, the proceedings upon such original petition shall be considered as closed, and so entered of record, and all claims for damages, other than those awarded by the County Commissioners, shall be and remain forever barred; but if any petition be presented as aforesaid, for increase of damages, by reason of laying out of said road, and a committee be appointed or jury ordered thereon, it shall be the duty of the County Commissioners, still further to continue the original petition," &c. And it is further provided, that the county or town, liable for damages, shall be allowed a time not exceeding two years from the day on which all proceedings on the original petition are closed, within which to pay all damages, that may then appear of record to be due by reason of laying out such road.

In the petition before us, there is no averment, that applications had not been made for redress by persons or corporations, aggrieved by the decision of the County Commissioners in estimating damages; nor that petitions were presented and continued, and committees appointed or juries ordered, and returns made by them and accepted, and all proceedings closed at a certain time mentioned. It contains no statement of the time within which damages were to be paid, after proceedings were closed. The Commissioners were not bound by the statute to order the damages to be paid till two years thereafter, nor until demand should be made for the sums allowed. There is no allegation, that the proceedings were closed, or that demand had been made, for the damages, at a time when the petitioners were entitled thereto. Every statement in the petition may be true, and the respondents be in no fault whatever.

The allegation in the petition, that the sum of forty-five dollars was allowed to Abel Hoxie as damages, is not supported by the proof adduced. It appears from the record, that there was allowed to Simeon Doe *or* Abel Hoxie that sum. Doe had an equal right with Hoxie to receive it; and there is nothing in the petition or the evidence, to show, that the right of the former was extinguished, or that he did not receive the amount awarded, or give a discharge therefor.

It may well be doubted, whether two or more persons, whose interest and cause of complaint are entirely distinct, can make a joint application for the writ prayed for. It is not believed that the common law authorizes such a course; and the provision in Stat. of 1821, c. 118, § 5, and in Rev. Stat. c. 25, § 9, do not appear to have been designed for such a purpose, but extend only to an application for an increase or decrease of damages. The record shows, that a certain sum was awarded to Simeon Doe, or Abel Hoxie, and another sum to Dennis Blackwell, as damages, severally sustained by them, by reason of the road laid out across their lands; there was no interest common to both in either parcel.

The petition must be dismissed.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PISCATAQUIS,

ARGUED AT JUNE TERM, 1845.

JOHN E. SAWYER *versus* ELLIOT G. VAUGHAN.

When the defence of failure of consideration is set up to an action upon a note, expressing therein that it was for value received, given as the consideration for a deed of land, the burthen of proof is upon the maker of the note to show the facts which would exonerate him; and if it be left doubtful whether he acquired the title intended, the defence fails.

If one person bargains with another for the release and conveyance of a title, equally known to both to be a doubtful one, and takes such conveyance and gives his note for the price; he does not show a failure or want of consideration, by proof that the grantor had no valid title.

ASSUMPSIT upon a note of which the following is a copy. "Monson, Oct. 11, 1841. I, for value received, promise to pay J. Emery Sawyer, Treasurer of the town of Elliotsville, one hundred and sixty-eight $\frac{30}{100}$ dollars, in labor on the bridge over Wilson stream, according to a contract with E. H. Drake, surveyor of highways, said work to be done in all the month of November next. "Elliot G. Vaughan."

A statement was drawn up and signed by the parties setting forth certain facts and referring to certain deeds. So far as the case could be understood, the facts appear in the opinion of the Court.

Blake argued for the plaintiff, contending that the action was rightly brought in the name of Sawyer, as treasurer. Rev. St. c. 115, § 14; 3 Greenl. 369; 19 Maine R. 322.

There was no failure of consideration; and there was originally a sufficient one. The case finds that the defendant knew all the facts; and the defendant took this title at his own risk of loss or gain; and if he should lose, it furnishes no defence to the note. *Baker* v. *Page*, 2 Fairf. 383.

The sale was legal. There is no necessity, that the collector's deed should state the manner in which he had proceeded in making the sale.

There has been no failure of title, for the defendant still remains in possession of the land, and has never been disturbed. In such case want or failure of consideration cannot be set up in defence of a suit on a note given for the purchase money. 7 Martin, 223; 15 Mart. 111; 19 Mart. 235; Bailey, 250; 17 Wend. 188; 25 Wend. 113; 2 Johns. Ch. R. 519; 21 Wend. 138.

He also contended, that even if the defendant had been evicted, it would have furnished no defence to the note, but the only remedy, if any there was, would have been upon the covenants in the deed. *Lloyd* v. *Jewell*, 1 Greenl. 352; *Wentworth* v. *Goodwin*, 21 Maine R. 154; 25 Wend. 117; 2 Kent, 473.

A. Sanborn, for the defendant, said the defence to the note was, that the town had no title or claim to the land; and that, therefore, there is a total failure of consideration, and the note is void. The sale was invalid, and the town derived no title under it. The assessments were not produced, and there is no proof, that the provisions of the law, in advertising and selling, were complied with. And because the collector did not in his deed state specifically, that he had advertised, &c. 3 Pick. 457; Bayley on Bills, 340; 11 Johns. R. 50; 14 Pick. 293; 20 Pick. 105; 2 Greenl. 390; 2 Wheat. 13.

The note is void, also, on the ground, that the selectmen had no authority to take such note in payment of the tax. The transaction was illegal.

Again, no title vested in the town, or in Sawyer, because, if Sawyer was agent of the town, then the town was both seller

and buyer, grantor and grantee; and the sale and conveyance under it were illegal and void.

The opinion of the Court was drawn up by

SHEPLEY J. — The case shows, that a tract of land, known as the undivided Vaughan tract, in the town of Elliotsville, was assessed for the years 1836 & 7, in that town; and that those assessments were committed to the collector, Benjamin Thombs, for collection; that to obtain payment he sold three undivided fifth parts of that tract at auction, on October 18, 1838; that the plaintiff, being treasurer of the town, by the request of the selectmen purchased the same, and on February 25, 1839, received a deed from the collector, in which he was described as agent of the town. Before the eleventh day of October, 1841, the defendant agreed with the selectmen to pay the taxes, which had been assessed upon the land, and that the town should release to him the title acquired by that sale. And on that day the plaintiff, by virtue of a vote of the town, executed a deed of release, conveying to the defendant all his right, title and interest to the lands conveyed to him by the collector, with covenants of warranty against the title of any one claiming under him; and the defendant made the note, upon which this suit was instituted, payable to the plaintiff, as treasurer, in labor in the month of November then next, in part payment of those taxes. The case states, that the defendant knew all the facts. There is no suggestion of any concealment, misrepresentation, or fraud, in the case. It does not appear, that the defendant is not in possession of the lands.

It is contended in defence, that the note was made without any consideration; that the plaintiff acquired no title to the lands by that sale, and conveyed none to the defendant. And it is said, that it does not appear, that the lands were legally assessed. It is true, that the case does not present sufficient facts to enable the Court to decide, whether they were legally assessed or not. If the defendant would avoid the payment of his note, stating, that he has received the value of it, he should

prove the facts which would exonerate him. The burthen of proof is upon him.

It is also contended, that the sale was illegal, and that nothing passed by the deed of the collector to the plaintiff, because he made the purchase, acting as agent of the town, by the request of the selectmen. It does not appear, that the collector had any connexion with that arrangement, further than making the deed to the plaintiff, in which he is described as agent, or that he did not sell to the highest bidder. It is not necessary to decide, whether the town acquired any equitable interest in those lands. It did not obtain the legal title. That, so far as the collector's deed may have conveyed any, passed to the plaintiff, and from him to the defendant. But a more conclusive reason for not admitting the defence to be a valid one is, that if one person bargains with another for the release and conveyance of a title, equally known to both to be a doubtful one, and takes such conveyance, and pays or secures the agreed price, he cannot establish a failure or want of consideration by proof, that the grantor had no valid title. In such a case it would appear, that the money had not been paid or the security given for a good title, but for the conveyance by release of a doubtful one. The consideration would be the adjustment, extinguishment or conveyance of a doubtful title or claim of title; and that would be sufficient. Such a bargain would essentially differ from one for the conveyance of a title as a good one. In the latter case, if there should prove to be a failure of title, the purchaser would not have obtained that, for which he had paid or agreed to pay; while in the former he would have obtained all, which formed the basis of the contract; and the conveyance, by release of a claim of title, would be a sufficient consideration.

Judgment for the plaintiff.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PENOBSCOT,

ARGUED AT JULY TERM, 1845.

CALEB CHASE *& al. versus* GEORGE PALMER *& al.*

A bill in equity must state a cause within the appropriate jurisdiction of this Court as a court of equity. If it fails in this respect, the error is fatal in every stage of the cause, and can never be cured by any waiver, or course of proceedings, by the parties. The Court itself cannot act, except upon its own intrinsic authority, in matters of jurisdiction.

Under the provisions of the Revised Statutes, c. 96, and c. 125, this Court, as a court of equity, has no power to act on the subject of "foreclosure of mortgaged estates."

The mortgagee is not accountable to the mortgagor, nor to any one claiming under him, for rents and profits of the estate anterior to his entering into the possession thereof; nor is the mortgagor accountable to the mortgagee for the same until the latter has taken possession of the estate mortgaged.

At law, when a married woman who is entitled to a distributive share in the estate of a deceased relative, receives the amount herself, separate from her husband, and with his assent, it immediately becomes the estate of the husband, as much as any other funds he may hold.

And the rule is the same in equity, if the husband is insolvent at the time, and the fund is wanted for the payment of his debts.

Where the husband purchased an estate encumbered by a mortgage, and afterwards mortgaged the same to another; and subsequently the wife, with the consent of the husband, received money belonging to her as her distributive share of an estate to which she was an heir, and delivered the same herself to a friend, to be by him appropriated to procure the assignment of the first mortgage to himself, to be holden in trust for her benefit,

and the money was so appropriated and the mortgage assigned; *it was held*, in a bill in equity brought by the last mortgagee, whose debt remained unpaid, against the husband and wife and assignee, that the first mortgage was thereby discharged.

BILL IN EQUITY, brought by Chase and Grew against George Palmer, Abigail Palmer, his wife, and Charles Palmer.

On the ninth of September, 1833, George Palmer purchased the right of redeeming a house and lot in Bangor, then encumbered by two mortgages thereon, made by former owners, to the amount of nearly the value of the premises. On July 10, 1837, George Palmer mortgaged the same to Chase and Grew, the plaintiffs. In 1840 the two first mortgages, while the amount thereof remained unpaid, were assigned to Charles Palmer. The plaintiffs allege, in their bill, that the purchases of those mortgages were made by Charles Palmer with the funds of George Palmer and in trust for him; and that the plaintiffs, as grantees of George Palmer, are entitled under his covenants of warranty to the full benefit of these purchases. The defendants allege, that the funds, with which the purchases were made, were a portion of the personal estate of Abigail Palmer, the wife of George, being her distributive shares in the estate of her grandmother and of her former husband; and that the same passed from the hands of the administrators directly to her, and from her to Charles Palmer, to be by him invested, under a written agreement, in the purchase of those mortgages, to be held by said Charles in trust for her; and that George Palmer never interfered with the property of his wife, but knew and approved of her obtaining and appropriating her own private property in this way, that she might have a house to live in. The hearing was on the bill, answers and evidence. The portions thereof considered to be important are stated in the opinion of the Court.

Hobbs, for the plaintiffs, examined the evidence, and contended that the view taken by the counsel for the plaintiffs was the correct one.

When personal property of the wife is reduced to her actual possession, such possession is that of the husband, and becomes

a part of his personal estate. 2 Kent, 162. All the property of the wife passes to the husband by the marriage; if in possession of the wife, absolutely; if in action, conditionally. Co. Lit. 351; 2 Bl. Com. 433; 8 Mass. R. 99. A legacy given to the wife, and her distributive in an intestate estate, vest absolutely in the husband. Com. Dig. Bar. & Feme, E. 3; 12 Pick. 175; 8 Ves. 599; 8 Mass. R. 229; 8 Pick. 211. The property in law vested in the husband, in this case, absolutely, when the wife received it, and he could not divest himself of it to make a provision for his wife, if thereby he defrauded his creditors. 2 Kent, 163; 8 Pick. 211; 3 Johns. Ch. R. 492; 4 Johns. Ch. R. 450; 2 Story's Eq. § 1375. If the husband or wife receive the money, or if he alone, or he and his wife authorize a person to receive it, who actually obtains it, it is a reduction of the chose in action to the husband's possession. If the wife, herself, receives the money, it becomes that instant the property of her husband. 1 Wms. Ex'ors, 556; 12 Ves. 473; 1 East, 432; 17 Maine R. 301.

J. Appleton, on the same side, cited 2 Des. 254; Bing. on Inf. & Cov. 209; 2 Atk. 208; 2 Kent, 136; 5 Johns. Ch. R. 196; 20 Pick. 564; 17 Johns. R. 271; Clancy on Rights of Married Women, 262; 15 Maine R. 304; 3 Greenl. 50; 9 Cowen, 463; 12 Pick. 173; 6 Greenl. 269.

A. T. Palmer, for the defendants, examined the bill, answers and evidence, and said that the answers disclosed the true state of the case, and that they were not contradicted by the evidence.

The general proposition for which the defendants contend is, that the wife has the power, with the assent of her husband, to transfer any portion of her distributive shares in estates, from the possession of the administrators, to that of a trustee for her benefit; and with this the creditors of the husband have no right to interfere. While the property remained in the hands of the administrators the husband's creditors could not touch it. It was no fund for the payment of his debts. It might remain until after the husband's death, and his creditors could not be entitled to it. It is the duty of

courts of equity to protect the property of the wife, and to see that she has the benefit of it.

A legacy, or distributive share in the hands of an administrator, is a mere chose in action. 2 Brockenb. 285; 4 Metc. 486.

Nor is there any distinction as to choses in action accruing to the wife before or during the coverture. She is entitled to either, if not reduced to possession, while the coverture exists. 20 Pick. 517; 5 Johns. Ch. R. 196; 2 Serg. & R. 491; 4 Rawle, 177; 4 Metc. 486; 22 Maine R. 335. The same cases show, that there must be some act done by the husband with the intention of reducing to possession the choses in action of his wife, or they remain hers.

The idea that her receiving the money, to be appropriated in another manner to her separate use, is a reduction to possession by the husband, is not supported by reason or authority. That doctrine would negative the possibility of her having her own property for her separate use. Such is not the law in courts of equity. 2 Story's Eq. § 1368; *Flagg* v. *Mann*, 2 Sumn. 487. Where there has been an intention not to reduce to possession by the husband, or where he has declined or neglected to do so, the right of the wife has been sustained. 16 Mass. R. 480; 17 Mass. R. 57; 13 English Ch. R. 281; 9 Ves. 175; 12 Ves. 497; 2 Call, 447; 16 Ves. 413; 2 Brock. 285.

The creditors, or assignees of the husband can be placed in no better situation, than the husband himself, as to the property of the wife. And equity will not assist him to reduce the choses in action of the wife to possession, without making a proper provision for her. 2 Story's Eq. 631, 634; 1 Roper on Hus. & Wife, 269; 6 Metc. 537.

Charles Palmer holds the mortgages of this property in trust for Mrs. Palmer; a trust which a court of equity should protect and enforce in her favor. 4 Russell, 422; 1 Paige, 494; 21 Maine R. 195; 8 Pick. 388; 2 Pick. 206.

Cutting, also argued for the defendants.

J. Appleton, for the plaintiffs, replied.

The opinion of the Court was drawn up by

WHITMAN C. J. — This is a suit in equity. In regard to such suits, the jurisdiction conferred upon this Court is limited and specific. Even in courts of general equity jurisdiction, the "bill must state a cause within the appropriate jurisdiction of a court of equity. If it fails in this respect the error is fatal in every stage of the cause; and can never be cured by any waiver, or course of proceeding by the parties." "The Court itself cannot act except upon its own intrinsic authority in matters of jurisdiction." Story's Eq. Pl. 8.

One of the defendants, George Palmer, is alleged in the bill to have mortgaged the premises in question to the plaintiffs. The proper proceeding against him would seem to be to obtain possession of, or to foreclose the mortgage. Yet we do not understand such to be the object of this bill. And if it were, though this Court, by the Revised Statutes, c. 96, is in terms authorized to take cognizance, as a court of equity, of "suits for the redemption and foreclosure of mortgaged estates," it is believed, that the statute concerning mortgages, c. 125, actually precludes any action of this Court, sitting in equity, on the subject of foreclosing mortgages; the provisions of that statute containing the rules, which must govern in reference thereto; and none of them having reference to the action of a court of equity. The language of the statute therefore, as to foreclosing mortgages in a court of equity, is inappropriate, and must have been introduced inadvertently, without recurring to the specific provisions enacted for the purpose.

What, then, is the object of this bill, of which a court of equity can take cognizance? It recites a willingness to redeem certain mortgages, older in date than that held of the premises by the plaintiffs; and sets forth, that means have been taken to obtain from the defendants, one of whom is alleged to have obtained an assignment of them in trust for one or both of the others, information of the amount due on them, with a view to make a tender of such amount; and that the plaintiffs have been frustrated in that attempt, by the refusal of the defendants to make such statement. But the bill does not conclude

with any prayer, particularly, that any account may be taken, to ascertain the amount to be paid, in order to a redemption; or that the plaintiffs may be allowed to redeem those mortgages; nor are we furnished with any proof, that the defendants, who peremptorily deny any refusal or neglect on their part to state the amount due on those mortgages, to overcome such denial; nor is it stated or proved, that any tender of the amount due on those prior mortgages, has ever been made. The bill, therefore, if such were in fact the object of it, is not sustainable for the purpose.

The bill, however, further sets forth, that the defendants have conspired, for the purpose of wronging the plaintiffs, to have those prior mortgages assigned to the defendant, Charles Palmer, for the use and benefit of the said George, and by the use of his funds; and thereupon prays that the defendants may be decreed to account for, and pay over to the plaintiffs, such rents and profits as they have received or might have received from the premises mortgaged by the said George to the plaintiffs; and that such prior mortgages may be decreed to be canceled.

The first inquiry, which would naturally occur upon this branch of the case, is, what right, under a proceeding in equity, has a mortgagee to claim of his mortgagor, or of others, not in the possession of the mortgaged estate, as is the condition of Charles Palmer, to be paid for rents and profits of the estate, holden by him in mortgage, anterior to his entering into the possession thereof. It is believed that such a claim is unprecedented and not sustainable. It has been often ruled, that the mortgagor is not accountable to the mortgagee for rents and profits, till the latter has entered into possession for condition broken or otherwise.

The claim, however, to have the prior mortgages canceled, may be supported, if we can regard them as having been discharged by payment. The averment in the bill, that they have been purchased by Charles Palmer, with the funds of George, and are holden in trust for the latter, may be regarded as tantamount to an averment, that they have been discharged

by payment. In § 16, 17, and 18, of the Revised Statutes, c. 125, it appears to be provided, that whenever any sum of money due on a mortgage, has been paid or tendered to the mortgagee, or person claiming under him, by the mortgagor, or person claiming under him, within the time prescribed for the redemption of mortgaged estates, he may have a bill in equity for the redemption of the mortgaged premises. The preliminary demand of a statement of the amount due, in order to the sustaining of a bill, is, in such case, dispensed with.

It seems to be conceded on all hands, that Charles Palmer holds the prior mortgages in trust for some one. It is equally clear, that, of his own funds, he has paid nothing for them. The defence is, that he holds them in trust for Abigail, the wife of George, and one of the parties defendant. She and her husband, in their answers, state, that the purchase was made at her request, and with her money, received by her, partly for her distributive share in the estate of her grandmother, and partly for her share of the estate of her former husband; and, although received since her intermarriage with her present husband, yet that it never went through his hands or was ever in his possession; but was paid directly to her; and it is insisted, therefore, that it was her separate property. And the statement further is, by all the defendants, that she furnished Charles with the funds to buy those mortgages. The evidence, however, that she received the money herself, without the intervention of her husband is at least doubtful. But suppose it to be a fact, that Mrs. Palmer received the money herself, personally, from the sources named in her answers, and kept it in her possession till delivered over to Charles, how will the case stand?

When a woman marries, there is no question, but that whatever money she possesses instantly becomes her husband's. All the authorities agree in this point. How does it vary the case that it comes into her hands for a debt before due, or for a legacy or distributive share of the estate of a relative? Mr. Reeve, in his Domestic Relations, lays down the law in this

wise. He says, "I know of no difference between money belonging to her (the wife) in the hands of trustees, and money paid to her, which would certainly belong to the husband." Though the first part of this position, as to money in the hands of trustees, may be questionable, and the correctness of it has been doubted, the latter part, as to money paid to her, remains unshaken. If, then, the money, as is alleged, came directly into the hands of Mrs. Palmer, and remained there till handed over to Charles, for the purpose named, it became the property of her husband; as much so as if actually paid to him. The same author, at page 60, says further, that even a legacy bequeathed to a married woman, not named as being for her exclusive use, vests in the husband; and that he may sue for it, without joining her in the suit. This, according to modern authorities, must be confined to suits at law; and legacies in this State are only so recoverable. Where suits in equity may be brought for legacies, bequeathed to the wife, she must be joined, that the Court may have it in its power to compel him to make suitable provision for her out of them. If a note be given to a *feme covert* for a legacy bequeathed to her, it will be the property of the husband. *Commonwealth* v. *Manley*, 12 Pick. 173. So if husband and wife jointly empower a person to receive a legacy, bequeathed to her, the instant he receives it, it becomes the absolute property of the husband. *Huntly* v. *Griffith*, Moore, 452. These cases show that legacies and distributive shares, coming to the wife, vest in the husband, and become his absolutely, the moment they cease to be choses in action. When paid to the wife, with his approbation, they are paid to his lawfully authorized agent, and virtually to him; and become his, as much so as any other funds he may hold. The money, then, which Mrs. Palmer received, whether for legacies or distributive shares in the estates of her relatives, whether paid first to him or her, became the money of her husband; and that money it was, if the statement of herself and husband may be believed, with which the prior mortgages were purchased.

But it is urged, that her husband gave her the money, as

and for her own, exclusively; and so that she might employ it for her own benefit, independent of his control. And equity recognizes the validity of such gifts, though the common law does not. But, even in equity, the rule is not without an exception. To make such a gift valid it must be free from injury to others, viz. to creditors. If the husband be insolvent, as in this instance he unquestionably was, he had no power to alienate any portion of her funds gratuitously; not even to his wife. *Stanning & al.* v. *Style*, 3 Peere Wms. 334.

Impressed with these views of the state of the case, we have not deemed it important, that we should minutely examine, as to the discrepancies between the statements of Mrs. Palmer, and the evidence adduced, in reference to how she came by the funds, with which to purchase the prior mortgages. It is obvious that serious difficulties would be encountered in an attempt to reconcile them.

On the whole, we are brought to the conclusion, that the prior mortgages have, in effect, been discharged by the use of the funds of the defendant, George Palmer, whose duty it was to discharge them, and free the premises from their incumbrance, in order to give effect to his mortgage to the plaintiffs. The sums alleged to have been advanced in making improvements and repairs were derived from the same sources, as those for purchasing in the prior mortgages, and must fall into the same category. Whatever the mortgagor may do of that kind, cannot be taken into consideration as affecting the claim of the mortgagee. Charles Palmer must be decreed to extinguish his claim under the prior mortgages; and George Palmer and his wife, Abigail, must be enjoined never to set up any claim under them adverse to that of the plaintiffs. And a decree may be drawn up in form, and entered accordingly.

The plaintiffs are allowed their costs.

The State *versus* Caleb Blake.

On exceptions from the District Court, it cannot be considered, that the District Judge acted erroneously in the admission of testimony, authorized by an opinion of this Court, which has not been overruled; although the correctness of that opinion may well be doubted.

Whether the testimony has a direct tendency to prove or disprove the issue, is not always the true criterion, by which to determine whether such testimony be material and relative to the issue to be tried. When a witness has been introduced and has testified, it may become very material to ascertain whether confidence can be reposed in the veracity of his statements; and therefore testimony to contradict the witness, or to show that the statements made by him should not be believed, is not to be excluded as hearsay, or as contradicting that which is collateral and irrelative.

If a witness be inquired of whether he has not testified falsely in a former case in which he had been called by the same party, he may refuse to answer, because it might criminate himself; but if he consents to answer, and states that he had not, his declarations to the contrary may be received to discredit him. And as the present practice in this State does not require the previous examination, his declarations that he has sworn falsely may be received, without any previous inquiry of the witness, whether he had made such statements.

The exceptions state, that this was an indictment, tried in the District Court, "for an assault;" that Blake called Michael Carey, by whom he proved, that the assault was made by French, the complainant, and that the defendant acted in self-defence.

The county attorney, to impeach Carey, without inquiring of the witness, if he had so said, called Charles Blake, who testified, that he asked Carey, if he had sworn falsely in a case in which he had been a witness for said defendant; and that the witness said "he had, and would again, if Blake wanted him to;" and by another witness, that he said, "that he would tell just what Caleb told him to." Objection was seasonably made to the admission of this testimony, but it was admitted by Allen, District Judge, presiding at the trial.

On the return of a verdict of guilty, the accused filed exceptions.

J Appleton, for the accused.

1. The law recognizes but three modes of impeaching a witness. First. By disproving the facts stated by him, by the testimony of other witnesses. Second. By general evidence affecting his credit for veracity. Third. By proof that he has made statements out of court contrary to what he testified on the trial. 1 Greenl. Ev. 512, 513, 514; 1 Phil. Ev. 229, 230, 231; 1 Stark. Ev. 145. The evidence objected to comes within none of the above modes; and those are the only modes known to the law.

2. The evidence of Charles Blake was inadmissible on another ground. If offered as proof of former perjury, that can only be done by the record of conviction.

3. It is raising a new issue; and if the government can prove one side, the accused may the other, and the guilt or innocence of a witness may thus be tried collaterally.

4. The evidence thus admitted is hearsay, and so inadmissible.

5. If the defendant's witness had been asked that question, the government would have been bound by the answer. It is a mere collateral matter. If a witness is allowed to be impeached on collateral matter, issues may be raised indefinitely.

6. The evidence should have been excluded, because it was not relevant to the issue; and because it did not conflict with any statement by him made; and would open a wide door without any definite limitation. *Halley* v. *Webster*, 21 Maine R. 464.

Moor, Attorney General, for the State.

If the evidence received was proper evidence to impeach or discredit the witness with the jury, it was not necessary to inquire of the witness, before offering the testimony, whether he had made the statement proved by the impeaching witness. The English rule has never been introduced into our practice. *Ware* v. *Ware*, 8 Greenl. 42; *Tucker* v. *Welch*, 17 Mass. R. 160.

The three modes of impeaching a witness, cited from Greenleaf's Evidence, are not the only modes. A very common method of impeaching a witness is, to prove that he was not

present, when the facts transpired about which he was testifying; or to prove a witness in a state of intoxication at the time. Swift's Ev. 141; 1 Stark. Ev. 157; 1 Greenl. Ev. 516.

The testimony introduced was the most effectual way of discrediting the witness.

There is no greater ground for objection to this, as hearsay evidence, than can be made to all testimony introduced to impeach any witness. This was relevant to the issue, having a direct bearing upon the credibility of the witness.

The government would not have been bound by the answer of the witness, if it had been asked. It would not have been irrelevant, because it went directly to the character of the witness. 1 Greenl. Ev. 506. It was therefore clearly admissible.

The opinion of the Court was drawn up by

Shepley J. — The prosecuting officer was in this case permitted to introduce testimony, that a witness, who had testified in favor of the accused, had declared, that in a former case, when called by the same party, he had testified falsely, and that "he would tell just what Caleb told him to." The witness had not been first asked, whether he had made such declarations. This course was undoubtedly contrary to a well established rule, which prevails in England and in most of these United States. It was authorized in this State by the case of *Ware* v. *Ware*, 8 Greenl. 53. It does not appear to have been necessary to the decision of that case, that the opinion should have stated, that the rule, which requires, that the witness should be first examined respecting his declarations and acts, had not been admitted in the practice of this State. Whether a practice at variance with a rule resting upon long experience of its beneficial effect, and sustained by many other substantial reasons, should be continued, may deserve consideration; but the Judge of the District Court cannot be considered as acting erroneously in the admission of testimony authorized by an opinion of this Court which has not been overruled.

The testimony was therefore admissible according to our practice, unless it be considered as collateral and irrelative. It certainly had not any direct tendency to prove or disprove the issue. But this is not always the true criterion, by which to determine, whether testimony be material and relative to the issue to be tried. When a witness has been introduced and has testified, it becomes very material to ascertain whether confidence can be reposed in the veracity of his statements. His means of knowledge, his general character for truth, his former statements respecting the same matter, can have no direct tendency to prove or disprove the issue; yet they may be very material to enable a jury to decide it correctly. Upon the same principle, and for a like purpose, the witness may be examined and other testimony may be introduced to prove, that he has been suborned or corrupted, or that he has attempted to corrupt others, with reference to the pending controversy; that he has testified under the influence of settled hostility, or of revengeful passions, or under some improper influence of the party, who has introduced him. Many examples of this kind of testimony are to be found in the decided cases, and are cited in the books upon evidence. Such testimony is not considered as coming within the rule, which excludes testimony offered to contradict that, which is collateral and irrelative.

If the question had been put to the witness in this case, whether he had testified falsely in a former case, in which the accused was a party, he might have refused to answer, because it might have criminated himself; but if he had consented to answer, and had stated, that he had not, his declarations to the contrary might have been received. Such testimony would not be admissible for the purpose of showing, that he had been guilty of an offence; but for the purpose of showing, that the relations between him and the party, who introduced him, were such as to induce him to swerve from the truth. For the like reason he might have been required to answer, whether he had stated, that he would testify, as the accused should desire. As our present practice does not re-

quire such previous examination, his declarations must be considered as properly received.

Exceptions overruled, and case remanded.

METHODIST CHAPEL CORPORATION *& al. versus* JEDEDIAH HERRICK *& al.*

Where a corporation brings a bill in equity, and alleges therein that certain acts were done by committees thereof, whereby a resulting trust in certain land, conveyed to a third party, was raised in favor of the corporation, it cannot prove the authority of the committees to act therefor by parol evidence; their power to act can be shown only by its records.

It is sufficiently early to make the objection, that no legal proof of the authority of the committees to act in behalf of the corporation had been shown, at the hearing.

THIS was a bill in equity by The Methodist Chapel Corporation, Sylvanus Rich, jr. and Samuel Larrabee, against Jedediah Herrick and Joshua W. Hathaway. The facts sufficiently appear in the opinion of the Court.

Robinson, for the plaintiffs, in support of his argument, which, as well as that in defence, turned mainly on the facts, contended for the correctness of these legal propositions.

Where the consideration for real estate is paid by one person, and the deed is made to another, it is in equity held in trust for him who paid the money. *Buck* v. *Pike*, 2 Fairf. 9.

It is too late to question the existence of the corporation. It should have been pleaded in abatement, or taken in the answer by a direct denial of the fact. 17 Maine R. 34; 3 Fairf. 381.

It is not necessary, as this case stands, that the plaintiffs should have proved the acts of the corporation by the records; as none of these matters are put in issue, not being denied in the answer. And besides, they should have called for the records. We were not entitled to use them in evidence in our own favor, but they could do so. Angel & A. on Corp. 407; 3 B. & Ald. 142; 2 Johns. R. 226; 4 Russ. 222.

It is well settled that a person claiming a trust estate, as a creditor of the trustee, whether by judgment or otherwise, is not to be viewed in the light of a purchaser for value, and that such an estate is not bound by any judgment, or any other claims of creditors against the trustee. Story's Eq. § 977, and authorities there cited.

Payment of the consideration by the *cestui que trust* may be proved by parol, even in contradiction to the recital in the deed to the trustee. 2 Fairf. 9; Story's Eq. § 1201; 4 Kent, 305.

J. B. Hill, for Herrick, said, that this defendant insists that the bill and proofs taken, do not make out a case of a resulting trust, nor any other trust, of which the corporation or other parties can avail themselves, or which will authorize, or justify such a decree as they ask for; and he should hold the following propositions to be well established law, and to be entirely inconsistent with the claims of the plaintiff.

1. Courts admit the claim of a resulting trust with great caution, on account of its introducing all the mischiefs intended to be guarded against by the statutes of frauds; and will therefore, require proof of every particular necessary to constitute the trust. 1 Johns. Ch. R. 487 and 590; Sugd. Vend. & Pur. 417.

2. To constitute a resulting trust, there must be proof of the payment of the money or the consideration, by one person, and the deed taken in the name of another. 2 Johns. Ch. R. 409; 4 East, 577; 2 Johns. Ch. R. 412, 414, 415; Sugd. Vend. &. Pur. 418; 5 Johns. Ch. R. 1.

3. The trust must arise at the time of the conveyance; and the money or other consideration must be paid at that time. A subsequent payment will not answer. 2 Paige, 238; 2 Fairf. 9; 2 Johns. R. 414.

4. There can be no resulting trust where there is an agreement, written or parol. 2 Paige, 265; Sugd. Vend. & Pur. 417.

5. It must be an unmixed trust of the title and ownership of the land or estate itself; and not an interest in the proceeds

of the land, or a lien upon it as security for advances. 2 Paige, 238.

6. A resulting trust cannot be raised in favor of a person against the intention of the parties. 2 Paige, 265.

7. The rights of a party under a resulting trust should be seasonably enforced. *Shaver* v. *Radley*, 4 Johns. Ch. R. 310.

8. There is no proof of the existence or organization of the corporation unless by parol testimony, which is inadmissible for that purpose. A corporation can act only by its votes, or by its agents duly chosen and authorized; or by its officers deriving their authority from its by-laws or other corporate acts.

The opinion of the Court was drawn up by

TENNEY J. — The bill alleges, that about Sept. 1835, the Methodist Chapel Corporation was organized for the purpose of purchasing a lot of land, and erecting thereon a house of worship; that they chose a committee to make the purchase, and another to superintend the building and to raise funds, to defray the expenses thereof and to pay for the lot; that a lot was conveyed by Harvey Reed to the corporation, by deed, one half the consideration therefor being paid in money, and the individuals of the committee first named, becoming responsible for the balance, by giving their note payable in one year with interest. The lot purchased was not satisfactory; and the deed, not being recorded, was given up to the grantor, who thereupon gave another to Nathaniel French, one of the committee, the members of that committee, having taken up the note and given therefor a draft indorsed by Wm. B. Reed. It is alleged in the bill, that the consideration for the conveyance was wholly paid by the corporation, whereby a trust resulted to them, and that French received the last deed, with full knowledge of the prior conveyance to the corporation, with the intent to hold it for the corporation; that about the 25th day of June, 1837, French conveyed the same to John S. Ayer, to hold in trust for the corporaton; and afterwards the lot was conveyed by Ayer to Wm. B. Reed, said Rich and

said Larrabee, who in consideration paid the execution which had been recovered against Wm. B. Reed upon the draft before named; and Wm. B. Reed, Rich and Larrabee, were authorized by the committee of the corporation to sell the lot, and reimburse themselves from the proceeds, if sufficient for that purpose; if any surplus should remain, it was to be paid to the corporation, who were to make up any deficiency. Wm. B. Reed conveyed by quitclaim deed one undivided third of the lot to said Rich, July 9, 1839; Rich conveyed by quitclaim deed, dated Sept. 21, 1839, one undivided half of one third to Samuel Larrabee, and Larrabee conveyed with covenants of warranty, one undivided half of the lot to Joshua W. Hathaway, by deed, dated Sept. 20, 1839. The bill further alleges, that Buck and Kidder, having obtained judgment and execution against Nathaniel French and others, took execution thereon, Nov. 21, 1839, and on the 18th Dec. 1839, assigned the judgment and execution to J. Herrick, the defendant; and on the same day the execution was levied upon the lot in question as the property of French; and on the 23d day of December, 1839, Buck and Kidder conveyed the same to Herrick, who now claims to hold it by virtue of the levy, and an attachment upon the original writ, alleged to have been made prior to the deed from French to Ayer; the bill alleges, that Herrick paid no consideration for the assignment of the judgment, and that the creditors therein, and Herrick, had notice, before the levy, that French held the same in trust for the corporation; it alleges further that Herrick holds the lot in trust for Rich and Larrabee, who have made advances for the corporation; and that previous to the bringing of the bill, Herrick was requested to relinquish possession to them, which he refused to do.

The bill contains a prayer, that Herrick be decreed to convey the premises to Rich, Larrabee and Hathaway, or to such as the Court may deem equitably entitled to hold the same.

The answer of Herrick, sets forth the suit of Buck and Kidder against French and others, the attachment of the lot upon

the writ, the assignment of the suit and claim to him, the levy of the execution, issued upon the judgment obtained, and the conveyance of the lot to him by the creditors; that the deed to French was on record, when the attachment was made, that it contained covenants of warranty, and no trust appeared therein, or in any paper on record; that he took the assignment relying on the attachment, and had no knowledge of any claim of trust, of want of title, in French, that he had no notice of the trust alleged, till after the levy, and denies all notice personally to him before the levy, and also denies all knowledge of the purchase made by the corporation, and the several transfers and conveyances set forth in the bill, or of the other negotiations, alleged therein.

The evidence introduced by the plaintiffs, if competent, establishes substantially, the allegations in the bill; and it is unnecessary to indicate, what should be the effect of the facts disclosed, if the Court could with propriety give them consideration. We think much of the testimony is inadmissible as proof. The Methodist Chapel Corporation, is alleged to have been duly organized; all the purchases, negotiations and payments relied upon by the plaintiffs to show a resulting trust for them, were made, as the bill alleges and as the depositions show, by committees of the corporation. Without competent evidence of the authority of these committees to act in behalf of the corporation, the foundation of their suit fails. Being a corporation, they can act only as corporations, and their doings can be shown only by their records, which are presumed to be made and preserved. Parol evidence cannot be admitted. This objection is taken at the hearing, and could not be taken before; consequently, there was no waiver by the defendants of their right to require legal proof.

Bill dismissed with costs.

Mason Brown *versus* Samuel Veazie.

To make out a valid title to land sold to obtain payment of taxes assessed thereon, the purchaser under the collector's sale must show, that the provisions of law preparatory to and authorizing such sales, have been punctiliously complied with.

In determining the validity of a title under a collector's sale of land, on account of the non-payment of taxes thereon, the case must be governed by the law as it stood at the time of the assessment and sale.

Collectors have no power to sell lands, by reason of the non-payment of taxes thereon, except in pursuance of the provisions contained in the statutes; and can sell only in the precise cases in which it has been so authorized.

Property taxed to an individual, must be understood to be taxed to him by name, and not as to a person unknown.

A collector of taxes, before he can proceed to sell real estate taxed to persons unknown, must ascertain whether the owner lives out of the State or not; if he lives within the State, then the collector must, before proceeding to sell his land for the payment of taxes, give him two months previous notice in writing of his liability; or the sale will be unauthorized and void.

Writ of entry. The case was opened for trial before Tenney J. and testimony, as well as written evidence, was introduced by the respective parties; and thereupon the cause was taken from the jury by consent of parties; and such judgment, on nonsuit or default, it was agreed should be rendered, as upon such of the evidence introduced, and which is legally admissible, the whole being considered as objected to and ruled in, subject to objection, may seem to the Court to be in conformity to law.

The report of the evidence was quite extended; but the view taken of it by the Court shows with more readiness and equal clearness the application of the principles of law to the facts proved, than would a publication of the evidence in full.

J. H. Hilliard argued for the demandant, contending, that this property, being non-resident improved land, the owner or owners of which were unknown, was liable to taxation as such in the manner it was done. Stat. 1821, c. 116, § 30; Stat. 1823, c. 229. Where land is thus taxed, the collector is not

bound to inquire whether there is or is not an owner within the State. Nor is he the judge of the ownership.

The assessors and collector were legally chosen and sworn, and fully empowered to act in their respective capacities. 8 Greenl. 334; 13 Pick. 305; 2 Greenl. 218; 3 Fairf. 254; 7 Greenl. 120; 11 Mass. R. 477; Stat. 1821, c. 116, § 1; 10 Mass. R. 105.

The taxes were legally made and proper lists and warrants given to the collector, authorizing him to collect the same. The premises were sufficiently described. 5 Greenl. 492; 4 Mass. R. 191; 14 Mass. R. 145; 5 Metc. 15; 2 Greenl. 332; Stat. 1826, c. 337, § 2.

The collector complied with the requisitions of the law, in advertising and selling the property. Stat. 1821, c. 116, § 62; Stat. 1826, c. 337, § 8; 22 Maine R. 564; Stat. 1844, c. 123, § 16.

Cutting, for the defendant, among other objections to the validity of the collector's sale, under which the demandant claimed title, made the following: —

A sale of land for taxes, being an *exparte* proceeding, every substantial requisite of the law must be complied with, before the owner can be divested of his property; and no presumption can be raised to cure any radical defect in the proceedings. 4 Peters, 359; 1 Greenl. 339; 13 Mass. R. 272; 15 Mass. R. 146; 1 Greenl. 308; 20 Pick. 421.

The Stat. 1831, is repealed by the Revised Statutes, so that in a trial involving the validity of any tax sale, the purchaser must establish his title by proof of the legality of the town in voting and raising the money, and assessing the taxes, &c. the same as prior to the passage of the act. The repealing act applied only to the remedy, and quantum of proof; and therefore the provisions in that act respecting vested rights does not reach this case. 2 Fairf. 288; 4 Wheat. 122, 209.

But if this is not the right view, still the act does not dispense with the necessity of proving that there was a legal collector and legal assessors. Various objections were here urged, and these citations were made. *Alvord* v. *Collins*, 20

Pick. 427; 2 N. H. R. 517; 5 N. H. R. 196; 6 N. H. R. 182; 7 N. H. R. 113; Stat. 1821, c. 116, § 1; 11 Mass. R. 447; 24 Pick. 124; 5 Mass. R. 427.

The law requires, that the assessors should commit the original assessment of the taxes to the collector, and first take a copy thereof, and file the same in the office of the town clerk, or in their own. Stat. 1821, c. 116, § 1; Stat. 1826, c. 337, § 2. It was urged, that this provision of the law was not complied with in two particulars. One, that there was a variation between the paper committed to the collector and the one kept; and another, that the copy was committed to the collector, and the original one retained.

The collector did not describe, in his advertisements, the land in the same manner, as it was described in the list committed to him, nor in such manner, as to show, that it was the same. The description would better, or at least, equally well, apply to a different lot.

The estate sold was improved real estate; and although non-resident, yet the owner lived within the State and but a few miles distant from the property. Before the collector in such case can proceed to advertise and sell the land to pay the taxes thereon, six months must first have elapsed, and after the expiration of the six months, two months notice in writing must have been given. Stat. 1821, c. 116, § 31. If the owner's name is not mentioned the collector must find him out, and give him the written notice, before he can sell. Here the taxes were committed to the collector on July 1, 1839, and the advertisements of the sale were dated December 26, 1839. This positive requirement of the law, therefore, was not complied with.

J. Appleton, for the plaintiff, replied.

The opinion of the Court was drawn up by

WHITMAN C. J. — It appears, that the tenant claims to hold the demanded premises as mortgagee under Joseph Smith, by deed bearing date, December 28, 1836. The tenant, being in possession, under a title apparently good, he cannot be disturbed, but by a claimant under a title paramount to his. The

demandant claims under a sale made for the non-payment of taxes, assessed on the premises, in the town of Orono, in June, 1839. His deed from the collector bears date, May 9, 1840. To substantiate his claim he introduced, at the trial, proof, supposed by him to be sufficient to show the legality of the assessment, and of the proceedings of the collector in making sale of the premises.

Sales of real estate, for the non-payment of taxes, must be regarded, in a great measure, as an *exparte* proceeding. The owner is to be deprived of his land thereby; and a series of acts, preliminary to the sale, are to be performed to authorize it on the part of the assessors and collector, to which his attention may never have been particularly called; and experience and observation render it notorious, that the amount paid by purchasers, at such sales, is uniformly trifling in comparison with the real value of the property sold. In this very instance the purchaser, at the collector's sale, bought, for less than $17, an estate, valued by the assessors at $900. It has, therefore, been held, with great propriety, that, to make out a valid title, under such sales, great strictness is to be required; and it must appear that the provisions of law preparatory to, and authorizing such sales, have been punctiliously complied with. The counsel for the defendant, in this case, may, therefore, be excusable, if not commendable, for the astuteness and searching manner in which he has scrutinized the doings of those officers, in the instance before us.

This case must be governed by the law as it stood at the time of the assessment and sale. By the act of 1821, c. 116, § 13, the assessors were required to file attested copies of their "assessments and valuations" in the town clerk's office or "in their own office, if any such they had." By § 1, of the same statute, they were to "have their assessments recorded in the town book," or "to leave an exact copy thereof, by them signed, with the town clerk; or file such copy in the assessors' office, when any such is kept, before the same is committed to an officer to collect; and, at the same time, "were to lodge, in the said clerk's office, the invoice or valua-

tion, or a copy thereof, from whence the rates of assessments were made; that the inhabitants or others rated, may inspect the same." By the act of 1826, c. 337, § 1, it is enacted, that the assessors shall "make a record of their *assessments*, and of the invoice or valuation, from which such assessments shall have been made; and, before the taxes are committed to the proper officer for collection, deposit the same, or a copy thereof, in the assessors' office, when any such is kept; otherwise with the town clerk, with whom it shall remain for the purpose of affording to all persons interested, an opportunity for examining and correcting any error, that may have happened in the assessment of any tax."

By these enactments it appears, that there was, in the first place, to be a valuation of the estates, liable to be taxed; and, then, an assessment of the moneys to be raised in conformity thereto. Both were to be recorded, or copies made of them, and lodged in the assessors' or town clerk's office, before the assessments were to be committed to the proper officer for collection; instead of doing which the assessors, in this instance, according to the testimony, lodged neither a record or copy of their valuation and assessments in the office of the assessors, or of the town clerk; but left the original document containing, as it would seem, both the valuation and assessment there; and delivered a copy thereof to the collector, by virtue of which he supposed himself authorized to make the sale. In so doing neither the assessors nor collector conformed to the literal import of the law. This may not have been productive of any inconvenience to those interested in their doings; but it was a departure from the line of duty, marked out for them to pursue, which may be regarded as, in strictness, affecting the authority of the collector to make sale of the premises. The assessment, which he should have had, should have been the original and not the copy. No record could, with propriety, be made of a copy; and of course, none could be, or is pretended to have been made thereof; and no copy of a copy could, in compliance with the law, be lodged with the assessors. Whether this irregularity should be considered as

fatal to the plaintiff's title or not, we do not now definitively decide; but assessors and collectors will do well to notice, that it will be hazardous to suffer the like to occur in future.

It is urged by the counsel for the tenant, that there is a discrepancy between the description of the premises, as taxed, and as advertised for sale, such as should vitiate the proceedings of the collector; and, also, that the description in either is too vague and uncertain to uphold the sale. The difference pointed out is this; in the assessment the description is, "house, lot and stable, south of *R. & Kennedy's* block, being the Jos. Smith lot;" and, in the advertisement, it is, "house, lot and stable, south of *R. Kennedy's* block, being the Jos. Smith lot." It behooves collectors, in advertising lands to be sold for taxes, to give such a description as will enable owners to know, that the lands advertised are theirs. It is not indispensable that the description should be precisely that, which is given in the tax bill. It should be such, however, that the identity will be manifest. It would seem that a more intelligible description might have been given in both instances. And in naming it as the Jos. Smith lot, when there was another lot, not more than one hundred rods south of R. & Kennedy's block, which, without a comma between the words, house and lot, would in the description, be precisely descriptive of that lot; and one particular would render it more presumable to be the lot intended, viz., the fact that Jos. Smith last lived there, rendering it more proper to call it the Jos. Smith lot than the other. Although there is great force in the argument of the counsel for the tenant, on this point, yet we are inclined not to come to a decision in regard to it. We notice it rather to place assessors and collectors upon their guard in reference to such circumstances.

The counsel for the tenant lays much stress upon a defect in the manner in which, he argues, that the assessors and collector were sworn into office. If we saw no other difficulties in sustaining the plaintiff's title, and, were satisfied that there ought to be proof tending more directly to show that the proper oaths were taken, we might think it reasonable to send

the cause to a new trial, in order that the record, creating the difficulty, might be amended, if amendable, in the particulars that are essential; or that, record evidence failing, there might be parol evidence introduced to show that the appropriate oaths were duly administered.

But there does seem to us, to be a difficulty, in the way of sustaining the plaintiff's title, which is insurmountable; and upon that we prefer to place our decision of this cause. Collectors have no power to sell lands, by reason of the non-payment of taxes assessed thereon, except in pursuance of the provisions contained in the statutes; and can sell only in the precise cases in which it has been so authorized. The statute, of 1821, c. 116, § 30, provides for a sale of real estate for the non-payment of taxes, no one having appeared to pay them, "of unimproved lands of non-resident proprietors;" and of "improved lands of proprietors living out of the limits of this State;" and, § 31, provides for the sale, for the non-payment of taxes, of improved lands of proprietors, living in the State, but not in the town in which such real estate lies, after first giving the proprietor notice in writing, two months prior to proceeding to sell; and by the act, of 1823, c. 229, collectors may sell improved real estate, taxed to the owner thereof, for the non-payment of his tax, assessed thereon, whether he may be living in this State or elsewhere. These are all the cases in which a collector can make a valid sale of real estate, for the non-payment of taxes, assessed thereon.

Now, was the estate in question, in either of these predicaments? It was not, in the first place, unimproved land; for it is apparent, that it was a mere house lot, with a house and stable on it. Secondly, it was not improved land of a proprietor, living out of the State; for the owner lived in Bangor, but ten or twelve miles from it; thirdly, no notice in writing was given to the owner, two months before proceeding to make sale of the estate; and, fourthly, the estate was not, as provided in the statute of 1823, taxed to the owner. It was taxed as belonging to persons unknown. The statute, of 1823, was passed to authorize the taxing of land possessed by a lessee,

either to him or to the owner thereof, unquestionably by name. It would not, in common parlance, be taxed to him unless he were named as the person taxed. Being so taxed he would be subject to other modes of enforcing payment, as by arrest, distraint or suit. A tax to persons unknown does not subject the owner to any compulsory process, except by the sale of his land. Property taxed to an individual, therefore, must be understood to be to him by name, and not as to a person unknown.

It seems to us to be very clear, that a collector, before he can proceed to sell real estate, taxed to persons unknown, must ascertain whether the estate be improved or not. If improved, he must ascertain whether the owner lives out of the State or not. If he lives in the State, then, the collector must, before proceeding to sell his land for taxes, give him two months previous notice in writing of his liability. In this case the estate being taxed to owners unknown, and being under improvement, and no such notice having been given, the sale was unauthorized and void.

Plaintiff nonsuit.

GLOBE BANK *versus* OTIS SMALL.

If at the time when an accepted bill, payable at a fixed time, and guarantied to be paid according to its terms, became payable, the acceptor was solvent, and so continued to be for four months thereafter, and then became insolvent; and no notice of the non-payment was given to the guarantor during the next four years; he is by such neglect, discharged from the payment thereof.

ASSUMPSIT upon an instrument in the terms following: —

"Bangor, Oct. 11, 1836. I hereby guaranty the punctual payment of S. G. Glidden's acpt. and John A. French's acpt. each for $141,46, dated Oct. 1, 1836, in sixty days, payable at Suffolk Bank, Boston. "Otis Small."

The plaintiffs introduced in evidence the writing declared on; also the acceptances of Glidden and French referred to

therein; and a protest showing a demand on the acceptors and notice to the plaintiffs and the other parties to the note; but there was no evidence, that any notice was given to Small before the commencement of this suit, on May 4, 1840. Glidden had attachable property of greater amount than this demand until Aug. 1837, after which time he became insolvent. French had attachable property until the spring of 1837, when he failed, and has since been insolvent.

A nonsuit was ordered, with the consent of the plaintiffs, which was to be taken off, and a new trial granted, if the plaintiffs, in the opinion of the Court, could maintain the action.

S. H. Blake, for the plaintiffs, said that this was not a contract of guaranty in the commercial sense of the term, but an original undertaking. It is entirely immaterial what words are made use of, if the meaning conveyed may be ascertained. This was an absolute undertaking to see the note paid at the time stated. The defendant therefore was liable without notice. 8 Johns. R. 39 and 376; 15 Johns. 425; Fell on Guaranty, 17; 3 Hill, 584; 19 Wend. 202; 20 Johns. R. 365; 7 Peters, 127; 1 Hill, 258.

But if Small is to be regarded as a guarantor merely, then we have adopted in this State the distinction of absolute and conditional guaranties. This was of the former kind, and no notice was necessary. *Cobb* v. *Little*, 2 Greenl. 264; *True* v. *Harding*, 3 Fairf. 193; 7 Conn. R. 523; 6 Bingh. 94; 1 Stark. R. 14; 20 Johns. R. 365; *Norton* v. *Eastman*, 4 Greenl. 526.

He commented upon the cases *Read* v. *Cutts*, 7 Greenl. 186, and *Oxford Bank* v. *Haynes*, 8 Pick. 423; and contended that those cases were not to be considered as overruling the principle established in *Cobb* v. *Little*, and in the other cases cited by him, but might be distinguished therefrom; and that if they were inconsistent, the true principle was laid down in the cases cited by him. In this discussion he cited as additional authority, 24 Wend. 35, and 1 Hill, 259, in which it is said, that the decision in *Oxford Bank* v. *Haynes*, "was

based on a rule, as to the mode of fixing guarantors, peculiar to that State."

Jewett and *Crosby*, for the defendant, contended that the paper signed by the defendant, was a mere collateral undertaking, to pay conditionally the debt of another, and not an original undertaking.

It is the well settled law in Massachusetts and Maine, as well as in several other States, and in the courts of the United States, that where the payment of a note or draft, payable on time, is guarantied according to the terms of the paper, then it is necessary for the holder of that paper, in order to recover of the guarantor, not only to take the proper steps, when it becomes payable, to fix the liability of the proper parties to it, but also to give notice of non-payment to the guarantor within a reasonable time, provided the parties to the paper were solvent when it became payable, and became insolvent before the notice was given. *Read* v. *Cutts*, 7 Greenl. 186; *Oxford Bank* v. *Haynes*, 7 Pick. 423; *Cannon* v. *Gibbs*, 9 Serg. & R. 202; *Douglass* v. *Reynolds*, 7 Peters, 127.

The opinion of the Court was by

WHITMAN C. J. — The case of *Gamage* v. *Hutchins*, 23 Maine R. 565, would seem to be decisive, that the defendant in this case was, by his guaranty, liable only in case the plaintiffs were careful to give him notice of non-payment, before any injury could have arisen to him for the want of it. The guaranty in that case was absolute in terms; as much so as in this. But in both the guaranty was collateral. There was, in each, a debt due or incurred by some other person; and the guaranty was, that it would be paid as had been agreed. Where considerable time had elapsed, after the debt had become due, the guarantor had a right to presume the debt had been paid, if not notified to the contrary; and, if the laches of the creditor continued till the condition of the original parties to the security had become altered from ability to pay, to utter inability, there would be much good reason for allowing the loss to fall upon the creditor.

The plaintiffs in this case received regular notice of the dishonor of the bills guarantied, and took no measures to secure the amount due on them, excepting simply to give the acceptors notice of non-payment. To the defendant no notice was given of the dishonor. The acceptors of the drafts remained in good credit, or had attachable property, for some months after they became payable. If the defendant, therefore, had been seasonably apprised, that he was relied upon for payment, he might have secured himself. As it is, it seems, if compelled to pay the amount due, he would have no resource for reimbursement.

The counsel for the plaintiffs relies, with much confidence, upon the case of *Cobb & al.* v. *Little*, 2 Greenl. 261; and urges that the case at bar is similar to that; and at first blush there would seem to be a resemblance. But, in that case, the guaranty was made by Little, without reference to the time when the note guarantied would become payable. The note itself was payable in six months from the 30th of April, 1817. On the 3d of June, in the same year, Little guarantied it should be paid in six months from that time. He did not, as did the defendant here, guaranty punctual payment, according to the terms of the security. He, therefore, had no reason to expect a demand of payment upon the maker on the day he, Little, had agreed the debt should be paid. He alone, and not the maker, had stipulated for payment at that time. He alone, therefore, might be expected to look to it, and see that it was paid according to his agreement. This peculiarity was noticed by the late C. J. Mellen, in *Read* v. *Cutts*, 7 Greenl. 186. Little, perhaps, might be regarded as an original promisor, and as undertaking to guaranty the payment, without reference to or reliance upon payment by the maker. In the case before us the guaranty was, that the acceptances should be promptly met by the acceptors. An agreement in such case, to pay at all events, without reference to or reliance upon the acceptors could not be inferred. His warranty was that the acceptors would pay as they were bound to do; and not that

he himself would pay, without regard to whether they did so or not.

The cases cited and relied upon by the counsel for the plaintiffs, from the New York Reports, may not be reconcilable with the decisions in Maine, Massachusetts, Pennsylvania, and in the S. C. of the United States, as contained in *Oxford Bank* v. *Haynes*, 8 Pick. 423; *Read* v. *Cutts*, above cited; *Gibbs* v. *Cannon*, 9 Serg. & Rawle, 198; and *Reynolds & al.* v. *Douglass & al.* 12 Peters, 497. But we think that these cases fully sustain the decision in *Gamage* v. *Hutchins*, which does not seem to be distinguishable in principle from the case at bar. Indeed the learned Chancellor Kent, although as intimately acquainted with the law as administered in New York as any one ever has been, and whose legal acumen is scarcely surpassed by that of any man now living, would seem, in his commentaries, vol. 3, p. 123, to view the law as to guarantors no otherwise, than it is recognized in this State.

Nonsuit confirmed.

Jacob S. Elliot *versus* Joseph Shepherd.

Where the owner of land through which a stream of water passed, had erected thereon a grain mill, and had raised near to it a dam to furnish a water power to drive the mill, and also, further up the stream, had erected another dam to preserve water for the use of the mill below, and afterwards had built a shingle mill on the lower dam near the grist mill, and which was driven by the same water power; and first granted to the plaintiff the grain mill and land whereon it stood, "with the privilege of drawing water from the mill pond sufficient for this or any other grist mill that may be built on the ground that this mill stands on, the grist mill having the privilege of drawing water over every other machinery on the dam;" and next granted to the defendant the shingle mill and land whereon it stood, "with the privilege of water sufficient to drive a shingle saw at all times, except when the water is so low that the grist mill will require it all, and then the shingle mill must stop and not till then;" and afterwards conveyed to the plaintiff the land on which the upper dam had been erected; *it was held*, that the defendant acquired the right to the use of water from the upper as well as from the lower dam, when it could be taken without injury to the rights previously granted to the plaintiff for the use of the grist mill: —

That the defendant had the right to draw water for the use of his shingle mill, whenever such drawing did not thereby injure the plaintiff in the use of his grist mill, although "there were reasonable grounds to believe the water would be needed for the use of the grist mill:" —

That when the grant of the right of water for the use of the shingle mill was made in express terms, there was granted also by operation of law the right to use the means necessary to the enjoyment of the right: —

And, therefore, by the grant to the defendant he had the right to enter upon any land then owned by his grantor, when and where necessary, to enable him to obtain his just supply of water.

If the plaintiff, being the owner of several closes in the same town, brings an action of trespass *quare clausum*, and declares generally, that the defendant broke and entered his close in that town, and thereon committed certain acts, he may prove such acts of trespass to have been committed on any one close of his in that town; but if he introduces and relies upon testimony to prove a trespass upon one close, he must be confined to the close thus selected; and cannot support his action by the introduction afterwards of testimony to prove acts of trespass upon a different close, whether such testimony be objected to or not.

At the trial of this action, which was trespass *quare clausum*, before Whitman C. J. the plaintiff contended, that the action was maintainable; that the defendant had no right to hoist the upper dam gate at any time, or to enter the plaintiff's

land for that purpose; that if he had that right at any time, the plaintiff had the right to forbid such entry and hoisting, when there were reasonable grounds to believe, the water would be needed for the grist mill, &c. and that, there being passage ways reserved in the defendant's deed, he had no right to pass over the plaintiff's land below the passage way.

The presiding Judge did not give the instructions requested, but did instruct the jury, that under the deed to the defendant's grantee, he had a right to draw water from the upper dam, when necessary to the convenient use of the shingle machine; provided it did not incommode the operations of the grist mill and carding machine; and that if it were necessary, in such case, to hoist the gate of the upper dam, the defendant would have a right so to do; that in order to do so, if it were necessary to pass over the plaintiff's land, he would have a right to a convenient way over the same for that purpose; that they must judge, whether the defendant exercised these privileges unnecessarily and to the detriment of the plaintiff's rights; and if he did, he must be found guilty; otherwise not.

The verdict was for the defendant; and the case was reported for the decision of the whole Court.

The precise language of the material parts of the deeds and of the declaration, is given in the opinion of the Court, as is also the substance of the testimony in the case.

J. Appleton argued for the defendant, contending that the instructions given were erroneous, and that those requested were improperly withheld.

By a fair construction of the deed under which the defendant claims, rights to the lower dam are alone given, that being the privilege. The dam referred to in the deed is the only one in which any rights are acquired; otherwise the word dams should have been used.

The right claimed is that of a perpetual easement on the land of the plaintiff. It is not adjoining the land granted, nor necessary to its use, nor referred to in the defendant's conveyance. The origin of every easement may be referred to an agreement or to a prescription which supposes an agreement.

Neither is the case here. Gale & Whately on Easements, 13; 4 Johns. R. 81; Angell on Limitations, 208.

The defendant had no right to pass over the plaintiff's land, passage ways sufficient being given. He had a way by grant, and he was bound to use that alone. A way of necessity is limited by the necessity which created it; and when such necessity ceases, the right of way also ceases. 9 Moore, 166; 2 Bing. 76; 24 Pick. 102. Even if there was a way of necessity, it should have been located by the owner of the land, which has not been done. 5 Pick. 574.

Knowles, for the defendant, said that the owner of the land, under whom both parties claimed, granted to the defendant, the shingle mill "with the privilege of water sufficient to drive a shingle saw at all times, except when the water is so low, that the grist mill and James Hawes' mill require it all." Nothing is said about upper dam or lower, one lot or another lot. The defendant acquired all the right which the grantor then had to water sufficient to "drive a shingle saw," wherever it might be found, with the exception named, which has no concern with the present question. The deed conveys to the defendant the shingle mill, "with all the privileges and appurtenances thereto belonging." This would convey the right of water claimed by the defendant. The right to the water and to the use of it was in the defendant. Angell on Water Courses, 43, and cases there cited; *Blake* v. *Clark*, 4 Greenl. 436.

The defendant having acquired the right to the use of the water, he acquired of course the right, as far as Moore could give it, to enter upon the land and hoist the gate to let the water down. The counsel for the plaintiff is in an error in supposing, that there were ways granted for this purpose. The grant of ways was for an entirely different object. In passing to the upper dam the defendant had the right to pass in any convenient direction. 3 Mason, 280; 1 Taunt. 495; 14 Mass. R. 49; 2 Mass. R. 203; 8 Mass. R. 411.

The declaration claims damages only for entering the plaintiff's close, where the dam was, and removing the gate to the dam and letting off the water. No damages for any other

act is pretended to be claimed. The verdict of the jury has settled the question, that the defendant did the acts in a proper manner, if he had the right to the water, and to open the dam to obtain it. The only questions reserved are, whether the defendant had the right to the water, and the right to enter upon the land for the purpose of using his right by hoisting the gate. Whether it was done in a proper manner is not now before the Court.

J. Appleton, in reply, among other remarks, said that the defendant's construction of his grant of water, would destroy all substantial benefit the grist mill had to the first right of water. If the defendant can draw water so long as there is enough for the grist mill, they must both stop nearly together. The reserved water was to be left for the use of the grist mill.

The instruction of the Judge was erroneous in confounding a way of convenience with one of necessity. The grant of a way of necessity does not give the party the right to select the most convenient way, but merely the right to pass in any way the other party may select.

The opinion of the Court was drawn up by

Shepley J. — Benjamin C. Moore, prior to the year 1828, appears to have been the owner of a grain mill upon a dam, which had been erected on lot numbered eleven, in range three, in the town of Corinna, and which had occasioned the flow of a pond of water covering about six acres of land. During that or the following year, he built another dam, about fifty rods further up the stream, on lot numbered eleven, in range four, to preserve the water for the use of his mill, and thereby obtained another pond of water, covering about one hundred acres of land. During the year 1836, he erected a shingle mill on the lower dam. A carding machine appears, at some time not stated, to have been erected on that dam, and to have been conveyed to James Hawes. Moore conveyed to the plaintiff, on July 3, 1839, one undivided half of the grain mill and of a small tract of land, containing about half an acre, "with the privilege of drawing water from the mill pond

sufficient for this or any other grist mill, that may be built on the ground, that this mill stands on, or larger, if the owners of the privilege shall select, but not to infringe on the saw mill privilege. The grist mill has the right of drawing water over every other machinery on the dam, except what is deeded to James Hawes." Moore conveyed to Abner Shepherd, on November 12, 1841, the shingle mill "with the privilege of water sufficient to drive a shingle saw at all times, except when the water is so low, that the grist mill and James Hawes' mill require it all, and then the shingle saw must stop, and not until then." Moore conveyed to the plaintiff, on July 18, 1842, lot numbered eleven, in the fourth range, on which the upper dam had been erected.

It appears from the testimony, that "when the water runs over the upper dam, there is water enough for all the machinery. When it does not, the upper gate must be hoisted to furnish water for the shingle machine." The water had fallen from twelve to eighteen inches below the top of the upper dam, in the month of July, 1842, when the defendant passed over the land of the plaintiff and raised the gate in that dam to obtain sufficient water to work the shingle saw. This he had been forbidden to do by the plaintiff, who has brought this action of trespass *quare clausum*, to recover damages for the alleged injury. "There was no lack of water then to drive the grist mill." The water was then falling, and the plaintiff and Hawes stated, "that they expected a drought, and that the reserve water would be needed." There was, however, no lack of water afterward. In the conveyance from Moore to Shepherd, there was a grant of "a passage way from the west bank at the foot of the saw mill, to the machine. Also a passage from the machine to the east on the mill dam." The defendant appears to have been the assignee or lessee of Abner Shepherd. The jury were instructed, that "he had a right to draw water from the upper dam, when necessary to the convenient use of the shingle machine, provided it did not incommode the operations of the grist mill and carding machine; and that if it were necessary in such case to hoist the gate

of the upper dam, the defendant would have a right so to do; that in order to do so, if it were necessary to pass over the plaintiff's land, he would have a right to a convenient way over the same for the purpose."

The first question presented for consideration is, whether the defendant, under any circumstances, could rightfully claim to draw water from the upper dam and pond to work the shingle saw. The principal grounds, upon which the denial of such a right rests, are, that the upper dam was erected to reserve the water for the grain mill; that it was wholly owned by the owners of that mill; and that Shepherd by his conveyance acquired no interest in it. These positions being admitted do not authorize the conclusion. When Moore, being the owner of the land and stream, erected that dam to preserve the water for his grain mill, the whole water power or head of water, for whatever purpose created, became a common fountain of life to any machinery, to which it might be his pleasure to impart it. He was under no restraint; and might apply that, which was created for one purpose to another and different one. And might grant the right to draw water from such head of water without conveying any title to the dams or land, on which they had been erected. A subsequent conveyance of either dam and land could not deprive the first grantee of any rights, which he had thus acquired. The rights of these parties must therefore be ascertained from the conveyances made by Moore. He first conveyed one undivided half of the grain mill "with the privilege of drawing water from the mill pond," (regarded as one head of water) "over every other machinery on the dam, except what is deeded to James Hawes." By this grant alone of the right to draw water he would obtain no title to the dams or land. Moore, as the owner of the estate and of the remaining water power, would not be entitled to use it to the injury of the plaintiff's rights. The defendant could acquire from him no better title. With such a right to be secure in a present enjoyment of the use of the water without being damaged by others, the plaintiff does not appear to be satisfied. He claims the right to prevent the subsequent

grantee of Moore from using it, "when there were reasonable grounds to believe the water would be needed for the grist mill." His right to draw and use the water to the exclusion of others is not in his conveyance made to rest upon reasonable grounds of belief of a lack of water at a future time, but upon the fact, that the use of it by others would be injurious to the working of his mill. If Moore had continued to be the owner of the upper dam and pond and of the remaining water power, and had drawn the water from that pond at any time wastefully or for use, the plaintiff could have maintained no action against him therefor, unless he could have proved, that he had been deprived of water sufficient for the working of his mill. It is not difficult to perceive, that the rights of the parties could not be properly regulated or secured, if they were to rest upon apprehensions of approaching danger, and not upon an existing state of facts.

The defendant could not draw water from the upper dam and pond, if the conveyance from Moore to Shepherd granted no such right, whether the plaintiff was or was not injured by it. It is contended, that the language used to make that grant may have its full operation, if the right to draw water, be limited to the lower dam and pond. The grant was made by Moore while he was the owner of all the residue of the water power, and there is no limitation of it. It is a grant in general terms of so much water power owned by the grantor; who in effect engages to furnish so much water power from that stream, unless the water should be required to work the grain mill and carding machine. No dam or pond is named, except for the purpose of designating the bounds of a lot of land or defining a passage way. If Moore had continued to be the owner of the upper dam and pond, and had refused to Shepherd water to work his shingle saw, when there was not sufficient in the lower, but was in the upper pond to work all the machinery, he would have been liable to an action for the injury thereby occasioned; for he had under such circumstances authorized him to use it. The language used in the conveyance of the grain mill to the plaintiff would tend to confirm

this construction, for one mill pond only is mentioned, and the only dam named, is the lower one; and yet there can be no doubt of the intention to authorize the owners of that mill to use the whole water of the stream not required for the mill of Hawes. The defendant must therefore be considered as entitled to the use of the water, when he was forbidden to use it, as he did not thereby injure those, who had superior rights.

Had he a right to raise the gate in the upper dam to obtain it, and to pass over the land of the plaintiff for that purpose? When Moore granted by express terms sufficient water for the use of the shingle saw, he thereby granted by operation of law the right to use the means necessary to its enjoyment, according to the maxim, *quando aliquis aliquid concedit, concedere videtur et id, sine quo res uti non potest.* And Shepherd might enter upon Moore's land, when and where necessary, to enable him to obtain his just supply of the water. Moore could afterward only convey his land subject to that servitude. But Shepherd could not thereby acquire any right to enter upon the lands of others obtained by a prior purchase from Moore. Nor would the plaintiff, by the purchase of the upper dam and land, while subject to such servitude, impose it upon other lands, which he had before purchased of Moore. Such a right of entry for a special purpose, if it may be denominated a right of way, can be little affected by express grants of ways for different purposes contained in the same conveyance. The testimony in the case shows, that the defendant passed over the lot of land which the plaintiff had purchased in part of Moore, before the defendant had acquired any right whatever to the land or water.

The counsel for the plaintiff contends, therefore, that the action can be maintained for a trespass committed upon that lot. The declaration alleges, that the defendant "broke and entered the plaintiff's close, situated in said Corinna, and then and there took up and removed and opened a certain gate in a dam, made on and upon a stream of water passing through the said close and left the same open." The plaintiff might have proved acts of trespass committed on any close in that

town. But he must select and be confined to testimony applicable to some one close; and none could be received to prove a trespass on two different closes. The plaintiff appears to have selected lot 11, in range 4, as his close; and to have introduced and relied upon his testimony to prove a trespass on that lot, as the principal cause of action. And to that close his declaration appears to have been designed to apply. The half acre does not appear to have been, any part of it, within the bounds of that lot. He could not then be permitted to introduce proof, that the defendant had passed over the half acre lot, and in case he should fail to maintain his action for a trespass on the first close, claim to abandon it, and to resort to the last to sustain it. Should it be said, that such testimony was received without objection, the answer would be, that testimony showing a trespass upon a close other than the one, which must be regarded as the one described in the declaration, could not support the action. *Mudie* v. *Bell*, 3 C. & P. 331. The instructions, which authorized the defendant, if it were necessary, to pass over the plaintiff's land, must be considered as having reference to the close selected as the one, upon which the trespass was alleged to have been committed; and as it respects that close they were correct.

Judgment on the verdict.

RUFUS DWINAL *versus* JOHN B. SMITH *& al.*

Where the bill alleges a conspiracy between the defendants to defraud the plaintiff, and sets forth the acts done to effectuate the objects of the conspiracy, the case is cognizable in this Court as a court of equity.

The defendant in a bill in equity cannot refuse to make answer and discovery relative to the facts stated in the bill, on the ground, that if he should do so, it would render him liable to be prosecuted for a criminal offence, if the period fixed by law, within which he could be prosecuted, has elapsed before the answer is filed.

THIS was a bill in equity in favor of Rufus Dwinal against John B. Smith and Merritt D. Gilman, wherein the plaintiff alleged, setting forth the facts particularly, that on Oct. 6,

1837, Gilman was indebted to him in the sum of $683,50; that Gilman on that day conveyed to him certain real estate in payment thereof; that at this time, the plaintiff examined the records and could there find no notice of any conveyance, attachment, or incumbrance thereon, and that Gilman assured him, that there was none; that afterwards he discovered, that Smith had, on the twenty-second day of August preceding, privately attached the same premises, recovered judgment on his demand by default, and levied his execution upon the same; that the demand sued by said Smith was fictitious, and wholly without consideration, and made and received for the purpose of defrauding the plaintiff; that the said Smith and Gilman had combined together and with others, to convey away the property, and place it where it should be held for the benefit of Gilman; and that he has demanded possession of the premises of Smith, who sets up his pretended title, thus founded in fraud, and refuses to give up the possession thereof. The bill prays, that the defendants may be held to make disclosure and discovery of the facts, and that they may answer interrogatories, particularly propounded; that the levy may be decreed to be inoperative; and said Smith compelled to release the same to the plaintiff; with a prayer for general relief.

The defendants jointly demurred to the bill.

Ingersoll argued in support of the demurrer, contending, that the Court have no jurisdiction of the case, because there was a complete and adequate remedy at law. The bill goes on the ground that the debt was fictitious, and the attachment and levy therefore void. The plaintiff should, in such case, have brought his writ of entry, instead of his bill in equity. *Holland* v. *Cruft*, 20 Pick. 321; *Adams* v. *Page*, 7 Pick. 542; *Fairfield* v. *Baldwin*, 12 Pick. 388; *Spear* v. *Hubbard*, 4 Pick. 143.

The plaintiff is not entitled to any discovery or answer from the defendants, on the ground, that by so doing they might criminate themselves. The bill charges a criminal offence upon the defendants; and the law does not permit a

course which might force them to furnish evidence to be used against them in a criminal trial. It is an indictable offence by statute, and at common law. Rev. Stat. c. 161, § 2; c. 148, § 49; 16 Johns. R. 592; 1 Woodeson, 207; Story's Eq. Pl. 438; Wigram's Points of Discov. 82 and 259; 1 Sumn. 504.

Hathaway, for the plaintiff, contended, that the Court had jurisdiction of the case, as one of fraud. There was no adequate remedy at law. Nor could relief be obtained without discovery of the truth in some way to render it available. And for this purpose he is entitled to a discovery of the truth from the defendants. *Briggs* v. *French*, 1 Sumn. 504; 1 Story's Eq. Pl. 82 and 578; *Evans* v. *Chism*, 18 Maine R. 220; *Gordon* v. *Lowell*, 21 Maine R. 251.

The defendants cannot refuse to answer, on the ground, that the bill charges a crime; for it appears from the facts stated in the bill, that all prosecutions under it are barred by the statute of limitations. Rev. Stat. c. 167, § 15; Story's Eq. Pl. § 598; Hare on Discov. 147.

The demurrer should be overruled, because no causes of demurrer are assigned. Story's Eq. Pl. § 452, 453, 454.

The opinion of the Court was drawn up by

WHITMAN C. J. — The cause comes before us upon a demurrer to the plaintiff's bill. The causes of demurrer are not very technically or distinctly assigned, if they can be considered as assigned at all. It may be gathered, perhaps, that the intention of the demurrer is twofold; first, to deny that the bill presents a case entitling the plaintiff to relief in equity; and, secondly, that any discovery, which the defendants or either of them could make, would be unavailing for the purpose of establishing the facts set forth in the bill.

Without questioning the propriety of this course of proceeding, we may remark at once, that the stating part of the bill alleges a conspiracy between the defendants to defraud the plaintiff, and sets forth the acts done to effectuate the objects of the conspiracy. These make out a case clearly cognizable

in a court of equity. The remedy may not be attainable at all, in such cases, without deriving evidence, of the facts set forth, from the defendants. And, as to what the defendants can disclose, can only be known, when they shall have fully discovered what knowledge they have in reference to the facts relied upon.

In the argument of the counsel for the defendants, we are told, probably, what was intended by their allegation in the demurrer, that a good case for relief in equity was not presented by the bill, to wit: that the plaintiff had a plain and adequate remedy at law; but in a case of fraud this cannot be presumed, especially when a discovery is prayed for.

We are, also, in the argument, told, that the reason why the defendants cannot make a discovery, that would aid the plaintiff in recovering, is, that, if they were to make such discovery, it would render them liable to be prosecuted for a criminal offence. But to this it is replied, by the counsel for the plaintiff, that the period within which they could be prosecuted for any such offence as is indicated, has elapsed. And the authorities are to the effect, that in such case a disclosure cannot be refused. Story's Eq. Pl. § 598, and cases there cited. Our statute, c. 167, § 15, limits the prosecutions for such offences to the term of six years next after their commission. And it matters not, if such were the fact, that such period had not elapsed at the time of the filing of the bill: it is sufficient that it has so elapsed before an answer is filed. Story's Eq. Pl. § above cited.

Demurrer overruled.

THOMAS P. CUSHING *& al. versus* JOHN S. AYER *& al.*

If a mortgagee, upon a demand being made by the assignee of the mortgagor "to render a true account of the sum due," (under the provisions of Rev. Stat. c. 125, § 16,) renders an account, wherein he states that two separate items are both due, and claims to be paid the amount of both in order to a redemption, when he is entitled to receive one of those sums, but not the other; this is not "a true account of the sum due," and amounts to such refusal to render an account, as will enable the assignee of the equity of redemption to maintain a bill in equity to redeem the mortgage without having first tendered payment.

If the mortgagor, for an adequate consideration, conveys a part of the mortgaged premises, and afterwards conveys the residue to another person, it would seem, that the estate last conveyed, if of sufficient value for that purpose, is charged in equity with the redemption of the mortgage.

Where a part of a lot of land, the whole of which is encumbered by a mortgage, is sold to one for an adequate consideration; and afterwards the residue is sold to another, and a sufficient amount of the consideration is kept back and reserved to redeem the mortgage, under an express agreement to apply the same for that purpose; and the last purchaser pays the amount due on the mortgage, and takes to himself from the mortgagee a quitclaim deed of the premises; so far as it respects the first purchaser, this is a redemption of the mortgage.

When the deeds affecting the title are all on record, one purchasing of such second purchaser by deed of warranty, must be deemed to have had constructive notice of their contents, and can stand in no better condition than his grantor.

Where notice of foreclosure of a mortgage by advertisement has been given, in pursuance of the first mode provided in the fifth section of Rev. Stat. c. 125, by the mortgagee, after he has sold and assigned the mortgage, and has ceased to have any interest therein, such proceeding is wholly ineffectual, and cannot enure to the benefit of any one.

BILL IN EQUITY against John S. Ayer and John Fiske; and heard on bill, answer and proof.

Brown and Gardner were the owners of a lot of land in Bangor, and on Nov. 19, 1833, conveyed the same to P. & P. H. Coombs, who at the same time gave back a mortgage thereof to secure the payment of notes for the consideration. Both deeds were recorded on the day of their date. On the same day P. & P. H. Coombs conveyed to Norcross and Treadwell a part of the same lot, by deed of warranty, duly recorded. On Jan. 2, 1835, Norcross and Treadwell, by deeds

of release, divided between themselves the lot conveyed to them by P. & P. H. Coombs, and afterwards, on the same day, by separate deeds, dated back to Nov. 19, 1833, mortgaged their separate lots to their grantors to secure their several notes for the purchase money. These mortgages were recorded on Jan. 3, 1835. On Nov. 16, 1835, P. & P. H. Coombs conveyed the residue of the lot to Treadwell, who gave them a mortgage to secure the purchase money, which was recorded the same day. The right which Norcross had to redeem his lot was sold on execution to Johnson and conveyed to him by the officer on Sept. 3, 1838. On July 19, 1841, Johnson conveyed the equity of redemption, by him purchased at the sheriff's sale, to the plaintiffs. On August 24, 1841, P. & P. H. Coombs, by their deeds, on the outside of the aforesaid mortgages from Norcross and from Treadwell to them, did "grant, assign, release and convey," the same unto John S. Ayer, one of the defendants, the said deeds containing covenants of general warranty, "the proviso within contained for the redemption only excepted." These assignments were duly recorded. On the next day, August 25, 1841, Ayer paid to Mrs. Kinsley, to whom the Brown and Gardner mortgage from P. & P. H. Coombs had been assigned, the amount due thereon, and received from her a quitclaim deed of "all the right, title, interest and claim I have in and to the following described premises," describing the same premises mortgaged to Brown and Gardner; the descriptive part concluding thus:— "And being the same deeded by Enoch Brown and Samuel J. Gardner to Philip and Philip H. Coombs, and by them conveyed in mortgage to said Brown and Gardner, by deed dated Nov. 19, 1833. The same having been assigned to me by said mortgagees, and is hereby released." On Dec. 9, 1841, Ayer conveyed to Fiske, the other defendant, by deed of warranty, the lot embraced in the mortgage from Norcross to Coombs.

The facts, considered by the Court to have been proved by the answers and evidence, are stated sufficiently in the opinion of the Court.

The case was very fully argued, mainly upon the facts, by

Cutting, for the plaintiffs, and by

S. W. Robinson, for the defendants.

Cutting called to his aid, as matter of law, these principles.

When the holder of a mortgage is called upon to render an account of the amount justly due, and he does not do it, the necessity of a tender is dispensed with. It is not enough, that he should state, that two or more sums are due, even if one of them should be the true sum. Rev. Stat. c. 125, § 16, 17 and 18; *Willard* v. *Fiske*, 2 Pick. 540.

Ayer purchased of Coombs with the knowledge of the state of the title, and of the prior conveyance to Norcross. It was the duty of Coombs to pay off and discharge the Brown and Gardner mortgage; and Ayer took the estate with all the equities attending it. On this principle, that mortgage was discharged on the payment of the money to Mrs. Kinsley. *Wade* v. *Howard*, 6 Pick. 498; Rev. Stat. c. 125, § 17; *James* v. *Mory*, 2 Cowen, 320; *Clute* v. *Robinson*, 2 Johns. R. 612.

Ayer received the conveyance of the property from P. & P. H. Coombs in payment of a preexisting debt, and therefore received it subject to all the equities to which his assignors were subject. *Clark* v. *Flint*, 22 Pick. 243.

On the face of the deed from Mrs. Kinsley the mortgage is discharged, not assigned. 6 Pick. 492; 11 Pick. 289.

The consideration paid by Ayer to Coombs for the assignment of the Coombs mortgages to him was but the balance due to Coombs on those mortgages above paying the Brown and Gardner mortgage. And the evidence shows, that he expressly agreed to procure the discharge of that mortgage.

Fiske was bound to know the state of the title upon record, and by his conveyance from Ayer took nothing but the title of the latter. *Clark* v. *Jenkins*, 5 Pick. 280; *Mills* v. *Comstock*, 5 Johns. Ch. R. 214.

Robinson, in his legal positions, contended that the defendant, Ayer, did furnish a full and fair account of the amount due, as the statute requires. There was a full and fair statement of

the amount due on the mortgage from Norcross to Coombs, which the plaintiffs admit they must pay; and also of the Brown and Gardner mortgage, which we say they ought to pay. All that is necessary, is, that the party wishing to redeem, should know how much to tender. *Willard* v. *Fiske*, 2 Pick. 540; *Allen* v. *Clark*, 17 Pick. 54.

He objected to the admission of all the parol evidence offered by the plaintiffs, giving his reasons for his objections.

He considered it a perfectly well settled principle in courts of equity, that where a person who has acquired an interest in an equity of redemption takes a conveyance from the mortgagee, that the mortgage is to be upheld, if his interest requires it. 3 Greenl. 260; 7 Greenl. 102, & 377; 14 Maine R. 9; 22 Maine R. 85; 16 Maine R. 146; 3 Johns. Ch. R. 53; 18 Ves. 384.

The intention must be gathered from the deed itself, and parol evidence is inadmissible to show what that intention was. 6 Pick. 492; 12 Mass. R. 26.

Even the delivery of the Brown and Gardner notes to Ayer by Mrs. Kingsley would in equity draw after it the mortgage. 2 Burr. 978; Powell on Mort. 186 to 190; 17 Mass. R. 425; 1 Johns. R. 580.

Should the plaintiffs sustain their bill, they are not to be entitled to costs. Rev. Stat. c. 125, § 16; 6 Pick. 420; 17 Pick. 47.

The opinion of the Court was drawn up by

WHITMAN C. J.:—The bill seeks to obtain a redemption of a mortgage, of certain real estate situate in Bangor, made by two persons by the name of Coombs, who had immediately before conveyed the same in fee to their mortgagor, Norcross. The plaintiffs are the vendees, under a sale upon execution against him, of his equity of redemption; and the defendant, Ayer, claims the premises as the assignee of the Messrs. Coombs, by virtue of a deed made to him by them, of their right and title thereto. So far there is no controversy between the parties.

But, when the Messrs. Coombs conveyed to Ayer, there was an outstanding mortgage, made by them, anterior to their conveyance to Norcross, to Messrs. Brown and Gardner; so that neither Norcross, nor those claiming under him, nor Ayer could have an unincumbered title to the premises, till the mortgage to Brown and Gardner had been redeemed. Ayer, therefore, after his purchase of the Messrs. Coombs, paid the amount due on that mortgage to a Mrs. Kinsley, who had become the assignee thereof; and took from her a deed, *releasing*, *selling* and *forever quitclaiming* to him her right and title to the premises. Ayer now claims to hold the same against the plaintiffs till they will pay, not only what is necessary to discharge the mortgage made by Norcross, but, also, the amount paid by him to obtain his conveyance from Mrs. Kinsley. This latter claim the plaintiffs resist, upon the ground, that the Messrs. Coombs were bound to clear the estate from that incumbrance; and that Ayer, in taking his assignment from them, of the mortgage made by Norcross, having had notice, at the time, of the existence of the mortgage to Brown and Gardner, could be in no better situation than were the Messrs. Coombs; and moreover, because, at the time of his purchase of them, it was expressly understood and agreed, in effect, that he should remove that incumbrance: that virtually, so much of the consideration for the assignment of the mortgage made by Norcross, and for the assignment of mortgages of other portions of the estate mortgaged to Brown and Gardner, was retained by Ayer as would be sufficient to redeem the latter mortgage.

Before going into a consideration of the questions thus arising, it becomes necessary to dispose of a preliminary objection, made by the defendant, Ayer. The bill is framed under the Revised Statutes, c. 125, § 16; and alleges a demand upon the defendants severally, before filing the bill, to "render a true account of the sum due," in order that a tender might be made thereof, and that they, each, "refused or neglected" to render such an account. Ayer's reply to the demand is in writing. It begins by saying, "the following is a statement of

my claim on the land and buildings on State Street, now occupied by Jesse Norcross, Jr. (being the premises in question) as near as I now can present it." And then states, and (for aught appearing to the contrary) truly, that the amount due on the notes given by Norcross, and secured by his mortgage, was, on the 31st of August, 1841, (which was soon after the demand was made) $700,44, but goes on to say, "I have paid off a prior incumbrance upon a tract of land, which includes the above;" and then states the amount so paid, to be $1853,72; and insists that this was a rendering of "a true account of the sum due;" and is a sufficient reply to the demand of the plaintiffs to render such an account; and that, whether the plaintiffs are bound to pay but $700,44, or more, he has furnished the data by which they might be enabled to make a tender understandingly, if they were disposed to make one; and it would seem quite clear, that they might have done so. But it is equally clear, that it would have been a useless ceremony. The reply to the plaintiff's demand shows, that he insisted on the payment of both of the sums named, in order to a redemption; and the argument of his counsel fully confirms the belief, that he would not have accepted the $700,44, if it had been tendered to him.

In *Willard* v. *Fiske*, 2 Pick. 540, the subject of such demands and replies is very fully considered. It is there said, that the statute (and the Massachusetts statute is precisely like ours) should have a liberal construction, by way of effectuating the object manifestly in view in passing it; that it was to facilitate the redemption of mortgages, concerning which formerly much inconvenience had been experienced; and that a denial of the plaintiff's right would be sufficient to authorize the maintaining of a bill. Ayer's reply was virtually a denial of the plaintiff's right to redeem, unless he were paid both of the sums named. If he had a right to exact both sums, then his reply was a true statement of "the sum due." The object of a demand in such cases must be believed to be to obtain a statement of the precise sum due, so that a tender could be made, which would be accepted. If a mortgagee

states a variety of items as presenting the amount due, and he has no right to one or more of them, it is no statement of the sum due. We think, therefore, that the demand of the plaintiffs, of a statement of the amount due, was not, according to the requirement in the statute, complied with by Ayer, unless he is entitled to both of the sums named. If he is so entitled the object of the plaintiffs in redeeming will be wholly frustrated; for the amount to be paid to extinguish the incumbrance alone would be greatly beyond the value of the premises sought to be redeemed.

We must, then, determine whether Ayer has a right to withhold the premises till the sums claimed by him shall have been paid. The plaintiffs' first position, that Ayer, having purchased of the Messrs. Coombs, with knowledge of their liabilities, and such knowledge he appears to have had, he must be deemed to have taken the estate, with all the equitable claims connected with it, is not without, at least, the semblance of support from the authorities. In *Taylor* v. *Stibbert*, 2 Ves. jr. 439, it is said, "that a purchaser with notice is bound in all respects as the vendor." And this doctrine is confirmed by Chancellor Kent, in *Champion* v. *Brown*, 6 Johns. Ch. R. 402; and, again, by the Supreme Court of Massachusetts, in *Clark* v. *Flint & al.* 22 Pick. 231; and the same principle would seem to have been recognized in *Wade* v. *Howard & al.* 6 Pick. at page 498. This, certainly, is a very reasonable position; for it cannot well be supposed, that any one would purchase an estate, knowing it to be incumbered, without reserving to himself, in the purchase, adequate means to remove it.

But we do not deem it necessary to place the decision of this cause upon the ground of any equitable presumption, however forcible it may be, the proof, in our opinion, clearly warranting the belief, that Ayer purchased the mortgage in question, with certain other mortgages of parcels of the estate mortgaged to Brown and Gardner, with an express understanding and agreement, that he should, with an adequate amount of the consideration reserved by him for the purpose, extinguish that incumbrance. It is true, that Ayer, in his answer, denies

this fact. The proof therefore must be sufficient to overcome the evidence arising from such denial. For this purpose Philip Coombs, one of the mortgagors, has been examined by the plaintiffs as a witness. Ayer objects that he is incompetent by reason of interest. It appears, that immediately before he and his partner took their mortgage from Norcross, they had conveyed the premises to him by deed of general warranty, so that they would seem to have a direct interest in compelling Ayer to redeem the incumbrance, which they had created before they sold to Norcross. But it further appears, among the exhibits in proof, that the interest of the witness is a balanced one. In the deeds, which Ayer took from the Messrs. Coombs, which were assignments upon the back part of three mortgages, covering all the estate described in the mortgage to Brown and Gardner, the Messrs. Coombs "*grant*, assign, release and *convey*," "the *premises* within conveyed," to them; and all their "right, title, interest and estate in and to the same;" and in conclusion, they covenant, that the premises are free of all incumbrances, "the proviso within contained for redemption only excepted," and that they and their heirs "will warrant and defend against all persons." The same incumbrance of the mortgage to Brown and Gardner was, therefore, warranted against by the witness, in his conveyances to Ayer, as in the deed to Norcross; and the liability to Ayer, would seem to be equal, at least, to that to Norcross, and those claiming under him. The witness, therefore, is competent.

He testifies very fully to the fact, that it was expressly understood and agreed, between him and Ayer, that the funds put into Ayer's hands, by the transfers of the mortgages to him, were sufficient, if redeemed, to enable him to pay the amount due on the mortgage to Brown and Gardner, and to leave a surplus for his benefit, in payment of a debt due from the Messrs. Coombs to him of $534,32; and if the mortgages should not be redeemed, that the surplus would be still greater, as the property mortgaged was worth much more than the sums, which were secured by the mortgages. And he produces a memorandum tending to that effect, which he says

was, in the course of the negotiation exhibited to Ayer; and he thinks more than once. Thus, it would seem, according to the testimony of this witness, that the real consideration for the assignment of the mortgages to Ayer, was the liability to extinguish the claim under the mortgage to Brown and Gardner, and $534,32 in payment of his debt, due from the Messrs. Coombs, in case the mortgages should be redeemed; and if not, as much as he could get from the property mortgaged, over and above what would be requisite to clear the estate of incumbrance.

But the testimony of this witness alone, would not be sufficient to overcome the denial of Ayer, in his answer, of any such understanding. Further evidence should be found for that purpose. And the fact, that Ayer took the assignments of the mortgages, with a knowledge that a prior incumbrance was outstanding upon the estate, embraced in those mortgages, may be presumptive evidence, to some extent, that he never would have taken those assignments without securing adequate means to remove it. But there is further testimony, which tends to corroborate this presumption, and to confirm the testimony of Coombs.

Henry Warren states, that, in the latter part of 1841, Ayer held a conversation with him; and said, that he had raised about eighteen hundred dollars to redeem the mortgage made to Brown and Gardner; that he did not know as he could raise the money till he tried; and had queried, whether, as money was hard to be obtained, it would be better to raise so large a sum to save so little as he should, by raising it; that "the sum he was going to save, I think he named, was about five hundred dollars;" that he asked him if the property was good for it, and he replied that he thought it was. This testimony seems to tend strongly to corroborate the statement of the witness, Coombs, as to the views entertained by both parties at the time the mortgages were assigned to Ayer; so that, on the whole, we can have no reasonable doubt, that a portion of the consideration for the transfer of those mortgages was the amount of the debt due to the holder of the

securities and mortgage made to Brown and Gardner; and that that portion of the consideration for the transfer was retained by Ayer for that purpose. And it has been settled in this State, that it is competent to show, that "the acknowledgment of the payment of the consideration money in a deed of conveyance, does not estop the grantor from showing, that a part of the money was left in the hands of the grantee to be applied to the grantor's use." *Skillinger* v. *McCann*, 6 Greenl. 364. And, if the grantor is not estopped, surely those claiming under him cannot be. Ayer, therefore, could not, by taking an assignment of the mortgage made to Brown and Gardner, be allowed to set it up in defence against the claim of the plaintiffs.

But it is insisted, that that mortgage became foreclosed, after Ayer made his purchase of the Messrs. Coombs, so that the title to the premises had become absolute in him before the plaintiffs' bill was filed.

It appears, that Brown and Gardner, in September, 1838, advertised, in the form prescribed by law, their intention to foreclose the mortgage, so that if they were then the owners of the mortgage, the right of redeeming the premises, if the debt were not paid, would have expired in September, 1841. But, although Ayer did not obtain his deed from the assignee of the mortgage till October of that year, yet he had paid the debt to the assignee of Brown and Gardner, in the month of August previous. And, besides, it appears, that Brown and Gardner, at the time they so advertised, were not the owners of the mortgage; but had assigned the same, in the September previous, to Mary Kinsley, of whom Ayer took his deed; so that the advertising by Brown and Gardner was wholly ineffectual for the purpose of foreclosing the mortgage; and could not enure to the benefit of any one. And, moreover, the payment of the amount secured, before the three years had elapsed after such advertising, if they had remained the owners of the mortgage, would have saved the forfeiture.

But there is another answer to this claim on the part of Ayer. We have before come to the conclusion, that Ayer

was bound to save the plaintiffs harmless from this incumbrance; especially if he, as was in contemplation between him and the Messrs. Coombs, should become possessed of it. Being so bound, the circumstances under which he had acquired it would become immaterial.

As to the matter of the payment of taxes, and any title derived from or in consequence of their non-payment, Ayer, in reference to the premises in question, has no ground of defence, further than to have the amount paid to the other defendant, Fiske, on account thereof, taken into consideration in ascertaining the amount necessary to be paid to entitle the plaintiffs to redeem the same. Neither Ayer nor Fiske has any deed recorded in reference thereto, nor is any evidence adduced, showing the requisite proceedings necessary to authorize a sale for taxes, either of the premises, or of the property mortgaged by Treadwell, with which now we have no concern.

The defendant, Fiske, in his answer, states, that, on the ninth day of December, 1841, he purchased the premises in question, in fee, and by deed of general warranty, of the defendant, Ayer, for the agreed consideration of fourteen hundred dollars; and on the same day re-conveyed the same in mortgage to secure the payment of said consideration; and without any knowledge that Ayer had not an indefeasible title thereto. But it appears, that the deeds affecting Ayer's title were all duly recorded; Fiske, therefore, must be deemed to have had constructive notice of their contents.

He insists, further, that the demand made upon him by the plaintiffs to state the amount due, was not sufficiently explicit to entitle them to maintain their bill against him; and offers this as an excuse for not having made any reply to it. This demand, which is in writing, sets forth, that the plaintiffs had a right to redeem the premises, describing them particularly, and requests him to render a true account of the sum due, and for which he claimed to hold the premises. He being bound to know the state of his title, as the same appeared of record,

and the record affording sufficient means to enable him to see to what the plaintiffs' demand referred, we think the demand was sufficiently explicit. He having set up no other defence, except his reliance upon the ground taken by his warrantor, Ayer, and that proving insufficient, a decree must be passed against both defendants, allowing the plaintiffs to redeem the premises, upon paying to Ayer the amount of the principal and interest due, according to the terms of the mortgage to the Messrs. Coombs, the *net* rents and profits received, or which by due diligence might have been received by either of the defendants, and also the plaintiffs' cost of suit being deducted therefrom. If the parties cannot agree on the balance so to be paid, a master may be appointed to ascertain it.

JEPTHA NICKERSON *versus* SAMUEL HOWARD.

If there was a clerk of a company of militia in office at the time a penalty was incurred by a private by non-appearance at a company training, but he had ceased to be clerk before an action for the recovery of the fine could be commenced, and no person had been appointed in his place at the proper time for the institution of a suit, the action should be brought in the name of the commanding officer of the company.

Where the ensign of a militia company has had the actual command thereof for one year by virtue of his authority as such ensign, and in pursuance of a special order for the purpose from the colonel of the regiment to which the company belonged, and no one has appeared to interfere with him in such command, it furnishes no valid excuse to a private for refusing submission to such ensign as commander of the company, and absenting himself from a company training, if such private can prove, that the proceedings of a court martial, by the sentence of which the captain of that company had been removed from office, were illegal and void.

THIS was a writ of error brought by Nickerson to reverse a judgment against him of the police justice of the city of Bangor, in a suit commenced by Howard, as ensign and commanding officer of a company in which Nickerson was liable to do militia duty, to recover a fine for non-appearance at a May training. At the time of the training there was a clerk of the

company in office, who had ceased to be such, without having commenced any process, before the suit was instituted.

Several errors were assigned, of which the only two considered by the Court are found in the opinion.

D. T. Jewett, for Nickerson, on the first point, contended, that the commanding officer of the company, whoever he might be, could not maintain an action in his own name, as there was a clerk at the time the fine accrued. If he resigned, another should have been appointed, who should have brought the suit. Stat. 1834, c. 121, § 45; Stat. 1837, c. 276, § 3, 9; *Taylor* v. *Smith*, 18 Maine R. 288.

It was contended, that Howard had no right to command the company, because there was a captain legally in office. The reason for this conclusion was, that the proceedings of a court martial, by means of which he had been considered as removed from office, were illegal and void. Much learning was brought to the attention of the Court on this subject by the counsel for the respective parties.

Prentiss, for Howard, said that the clerk could not have commenced the action, for he was out of office before the time had expired, after the training, that was allowed for settlement or excuse, before a suit could be commenced. The right of action did not accrue until that time had expired. By the statute of 1834, no one can bring an action, as clerk, unless he was clerk at the time the suit is commenced. If there is no clerk at the proper time to commence the suit, it must be brought by the commanding officer of the company. The militia act of 1837 makes no change of the law in this respect.

It was also contended, that there was sufficient legal evidence, that the captain of the company had been removed by the sentence of a court martial; and that those proceedings were legal.

But, however that may be, Howard was bound to obey the orders of his colonel, and take command of this company; and could not raise questions as to his superior officers, when they did not come forward to claim the command. *Lowell* v. *Flint*, 20 Maine R. 401.

The opinion of the Court was drawn up by

WHITMAN C. J. — This is a writ of error, brought to reverse the judgment of the judge of the police court, of the city of Bangor. The first error assigned, and relied upon in argument, is, that the action, in which the judgment was rendered, was instituted by the plaintiff therein, to recover a fine against the plaintiff in error, incurred, if ever, while there was a clerk of the company, in not attending a company training, in which the supposed offence consisted, actually in office; and, although that clerk had resigned before the penalty could have been sued for, yet that action was commenced by the plaintiff therein as commander of the company before a new clerk had been appointed. In this we think there was no error. By the statute of 1834, c. 121, § 45, it is provided, "if there be no clerk to prosecute as aforesaid, the captain, or commanding officer of the company, shall prosecute for said fines." This provision is comprehensive and explicit. How the vacancy in the office of clerk occurred would seem to be immaterial. Whether the offence occurred or not, while there was a clerk in office, would seem to be equally immaterial. If at the time the suit was required to be commenced, the office were found vacant, the commanding officer was bound to commence the suit. Nor does the act of 1837, c. 276, abrogate or affect this provision. Sections 3 and 9 of that act merely make further provisions in reference to the collection of fines; and is in addition to the act of 1834, and in its provisions for the collection of fines is not inconsistent with that act.

The second error assigned, and relied upon in argument, is, that the defendant in error was not the commandant of the company, and therefore could not sue for the fine. It appears that he was the ensign of the company, duly elected and qualified, and, for a year previous to the commission of the offence, had commanded the company by virtue of his authority as such ensign; and in pursuance of a special order for the purpose from the colonel of the regiment, to which the company belonged; and no one appeared to interfere with him in such command. The order of the colonel could not be

disobeyed without the hazard of being punished for such disobedience. Obedience to superiors in the military line is one of the first duties. The colonel was to be presumed to have good reasons, whether he condescended to assign them or not, for his mandate. The defendant in error finding no officer superior in rank to himself, offering to command the company, would clearly have been inexcusable, if he had hesitated in his obedience. And no private in the company, certainly, after the defendant had so exercised the command for over a year, could be excusable for refusing submission to him as such commandant.

We dismiss from our consideration whatever was introduced at the trial, in reference to the court martial, convened to try the former captain of said company, and in reference to the discharge of the former lieutenant thereof, as having been irrelevant.

This brings us to the conclusion, that there was no error in the proceeding or judgment of the Court below; and the judgment there is affirmed; with costs for the defendant in error in this Court.

WILLIAM BRADBURY *versus* SAMUEL H. BLAKE.

If a note be given to prevent the sale of an equity of redemption, so that a clear title to the same land under a deed, should be obtained by a relative of the maker; or if the payee parted with a right which he had under an attachment of land, by omitting to levy thereon, in consequence of the note; such note is not void for want of consideration.

ASSUMPSIT upon an instrument of which a copy follows: "I hereby, value received, promise and engage to pay William Bradbury two hundred dollars and interest in one year from this date, provided Elisha H. Allen shall not redeem lot No. 207, and house thereon, the equity of redeeming of which has this day been sold to said Bradbury; said redemption to be in one year from date. Feb. 19, 1838.

"Witness, Allen Gilman. "S. H. Blake."

It was admitted, that Allen did not redeem the lot. The defendant introduced in evidence a paper of which the following is a copy. "Whereas I, the subscriber, have this day purchased the right in equity of redeeming a certain lot and dwellinghouse, being lot No. 207, lying on Cumberland Street and Broadway in Bangor, and have received of S. H. Blake his obligation for $200 in one year and interest, and have agreed to transfer all my right to said lot to said Blake on the following conditions, viz. that if Elisha H. Allen shall fail to redeem the same at the sum of one thousand dollars and interest, and the said Blake or his assigns shall pay in addition to his said obligation for $200 and interest, within one year from the date, the sum of eight hundred dollars and interest; now I hereby engage to convey all my right of redeeming said lot, No. 207, to said Blake on the above conditions happening.

"Witness, Allen Gilman. "William Bradbury."

This paper was without date but was made at the same time as the one signed by the defendant.

The facts sufficiently appear in the opinion of the Court.

The case was taken from the jury, and by the parties, agreed to be submitted to the opinion of the Court on the report of the Judge, the Court having power to decide both law and fact upon the evidence.

Prentiss, argued for the plaintiff, citing 13 Maine R. 394; 8 Greenl. 94; 2 Hill'd Abr. 427, 428; 7 Greenl. 195; 3 Metc. 275; 21 Maine R. 327; 5 Pick. 393; Com. on Con. 12; 4 Metc. 211; 9 Pick. 305; 22 Maine R. 502; 19 Pick. 330; 2 N. H. Rep. 97; 2 Fairf. 459; 17 Maine R. 378; 16 Maine R. 458; 3 Stark. Ev. 1046; 1 Greenl. Ev. 284, 286; 2 Fairf. 398; 20 Maine R. 56; Chitty on Bills, 70; 21 Maine R. 154; 10 Mass. R. 423; 14 Pick. 210; 2 Greenl. 390; 7 Mass. R. 14; 8 Mass. R. 51; 10 Mass. R. 279; 15 Mass. R. 171; 1 Greenl. 352; 20 Pick. 105; 19 Maine R. 74; 17 Maine R. 85; 9 Greenl. 128; 14 Maine R. 276; 15 Maine R. 350; 21 Maine R. 488; 17 Maine R. 325.

Blake argued *pro se*, citing 22 Pick. 175; 17 Maine R. 298; 1 Story's Eq. 122.

The opinion of the Court was drawn up by

TENNEY J. — It is admitted, that E. H. Allen did not redeem lot No. 207, at any time. The sale of the equity of redeeming, referred to in the note, took place upon an execution in favor of the plaintiff against one Niles, the interest of the debtor as mortgagor, in lots 207 and 208, having been attached on the original writ, and taken upon execution in season to save the attachment. The defendant introduced a writing of the same date as that of the note, in which, after stating the purchase of the right in equity of redeeming lot No 207, and that he held the defendant's obligation for $200, payable in one year with interest, the plaintiff agreed to transfer all the right which he had acquired therein, on condition that E. H. Allen should fail to redeem the same in one year, and the defendant should pay within the same time in addition to the amount which should be due upon his obligation, the further sum of $800, with interest. He also proved by evidence, which was objected to, that the plaintiff, before the expiration of the year, conveyed his interest in lot No. 207 to another person, and did not afterwards receive a reconveyance. Allen Gilman, the subscribing witness to the contract, introduced by the defendant, was called to prove its execution, and he testified further, that after the sale and on the same day, he wrote the note and the other instrument at the same time; that previous thereto, he heard a part of a conversation between the parties in reference to a release by the plaintiff of his attachment upon lot No. 208, and afterwards, they being together, stated to him the bargain, which they had made with each other, "and he had no doubt the two hundred dollars was given for the release, or the omitting to levy Bradbury's execution on lot No. 208." It appeared, that Niles had conveyed lot No. 208 to Wm. A. Blake, the defendant's brother, by deed dated on the same day of the plaintiff's attachment, but not recorded till one month afterwards; the defendant, however, introduced evidence, which was objected to, tending to show, that Wm. A. Blake was in possession of the premises

mentioned in the deed as early as its date, and built a house thereon after that time.

The defendant contends, that by the conveyance by the plaintiff, the consideration of the note, which he insists was the conditional agreement to transfer the equity to him, has failed. The note, as well as the other sum named in the plaintiff's agreement, was to be paid in order to entitle the defendant to a deed of the right, acquired by the plaintiff, and the contract discloses nothing, showing that the note was not a part of the consideration of that contract; but this is insufficient, as the defendant must show affirmatively what was the consideration, and also that it has failed. The recitals in the contract of the plaintiff may all be true consistently with a consideration entirely distinct from that contract, and the testimony of Mr. Gilman shows that the note was given to carry into effect another agreement between the parties, which he had knowledge of.

It is however contended that the evidence of Mr. Gilman shows that the note was destitute of any consideration, which the law will regard, at the time it was given; that the plaintiff secured no right by his attachment in lot No. 208; and that if Niles had any interest therein, the defendant obtained nothing for the note.

Assuming that the plaintiff was affected by the deed of Niles to Wm. A. Blake, immediately upon its execution, his attachment was as early as the conveyance, and would secure to him certainly a moiety of the debtor's interest in lot No. 208, as there is nothing tending to prove, that Niles had in any other mode disposed of his right therein. All interested in any manner in lot No. 208, were at the time of the sale of the equity in lot No. 207, charged with actual or constructive notice of the plaintiff's attachment thereon, and if the defendant gave his note to prevent a sale of Niles' interest in that lot, and to give to his brother an indefeasible title under his deed; or if the plaintiff parted with a right which he had under his attachment, by omitting to levy thereon, in consequence of the note, there certainly was a consideration, which the law will

recognize. And as that it was one or the other, or both, appears from the testimony and by the argreement, a

Default must be entered.

HENRY K. ROBINSON *versus* BENJAMIN FISKE *& al.*

Every contract must have an interpretation governed in some measure by the subject matter to which it relates; and at the same time, with reference to any known usage connected therewith.

Where the plaintiff entered into a written contract with the defendants to cut and haul sound timber, suitable for boards, from their land to the river, to be by them run from thence and sawed at their mills, at an agreed price per thousand feet, "the timber to be scaled," before put into the river, by one of certain persons named, to be selected by them; such survey, no fraud appearing, is conclusive between the parties to ascertain the amount to be paid for cutting and hauling; although it might appear by a re-survey at the mills, that the first surveyor made an over estimate, caused by not making a sufficient allowance for defective timber.

THIS was an action of assumpsit in which the plaintiff claimed to recover an alleged balance for cutting and hauling a quantity of pine logs from defendants' township, under a written contract dated October 12, 1841.

At the trial, before WHITMAN C. J. the plaintiff, in support of his claim, called Daniel Davis, who testified, that he went on in April, 1842, for the purpose of scaling all the logs except what have been scaled by O. W. Gilman, that he had a letter of instructions from the defendants, directing him to scale and examine each log, and that no logs would be paid for unless he made an actual survey; that Robinson was present and concurred in the instructions. The plaintiff then read this letter, which may be referred to by either party. Davis then testified, that by his return of the scale, there were 2657,370 feet of pine timber scaled by him, and 20,856 feet of spruce; that he did not examine and make an actual survey of all the logs, as owing to the situation and manner in which the logs lay, he could not at the time get at them; that upon one landing out of 134 logs he did not scale more than 15 or 20 logs; that he saw a great many unsound logs which were unfit for

boards; that out of the first 184 logs he scaled, he threw out 27 logs; and that in making up his scale, when he could not get at the logs to make an actual survey, he made an average of the quantity of feet.

O. W. Gilman, called by the plaintiff, testified that on the North Yarmouth tract he scaled 586 logs; that out of that number he threw out 63 logs as unfit for boards, making in all as scaled, and returned by him, 171,890 feet, and that there were logs at that landing so covered with snow and ice that he could not and did not scale them. The plaintiff also read the deposition of P. Hildrith; and here rested his case.

The defendants' counsel then offered to prove by those who drove and manufactured the lumber and others, that all the logs, sound or unsound, cut by the plaintiff, except 10 or 20 logs, were run to the defendants' mills in Milford the same spring, and when they came to saw and manufacture the logs into boards, there were over six hundred thousand feet which had been included in the scale and measurement of the scalers, that were unsound and totally unfit for boards; that this quantity was in addition to the unsound and rotten logs which were thrown out by the scalers or which by agreement they had a right to scale; and that there was a loss to the defendants of more than the balance claimed by the plaintiff in this action, and which resulted from the great number of unsound and unfit logs cut and hauled by the plaintiff; and that the defendants had already paid more than there would be due under the contract for sound pine timber, suitable for boards, actually cut and hauled, by the plaintiff; which was not admitted.

The writ, contract and deposition of Parlin Hildrith may be referred to by either party.

Upon this evidence the counsel for the defendant consented that a default should be entered; and if the evidence offered should have been admitted, and the action could be maintained, the default was to be taken off.

No copy of the writ, deposition or letter referred to, came into the hands of the reporter.

The following is a copy of the contract: —

"This memorandum of agreement by and between Fiske & Bridge on the one part, and Henry K. Robinson on the other part, witnesseth; that the said Robinson hereby agrees to go on to the North Yarmouth tract of land, so called, and on township, number two in the fourth range, the coming logging season with six good six ox teams, well manned, and there cut and haul through the logging season the sound pine timber upon said tracts, which may be suitable for boards, and deliver the same on good landings on the Macwancock stream and Gullifer brook, so called; and the logs are to be marked F. × B. and water marked, and to be cut into board logs in a saving and prudent manner, and suitable for running, and for sawing into boards.

"And for the payment of the above cutting and hauling by the said Henry K. the said Robinson is to receive two dollars and fifty cents per thousand feet, board measure.

"It is further mutually agreed by the parties that said Robinson shall receive his pay for the above as follows, viz. Three hundred dollars in the month of November next, with interest to the fifteenth of May next; three hundred dollars in the month of January next, with interest to the fifteenth of May next; and the provisions, goods and grain necessary for the teams and men, without interest; and the balance, after deducting the money and supplies, is to be paid, one half of it by an acceptance at sixty days from the first of May next, and the other half, on the first of November next, 1842.

"It is further understood by the parties, that no timber or logs shall be landed or hauled on to the streams above the landings made by Willey and Hathornes & Co. during the logging season of 1840 and 1841. It is further understood, that the timber is to be scaled by Messenger Fisher, O. W. Gilman, or by Daniel Davis, as Fiske & Bridge may elect, or by some other man to be chosen by the parties. It is further agreed by the parties, that should there be any hollow butted logs cut and hauled by said Robinson, with eight inches of sound timber around the hollow, such logs are to be scaled and a reason-

able allowance is to be made by the scaler. And said Robinson is not to cut and haul any hollow butted logs with less than eight inches of sound timber around the hollow."

"Milford October 12, 1841. "Fiske & Bridge,
"Henry K. Robinson.

"Witness, Chas. S. Bridge."

The case was fully argued by

Kent & M. L. Appleton, for the defendants — and by

J. Appleton, for the plaintiff.

The opinion of the Court was drawn up by

WHITMAN C. J. — A contract between the plaintiff and the defendants, was entered into in October, 1841, in which the plaintiff agreed to cut and haul timber for the defendants, from their land, during the succeeding logging season, at a certain rate per thousand feet, board measure; and this action is brought to recover a balance, alleged by the plaintiff to be due to him for his services under that contract. By the terms of the contract the plaintiff was to employ six good six ox teams in the business; and was to cut and haul sound pine timber, suitable for boards; and should there be any hollow butted logs cut, having eight inches of sound timber around the hollow, they were to be scaled; and a reasonable allowance made by the scaler on account of the hollow. Under such contracts it is understood, that a surveyor shall be agreed upon to ascertain the quantity of boards, which logs, so cut and hauled, will make. It is obvious that nothing like absolute certainty can be expected to be the result of such a survey. Surveyors are expected to be men of experience in that line; and, by the use of their scale and judgment together, to be able to approximate, in ascertaining the quantity, sufficiently near the truth for the purpose in view. In this case three such surveyors were named in the contract; and the defendants were to select either of them, at their pleasure, to ascertain the quantity cut and hauled; and payment was of course to be made accordingly. The defendants selected one of the individuals named, who surveyed and certified his doings to

the amount of 171,890 feet. He not being able to survey the rest, the defendants selected another of those individuals, who surveyed, or certified that he surveyed, to the amount of 2,657,330 feet of pine, and 26,856 feet of spruce timber. The plaintiff's claim is predicated upon these certificates, made under his contract.

The defence set up, was, that over six hundred thousand feet of the timber was unsound, and unfit for boards; and proof was offered to be made that the whole, with the exception of some ten or twenty of the logs, were run to the defendants' mills; and, in manufacturing them into boards, such appeared to be the case. This proof was considered by the Court at the trial as inadmissible; and the question, whether it was so or not, is now for the consideration of the Court. If it was admissible, the default, which was entered, under the ruling of the Court, is to be taken off, and the action to stand for trial; otherwise judgment is to be entered thereon.

It is insisted, on the part of the defendants, that the surveyors were agreed upon between the parties merely to ascertain, by admeasurement, the precise quantity, that, according to such measurement, each log would make, and that they were not to exercise their judgments, except in one event, viz: when a log was found with a hollow at the butt, having eight inches in thickness of sound timber around the hollow. If the defendants were right in this position the proof proposed may have been admissible. On the other hand, it is urged, that the object of agreeing on the surveyors was to settle conclusively the amount of the timber cut, and so to what, according to the rate agreed upon, the plaintiff should be entitled to receive for his services.

Every contract must have an interpretation, governed in some measure by the subject matter to which it relates; and, at the same time, with reference to any known usage connected therewith. If a surveyor be hired to survey a lot of boards it is expected he will do something more than merely ascertain the number of feet each board may contain. He would be ex-

pected to ascertain whether they were of one class or another; whether they were clear, refuse or merchantable; and if a board were split or rotten, for some small space on one side, to make an allowance, such as would bring it within one of the known classes; or, if it were so badly defective as to be useless as a board, to reject it altogether. This results from the nature of the employment; and is in accordance with a well known usage.

The business of getting lumber, or logging, as it is more familiarly called, is a business somewhat peculiar in its nature, especially when carried on remote from settlements, and in large operations, as was the case in this instance. It is to be carried on in the winter time, when snow is accumulating which oftentimes becomes of great depth. The owner of the timber is seldom expected to be present. He may have permitted it to be cut upon shares, or at so much per M. or he may, as in this instance, have hired it cut and hauled. In every such case a surveyor or scaler, as he is sometimes called, from his using a scale, must be selected to ascertain the quantity cut and hauled out to a landing, where, in the spring, when freshets arise, it is to be turned in, and be set afloat to go to its place of destination. In cutting the timber mistakes are inevitable in reference to its quality. It may, till felled, have the appearance of being sound, and in cutting it may prove to be very defective. The surveyors cannot be expected to be present during the whole operation; even at the landing places. In this instance the surveyor, who surveyed the great bulk of the timber, was not sent on by the defendants, as appears by their letter of instructions which is filed in the case, till the operations of cutting and hauling must have about closed. The logs in such cases must be expected to be piled one upon another, to a considerable height, and be often imbedded in a great depth of snow. Yet a survey is to be made of them. This is done sometimes to enable the proprietor to make sale of them by the survey bill; at others, to enable the proprietor to know how much has been cut and

hauled, for the double purpose of knowing what he must pay for the labor; and for selling it by the survey bills. This is the well known course of such business.

Under the contract the plaintiff was to cut and haul sound timber, suitable for boards; and it was to be surveyed by one of three individuals, to be appointed by the defendants; who did not want the timber in order to sell it at the landings; they wanted it for their own use; it was to be cut from their own land. What must they have understood? They must have known the course of such business; they must have known that, to cut timber utterly free from defects, situated as this was, would be impracticable. Suppose a tree were felled, and thereupon found to be defective to some extent, yet not so as not to be of some considerable value for board logs, did the defendants mean, that it should be left to rot upon the ground? or did they mean that it should be hauled, and, by the surveyor, be estimated according to what it would make of sound timber? That they must have intended the latter is certainly the most rational conclusion, if they regarded their own interest, as we may reasonably suppose they did.

Besides, the plaintiff was to cut and haul sound timber, suitable for boards. What would lumbermen understand by sound timber suitable for boards? Would it be that it was to be timber entirely free from defects? Or would they take it to mean so sound as to be profitable to work into boards? It would seem that whatever of it was sound, if enough of it were so, to make it profitable for boards, that it would be deemed to be sound timber, suitable for such purpose, and this we think must be a fair interpretation of the contract.

What then must have been the duty of the surveyors? It is well known that timber may be crooked; it may not be exactly round at each end. These, also, would prevent mathematical precision in ascertaining the quantity of boards it would make. These, as well as defects, must call for the exercise of the judgment of the surveyor in ascertaining what quantity of boards the timber would make. Again, it can hardly be doubted, that the parties, in making their contract,

must have had in view the situation in which the lumber would be found, at the time when the survey would be expected to be made; the depth of the snows; the manner of piling it up, &c. and that they must have expected such course would be adopted, as had been usual in such cases, in arriving at a knowledge of the quantity of timber. On the whole, it cannot be reconciled to reason, to suppose that the surveyors, in this instance, were appointed to make their survey, by merely applying the scale, and making their calculations therefrom, with the exception of the case of a hollow butted log. Purchasers by their certificates never understood this to be their course of proceeding. They suppose, unquestionably, that the quantity is ascertained by the use of the scale, and of a sound judgment as to defects, crooks and all the other incidents connected with such business. The surveyors, in this very case, guided, no doubt, by their former habits, exercised their judgments, as they testified, in rejecting many of the logs as unsuitable to make boards; and of course included all that they judged suitable for that purpose; making due allowances in all proper cases, it may be presumed.

The parties, in making their contract, have not intimated an intention, that the surveyors agreed upon should proceed otherwise, in reference to the timber, than had been customary in other cases: and it is difficult to entertain a doubt, that they contemplated being bound by their doings. The only object, as between them, of having a survey made, was to furnish the data upon which to calculate the amount, according to the terms of the contract, which the plaintiff should receive for his services. We think, therefore, that the report of the surveyors, in the absence of fraud, or any thing tending to show unfairness on the part of the plaintiff in procuring the result, should be conclusive between the parties; and that the evidence offered to impeach it was inadmissible.

Judgment on the default.

JEWETT SANBORN *versus* EDWARD R. SOUTHARD.

Parol evidence of statements made by the indorser at the time of a blank indorsement of a promissory note, is not to be received to contradict or vary the legal contract implied by such indorsement; but such evidence is admissible for the purpose of showing a waiver of the necessity of making a demand or giving notice.

If a note is indorsed when overdue, a demand is sufficient, if made within a reasonable time after the indorsement.

ASSUMPSIT by Jewett, as indorsee, against Southard, as indorser, of a note given to the defendant by one Moore, payable on September 16, 1838. The note was indorsed by Southard, by writing his name only, on the last of January, or first of February, 1839.

The plaintiff, at the trial before CHANDLER, District Judge, offered the deposition of John S. Woodbury. This deposition was objected to by the defendant. The presiding Judge ruled, that so much of the deposition as went to prove a verbal waiver of demand and notice by the defendant, made at the time he indorsed the note; "that is to say, so much of it as included what the defendant said at that time, to wit: his promise to pay the note himself, if the holder did not get payment of said Moore, was inadmissible, and rejected it. Thereupon the plaintiff became nonsuit. To this ruling of the Court the plaintiff excepts." The deposition is not referred to in any other manner in the exceptions, and no other ruling was excepted to by the defendant. A copy of the deposition was annexed, by which it appeared, that "about or a little past the middle of March, next following the indorsement, the note was presented to Moore for payment, which was refused, and on the same day notice thereof was given to Southard.

A. Sanborn, for the plaintiff, said that the only question in this case, under the exceptions, was whether the testimony rejected was legally admissible. He relied on the case *Lane* v. *Steward*, 20 Maine R. 98, and cases there cited, to show that the ruling of the District Judge was clearly wrong.

Cutting, for the defendant, contended that the case cited

for the plaintiff did not apply to the present case. This case comes within the principle of *Davis* v. *Gowen*, 19 Maine R. 448, that "the agreement of the defendant must be understood to have been made with the implied reservation, that if the maker paid, he was not to be liable. He did not discharge the holder from the duty imposed upon him, to demand payment of the maker at the maturity of the note."

The question, whether a demand was seasonably made, is not before the Court. But if it were, after a delay of more than six weeks, it is too late to make a legal demand and give notice.

The opinion of the Court was drawn up by

SHEPLEY J. — This is a suit by the indorsee against the indorser of a negotiable promissory note, made on September 16, 1837, by Robert Moore, for the sum of one hundred and fifteen dollars, payable to the defendant in one year after date, with interest, and indorsed by him. The witness states in his deposition, that the defendant indorsed and delivered the note to him the last of January or first of February, after it became payable; and that at the same time, he promised that he would pay it himself, if he did not get payment of Moore. The presiding Judge excluded the testimony to prove that promise. Testimony to contradict or vary the legal contract, implied by a blank indorsement, is not to be received. Testimony of the description offered in this case has not been regarded as of that character; but as evidence only of a waiver of the performance of the demand or duty required by the law. *Lane* v. *Steward*, 20 Maine R. 98. The witness states, that he made a demand for payment of the maker, a little past the middle of the month of March following, and on the same day gave notice thereof to the defendant. The indorsement having been made after the note was overdue, the demand would have been sufficient, if made within a reasonable time after the indorsement. The case does not present sufficient facts to enable the Court to determine, that the holder delayed the presentment for payment for an unreasonable time.

Exception sustained and a new trial granted.

WALTER BROWN *versus* JOHN WARE.

Possession of personal property in the plaintiff is sufficient evidence of title, to enable him to maintain trespass therefor, unless the defendant exhibits a superior title.

If the owner of land has been disseized thereof, he cannot after that time maintain an action founded upon possession, until he has regained it; but by such disseizin, merely, the disseizor would not acquire a legal interest in the rents and profits, or in timber trees severed from the freehold. And should the disseizor cut the trees and appropriate them to his own use, he would be accountable to the owner for their value, after he had regained the possession, but would not be accountable for trees cut by a third person without his consent or connivance.

Where the owner of land has been disseized thereof for the term of six years, and has brought a writ of entry to obtain the possession, and the disseizor has put in his claim for improvements made by him during his possession, and the amount thereof has been found by the jury, and the owner of the land has elected to retain it and pay for the improvements, the disseizor should not be made acountable for timber trees cut upon the land, during the disseizin, by another without his consent or connivance; and if the timber, thus cut, has come into the actual possession of the owner of the land, and it is afterwards taken from him by the disseizor, he may maintain trespass therefor against the disseizor for such taking during the pendency of the writ of entry.

AT the trial, before TENNEY J. after the evidence was before the jury, on both sides, the substance of which is given in the opinion of this Court, the presiding Judge intimated an opinion, that the action could not be maintained; and thereupon the plaintiff consented, that a nonsuit might be entered, to be taken off, and the action to stand for trial, if in the opinion of the Court it could be maintained; and a nonsuit, on those terms, was then ordered.

McCrillis and *A. W. Paine* argued for the plaintiff, citing Stat. 1821, c. 47, § 1; 1 Greenl. Ev. 19 and 22; 1 Chitty on Pl. 521, 522; Stat. 1821, c. 62, § 5; 10 Mass. R. 146; 5 Pick. 131; 1 Kinne's Compend, 338 and authorities there cited; 6 Metc. 407; 4 Mass. R. 416; 3 Hill, 348.

Kent & Cutting argued for the defendant, and cited 10 Pick. 161; 17 Mass. R. 299; 14 Mass. R. 96; 1 Metc. 528; 8 Mass. R. 415; 15 Pick. 33; 22 Maine R. 451.

The opinion of the Court was drawn up by

SHEPLEY J. — This is an action of trespass brought to recover the value of certain mill logs cut during the former part of the year 1841, on lots numbered six and seven, in the town of Argyle, under a permit from Luther Lewis. The plaintiff had purchased them of the persons, who had cut them, and was in possession of them, when they were taken by the defendant. That was sufficient evidence of title to enable him to maintain the action, unless the defendant exhibited a superior title. His title was derived from Joseph Kinsman. He purchased of the Commonwealth of Massachusetts its title to a tract of land, including those lots, on February 26, 1833, and conveyed a part of it, including them, on March 20, 1833, to Hollis Bowman, who on the same day reconveyed the premises to Kinsman in mortgage, who assigned the mortgage to the defendant on December 22, 1838.

To defeat this apparently good title, the plaintiff exhibited proof of a conveyance from the Commonwealth to John Bennoch, on December 1, 1815, of a tract of land including those lots, and of conveyances of them from Bennoch through several persons to Isaac Williams and Joseph Cotton, by whom they were conveyed to Luther Lewis on Febuary 6, 1838. If these conveyances were all operative, he became the legal owner of the lots. It appears, however, that Kinsman had disseized Williams and Cotton, before they conveyed to Lewis. And the owners would not after that time be able to maintain an action founded upon possession, until they had regained it. But Kinsman by such disseizin, merely, would not acquire a legal interest in the rents and profits, or in timber trees severed from the freehold. For the owners, after they had regained the possession, might recover the value of them in an action for the mesne profits. The disseizor would be considered, by cutting the trees and appropriating them to his own use, as obtaining their property and not his own.

Did the proceedings in the action of entry, prosecuted by Lewis in the names of his grantors to recover the lots, change the aspect of the case, and transfer the mill logs from the

owners of the land to their disseizor? The tenant alleged, that the premises were holden by virtue of a possession and improvement for more than six years before the commencement of the action; and filed a claim to have the jury find the increased value of them by reason of any buildings and improvements. And the demandants filed a claim to have them find, what would have been their value without such improvements. A verdict was found for the demandants by the jury, who also found the value of the land and of the improvements. The demandants made their election and paid the tenant for the improvements. The mill logs were cut, while the premises were held by virtue of that possession and improvement. But they were not cut by the tenant or by his consent or connivance. The tenant would become the owner of wood or timber cut on the premises during that time, by him or by his agency. For all his proceedings in the management of the estate, must be taken into consideration, to estimate the value of the improvements, or benefits to the estate. All questions respecting them would be adjusted by the finding of the jury; and no action for mesne profits could be maintained against him for his acts during that time. But he could not, in that estimate, be made responsible for the illegal acts of others, committed without his knowledge or connivance, on the premises; although their value might thereby be materially diminished. The jury are not by the statute required to consider or find, what damage has been occasioned by the acts of others without the fault of the tenant. The loss occasioned by such acts must in any event fall upon the owner of the land. Should he elect to pay for the improvements he would receive his land, diminished in value by them. Should he abandon it to the tenant, the price obtained for it would have been fixed at a less sum by reason of them.

In this case there is no proof, that the tenant was, or could have been made responsible for the acts of those persons, who cut the logs under Lewis; or that he could have obtained any

title to them by the estimate made of the value of his improvements. The defendant can have no better title.

Nonsuit taken off, and action to stand for trial.

OLIVER FROST *versus* JOHN GODDARD *& al.*

When a seller has set apart property for a purchaser by the survey or assortment of a person other than the one agreed upon, and such property has been received by the purchaser, or by any one to whom his right to it has been transferred, the seller cannot, by denying the validity of his own acts, reclaim the property, on the ground, that there is no proof, that the purchaser consented to such a survey or assortment.

Where there has been a sale of property for the purpose of defrauding creditors, a creditor must take measures to avail himself of his rights, if he would defeat the title thus acquired. He is not, however, restricted to the single mode of proceeding on legal process, but may obtain a satisfaction of his debt by a subsequent purchase of the debtor in good faith and for a valuable consideration.

When counsel have presented a question testing the admissibility of a particular description of testimony, and have obtained a decision of the Court that it is not admissible, if some portion of the same description of testimony should afterwards be introduced, the objecting party would not be entitled to file exceptions, unless he had called the attention of the Court to it at the time when it was introduced. It is too late to make the objection when the cause has been argued by counsel and committed to the jury by a charge from the Court.

TENNEY J. presiding at the trial, among other instructions to the jury, gave the following: —

If on the 27th or 28th of July, 1842, Bragg consented to deliver the property to Goddard, and Bragg agreed, that Couillard should sort the shingles, and he did sort them, and they were afterwards delivered to Goddard before the delivery by Bragg to Frost, or the taking possession by Walker, Goddard had a right to the same, and there was no trespass.

If, at the same time, Bragg consented that Goddard should have the property, and Bragg said he would deliver it, and he also agreed, that Couillard should sort the shingles, and they were sorted by Couillard, and delivered to Goddard after the sale and delivery to Frost, or the possession taken by Walker,

and the jury should also find that the sale to Frost was only to save the property from being taken on Bragg and St. Clair's debts, and was not intended by Bragg and St. Clair as a real sale, and Frost knew their intention, and was willing to aid them to carry it out, Goddard had a right to take the property, and there was no trespass.

The evidence is given in the exceptions. The facts may be found in the opinion of the Court. The verdict was for the defendants, and the plaintiff filed exceptions to the ruling of the presiding Judge.

Rowe and *E. G. Rawson* argued for the plaintiff, contending: —

1. The part of the affidavit of Goddard, stating his own knowledge of the facts, which he said the witness would testify to, ought not to have been permitted to go to the jury. The facts were material, and could not be proved by the oath of the party. 5 Mass. R. 405; 5 Pick. 296; Co. Lit. 227 (c); 3 Johns. R. 252; 6 Greenl. 141.

2. The instruction was erroneous wherein it was said, that the consent of Bragg alone was sufficient to authorize the alteration of the contract, and to substitute Couillard instead of Dutton to sort the shingles.

3. The admission of testimony to show that the sale from Bragg and St. Clair to the plaintiff was made to defeat or delay creditors, and the instruction to the jury, that if they found that the sale was so made, Goddard would have a right to take the shingles according to Couillard's survey, notwithstanding such sale, were erroneous. Such sales are void only against such creditors as are hindered or delayed by them. 15 Petersd. Ab. 344; 2 Hov. on Fr. 75; 1 Ves. Jr. 161; 2 Pick. 411; 15 Johns. R. 588; 1 Story's Eq. § 366, 367, 371.

McCrillis and *Washburn* argued for the defendants, citing 1 Pick. 476; 13 Pick. 175; 15 Mass. R. 216; 3 Fairf. 515.

The opinion of the Court was drawn up by

Shepley J. — This is an action of trespass brought to recover the value of certain shingles taken by the defendants

from a wharf in Bangor. Both parties claim them by conveyances from Bragg and St. Clair, who appear to have been in possession of the wharf, on which they had been piled.

In the month of February, 1842, Paulk and Dutton purchased all their cedar shingles of the two best qualities, then mixed with others of an inferior quality, to be sorted and selected by Dutton; and on July 2, 1842, conveyed by a bill of sale, their shingles on that wharf, with others, to Goddard and Jenkins, by whose order they were carried away by the defendants. At the time of this sale Paulk stated to Goddard, that he delivered to him all the shingles due to them by their contract made with Bragg and St. Clair. There was testimony tending to prove, that Bragg consented, that Goddard and Jenkins might take the shingles remaining to be delivered under that contract, by the selection and assortment of one Couillard instead of Dutton; and that they were accordingly selected and assorted by him. On July 28, 1842, Bragg and St. Clair, by bill of sale conveyed their shingles on that wharf with other lumber to the plaintiff, and one Walker took possession of the property for him. In relation to this branch of the case, the jury were in substance instructed, if they should find, that Bragg consented to deliver the shingles to Goddard, and that Couillard should sort them, and that they were delivered to Goddard, before they were delivered to the plaintiff or his agent, the plaintiff would not be entitled to recover.

Paulk and Dutton were to pay a higher price, than they were to receive for the shingles. And it is insisted, that these instructions were erroneous, because they did not require the consent of Paulk and Dutton, that Couillard instead of Dutton should select and sort them. When a seller has set apart property for a purchaser by the survey or assortment of a person other than the one agreed upon, and such property has been received by the purchaser or by any one, to whom his right to it has been transferred, the seller cannot by denying the validity of his own acts reclaim the property, on the ground, that there is no proof, that the purchaser consented to such a survey or assortment. Paulk and Dutton, by conveying their right

to receive shingles mixed with others, must be considered as thereby authorizing the purchasers to use the means necessary to obtain them.

The jury were further instructed, if they should find, that the shingles were so assorted and delivered to Goddard after the sale and delivery to the plaintiff, and "that the sale to Frost was only to save the property from being taken on Bragg and St. Clair's debts, and was not intended by Bragg and St. Clair as a real sale, and that Frost knew their intention and was willing to aid them to carry it out, Goddard had a right to take the property." The objections to these instructions are, that Goddard and Jenkins do not appear as creditors injured or delayed, or as having commenced any suit to attach or seize the property. According to the finding of the jury the plaintiff may be considered as the purchaser of the property, before the legal title had passed from Bragg and St. Clair, with an intention to aid them to defraud their creditors. In such case a creditor must take measures to avail himself of his rights, if he would defeat the title of the plaintiff. But he would not be restricted to the single mode of proceeding on legal process by attachment on a writ or seizure on an execution. The sale, as it respects a creditor, being void, he may entirely disregard it, and obtain a satisfaction of his debt by a subsequent purchase of the debtor in good faith and for a valuable consideration. In this case Paulk and Dutton, on the facts supposed by the instructions, would be creditors of Bragg and St. Clair; and their right to be paid by receiving the shingles, had been transferred to Goddard and Jenkins, who might, after a fraudulent sale to the plaintiff, proceed and obtain a title to the property to satisfy their claim in the same manner, as they would have done, if no such sale had been made.

Another cause of complaint is, that Goddard made an affidavit stating, what he expected to prove by an absent witness; that the plaintiff consented to admit, that the witness would so testify; that objection was made to the reading of any other portion of the affidavit; and that the objection was sustained;

and yet that another portion of the affidavit containing a declaration, that Goddard knew the same facts, was read and received by the jury as a part of the testimony. There can be no doubt, that such portion of the affidavit, as the Court had in effect decided to be inadmissible, was improperly read to the jury, although no particular objection was made to it at the moment. Before the papers in the cause were committed to the jury, the attention of the Court was called to that part of the affidavit, but no further order was taken respecting it. When counsel have presented a question testing the admissibility of a particular description of testimony and have obtained a decision of the Court, that it is not admissible, if some portion of that description of testimony should afterward be introduced, the opposing party would not be entitled to file exceptions, unless he had called the attention of the Court to it at the time, when it was introduced. If the testimony were contained in a deposition or other written document, and a principle of admission or exclusion had before been settled, which could be easily comprehended and applied, a party, who violated it by reading parts thereby excluded, could not be entitled to any protection or favor, if the opposing counsel did not at the moment notice it. And if such a course of proceeding were brought to the notice of the Court before such testimony had been used, without objection, as evidence in the cause, the Court should prevent the party, who had thus introduced it, from obtaining any advantage by it. If opposing counsel should omit to call the attention of the Court to it, until the cause had been argued by counsel, and committed to the jury by a charge from the Court, it would be difficult for the Court to determine whether such delay had been occasioned by inadvertence or by the expectation, that it might not be injurious to his client to permit it to be introduced. If he should therefore wait till the moment, when the papers were about to be committed to the jury, and then, after he had permitted it to be regarded as a part of the testimony, during the argument and charge make his election, and call upon the Court to exclude it, the Court might well regard it as

too late to raise a question respecting the admissibility of testimony. It is not supposed, that the counsel in this case delayed to make the motion for its exclusion with the design to have the advantage of it, if it might be found to aid him, and to have it excluded, if it proved to be injurious, but when a court of justice is called upon to establish or act upon some rule of evidence or practice, it must guard against all opportunities for wresting and applying it so, as to make it operate injuriously.

Exceptions overruled.

HENRY BURDITT *& al. versus* HIRAM HUNT *& al.*

If a mortgage be made of all the property "now in the shop occupied by me in said B." and is without date, parol evidence is admissible to show the day of the execution and delivery of the instrument; the description is sufficient to convey the property; and if such mortgage be duly recorded, it is a sufficient compliance with the provisions of Rev. Stat. c. 125, § 32.

If the mortgagor of personal property be in the actual possession, and makes an illegal sale thereof to a third person, a servant of the purchaser, who merely carries the goods from one shop to the other, without any knowledge of the mortgage, or of any claims upon the property but those of the seller and purchaser, is not liable to the mortgagee in an action of trover.

TROVER for certain goods. The plaintiffs, to show title in themselves offered a mortgage from Robert Kellen to them, without date, recorded Feb'y 1, 1842, of "all and singular the goods wares and merchandize, stock, harness work and other articles of every kind and description now in the shop occupied by me in said Bangor." The plaintiffs then introduced the subscribing witness to the mortgage, and proposed to prove by him, that the mortgage was executed and delivered on Feb. 1, 1842. To this the defendants objected, but the testimony was admitted by TENNEY J. presiding at the trial.

It appeared from the evidence, that the property was left in the possession of Kellen, the mortgagor, with authority to sell as agent for the plaintiffs, for cash and in small parcels. The sale of part of these goods by Kellen to Hunt, under which he

claimed, was not within the authority, and the plaintiffs refused to ratify it. The exceptions state, that it was contended on the part of McMullen, the other defendant, that he, as servant of Hunt, ignorant alike of the existence of the mortgage and of the terms of the contract of sale by Kellen to Hunt, and of any circumstances tending to show, that the sale was invalid, was sent by Hunt to bear the articles from Kellen's shop to Hunt's; that as Hunt's servant he received them from Kellen, and deposited them in Hunt's shop, and had no further connexion with them; and that therefore he was not liable to the plaintiffs in this action. The exceptions, also, state, that there was evidence in the case tending to sustain McMullen's position.

The presiding Judge instructed the jury, that the mortgage vested in the plaintiffs title to all the goods in Kellen's shop on the first day of February; and that if Hunt was liable in this action, and McMullen as his servant aided him in removing the goods, then McMullen was liable for all the goods he so removed.

The verdict was for the plaintiffs, and the defendants filed exceptions.

Rowe argued for the defendants, and said that the statute, (c. 125, § 32,) requires that all mortgages shall be in writing, and shall be recorded, unless actual possession is taken; or they will be invalid against creditors or purchasers. The record of the mortgage must show what property is conveyed. A reference to a schedule of the property is not sufficient. *Sawyer* v. *Pennell*, 19 Maine R. 167. If the subscribing witness had been referred to, that would have been much less satisfactory than a schedule. The record merely shows, that certain property which was in a shop at some indefinite time was attempted to be mortgaged. It is too uncertain to pass the property.

The paper has no meaning in itself, and on its face is void for uncertainty. 4 Mass. R. 205. If it be said there is an ambiguity, it is a latent one, and cannot be made certain by parol evidence. If the evidence is admissible, it is the witness, and not the writing which conveys the property. The testi-

mony was improperly received. Stark. Ev. Part 4, pages 170, 172, 173.

The action cannot be supported against McMullen. The articles were left by the plaintiffs in the possession of Kellen, and he delivered them to McMullen, to be carried to Hunt's store. He was a mere carrier from one shop to another. This is no conversion by him.

Robinson, for the plaintiffs, contended that where there is no date, it is to be presumed that the instrument was executed and delivered on the day on which it was recorded.

The parol evidence was properly admitted. It is always competent to prove the date of any instrument by parol.

Hunt was a wrongdoer, and the other defendant aided him in the commission of the wrongful act; and is therefore equally liable.

The opinion of the Court was drawn up by

SHEPLEY J. — This is an action of trover for goods claimed under a conditional bill of sale made to the plaintiffs by Robert Kellen. It was without date, and was duly recorded on February 1, 1842. A part of the property conveyed is described as all the goods "now in the shop occupied by me in Bangor."

In defence, it is contended that parol testimony ought not to have been received to prove the date of its execution, because the statute, c. 125, § 32, requires, that there should be written evidence of such a sale; and that without such testimony the conveyance would be void for uncertainty. The true date of the execution and of the delivery of a written instrument may be proved, without a violation of the rule, that would exclude all such testimony to contradict or vary the terms of it. *Hall* v. *Cazenove*, 4 East, 477. It does not appear to have been the intention to establish by the statute a different rule respecting mortgages of personal property. The goods, which were in the shop at the time of delivery might be ascertained by testimony, and the description would be sufficient to convey them.

The goods having been left in the possession of the mortgagor with authority to sell them for cash in small parcels, he sold and delivered those, for which this action was brought, to the defendant, Hunt; but in so doing exceeded his authority. There was testimony tending to prove, that the other defendant, McMullen, as the servant of Hunt, was sent for them, and that he received them by the delivery of the mortgagor, and deposited them in Hunt's shop; that he was ignorant of the existence of the mortgage and of the terms of the sale to Hunt; and that he had no other connexion with them.

The jury were instructed, if Hunt was liable, and McMullen, as his servant, aided him in removing the goods, he would be liable for those, which he removed. A servant, who receives goods delivered to him and carries and delivers them to his master, can be held responsible for them in action of trover only, on the ground, that such a removal of them amounts to a conversion. If such a position could be maintained, common carriers and other persons, by receiving goods delivered to them by a person in possession of them, and carrying them to another place would thereby be made liable for their value, if it should afterward be made to appear, that the goods were delivered without authority from the owner. And yet the possession of personal property is, *prima facie*, evidence of ownership. Such a position cannot however be sustained. Conversion is the gist of the action of trover; and conversion is a tort. *Draper* v. *Fulkes*, Yel. 165; *Fuller* v. *Smith*, 3 Salk. 366. When goods come to the possession of a person by delivery or by finding, he is not liable in trover for them without proof of a tortious act. 2 Saund. 47, e. *Mulgrave* v. *Ogden*, Cro. Eliz. 219.

The reception of them by delivery from one, whom he is entitled to regard as the owner, and the conveyance from him to another, to whom they are sent, are not tortious acts. In the case of *Parker* v. *Godin*, 2 Strange, 813, the defendant, who acted as the friend or servant of another, was held liable in such an action, because he pawned the goods in his own name, which had been improperly delivered to him. In the case of

Perkins v. *Smith*, 1 Wil. 328, a bankrupt after the act of bankruptcy delivered goods to a servant to be carried to his master, and the servant sold them for his master's use, and was held to be liable for them in such an action. In both these cases the servant was considered to be liable only on the ground, that they committed tortious acts by pawning and selling the goods. A refusal to deliver goods on a demand made by the owner may be a tortious act and a conversion by one, who is in possession of them. There is no evidence exhibited in this case tending to prove, that the servant committed any tortious act; or that he assisted his master in such an act.

Exceptions sustained, and new trial granted.

DAVID N. FALES *& al. versus* NATHANIEL GOODHUE *& al.*

To avoid the forfeiture of the condition of a bond given by a debtor, in accordance with the provisions of Rev. Stat. c. 148, to obtain a release from arrest on execution, he is bound to comply with one of the alternatives contained in the condition, unless prevented by the obligee, or the law, or the act of God, from so doing.

The poor debtor's oath should be taken before the expiration of the six months next after the giving of the bond, or it will not furnish a legal defence to an action thereon.

When the two justices of the peace and of the quorum are legally authorized to act in taking the examination of a debtor, who has been arrested on an execution and has given a bond under the provisions of Rev. Stat. c. 148, they may adjourn from time to time; but if their adjournments "exceed three days in the whole, exclusive of the Lord's day," their power to act ceases, and any oath administered by them to the debtor, after the expiration of the three days, is inoperative, and cannot furnish a defence to an action on the bond.

DEBT on a poor debtor's bond, dated April 25, 1843. The record of the justices shows, that they first met and organized on Oct. 24, 1843; and that they "then adjourned to the 25th day of October, 1843"; that they met on that day, and "again adjourned to November 18, 1843"; and having met on that day, they "further adjourned to the 29th day of November, 1843"; and on this latter day they administered the poor

debtor's oath to the debtor. The certificate of the justices is dated November 29, 1843, "being by sundry adjournments from Oct. 24, 1843, when said examination was commenced."

The parties agreed upon a statement of facts, from which it appeared, that the defendants could prove by parol evidence, and the same was to be considered as proved, if parol evidence for that purpose was admissible, on objection made thereto, that the adjournment from October 25 to November 18, was made at the request of the attorney of the plaintiffs.

S. W. Robinson, for the defendants, said that the justices had found the notifications sufficient, and had admitted the debtor to take the oath prescribed by law. Their determination on these points is conclusive; and no evidence, not even their own record, is admissible to invalidate their certificate. This would seem too well settled to require authorities for its support. A few will be cited. 3 Fairf. 415; 13 Maine R. 239; 17 Maine R. 411; 18 Maine R. 152; 19 Maine R. 111 and 452; 20 Maine R. 435.

The parol evidence, to show that the second adjournment was at the request of the attorney for the plaintiff, was admissible, because it does not contradict any statement in the certificate. 1 Fairf. 334; 18 Maine R. 142.

The provision of the statute in relation to adjournments is directory merely, and if they adjourned beyond three days, the defendants ought not to suffer from it. To save a forfeiture, the Court should adopt a liberal construction. 18 Maine R. 142; 4 Greenl. 298.

If the justices exceeded their authority at the request of the plaintiffs, they are estopped from availing themselves of the objection. 1 Fairf. 334; 18 Maine R. 142.

S. H. Blake, for the plaintiffs, insisted that the proceedings before the justices did not operate as a bar to the action, because the oath was not taken until after the expiration of the six months. Rev. Stat. c. 148, § 20; *Longfellow* v. *Scammon*, 21 Maine R. 108.

The certificate shows on its face, that the examination was commenced on Oct. 24, 1843, and continued until Nov. 29,

1843, and therefore the adjournments exceeded three days, exclusive of Lord's days. The justices thereby became ousted of their jurisdiction, and the discharge is invalid. c. 148, § 6 and 24.

The parol evidence to show that one of the adjournments was with the assent of the plaintiffs' attorney is inadmissible; because it is an attempt by parol to control a written certificate; and because it is a mere narration of what took place before the justices, and the record is higher evidence.

But if the parol evidence is admissible, it only goes to the second adjournment, and both difficulties remain untouched. Their jurisdiction was at an end before the oath was administered.

The opinion of the Court was drawn up by

WHITMAN C. J.—This is an action of debt upon a bond, with a condition, that if the defendant, Nathaniel Goodhue, should cite the plaintiffs, &c. or pay the debt, &c. or deliver himself to the keeper of the jail, &c. as prescribed in c. 148 of the Rev. Stat. then, &c. Obligors in such bonds, to avoid the penalty, are bound to comply with one of the alternatives contained in the condition, unless prevented by the obligee, or the law, or the act of God, from so doing. The defence is, that the principal, Nathaniel Goodhue, did cite the creditors and take the oath, as prescribed in said statute, and in the condition of the bond. This is denied by the plaintiffs.

The evidence is, that the defendant, Nathaniel Goodhue, did cite the creditors before two justices of the peace and of the quorum, in due season; but that no oath was administered to him till more than a month had elapsed, after the six months prescribed in the statute had expired. By a document furnished, as being the record of the justices, before whom the citation was returned, it appears, that they were duly constituted a tribunal, in accordance with the provisions of the statute, for the purpose of proceeding under the citation, on the 24th of October, 1843; and that, after proceeding in the business for some time, they adjourned to the next day; when, after some

further proceedings, they adjourned again to the 18th of November following; and, after some further proceedings at that time, they again adjourned to the 29th of that month, when they administered the oath, prescribed in the statute, to said Nathaniel. No reason is assigned in the record for either of the adjournments. If admissible, however, it appears, that parol evidence would show, that the second adjournment took place upon the motion of the counsel for the plaintiffs, the then creditors. But nothing of the kind is pretended in reference to the last adjournment.

In *Longfellow* v. *Scammon*, 21 Maine R. 108, it was held, that the oath prescribed, in order to a compliance with the statute, should be taken before the close of the six months next after the giving of the bond. In *Moore* v. *Bond*, 18 Maine R. 142, however, it was held that, if an adjournment of the justices took place at the request of the creditor till the next day after the six months had expired, it would not be allowable for him to object, that the oath was administered on that day. But though the creditor in this instance, should be precluded from objecting to the proceedings at an adjourned session, procured upon his motion, such could not be the case with regard to the subsequent adjournment, not so obtained or occasioned.

Again: the statute (§ 6 and 24) provides, that the justices may adjourn from time to time, but that "no such adjournment or adjournments shall exceed three days, in the whole, exclusive of the Lord's day." If the justices go beyond this limit, thus peremptorily prescribed, their jurisdiction must become annulled. They constitute a tribunal of but a limited jurisdiction. Their powers are specially marked out to them by the law, by which they are conferred; and they should confine themselves to a strict observance of them. It is to be noted, that they may adjourn from time to time, but their adjournments are not to exceed three days in the whole, exclusive of the Lord's day; not three days at each of several times, exclusive of the Lord's day. The justices, however, in this case, disregarded the provision, whether it could be taken to be the

one or the other; and so when the oath was taken it was *coram non judice.*

Judgment for the plaintiffs.

JOHN H. PILLSBURY *versus* ROBERT M. N. SMYTH.

If there be no direction in the execution to any officer of the county wherein the land lies, a levy of such execution thereon by an officer of the county is without authority, and void as to a subsequent attaching creditor.

The sale of an equity of redemption of real estate is void, if there was no mortgage upon the land, and the debtor had an unincumbered title thereto, at the time of the seizure on the execution.

The remedy by *scire facias*, under the provisions of Rev. Stat. c. 94, § 23, does not extend to a case, where there has been a sale of an equity of redemption of real estate, and no interest in the land has passed thereby, because there was no mortgage upon the estate at the time of the seizure on the execution.

But where there has been a return of satisfaction of an execution by an officer from the proceeds of the sale of an equity of redemption of real estate, when no right or interest passed by such sale, from a mistake in the mode of proceeding, the creditor has a remedy at common law, by a writ of *scire facias*, to obtain a new execution upon the judgment.

THIS case came before the Court upon the following statement: —

Scire facias to revive a judgment of this Court, and to have an alias execution issued. The plaintiff introduced a judgment of the Court, rendered October Term, A. D. 1839, in this county, for $4301,56, debt, and $17,56, costs. An execution issued Nov. 21, 1839.

On the 11th December, 1839, the execution was levied on ¼ of a township of land in Aroostook county by an officer of that county, and the execution returned satisfied thereby in the sum of $2424,01, which levy was duly recorded in Aroostook county. The execution contained no direction to any officer in that county.

On the 5th December, 1839, the plaintiff also caused the defendant's right in equity of redeeming a lot of land and house in Bangor, and also a tract of land in Jarvis' Gore, to be

seized, and after proper proceedings, to be sold, according to law, on the 17th of January, after; the said lot in Bangor selling for $1500, and said lot in Jarvis' Gore for $425. Both were sold to the plaintiff, and the execution was returned satisfied by avails of the sales in the sum of $1875,26, after deducting fees, $49,96. The execution was seasonably returned into Court, and no further proceedings had upon it.

On the 4th of Sept. A. D. 1838, James N. Cooper, by virtue of an execution in his favor against the same debtor, duly issued, made a levy on the same $\frac{1}{4}$ part of the township in Aroostook County, and the execution and levy were seasonably recorded and returned. On the 7th July, 1840, Ford Whitman & al. by virtue of an execution duly issued in their favor against said Smyth, levied on the house and lot in Bangor, and set the same off by metes and bounds; and afterwards said creditors commenced an action for possession of said premises against said Smyth, in which action judgment was rendered in favor of those plaintiffs, and they were duly put into possession by virtue of the writ of possession issued on said judgment, and they still retain possession. The mortgage, supposed to exist on said lot and house, had before said seizure on Pillsbury's execution been fully paid. In all said actions against Smyth, there were attachments on the original writs, the said Pillsbury's being first in order, said Cooper's next, and said Whitman's last, all being made prior to the year 1838; all said levies and seizures were made within 30 days after rendition of said judgments respectively. The Court are to render such judgment as the legal rights of the parties require.

A. W. Paine, for the plaintiff, said that this process was brought under the provisions of the Rev. Stat. c. 94, § 23.

The levy in the county of Aroostook was void, because the execution contained no direction or authority to any officer in that county. It was so decided by Judge Story in the Circuit Court of the United States, in a case growing out of this very levy. For that amount then we are entitled to have execution.

We are also entitled to have execution for the sums for which the equities sold. The Revised Statutes are to govern in this case. 8 Shepl. 53 and 206; 9 Shepl. 321; 1 Metc. 426 and 154. The term "levied upon," as used in the statute, includes not only lands set off, but lands, the right of redeeming which, had been sold. The seizure and sale of an equity is expressly called a *levy* in the statute.

But without the aid of the statute we have a remedy at common law. By the common law *scire facias* will lie to revive a judgment, when no title has been acquired by a sale of an equity. 1 Greenl. 309; 12 Mass. R. 1; 2 Saund. 72 (d); 9 Mass. R. 92; 15 Mass. R. 137; 12 Mass. R. 195; 19 Pick. 433; 7 Pick. 52.

Cutting, for the defendant, said there was nothing in the case, which shows, that the plaintiff was dispossessed by the second levy, or that he would ever be disturbed in his title.

As to the sale of the equities, they do not come within the provisions of the statute authorizing this process. That extends only to levies on land, and not to deeds of an equity of redemption. The statute is in derogation of the common law, and should be construed strictly. In a levy upon land, the creditor gets nothing unless he obtains a title to the land. On a sale of the equity, he obtains his money; and whether any title is acquired under the sale is a matter between the officer and the purchaser. The creditor cannot have his money, and still collect it of the debtor. No case has been found, where there has been an attempt to revive a judgment which has been satisfied by the sale of an equity of redemption.

The opinion of the Court was drawn up by

TENNEY J. — No question is made, that the plaintiff failed to obtain any right in the estate of the debtor upon which he levied his execution in the county of Aroostook; or that the return of the sale of an equity of redemption of the land in Bangor gave him no title therein; in the former levy the officer who made it had no authority, the execution not being directed to any one in that county; and in the latter, the

debtor having an absolute title to the land itself, when the seizure upon the execution was made, the proceedings of the officer were not such as the statute required in reference to such an estate. *Foster* v. *Mellen*, 10 Mass. R. 421. By the process, which he has now instituted, he seeks to revive the judgment, so far as the returns of these two levies show satisfaction, and to obtain an alias execution. And he first relies upon the Revised Statutes, c. 94, § 23, which provides, "If after the execution is returned or recorded, it should appear to the creditor, that the estate levied upon was not the property of the debtor, or not liable to be seized on execution, or that it cannot be held thereby, the creditor may sue out of the clerk's office of the Court, from which the execution issued, a writ of *scire facias*, to the debtor, requiring him to show cause, why an alias execution should not be issued on the same judgment, and if the debtor, after having been duly summoned, shall not show sufficient cause to the contrary, the levy of the former execution may be set aside, and an alias execution shall be, thereupon, issued for the amount then due on the original judgment without interest or further costs."

The execution having been duly returned and recorded, the statute clearly applies to the extent upon the land in the county of Aroostook, it appearing from the facts agreed, that another creditor has since duly levied upon the same land, and it cannot be held by the plaintiff's extent. The objection to a revival of the judgment and a renewal of the execution, because the plaintiff has not been disturbed in his possession, *non constat*, he never may be, urged by the defendant's counsel, is not founded upon any fact in the case, and it becomes unnecessary therefore to consider, what it would avail, if it were so.

The statute, however, relied upon by the plaintiff, does not seem intended to embrace the case of a levy upon an equity of redemption, where the creditor cannot hold any thing thereby. When the section cited is examined in connexion with others preceding in the same chapter, the legislature had in view only a levy by appraisal and set-off, and not that when

the purchaser at a sale of an equity of redemption or personal chattels failed to obtain a right therein. It refers to cases, where the creditor does not obtain what he supposed passed to him as a creditor by the levy directly, and not when the title failed in a stranger who was the purchaser, and who should resort to the creditor for indemnity for the money expended. The language, "If after *the* execution has been returned or recorded, it should appear to *the* creditor, that *the* estate levied upon," &c. imports, that it was the execution creditor and levy spoken of previously in the same chapter, and not intended as applying generally to all levies by sale, as well as by set-off.

The plaintiff contends that he is entitled under this process to the remedy sought by the principles of the common law. In the case of *Ware* v. *Pike*, 3 Fairf. 303, the Court held, that the statute of 1823, c. 210, giving a remedy by *scire facias* in cases therein named, did not annul those previously existing; and the statute cited by the plaintiff in support of this action, being limited to cases where the levy was by appraisal, and not by sale, it cannot by implication take from him any of the appropriate remedies, which existed before.

When an officer attempts to dispose of property upon an execution in his hands, in a manner unauthorized by law, so that the purchaser acquires no right thereto, the judgment is not in reality, satisfied; if he should cause goods to be appraised, or an entire estate in land to be sold on an execution against an individual, the title to the property would remain unchanged; the debtor would lose, and the creditor would gain no rights thereby. The return of the officer itself may exhibit essential defects; or if not, proof that the property was not of the description, to which the proceedings were legally applicable to pass the title, may be adduced. In neither case can it be pretended that the judgment is discharged; the doings of the officer and his return are in fact a mere nullity. The same result would follow, if the debtor had no interest in the property taken, and the owner should assert his right, and in the end, the creditor should receive nothing towards his

judgment. If the return itself should not disclose the error, it would be *prima facie* evidence of satisfaction, and after the execution should be returned, the officer could make no alteration in the return without the order of Court. If a purchaser, not the debtor but a stranger, of property sold in the ordinary mode upon execution, obtained nothing under the sale, for want of title in the debtor, payment in such case would, like other payments made in mistake, be without consideration, and could be recovered back; it would be gross injustice for a creditor and officer to expose for sale, goods which they had obtained by a trespass, and after sale and receipt of the purchase money throw upon the purchaser, the loss occasioned by recovery by the owner of his rights, in taking the property or compelling the buyer to pay its value; if the creditor be the purchaser, and obtained nothing, because no title existed in the debtor, this ceremony of sale cannot be satisfaction.

What is the process of *scire facias*, and what is its object? It is a judicial writ, is founded on some matter or proceeding of record, a judgment, recognizance, or letters patent, and on some matters incidental thereto, a regular and judicial statement of which is to further and accomplish the end and intent of that record, by insuring its proper operation in behalf of parties legally interested therein. Co. Litt. 524 and note I. Blackstone, in vol. 3d of the Commentaries, 421, says, "all writs of execution must be sued out within a year and a day after judgment is entered; otherwise the Court conclude *prima facie*, that the judgment is satisfied and extinct, yet it will grant a writ of *scire facias* in pursuance of the statute of Westminster 2, 13 Edw. 1, c. 45, for the defendant to show cause why the judgment should not be revived and execution had against him. In *Flagg* v. *Dryden*, 7 Pick. 52, where property not belonging to the debtor had been sold on execution, in reference to the owner's rights, the Court remark, "he may have his action of trespass against the officer, and the officer his suit of indemnity against the creditors, if they agreed to indemnify him, and they will have a right to *scire facias*, for new executions upon their judgments. In *Sig-*

ourney & al. administrators, v. *Stockwell & al.* 4 Metc. 518, it does not seem to be doubted, that *scire facias* is a proper process, when a judgment has been obtained, and execution remains to be done, but cannot be issued by reason of events subsequent to the rendition of judgment, in the ordinary mode; but refuse it in that case, as unnecessary for the purpose of doing justice between the parties.

In the case before us, the return of the sale of the equity of redemption upon the execution, was *prima facie* evidence of satisfaction of the sum returned as received therefor; but it was only such. The facts agreed, which are not objected to as inadmissible, show that the officer mistook the course of proceedings, and they were entirely without effect; the right of property was not transferred from the debtor to the creditor, who was the purchaser; nothing was received by the latter as the fruit of his judgment; it appears satisfied by the return from the proceeds of this sale for a large sum, whereas the creditor has received and can receive nothing. If he is not entitled to a revival of the judgment in this form, or in an action of debt, he is without redress; and by his ignorance of the state of the debtor's title, has lost the benefit of his judgment to the amount satisfied from this supposed, but ineffectual sale.

Judgment revived for the amount which appears by the return of the execution to be satisfied by the levy upon land in the county of Aroostook, and the sale of the equity of redemption in Bangor, and execution to issue therefor and for any other sum not satisfied by the return.

WILLIAM COLBURN *& al. versus* WILLIAM MASON.

One tenant in common occupying the estate does not oust or disseize another tenant in common, or one who claims to be such, unless he denies the right of the other to the possession, or does some notorious act indicative of a holding adversely to him.

If the tenant, on being informed by the demandant of his claim to be the owner of one fourth part thereof, merely admits that he is in possession of the demanded premises, and adds, "it is hard to pay twice;" — this is not evidence of an ouster or disseizin.

WRIT OF ENTRY. The demandants and the tenant were tenants in common of the demanded premises. The pleadings are stated in the opinion of the Court. To show a disseizin by the tenant, the demandant introduced a witness who testified, that in their behalf he read to the tenant the description in their deed of a fourth part of the premises, and said to him, "these are the premises you are in possession of." The answer was, "Yes — it is hard to pay twice." There was some question made, whether the tenant rightly understood the question, or made the reply as understood by the witness.

TENNEY J. presiding at the trial, instructed the jury, "that if the tenant was in possession of the premises demanded, as a tenant, at the time of the service of the writ, that the demandants were entitled to their verdict; but that if he was merely living with his son, making no claim to be a tenant, it would be otherwise."

The verdict was for the demandants; and the tenant filed exceptions.

J. Appleton argued for the tenant, citing 17 Mass. R. 282; 1 Fairf. 201; 13 Maine R. 29; Cooper, 218; 1 Greenl. 89; 1 Pick. 114; 4 Mason, 326; 5 Mass. R. 344; 7 Cranch, 456; 3 Burr. 1898.

N. Wilson argued for the demandants, citing 13 Maine R. 29; 1 Greenl. 89.

The opinion of the Court was drawn up by

WHITMAN C. J. — By the declaration in the demandants' writ it appears, that they claim to recover possession of one

undivided fouth part of a certain parcel of real estate, to hold in fee and in mortgage; and the tenant does not question their right thereto; and has, in his brief statement, set forth in substance a special non-tenure thereof; at the same time averring a title in himself to another undivided fourth part of the same estate, as tenant in common with the demandants; and that he never had withheld from the demandants the possession of their quarter part thereof. That the tenant was seized, as he claims, seems to be incontrovertible, and in fact is not questioned.

One tenant in common occupying the estate does not oust or disseize another tenant in common, or one who claims to be such, without some unequivocal act manifesting an intention to do so. Such tenants are individually seized *per mie et per tout.* The entry of one is the entry of both. Either has a right to actual possession; and his entry will be presumed to be in accordance with his title; and this presumption will hold until some notorious and unequivocal act of exclusion shall have occurred. *Jackson* v. *Wheelock*, 6 Cowan, 632; *Jackson* v. *Tibbets*, 9 ib. 241; *Fisher & ux.* v. *Taylor & ux.* 1 Cowp. 217. In the last case the language of L'd Mansfield was, "the possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; but is support of their common title; and by paying him his share he acknowledges him co-tenant; nor indeed is his refusal to pay, of itself, sufficient, without denying his title. But if upon demand of the co-tenant of his moiety, the other denies to pay and denies his title, saying he claims the whole, and will not pay, and continues in possession, such possession is adverse, and ouster enough."

Upon the issue, arising under the brief statement, it was incumbent on the demandants to show, that the tenant denied their right to possession, or did some notorious act, indicative of a holding adversely to them. It does not seem that the evidence could have been considered as amounting to any thing of the kind. Reliance is placed upon admissions made by the tenant as detailed by the witness, Wilson. But, from

those, it cannot be gathered, that the tenant distinctly claimed to hold adversely to the plaintiffs. He admitted himself to be in possession of the estate; and as a tenant in common he had a right to be so. Not a word escaped his lips tending to a denial of the demandant's right as a co-tenant. He said it would be hard to pay for the land twice. Was this a denial of the demandant's title? Was it not rather an ejaculation of a regret that he should be obliged to pay for the land again? Clearly it could not amount to an unequivocal denial of the demandants' title. The instruction to the jury, therefore, which was, "if the defendant was in possession of the premises demanded as a tenant, at the time of the service of the writ, that the demandants were entitled to their verdict," can hardly be deemed such as the case required.

Exception sustained, new trial granted.

FRANCIS WYMAN *versus* WILLIAM WOOD *& al.*

A reference in a bill of exceptions to papers introduced at the trial, does not make them a part of the exceptions; and they cannot properly be taken into consideration by this Court.

That a deposition was taken on the day next preceding that on which the Court, at which it was to be used, was to commence its session, without regard to the distance of the place of caption, when no sinister purpose was in view, is not a sufficient cause for excluding the deposition.

THIS case came before the Court on the following exceptions from the District Court.

This was an action of debt on a six months bond, dated March 14, 1842.

Plaintiff read his writ and bond, which was duly executed, and stopped. Amount of bond $198,10. Said writ and bond may be referred to. The pleadings may be referred to.

The defendants produced in defence a writ in the name of said Wyman vs. said Wm. Wood, returnable to the Jan. Term of the Court of Common Pleas, 1838, dated Oct. 24, 1837, upon which was the return of an officer of the arrest of said

Wood on mesne process, and his discharge by giving a bond to notify and disclose, &c. within 15 days after final judgment, all of which were objected to by the plaintiff but were read, and may be referred to by either party. Defendants read and put into the case an execution issued on a judgment rendered at the Oct. Term, 1839, which judgment and execution may be referred to. The principal defendant was arrested on a pluries execution, issued in March, 1842. Said judgment was rendered in the before named action. He then read, though objected to, a certificate of disclosure before Wm. C. Fillebrown and Samuel Buffum, dated Oct. 26, 1839, which may be referred to. He next read, though objected to, what purported to be a copy of the record of two justices of China in the county of Kennebec, of a disclosure on Sept. 10, 1842, which may be referred to. No certificate of discharge was offered.

The plaintiff then offered the deposition of O. W. Washburn, which was objected to by the defendants, and excluded by the Court, on the ground, that it was taken on Monday, at 9 o'clock, A. M. at China, Kennebec County, forty-five miles from Bangor, only the day prior to the sitting of the Court at Bangor, Penobscot county, at which term the deposition was to be used.

Upon the foregoing, the Court instructed the jury that a full defence had been made out, and for them to bring in their verdict for the defendants.

To which instructions and rulings of the Court the plaintiff excepts, and prays the same may be allowed and signed.

These exceptions were signed by counsel for the plaintiff, and allowed by the District Judge.

Other questions were argued by the counsel, but what related to the one, merely, on which the opinion was founded, will be noticed.

Wilson, for the plaintiff, said that the District Court very greatly erred in the rejection of the deposition of Washburn. The statute, c. 133, § 9, makes no provision whatever as to the time of returning to Court, after the taking. The ruling of the Court was at variance with the statute, with practice,

and with precedent on the subject. *Central Bank* v. *Allen*, 16 Maine R. 41.

Washburn, for the defendants, contended that the deposition was rightly rejected. It was impossible for the party or his counsel to attend to the taking of the deposition, at that distance, on Monday, and be present at the opening of the Court here the next day. *Ulmer* v. *Hills*, 8 Greenl. 326, is an authority directly in point for excluding it, and by this Court, under a statute in precisely the same words, as the present.

The opinion of the Court was drawn up by

WHITMAN C. J. — This case comes before us upon exceptions taken to the instructions to the jury, and, the rulings of the Judge of the District Court, on the trial between the parties. The action is stated to be debt upon a bond given by the defendants to the plaintiff; which is said to be a six months bond; by which it may be presumed to have been given under the statute, c. 148, in which it is provided, that a bond may be given, by one arrested on execution, for the performance of certain conditions, within six months, and thereupon be freed from his arrest.

It is not stated which of the defendants was principal in the bond. We may presume that the defendant, Wood, was, as he is the first named in it. It is stated that the principal defendant was arrested on a pluries execution in March, 1842. On what judgment that execution was issued is not stated; nor is it stated whether he gave the bond in suit upon that arrest or not. The bill of exceptions is singularly defective, not only in these, but in sundry other particulars. It is stated in it, that the writ, bond, pleadings and several documents, introduced by the defendants, at the trial, may be referred to. This does not make them parts of the bill of exceptions. The Court cannot in this way be put upon a search after such papers. They should be made a part of the exceptions if they are its necessary concomitants; otherwise they should not be alluded to. As the case is presented to us, therefore, we cannot form an opinion of its general merits.

One point, whether connected with the merits or not, we cannot determine, is distinctly presented. The deposition of O. W. Washburn appears to have been offered in evidence by the plaintiff, the excepting party, which was ruled inadmissible because it was taken the day before the sitting of the Court at which the trial took place. This, we think, was erroneous. The statute is general in its terms as to the admissibility of depositions taken for the causes and in the mode prescribed. It makes no exception of such as may be taken the day before the sitting of the Court to which they are returnable. Indeed it does not exclude depositions taken even in term time; but the Courts, having power to establish rules and regulations "respecting the modes of trial and conduct of business," not repugnant to law, have provided, that parties, during term time, shall not be obliged to attend to the taking of depositions, unless, for good cause shown, the Court shall otherwise order, and except they be to be taken in the town in which the Court may be holding its session, and at an hour when it shall not be actually in session. The defendant, however, has referred us to the case of *Ulmer* v. *Hills*, 8 Greenl. 326, which, he contends, shows that this Court has decided against the admissibility of a deposition taken the day before the sitting of the Court. But there were peculiar circumstances connected with the taking of the deposition in that case, which do not exist in this. On the Saturday before the sitting of the Court, at which the deposition was offered to be used, the party objecting had been cited to attend to the taking of the deposition of the deponent, and attended accordingly at the time and place appointed, and was there informed, by the counsel of the adverse party, that he should not take the deposition; but he afterwards gave new notice of an intended caption of the deposition on Monday following, at which the objecting party was not present. It is not clearly apparent that the rejection of the deposition was sanctioned upon the ground, that it was taken the day previous to the sitting of the Court. It would rather seem that it was placed on a different ground. For the Chief Justice, in delivering the opinion of

the Court, says, "In addition to the circumstance, that the plaintiff is presumed to have been traveling to Court on the preceding day, we consider the conduct of the defendant's counsel on Saturday, as amounting to a waiver of all answer to the objection, now urged by the plaintiff." But for the latter consideration we are not prepared to believe, that the rejection of the deposition would have been sanctioned. The conduct of the plaintiff's counsel in that case, might well be believed to have been intended to circumvent or to harass the defendant; and the Court should have hesitated, in such case, to suffer such an attempt to be attended with success. To take depositions on the day before the sitting of the Court is believed to have been no uncommon practice, without regard to the distance of the place of caption from the place of trial, when no sinister purpose was in view. If the opposite party could show to the Court, that it was impossible for him to attend the caption, or that the testimony was a surprise upon him, and no undue negligence should appear to be imputable to him in reference to it, his course would be to move to put off the trial, in which the evidence was to be used, till a reasonable opportunity could be afforded to remedy the inconvenience.

Exceptions sustained — New trial granted.

GEORGE A. PIERCE *versus* HASTINGS STRICKLAND.
SAME *versus* THE CENTRAL BANK.
SAME *versus* ARTEMAS LEONARD.

When a demandant recovers judgment in a writ of entry, he is not "entitled to recover, in the same action, damages against the tenant for the rents and profits of the premises," under the provisions of Rev. Stat. c. 145, § 14, unless he has made his claim therefor in his writ.

In a writ of entry, where the demandant is entitled to recover, and claims damages for the rents and profits of the premises, the tenant is allowed to retain, under the provisions of Rev. Stat. c. 145, § 16, only the value of the use of the improvements made by himself, or those under whom he claims.

THESE were writs of entry.

The demandant in these actions introduced to prove his

title, at the trial, before WHITMAN C. J. the same deeds and bond, which were in the report of the case, *Treat* v. *Strickland & al.* 23 Maine R. 234; and also the will of Waldo Pierce, and a deed of quitclaim from the heirs of said Pierce to himself, which may be referred to.

The tenants introduced the same deeds and papers which they introduced in said case, and the same offers were made, and same points taken, and the same rulings of the Court, as in the above case, and as reported by the presiding Judge, reference to said report being had.

In the present cases, which were instituted after the Revised Statutes went into operation, the demandant claimed to recover rent or damages against the tenants for the rents and profits of the premises according to the provision in the statute. This claim was resisted by the tenants. In order to settle the amount and to present the question of mesne profits to the whole Court, it was agreed to refer certain questions to Samuel Wells, Esq. by an agreement signed by the parties.

The demandant reserves the right to move to amend, by declaring specially for said mesne profits, if the Court should be of opinion that such an amendment is necessary to entitle demandant to said profits.

The demandant proved by Samuel Smith, that on Nov. 8, 1836, the said E. & S. Smith gave to said Treat & Pierce an agreement of which the following is a copy: —

"Bangor, Nov. 8, 1836.

"We hereby agrèe with Waldo Pierce and Robert Treat, that we will not call for or demand any paper or bonds signed by them, now in the hands of a third person, until we pay two notes of $1250 each, dated March 12, 1835, and payable to them. "E. & S. Smith.

"Witness, D. M. Howard."

The erections on the premises were made by said Smiths, in 1833, 1834 and 1835; and this fact may be considered as proved in deciding upon the questions in reference to rents and mesne profits. The buildings which were upon the pre-

mises in 1832, were removed by said Smiths, when the present ones were erected.

The demandant offered to prove that the deeds of quitclaim from Samuel Smith to John Fiske, and from same to Stricklands and Leonard were without consideration, and that defendants never in fact purchased or paid for the land or buildings claimed by plaintiff. This evidence was not received by the Court.

If upon the whole case, the demandant was entitled to judgment in his favor, the tenants were to be defaulted, and judgment thereon in each case; and such judgment as to damages for mesne profits and rents as the Court, upon the case and the report of the commissioner, may determine he is entitled to in each case; otherwise the cases may stand for trial.

The following is the agreement to refer, to which, reference was made in the report of the trial, and in the report of the referee.

"The parties agree, that Samuel Wells, Esq. of Hallowell, shall ascertain and report the net rents and profits of an undivided half of the wharf or gore lot declared for, and one undivided fourth part of the 23 feet strip, so called, declared for, on the following principles.

"1st. As the same would have been if the land had remained with such erections as were thereon at the time of conveyance from Smith to Treat & Pierce, in 1832.

"2d. What the ground rent only of said demanded premises, without any buildings, would be or would have been.

"3d. The rents and profits of said demanded lots and premises with the buildings and improvements thereon, as the same were, when said tenants respectively entered and have been since. And said commissioner is to ascertain and report, what part and portion of said rents and profits, he allows for the portion of land on said 23 feet strip, which lies below the line of highwater mark on said strip, and within lines at right angles on the flats from the base line of said highwater mark.

"Also report said rents and profits on the supposition that the lines of said twenty-three feet strip are continued on the flats in the same direction as the side lines of the upland.

"The calculation in all cases to be made, from the time the tenants entered, up to next term of this Court, said report to to be taken by the Court, as facts ascertained and settled, so far as the amount of rent is concerned; and judgment to be made thereon according to the opinion of the Court.

"The said commissioner not to report any specific line of highwater or to determine the same so as to affect the rights or title of the parties on that point, except as the questions of rents and profits are concerned.

"And the parties further agree, that if the Court shall consider the plaintiff by his deeds and the will of Waldo Pierce, and other deeds, papers and evidence in the case, all the evidence on both sides being considered, entitled to recover possession of said 23 feet strip, with side lines extended on the flats in same direction as the side lines of the upland, and should be of opinion that the plaintiff can legally be permitted to amend his declaration, and ought to have license so to do, so, as specifically to embrace the flats within said side lines continued as aforesaid, then said amendment is to be made and judgment on default and for rents and profits of said premises as the opinion of the Court may be.

"If such amendment is not allowed or asked for, then the Court may render such judgment upon default and for such amount for rents and profits as they shall decide the plaintiff to be entitled to.

"The commissioner to report what proportion each defendant is liable for, of the rents and profits."

This agreement was signed by the parties.

"Report of Samuel Wells, referee in the actions George A. Pierce against Artemas Leonard, the same against the Central Bank, and the same against Hastings Strickland & al. said actions now pending in the Supreme Judicial Court in the county of Penobscot.

"The referee having duly notified the several parties, met

them at Bangor in said county on the twenty-second day of May, 1844, and having heard their several pleas, proofs and allegations, and maturely considered the same, does award and determine, and this is his final award in the premises.

"That he does not find, that said Leonard has received any portion of the rents and profits demanded by said Pierce in said action, and it was agreed by the parties, that the referee should thus report in relation to the action against said Leonard.

"And said referee further reports, that upon the first "principle," upon which he is to ascertain the "net rents and profits," as provided in the agreement of the parties, that said Pierce shall recover against the Central Bank for said rents and profits, estimated from the first day of January, 1839, to the first day of July, 1844, the sum of eight hundred and twenty-four dollars and seventy-one cents, and that the said Pierce shall recover against said Strickland & al. the further sum of five hundred and forty-six dollars and fifteen cents.

"And the said referee does further award and determine that upon the second "principle" mentioned in said agreement, the said Pierce recover against the Central Bank the sum of three hundred and ninety-three dollars; and that he recover against said Strickland & al. the further sum of two hundred and sixty dollars.

"It was conceded by the parties, that the city ordinance, passed August 29th, 1842, prohibited the erection of wooden buildings after that period.

"And the referee does further award and determine, that upon the third "principle" mentioned in said agreement, the said Pierce recover against the Central Bank the sum of fourteen hundred and fifty-one dollars and thirty cents, and that he recover against said Strickland & al. the further sum of nine hundred and seventy-eight dollars and ninety cents.

"In the foregoing estimate, the calculation is based upon the assumption, that the lines of the "twenty-three feet strip" are continued on the flats in the same direction as the side lines of the upland; the other mode of calculation by deflecting lines having been waived by the parties. But if the Court shall be

of opinion, that said Pierce is not entitled to recover for rents and profits on said strip below the line of high water mark, included in said estimate, then the referee does award and determine, that there should be deducted from the sum, awarded as aforesaid to said Pierce against the Central Bank, one hundred and thirteen dollars and six cents; and that there should be deducted from the sum, awarded as aforesaid to said Pierce against said Strickland & al., one hundred dollars and twenty-nine cents.

"The preceding calculations are all based upon the time admitted by the parties to be correct, it being from the first day of January, 1839, to the first day of July, 1844.

"June 15th, 1844. "Samuel Wells, Referee."

The case was argued by

A. G. Jewett and *T. McGaw*, for the tenants; — and by *J. Appleton* and *Kelly*, for the demandant.

To show, that the tenant in possession may set off against the claim for rent, the value of the ameliorations of the estate, made thereon by the tenant, *McGaw* cited 8 Wheat. 75, 80; 5 Coke, 3; Wash. Cir. Rep. 165; 2 Johns. Cas. 438; Stearns on Real Actions, 374.

Appleton and *Kelly* cited 12 Mass. R. 314; 9 Greenl. 62; Stearns on Real Actions, 404; 2 Pick. 505.

The opinion of the Court, SHEPLEY J. dissenting therefrom, so far as it respected the damages, was drawn up by

TENNEY J. — The evidence in these cases being the same, which was adduced in that of *Treat* v. *Strickland & al.* 23 Maine R. 234, the demandant is entitled to judgment for possession, upon the principles of that case; he seeks also to recover damages against the tenants for the rents and profits of the premises, from the time of their entry, under the Revised Statutes, c. 145, § 14. The tenants admit the right of the demandant to damages for rents under a proper declaration, but deny their liability for such as were received for the erections made upon the land by E. & S. Smith, after the con-

veyance to Robert Treat and the father of the demandant, by deed of Dec. 18, 1832. The claim for rents and profits is not set out in the declarations of the writs; it has been settled by this Court, in a case not yet reported, that it should be done; but as the demandant has the right reserved to him in the agreement of the parties, to move for the amendment, the writs may be amended in this particular.

The 15th section of the chapter referred to, provides that the tenant shall be liable for the clear annual value of the premises for the time during which he was in possession thereof, deducting all lawful taxes and assessments on the premises, that shall have been paid by the tenant, and all the necessary and ordinary expenses of cultivating the land or collecting the rents, profits or income of the premises; and by the 16th section, in the estimation, the value of the use by the tenant of any improvements made by himself or those under whom he claims, shall not be computed or allowed to the demandant. The section last referred to, may apply to cases where the occupation of the tenant has been such, as not to entitle him to the benefit of the 23d section of the same chapter, and he has made improvements, the use of which have been valuable; of this, however, we give no opinion; but he is allowed to retain only the value of the use of improvements, *made by himself or those under whom he claims the land.* A person having made improvements upon another's land, without consent of the owner, or being in possession under one who made them, without such consent, does not become entitled to the value of the improvements themselves, unless he sustains to the proprietor, the relation, which brings him within the provision of the 23d section; if the tenant, having the right secured by that provision, abandons the possession, and the lawful owner takes it, the tenant relinquishes his rights with his possession, and no one can afterwards avail himself of the improvements previously made, against the owner, and on no principle, can improvements made without the consent of the owner, where the tenant does not claim to hold the land by virtue of the buildings and improvements, be a subject of purchase after the one who

made them has gone out of possession, having no interest whatever in the land.

The case finds, that the erections on the land at the time that Samuel Smith conveyed to Treat and the demandant's ancestor, in 1832, were removed, and new and valuable erections were made in the years 1833, 1834 and 1835, by Edward Smith and Samuel Smith. There is no suggestion that any of the erections, for which rents are claimed, were made by the tenants; and upon an examination of the deeds introduced in the case, we are satisfied they were not made by any person or persons, under whom they claim.

The demandant has the title in the premises, which his father derived by the deed to himself and Robert Treat from Samuel Smith. This deed was of the whole of the wharf or gore lot and an undivided half of the twenty-three feet strip, one undivided half of each portion conveyed, being the premises claimed in these actions. The grantees at the time of the conveyance, executed a bond to Edward Smith and Samuel Smith, to convey to them the same land on the fulfilment of certain conditions; the conditions were not fulfilled and the obligors were released from their obligation therein contained. The deed to Treat and Pierce, and the bond from them did not constitute a mortgage, and the former gave to the grantees an absolute and indefeasible title.

The tenants derive their title to the twenty-three feet strip under the levies of two executions in favor of Amos M. Roberts against Samuel Smith & al. one made Dec. 23, 1836, and the other Sept. 29, 1837; the former, of two undivided sixth parts, and the latter, of one undivided sixth part; the returns of the extent so made, recognize the existence and validity of the deed from Smith to Treat and Pierce. Roberts conveyed to the Central Bank all his interest arising from these levies, by deed of Dec. 27, 1838, referring to the executions and the returns thereon for a description. The tenants also introduced a deed from S. Smith to John Fiske, releasing one undivided sixth part of the strip, dated Sept. 29, 1837; also a deed from S. Smith to John Fiske, dated Dec. 4, 1837, releasing the

right of redeeming the "remaining two sixth" parts, from Treat and Pierce, of the strip, which is described to be twenty feet wide, and also the right of redeeming the other parcel described in the same deed, which is the wharf or gore lot, that is demanded in this action, referring to the deed, to Treat & Pierce in terms; they also adduce a deed from Fiske to Artemas Leonard, dated November 7, 1839, releasing all his interest to one sixth and to two sixth parts of the strip and to the whole of the wharf or gore lot, and a deed from S. Smith to Leonard, S. P. Strickland and H. Strickland, dated July 30, 1840, releasing in certain proportions to each his right in a parcel of land, which includes that claimed in these suits; and also deeds of the Central Bank of a part of their interest to S. P. Strickland and H. Strickland.

After S. Smith's deed of Dec. 18, 1832, he was the owner of one undivided half of the strip, but had no remaining interest in the wharf or gore lot; his title to the strip was covered by the levies of Roberts, and the creditor's title passed to the tenants, the debtor not having redeemed the land at any time. Till the time when Roberts conveyed, after his levies, he was the owner of one undivided half of the strip, and Treat & Pierce of the other; neither Smith, or any other, had the least interest therein; the possession was according to the title; and if Edward or Samuel Smith or both were upon the premises, it was in submission to the rights of Treat & Pierce. The deed of Smith to Fiske, dated Dec. 29, 1837, if of the sixth part that day levied upon by Roberts, ceased to be operative after one year; if of the grantor's right in that proportion of the undivided half in Treat & Pierce, it was equally inoperative, and the subsequent deed from Smith to Fiske of two sixth parts purports to convey only the right of redeeming of Pierce and Treat, which could convey nothing, as the latter had an absolute title. When the two last named deeds were executed, the grantor therein had ceased to have the least title to any interest, which he could transfer, excepting the right of redemption from Roberts' levy of one sixth part, and neither he or his grantee availed themselves of that right; the

lawful owners being in possession, Fiske obtained none by these deeds; and when he gave his deed to Artemas Leonard, the time of redeeming the one sixth of the strip from Roberts had expired, and he had by his other deed only the right to redeem from those having then an absolute title, and nothing could pass to the person named as grantee. The deed of Smith, dated July 30, 1840, was equally invalid; he had neither title or possession, and the erections made by him were not his property and could not be transferred to the tenants.

The referee agreed upon by the parties, was authorized "to ascertain and report the net rents and profits of one undivided half of the wharf or gore lot, and one undivided fourth part of the twenty-three feet strip." "The calculation in all cases to be made from the time the tenants entered"—"said report to be taken by the Court as facts ascertained and settled, so far as the amount of rent is concerned"—"and the amount of rents was to be ascertained and reported, upon different hypotheses, and one or the other should be decisive according to the construction, which the Court should give to the statute. The referee reported the amount of net rents upon the proportion claimed by the demandant," of the premises, with the buildings and improvements thereon, as the same were, when the tenants respectively entered, and have been since; and the calculations are stated in the report to be all "based upon the time admitted by the parties to be correct, it being from the first day of January, 1839, to the first day of July, 1844." The agreement of the parties on the question, for what time, the demandant was entitled to recover damages for the rents and profits, is conclusive upon the tenants, and they are not at liberty to contend, that they are not liable from the time of their entry.

A default is to be entered; judgment for possession; and, in the opinion of a majority of the Court, for the sums in damages, reported as above by the referee.

CHARLES G. RICHARDSON *versus* CHARLES COOPER.

It is competent to the parties to a written contract, by a parol agreement, made afterwards, to substitute a mode different from that contained therein, for the discharge of its obligations. And proof of the fulfilment of such parol agreement will be a defence to a suit brought upon the original contract.

But the mere agreement to change the written contract in this respect, when some act is to be done to carry the arrangement into effect, is insufficient; unless performance of the substituted agreement has been prevented by the party attempting to enforce the obligation of the written contract.

ASSUMPSIT. The plaintiff read in evidence a contract, of which a copy follows: —

"I hereby agree with Charles G. Richardson, for value received, to pay and take up of the land agent of Maine, four notes of hand signed by Ivory Jefferds, dated Dec. 10, 1834, for forty-six $\frac{53}{100}$ dollars each, amounting in all at compound interest, on the twenty-fifth of September next, to the sum of two hundred and forty-four $\frac{36}{100}$ dollars, and I hereby agree to take up said notes on or before said time. The notes when paid by me to be an offset to this obligation, and the obligation is binding upon me for the said sums, viz. $244,36, due Sept. 25, next, if I fail to pay said notes.

"Bangor, May 25, 1839. "Charles Cooper."

The defendant called Ivory Jefferds, who was objected to on the ground of interest, and admitted subject to objection. The facts on which the objection rests appear in his testimony. Jefferds testified, that in the summer of 1841, he was owing the defendant a note dated Sept. 26, 1840, for $331,87, payable on demand with interest; and had a claim of $356,69, against the estate of the plaintiff's father, of which estate the plaintiff was administrator; that some time during that summer, the plaintiff, defendant and witness met on Exchange street, in Bangor, near defendant's store, and it was then and there agreed between the parties, that plaintiff should take the note defendant held against witness, and give up the defendant's obligation to defendant; to which arrangement the witness assented; that the papers were not exchanged at the

time, because plaintiff said he had not the obligation with him; that previous to this he had talked with each of the parties separately on this subject, and had made an arrangement with defendant, for him to give up the said note which he held against witness to plaintiff, and take up his said obligation to plaintiff; and had made an arrangement with plaintiff, that plaintiff should take his note, as aforesaid, and give it up to witness for his claim against said estate; and that witness had never been called on by defendant to pay said note since, nor has he paid any thing on it.

On cross-examination the witness stated, that the papers had never in fact been exchanged, and nothing farther had been done in this matter.

The cause was then taken from the jury by consent, and continued on report. If upon the foregoing statement the whole Court shall be of opinion that the action is maintainable upon the evidence presented, the defendant is to be defaulted, otherwise the plaintiff is to become nonsuit.

The Court are at liberty to draw such inferences from the facts, as a jury would be authorized to do.

S. W. Robinson argued for the plaintiff, citing 14 Pick. 315; 19 Pick. 278; 3 Metc. 486.

Rowe, for the defendant, in his argument, cited 2 B. & Ald. 228; 3 T. R. 163; 19 Pick. 490; 3 B. & Ado. 328; Com. Dig. Accord, B 4.

The opinion of the Court was drawn up by

TENNEY J.—It appears from the testimony of Ivory Jefferds, called by the defendant, that in the summer of 1841, there being due upon the obligation in suit the sum of $446,36 and interest, in pursuance of an understanding between the witness and each party, it was agreed by them, all being together, that in consideration, that the claim, which the witness held against the estate of the plaintiff's father, of which estate the plaintiff was administrator, should be canceled, being for $356,69, and the defendant would give up to the witness a note, which he held amounting to $331,87, this obligation was

to be surrendered to the defendant; that the reason, that the papers were not exchanged was because the plaintiff had not with him, the obligation of the defendant.

Jefferds, offered by the defendant as a witness, was objected to, for incompetency, on the ground of interest. If the agreement testified to by the witness, had been carried into effect, his debt to the defendant, and his claim against the estate represented by the plaintiff, would have been paid; otherwise, they are both outstanding. The witness' demand against the estate being larger than his indebtedness to the defendant, the success of the plaintiff will be more for the advantage of the witness, than that of the defendant.

Is the verbal agreement made by the parties and the witness a defence to this action? It is competent for the parties to a written contract, by a parol agreement made afterwards, to substitute a mode different from that contained therein, for the discharge of its obligations; and proof of the fulfilment of such parol agreement will be a defence to a suit brought upon the original contract; such will be binding as accord and satisfaction. But the mere agreement to change the written contract in this respect, when some act is to be done, to carry the new arrangement into effect, is insufficient, unless performance of the substituted agreement has been prevented by the party attempting to enforce the obligations of the written contract. The party relying upon the oral agreement, is bound to prove that it was made, and that it has been performed; or that he has done whatever was necessary for him to do, to carry it into execution. *Cummings & al.* v. *Arnold & al.* 3 Metc. 491.

In the case at bar, it was agreed by the parties and the witness, that an exchange of their several claims should be made, which if made would have been a discharge of the contract declared on; but this contract not being present at the time of the agreement, the exchange did not take place. Something farther was to be done, to make this oral agreement effectual; it was executory; until executed all former liabilities remained. The plaintiff did not engage to meet the other parties and surrender the written contract, or to do any thing in execution of

the new agreement; he omitted the performance of no duty, which he had undertaken. Whichever of the parties to the substituted agreement wished it carried into effect, could have moved therein. Neither of them did so. The contract originally existing continued unchanged. If the defendant had desired its discharge, he could, within a reasonable time, after the agreement to vary the manner of payment, have surrendered to Jefferds his note, obtained a discharge of the claim, which he held against the estate, of which the plaintiff was administrator, tendered it to the plaintiff, and thereupon have demanded his own contract; not having attempted this, the relation of the parties, as it was under the original contract, continued. The case cited from the 3 Term R. 163, is distinguishable from the one before us. The agreement substituted in that case was executed; one's indebtedness was absolutely discharged, and a new debt created against another. According to the agreement of the parties

A default must be entered.

HORACE S. FISKE *& al. versus* OTIS SMALL.

Where a permit to cut timber has been assigned, and the timber, afterwards, has been cut under it, no delivery thereof is necessary, to enable the assignee to maintain an action against an officer, taking it by attachment as the property of the assignor.

If the assignee employs the assignor as his agent to take possession of the logs, after they are severed from the soil, and manufacture them into boards, this will not prevent his maintaining an action against one, who may take them as the property of the assignor.

If the vendee of personal property calls the vendor as a witness to prove the property to be in himself, the declarations of the witness, that he owned the property and not the plaintiff, may be given in evidence to discredit him; but are not to be taken by the jury as evidence of property in the witness.

In an action of trespass *de bonis asportatis* a mere stranger cannot set up an outstanding title in a third person, without showing some authority under it to justify the taking.

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

Trespass against Small, as former sheriff of the county, for taking a quantity of clapboards, by Haines, his deputy, alleged to be the property of the plaintiff, in March, 1837. The defendant justified the taking by virtue of a writ in favor of William Smith against Ezekiel Hackett, averring that the clapboards were the property of Hackett, and as such were attached.

To prove property in themselves, the plaintiffs offered in evidence two permits to cut timber, one given by Dwinal and Hackett, and the other by Ramsdell, Hackett and Martin, to said Ezekiel Hackett, and by him assigned to the plaintiffs. These were objected to by the defendant as irrelative; but were admitted by the presiding Judge.

It appeared that logs were cut under the permit, and that Hackett sawed them into clapboards "at the halves"; and that while he was sawing them, he spoke of them and treated them as his own; and did not then disclose that he acted as the agent of the plaintiffs. The counsel for the defendants requested the Judge to instruct the jury, that a delivery was necessary under said permits before the plaintiffs could maintain the action. The Judge declined so to instruct them.

The plaintiffs had sold a quantity of the timber cut under these permits to Davis & Pond. The contract of sale is referred to in the exceptions, but no copy of it is found among the papers. The defendant requested the Court to instruct the jury, that all the logs of that mark in the river passed to Davis & Pond, upon making the payments as named in the contract, and that the scaling of the same was not necessary to pass the property. The Judge instructed the jury, that all the logs of that mark did pass to Davis & Pond, that were in the two booms named in the contract; but that those logs, that came through the main boom in 1836, did not pass to Davis & Pond, unless they were delivered in those booms in accordance with the contract.

Witnesses introduced by the defendant testified, that Hackett, whose deposition had been read by the plaintiff, had stated, during the time the logs were in his possession, that the logs

were his, and were not the property of the plaintiffs. The presiding Judge instructed the jury, that the possession of the property by Hackett was evidence of title in him, but if the evidence satisfied them, that Hackett had the possession and control of the property by direction and as agent of the plaintiffs, that the possession by Hackett would be explained, and would be no proof of title in him; and that in such case, the declarations of Hackett to Coolbroth, Davis and Smith, that he owned the logs, and the clapboards sawed out of them, were not to be taken by the jury as evidence of property in himself; but they only went to discredit him as a witness for the plaintiff, and that this was the only way in which they should be considered by the jury.

The defendant requested the Judge to instruct the jury, that if they believed that Hackett had the possession of the logs and clapboards at the time of the attachment, and that the plaintiffs disclaimed to General Veazie all interest in them, that this action could not be maintained. The Judge declined to give such instruction.

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

Ingersoll argued for the defendant, citing 6 Greenl. 200; 4 Mass. R. 661; 8 Mass. R. 287; 1 Pick. 389; 12 Mass. R. 54; 1 Taunt. 318; 4 Pick. 378; 11 Pick. 310; 16 Mass. R. 108; 2 Greenl. 242; 1 Greenl. on Ev. § 109.

J. Appleton, in his argument for the plaintiff, cited 2 Phil. Ev. 133; 13 Johns. R. 151, 276, 284; 7 Wend. 404; 14 Wend. 34; 2 Kent, 496; 21 Maine R. 446.

The opinion of the Court was drawn up by

Tenney J. — Ezekiel Hackett and others, having written permits from the proprietors of lands to cut and haul timber therefrom, and having assigned them to the plaintiffs for the security of certain claims in the assignment mentioned, their interest in the permits and the license to cut the timber, as it then stood, passed to the assignees without further ceremony, subject to any right of interference by the proprietors of the

land for any violations of the contract, to their prejudice. Before the timber was cut, it is not pretended, that under the contract to cut, the persons permitted had any attachable interest, in the contract or the timber. No delivery of the trees attached to the soil could have been made, or was necessary to pass the interest to the assignees. Fraud between the parties to the assignment is not suggested. There was no delivery of the logs to the plaintiffs after they were cut, and it is therefore contended by the defendant's counsel, that their right thereto was so imperfect, as not to allow them to contest that acquired by virtue of an attachment of a creditor upon a precept against the assignors. The owners of the land make no complaint, and indeed it is not perceived, that they could do so, as it does not appear, that the cutting was not in the mode and by the persons, with whom they contracted. The individuals permitted had parted with all their rights before, and could not after the cutting acquire such an interest in the lumber, as to make it attachable for their debts. It was competent for the plaintiffs to employ either or all of these as their agents to hold possession of the logs for them, after they were severed from the soil; the assignors were not rendered incapable of performing such a service, by having been parties to the original contract. The case shows that the lumber was in possession of Hackett, and the jury have found, under proper instructions, that Hackett had this possession and control of the property, as the plaintiffs' agent; and his possession must be regarded as theirs. Several cases have been cited to show that property sold and not delivered, does not confer a title in the vendee, as against the attaching creditor of a vendor; also cases where the contract is for a chattel, not in existence, which will not vest the property in the one contracting to have it made for him, without a delivery after its manufacture. This case is different from those referred to. The identity of the timber was not changed, in the conversion from trees to logs; if the plaintiffs had a claim to the former, they had also to the latter.

Exceptions are taken to the instructions of the Judge to the

jury, that the acts of ownership of the timber by Hackett, and the statements made by him in reference to it, according to the testimony of several witnesses, were for their consideration only, as tending to discredit Hackett, who had been a witness, and not as showing property in him. If Hackett had not been a witness, the testimony of his acts and declarations, made after he parted with his interest could not have been received; these acts and declarations were competent only for the purpose of showing that he had not been consistent in his account of the transaction; he could not throw a doubt over the validity of a title, which had passed from him.

The evidence of Veazie, that one of the plaintiffs disclaimed all title to the property, in a conversation with him, was important for a jury to consider upon the question involved, but it was not conclusive; it could, like any other admission of a party, be explained.

The legal propriety of the instruction, that none of the logs paid for by Davis & Pond, under a contract between them and Hackett & Martin, would pass to them, excepting so far as they were delivered in the Penobscot boom in pursuance of the contract in other respects, may be considered more doubtful, provided the defence was put upon the ground, that Hackett's right at the time of the attachment was under that contract. The defendant justifies the act of his deputy under a precept in favor of Wm. Smith against Hackett, without any suggestion that the title of Davis & Pond passed to the debtor. As between these parties, the constructive possession was in the plaintiffs by the assignment and what took place under it; and it is a well settled principle, in an action of trespass *de bonis asportatis*, that a mere stranger cannot set up an outstanding title, without showing some authority under it to justify the taking. *Cook* v. *Howard*, 13 Johns. R. 276.

Exceptions overruled.

Alvin Haynes *versus* Joel Wellington.

If the assignee of a mortgage enters into the possession of the mortgaged lands *for condition broken and to foreclose the mortgage*, the entry must be considered as made by reason of the non-payment of the whole amount secured by the mortgage, which had then become payable, although but one of the notes was the property of the assignee, and the other remained the property of the mortgagee.

If a mortgage be made to secure the payment of two notes, falling due at different dates, and the mortgagee transfers the note last payable and assigns the mortgage, retaining the other note himself; and the assignee, after his note has become payable, enters into the mortgaged premises for condition broken and to foreclose the mortgage, and a foreclosure takes place; both notes are discharged, if the mortgaged premises were, at the time, of sufficient value for the payment thereof.

Assumpsit on a note for $1342, dated August 4, 1836, payable to the plaintiff or his order, in one year from date, with interest annually, signed by the defendant. This suit was commenced October 9, 1838.

The defendant proved, that he, at the time the above mentioned note was given, gave another note to the plaintiff of the same date, and for the same amount, payable in two years from date, *with interest annually;* and that he, at the same time, gave to the plaintiff a mortgage of certain real estate to secure the payment of each of said notes. On Dec. 11, 1837, the plaintiff indorsed the note, payable in two years from date, to John Bradbury, and assigned the mortgage to him — "hereby giving and granting unto the said Bradbury all the interest and estate I have in and to the premises therein described, reserving only a right to redeem said note from said Bradbury at any time within three years; the said Bradbury to have and to hold the same to his own use and behoof forever."

On June 18, 1838, the defendant gave to Bradbury a writing, under his hand and seal, "giving to said Bradbury actual and peaceable entry into said mortgaged premises for condition broken, and that the time of foreclosure should commence from the date of said entry." This writing was recorded by Bradbury.

About the time, that this suit was commenced, "this note was turned out as security by Haynes, the payee," to two of his creditors, both demands amounting to a sum much less than the amount of the note in suit.

The report of the trial, at October Term, 1843, before the Chief Justice, states, that the defendant then contended, that the plaintiff could not in his own name maintain this action — and offered to show, that at the time of said foreclosure and since, said mortgaged premises were worth more than the amount due on said notes secured by said mortgage, the note in suit being one of the two therein named — and that the Chief Justice presiding, expressed a wish to bring all the questions, which might legally arise, before the whole Court; whereupon the defendant consented to be called, subject to such opinion. If the evidence offered was legally admissible, then the default was to be taken off, and the action was to stand for trial.

Kent & Cutting argued for the defendant, citing 10 Pick. 380 and 336; 3 Mass. R. 562; 4 Pick. 136; 12 Mass. R. 31; 17 Mass. R. 371; 9 Mass. R. 347; Bayley on Bills, c. 5, § 1; 17 Pick. 361; 20 Pick. 545.

J. Godfrey argued for the plaintiff, and cited 16 Mass. R. 461; 19 Pick. 43; 3 Fairf. 15; 16 Mass. R. 461; 4 Shepl. 395.

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

TENNEY J. — On August 4, 1836, the defendant gave to the plaintiff a draft for $1000, payable in ninety days, which has been paid, and two notes for $1342 each, one payable in one, and the other in two years, with interest annually; and a mortgage of certain real estate of the same date to secure the draft and the notes. The defendant offered to prove at the trial of this action, which was upon the note payable in one year from date, that the land mortgaged was of greater value than the amount of the two notes. On Dec. 11, 1837, the mortgagee negotiated the note, which was payable in two

years from date, to one Bradbury, and also assigned to him the mortgage, giving and granting to the assignee his interest and estate in the premises therein described, reserving only the right to redeem the note at any time within three years. On June 18, 1838, the mortgagor, by writing under his hand and seal, acknowledged that Bradbury, the assignee of the mortgage, had made actual and peacable entry into the premises in the presence of two witnesses, for the breach of the condition of the mortgage, for the purpose of foreclosure.

We see no reason to doubt, that Bradbury had the right by the indorsement and delivery of the note and the assignment of the entire mortgage, to take the possession, which he did. The case discloses no evidence of any intention of the parties to the assignment, that Bradbury should not employ all the means, which the note and mortgage afforded, to enforce the payments of the note as early as possible, in the same manner that the mortgagee could have done if they had remained in his hands. The transaction passed the note and the mortgage to the assignee, subject only to the right of redemption reserved, and gave him the full control of both, till redeemed. If the note had been paid within three years to the indorsee, an offer to perform the terms of redemption, would give the indorser a right to the amount received and the interest, which must be as useful to him as the unpaid note. The entry of Bradbury was made for the breach of the condition of the mortgage; that breach was the failure of the mortgagor to pay the amount of the first and one year's interest of the second note, both of which became payable at the same time; and Bradbury having by the assignment, all the power of the mortgagee for that purpose, the latter is unable to say that the entry was not made for a breach of the mortgage arising from the non-payment of the first note; indeed, it is not perceived how there can be an entry for a part only of a breach, which has already taken place. The mortgagor was affected by the entry, in precisely the same manner that he would have been, if it had been made by the mortgagee, without the assignment. If the mortgagee had retained both notes and the mortgage in his own hands,

and had resorted to his action upon the mortgage after breach of the condition, to obtain possession, he could have taken only the conditional judgment. Stat. 1821, c. 49, § 3.

The assignment was made for the purpose of security alone, for an indebtedness to Bradbury. The plaintiff, by paying voluntarily the sum so secured within the time required by the agreement, was legally entitled to a reassignment; or if the plaintiff, being liable as indorser upon the note negotiated, had been called upon as such and compelled to pay the note, he would be equally entitled to a reassignment. If that had taken place, it cannot be contended, that the entry of Bradbury for the purpose of foreclosure, would then become ineffectual; it was caused by the plaintiff as mortgagee, and it is quite immaterial, whether he made the entry himself, by attorney, or by his assignee; the transaction was one which bound the mortgagor, and he could take no advantage of a change of the relations between those who claimed under the mortgage. On a reassignment, whatever was payable when the entry was made, would be a sum to be paid, to obtain a redemption.

The sum in the condition to be paid, to prevent a writ of possession, would be based upon that part of the notes which was payable and unpaid at the time of the commencement of the action. *Estabrook* v. *Moulton*, 9 Mass. R. 258. If the condition had not been fulfilled and the mortgagee had been put in possession by virtue of the judgment, his position would be the same, as if entry had been made in any other of the modes prescribed for condition broken. And if the mortgagor would prevent the mortgagee from obtaining an indefeasible title, he would be bound to make payment of the sum payable, when the action against him was commenced, or if entry was made in another mode, when that entry took place and interest thereon, within three years after possession was so taken. If the entire sum secured by a mortgage has become payable before entry for condition broken, the whole must be paid within the same time, to redeem the estate. This proposition is supported by the terms in the condition of the mortgage, which are, if the notes or other personal security shall be paid

according to their tenor, the mortgage deed shall be void, otherwise to be in full force. *Davis* v. *Maynard*, 9 Mass. R. 242. If a mortgagee negotiate one of two notes secured by mortgage, without any assignment of the security, the mortgagor is equally holden to pay the amount of the note transferred, in order to redeem, and whoever holds the mortgage may require that it shall be done in order that the mortgage should be discharged, and when received, it will be held in trust for the indorsee of the note. *Crane* v. *March*, 4 Pick. 131. And it is not perceived, that the same principle will fail to apply, if the mortgagee, as in this case, shall transfer one note, reserving the right to redeem it and assign the mortgage given to secure it, and another, which he retains, the latter being payable at the time of the assignment. Nothing but the payment of the full amount due, when the action for breach of the condition, or of entry, if made in another manner, within three years from taking possession, will prevent a foreclosure. The mortgagor could make no complaint; he is required to pay no more than he contracted to do, and being a stranger to the indorsement of the note and assignment of the mortgage he is not prejudiced thereby. If the mortgagor should fail to pay, what is required, to prevent a foreclosure within three years, it follows, that the same amount would be paid upon the personal security, by the foreclosure, provided the value of the land is equal to the sum due, and the personal security would so far become extinct.

The note which, according to its terms, was to have been paid in one year, was over due, when it was negotiated, and the mortgage assigned to Bradbury. If no transfer had taken place, the plaintiff could not prevent the application of the mortgaged estate, after foreclosure, to the payment of the whole debt, if of sufficient value. McLaughlin & Storer, and others, having acquired an interest in the note after its dishonor, could succeed only to the rights of the payee.

In this case, the entry was made for breach of the condition in the mortgage. There was no payment within three years afterwards, and the assignee of the mortgage obtained

an indefeasible title to the land described therein; that part of the debt, which became payable before the entry, so far as the value of the land extends, is thereby discharged.

Bradbury is not a party to this suit, and what may be the respective rights of him, and the plaintiff, or those who represent them in their relations to each other, may depend upon facts not now before us. The assignment of the mortgage was for the security of the note negotiated at the same time. Bradbury caused the foreclosure, and whether those interested in the note in suit, will be entitled to any allowance from the value of the land, obtained by the foreclosure, the plaintiff having chosen to separate this note from the mortgage, reserving only the right of reassignment on certain conditions, which do not appear to have been fulfilled, is a question, which we are not called upon to settle.

The defendant should have an opportunity to show, that the estate embraced in the mortgage was equal to the amount due upon the notes at the time of the foreclosure; and the default is taken off, and the action stands for trial.

CASE

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTIES OF WASHINGTON AND AROOSTOOK,

ARGUED AT JULY TERM, 1845.

ABNER SAWYER *versus* CLAUDIUS M. HUFF.

In an action of replevin where *non cepit* only is pleaded, the right of property is not put in issue; and it is but necessary, that the plaintiff should prove, that the defendant was in possession of the property, at the place named, when the suit was commenced. And without such proof the action cannot be maintained.

Where a nonsuit was entered by consent, to be taken off if the evidence was sufficient to maintain the issue, the question for consideration is not, whether there was testimony which might have had a tendency to maintain the action, but whether the testimony was sufficient to authorize a jury to find the issue for the plaintiff.

REPLEVIN "of a quantity of meadow hay lying on the heath in Alexander." *Non cepit* was pleaded. At the trial before WHITMAN C. J. the plaintiff introduced all his evidence, which is given in the report of the case, and thereupon a nonsuit was entered by consent; to be taken off, if the evidence was sufficient to maintain the issue on the part of the plaintiff; otherwise it was to stand.

What was proved by the evidence is stated in the opinion of the Court.

Written arguments were furnished to the Court on March 22, 1846.

J. Granger, for the plaintiff, said that the plea in this case admitted the property of the hay to have been in the plaintiff; and that there was but a single question for the consideration of the Court, namely, whether there was any evidence presented in the report tending to prove, that the defendant took the hay.

He referred to the testimony of the witnesses, and contended, that there was not only evidence having a tendency to prove the taking by the defendant, to go to the jury, but sufficient to justify them in returning a verdict for the plaintiff.

J. & B. Bradbury, for the defendant, said that this was simply a question of fact under the plea of *non cepit*, whether the taking of the hay by the defendant, as alleged in the writ, had been proved. To sustain the issue on his part, the plaintiff must prove, either an unlawful taking by the defendant, or an unlawful detention at the place set forth in the writ.

They examined the testimony, and contended that the plaintiff had failed to show either the one or the other.

The opinion of the Court was afterwards drawn up by

Shepley J. — This is an action of replevin, to which the defendant has pleaded *non cepit*. The right of property is not put in issue by such a plea. It is only necessary, that the plaintiff should prove, that the defendant was in possession of the property at the place alleged, when the suit was commenced. Without such proof the action cannot be maintained. A nonsuit was entered by consent. The question for consideration is not, as contended, whether there be any testimony, which might have a tendency to maintain the action; but whether the testimony be sufficient to authorize a jury to find the issue for the plaintiff.

The property replevied was meadow hay "lying on the heath in Alexander." It appears to have been in the possession of Elisha Stephenson and others on the meadow, where it grew, in the month of November, 1842.

Patrick McGraw, called by the plaintiff, testified, that the defendant, John Gooch and several other persons, removed the

hay from the meadow, nine loads of it to the heath, and three loads to the residence of Gooch. That this was done nine days before Christmas. John C. Bohanan was introduced by the defendant to explain his conduct in the removal of it. He testified, that a writ of replevin for the hay upon the meadow in favor of John Gooch against Elisha Stephenson and others, was put into his hands for service in the month of November, and that the defendant was acting under his authority as an officer in assisting others in the removal of the hay as stated by McGraw. To avoid the effect of this testimony, Jesse Stephenson was called by the plaintiff, and testified, that Bohanan left a copy of that writ at his house on the first day of December, and said that he had completed the service of it the day before except leaving the copy. The inference is, that the officer could not have been conducting legally in the removal of the hay, after the service had been completed, and nine days only before Christmas. If there be no error in their statements respecting the time, the fact would remain uncontradicted, that the defendant was employed by another person to assist in the removal of the hay; and if the removal was not authorized by the writ of replevin, the defendant would not continue in possession of the hay after it had been left upon the heath. It would remain there in the possession of John Gooch, or the person, who had employed the defendant to assist him to remove it. Bohanan further states, that the defendant informed him soon after it had been thus removed, that he had purchased it of Gooch. The defendant appears to have sued out a writ of replevin for the hay against the plaintiff, on the nineteenth of December, and to have placed it in the hands of Bohanan for service, who says, that he had the hay in his possession by virtue of that writ during the next day, while the present writ of replevin for the same hay in favor of the plaintiff, against the defendant, was sued out and served.

It does not appear, that the defendant was the owner or in possession of the land, upon which the hay had been deposited; or that it had been delivered to him by Gooch or any

other person; or that he had intermeddled with it, except by assisting to remove it for another, until after the service of the writ in this case was completed. And although he stated, that he had bought it, and that he was the owner of it, instead of claiming to be in possession of it, he admitted the possession to be in the plaintiff by suing out a writ of replevin to obtain possession from him. On the day after this writ was served, he appears to have taken possession of a part of it by virtue of his writ of replevin against the plaintiff; and for that part he will be accountable in that suit.

Nonsuit confirmed.

CASE

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF HANCOCK,

ARGUED AT JULY TERM, 1845.

NATHANIEL NOYES, JR. *versus* JOHN DYER.

A person who enters upon a tract of land under a deed duly registered from one having no legal title, and continues to improve a part of it, for a sufficient time, thereby obtains a title by disseizin to the extent of the bounds of the whole tract; unless there be other controling facts.

And the result will be the same, if the grantee acquired a perfect title under his deed to that portion of the tract which he occupied and whereon he resided.

If the bound first named in a deed cannot be found, it is competent to ascertain it by first ascertaining the position of some other bound named therein, and tracing the line back from that to the first bound.

A mortgage deed from the grantee, made during the continuance of such occupation, to a third person, describing the land as in his recorded deed, is admissible in evidence, on his part, to show, that he then claimed to be the owner, and that he performed an act of dominion over the whole tract included in his deed.

WRIT OF ENTRY. The description of the land conveyed by the proprietors of township numbered three to John Lee, was in these words: —

"The several lots of land lying within the township aforesaid, which are on the proprietors' plan numbered as follows, in that part of said township called Castine, viz: thirty-nine, forty, forty-one, forty-two and forty-three, containing about three hundred and five acres, bounded, southwesterly on land

possessed by the heirs of John Bakeman, Esq.; easterly on land owned by Rogers Lawrence; northerly, westerly and southerly on Castine harbor and Penobscot bay. Also the following lots of land numbered on the proprietors' plan aforesaid as follows, lying in said Castine, viz; sixty-one, sixty-two, sixty-three, sixty-four, sixty-five, sixty-six, and sixty-seven, containing about seven hundred and twenty-two and an half acres, situated on the southerly part of Cape Roseway, so called; also, one other lot of land numbered on the proprietors' plan aforesaid eighteen, lying in that part of said township called Penobscot, on the east side of Castine River, bounded northerly on land possessed by Mathew Varnum, and southerly on land possessed by Cunningham Lymburner and was originally settled by Gershom Varnum. The whole of said lots being considered as original settlers' lots, and the said Lee the purchaser thereof from said settlers and their assigns." No copy of the plan is found among the papers.

The description in the deed of the proprietors to Francis Bakeman was thus: — "A certain tract or parcel of land lying and being in said Castine, butted and bounded as follows, to wit: Beginning at a birch tree; thence south, 47° east, 200 rods; thence south, 20° west, 254 rods to the marsh; thence up the marsh to a fir tree at the head of the water; thence east, 127 rods; thence north, 20° east, 340 rods; thence north, 45° west, to the north corner of Howard's lot; thence south, 45° west, six rods, to a poplar tree; thence north, 45° west, to the shore; thence southwesterly by the shore to the first mentioned bounds; containing 523 acres, including the one hundred acres awarded the said Francis by the commissioners appointed by a resolve of the general court."

The facts are stated at the commencement of the opinion of the Court. At the trial, before Shepley J. the jury were instructed, that the actual, visible, exclusive and continued occupation and improvement of that part of his lot on which Bakeman lived under a recorded deed of the whole lot, for more than twenty years, with the other evidence in the case, if believed by the jury, constituted a disseizin of the demandant

and those under whom he claimed to the extent of the bounds of the lot as described in the deed. The verdict was for the tenant.

If the Court should be of opinion, that the mortgage deed was improperly admitted, or that the finding of the jury upon the evidence was incorrect, the verdict was to be set aside and a new trial granted.

The case was argued by

W. Abbott and *C. J. Abbott*, for the demandant — and by *Hathaway* and *H. Williams*, for the tenant.

The positions contended for on the part of the respective parties are stated in the opinion of the Court. The counsel for the demandant cited 1 Mass. R. 483; 4 Mass. R. 416; 14 Pick. 224; *Little* v. *Megquier*, 2 Greenl. 176; *Farrar* v. *Eastman*, 1 Fairf. 191; *Alden* v. *Gilmore*, 13 Maine R. 178; *Crane* v. *Marshall*, 16 Maine R. 27; 4 Kent, 475; 2 Wend. 203; 1 Burr. 60; 2 Mass. R. 439; 1 Stark. Ev. 386.

The counsel for the tenant cited *Little* v. *Libby*, 2 Greenl. 242; *Kennebec Purchase* v. *Laboree*, 2 Greenl. 275; 11 Pick. 308 and 362; 24 Pick. 242; 3 Metc. 199; 1 Stark. Ev. 66.

The opinion of the Court was drawn up by

Shepley J. — The proprietors of township numbered three conveyed a tract of land, including several lots, to John Lee, by deed executed on August 27, 1802, and recorded June 22, 1805. For the purpose of deciding the questions presented in this case, that conveyance may be considered as including the premises demanded in the action. And the demandant as having regularly deduced his title from it. The same proprietors, by deed executed on November 14, 1808, and recorded on the 28th of the same month, conveyed to Francis Bakeman a tract of land particularly described by metes and bounds; and the jury may have found, that those bounds included between thirty and forty acres of the land previously conveyed to Lee. Bakeman appears to have been upon a part of the tract of land conveyed to him as a settler, when he purchased; and to have continued to reside upon it more than twenty

years, and until his decease; and to have cultivated and improved during that time a part of the tract near his residence, which was about a mile and a half from the premises demanded. They are on the southerly end of the tract conveyed to him, and have not been improved or wholly surrounded by fences. The southwest corner bound of the Bakeman tract was a fir tree at the head of the water. According to the testimony there had been a line designated by marked trees, extending half a mile or more east from it, for twenty-eight or nine years, to which Bakeman had claimed, and by which he had directed a person, who occupied land on the southerly side of it, to be governed. And there was a fence on that line extending east from the stump of the tree seventy or eighty rods. A witness stated, that he had seen Bakeman cutting on the premises two or three times. The bounds of the lots conveyed to Lee were ascertained only by reference to a plan of the township, by which the premises would appear to have been included in one of those lots; but no marked lines or bounds of the lot were found upon the earth northerly of the line, to which Bakeman claimed. After the decease of Bakeman, his widow and administratrix continued his occupation, until by virtue of a license to sell for the payment of his debts she conveyed a part of his lands, including the premises, to the tenant.

In behalf of the tenant it was contended, if the demandant should appear to have the better title by the conveyances, that the title had been destroyed by a disseizin, continued for more than twenty years.

The counsel for the demandant contended, that the jury, from the facts presented in the cause, would not be authorized so to find. They now insist, that the residence and improvements of Bakeman were on land, to which he had an undisputed title, and that they would not, therefore, give notice to any one, that he claimed to own further than such title extended.

That the description of the tract of land conveyed by his deed was so indefinite, that persons owning adjoining lands

would not be informed by the record of it, that it included any of their lands.

And that they could not be expected to examine the records to ascertain whether a person residing on his own land had included in his conveyance a part of their lands.

It was decided upon full consideration, in the case of *The proprietors of the Kennebec Purchase* v. *Laboree*, 2 Greenl. 275, that a person, who enters upon a tract of land under a deed duly registered, from one having no legal title, and continues openly to improve a part of it for a sufficient time, thereby obtains a title by disseizin to the extent of the bounds of his whole tract, unless there be other controling facts. Such has since continued to be the received and settled law in this State.

The position first insisted upon to distinguish this case arising out of the fact, that Bakeman's residence and improvements were on land, to which he had an undisputed title, cannot be admitted to have that effect. He had apparently reason to conclude, when he purchased, that the proprietors had as good a title to the demanded premises, as they had to any portion of the tract included in his deed. He did not purchase of them a lot or lots designated by any number or plan. The record of his deed was legal notice of the extent of his title. If such a state of facts were admitted to destroy the effect of it, the result might often be, that one, who had purchased a tract of land and had continued to reside upon and to cultivate a part of it for more than twenty years, under a recorded deed, might afterward be deprived of any part of it, which had not been surrounded by fences or improved more than twenty years.

Nor can the objection prevail, that the bounds named in his deed were too indefinite to give notice of the extent of his claim. The plan may place the head of the water, where the demandant would desire to have them; but to ascertain where the head of the water named in the deed was, one must examine the condition and state of the water upon the earth. And according to the testimony, the fact might thus be ascertained with little difficulty; as well as the position of the fir

tree at the head of the water; the stump of which is said to be still standing there. No such tree appears to have ever stood at the head of the water as indicated by the plan. From this double designation of the southwest corner bound the line extended east; and it would not seem to have been very difficult to have ascertained and traced it upon the earth. The position of the birch tree, named as the first bound at the northwest corner of the tract, might not be ascertained without first ascertaining the position of some other bound named in the deed, and tracing the line back from that to the first bound; but it could thus be made certain.

Nor can the other objection, that a person under the circumstances named could not be expected to examine the records, prevail. To admit it to be valid would be to impair very materially the effect of a notice by the record. Besides, the objection assumes, that Bakeman would be well known, without any examination to ascertain the position of the bounds of his tract on the earth, to have a better title to all other portions of it, than to the premises; and the testimony does not appear to authorize such a conclusion.

An objection was also made to the introduction of the deed made by Bakeman to Perkins, on October 12, 1820, conveying in mortgage and with the like description the same tract of land. Mr. Starkie, speaking with reference to the possession and enjoyment of disputed property, states, that "written instruments, by which a dominion over such property was exercised," are admissible to explain the nature of such possession and enjoyment. 1 Stark. Ev. 66, (Metc. ed.) The acts and declarations of a person, while in possession of an estate, may be received in evidence to explain the nature and extent of his claim. *Moore* v. *Moore*, 21 Maine R. 350; *Shumway* v. *Holbrook*, 1 Pick. 116; *Van Deusen* v. *Turner*, 12 Pick. 532; *Jackson* v. *McCall*, 10 Johns. R. 380. The deed would seem, therefore, to have been correctly admitted to show, that Bakeman claimed to be the owner, and that he performed an act of dominion over the whole tract included in his deed.

Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF WALDO,

ARGUED AT JULY TERM, 1845.

ALFRED MCALLISTER *versus* WILLIAM SIBLEY.

In an action of slander, wherein it was alleged, that the defendant charged the plaintiff with being guilty of the crime of perjury, and in which the defendant pleaded the general issue, and by brief statement alleged that the plaintiff, "after being duly sworn, did falsely and corruptly testify," in a certain manner stated, and that the statements so made by the plaintiff, were known to him at the time to have been untrue, "and that the plaintiff committed the offence of perjury on said trial;" if the defendant proves, that the plaintiff, upon the former trial, made statements as a witness from the place where witnesses usually stand when testifying, this is not conclusive evidence, that the oath was taken, and the plaintiff is not thereby estopped from denying that he was sworn, although such evidence may properly be taken into consideration by the jury in determining whether he was sworn, or in mitigation of damages, if the justification was not fully made out.

In such action, the brief statement of the defendant, wherein he alleges that "the plaintiff committed the offence of perjury," may be taken into consideration by the jury, with other testimony, as one of the facts, merely, from which they may infer, that the defendant did speak the words as set forth in the declaration.

It is the duty of jurors to listen to the arguments of counsel touching the facts in issue, as they are not supposed to have viewed the evidence in all the aspects in which counsel may present it. But if a juror says, "that the Judge would let in no more evidence, that he had made up his mind in the case, and that all he wanted was the Judge's charge, and that it did not make any odds what counsel said," without stating in whose favor he had made up his mind, it is not such misconduct in the juror as should require the Court to order a new trial for that cause.

THIS case came before the Court on exceptions to the ruling

of the Judge before whom the trial was had; and upon a motion for a new trial on account of certain alleged misconduct of some of the jurors.

The brief statement of the defendant, referred to in the exceptions, described the action, *Robinson* v. *Sibley*, stated the issue, and that the testimony of McAllister was material, and proceeded as follows: —

"And the said McAllister was called by the said Robinson to testify in said action, and after being duly sworn did falsely and corruptly testify that he, as agent for said Robinson, did, after said payment and redemption, demand of said Sibley the said note of $26, and that said Sibley declined and refused and neglected to give it up, and said McAllister omitted to state, and suppressed the fact wilfully and corruptly, that the said Sibley offered or expressed a willingness to give up the said note of $26, if he, the said McAllister, as the agent of said Robinson, would have received the same, and in no wise refused to give it up, and that he, the said McAllister, refused to receive or take the said note unless said Sibley would deliver up other notes with it; when in truth and in fact the said Sibley did offer to give up the said note of $26, and the said McAllister refused to receive the same, unless he, the said Sibley, would give up the other notes with it; of all which the said McAllister, at the time of his testifying in said action, was well knowing. And that the said McAllister committed the offence of perjury on said trial."

"Exceptions. — This was an action on the case for slander, alleging that the defendant accused the plaintiff of the crime of perjury. The defendant pleaded the general issue, and filed a brief statement of the truth of the words spoken in justification.

"The plaintiff introduced evidence tending to prove, that the defendant said, that at the trial of an action, Charles Robinson vs. Willian Sibley, before the District Court held at Augusta, Dec. Term, 1839, in which trial the plaintiff was a witness, he, the plaintiff, swore falsely, and that he committed perjury.

"The defendant on his part introduced evidence tending to

prove, that said McAllister did in fact swear falsely and corruptly on that trial. It was testified by several witnesses, that said McAllister was a witness in that trial for Robinson, and that he testified as a witness on the stand. It was in evidence, that he stood in the place, box, or stand, from which witnesses usually testified, and from which other witnesses in the same cause delivered their testimony. But the defendant did not produce any witness who was able to testify, that said McAllister was actually sworn by having an oath administered to him by the clerk, or Court, though there was no evidence that he was not so sworn. It was testified by one witness that defendant said to plaintiff, after that trial, "if you had not sworn falsely," or "if you had not sworn as you did, the case would not have gone as it did;" and it did not appear that plaintiff made any explanatory reply, such as that no oath was administered to him, but only replied, that he should take notice of what was said.

"Another witness testified, that said McAllister stated to him after the trial of said Robinson and Sibley case, that he testified in that action to certain facts, which he mentioned. Several witnesses testified, that said McAllister spoke at other times of what he swore to in the trial of the same case of *Robinson* v. *Sibley*.

"It was also testified, that said McAllister, as an agent of said Robinson, had demanded five notes of hand of said Sibley, which he held as collateral security for a debt due him, according to a receipt produced by the plaintiff, on this trial, one of which notes was for $26,50; that the demand was made by McAllister after paying the note, for which the note for $26,50, was held as collateral security; that said Sibley offered to let him have the said note for $26,50, but not the others; that McAllister said his orders were not to take any, unless he had the whole, and refused to take one for $26,50, Sibley declining to let him have the others. And in the said action, Robinson's right to recover for detaining said note for $26,50, depended upon the question, whether said Sibley did so offer to let said McAllister have said note, and that he so refused to

receive it, or not. And there was evidence tending to prove, that said McAllister testified in said action of trover, that said Sibley refused to let him have the said note. And it was testified in this action by one of the plaintiff's witnesses, on cross-examination, that said McAllister was the only witness examined on that point, and that there was no other evidence touching it; that immediately upon his testifying touching that point, the Judge who tried the cause, ruled or suggested, that the action was maintainable on that testimony for the $26,50, but not for the other notes; and that said Sibley's counsel then said that the testimony was different from what he had expected, and would be defaulted for the amount of the $26,50 and interest, which was done, as shown by the copy of record.

"The counsel for the defendant contended, that the evidence was insufficient for the jury to find that the defendant charged the plaintiff with the crime of perjury.

"But if it was, and if, as the plaintiff's counsel contended, there was not sufficient evidence, that in the trial of *Robinson* v. *Sibley*, the oath was administered to McAllister before he testified, in that case, since the accusation made against him by defendant had special reference to his testimony in that action of *Robinson* v. *Sibley*, and was so stated by him at the time of speaking the words supposed to be proved, the accusation could not amount to a charge of perjury. And that if said McAllister palmed himself upon the Court as a witness, and testified when not under oath, and by his testimony subjected said Sibley to a verdict against him, or a default, he was estopped from alleging or contending in this action, that the charge of swearing falsely in that action imported the crime of perjury, and this action could not be maintained. And the counsel for the defendant requested the presiding Judge to instruct the jury in conformity with these positions.

"But SHEPLEY J. presiding at the trial, declined so to instruct the jury, and instructed them that they might take the defendant's brief statement into consideration, as a circumstance that might have some weight in their minds on the question, whether the defendant did charge the plaintiff with perjury before the

action was brought, although that alone would not be sufficient to establish that fact."

"And also, that although they might from the evidence be satisfied, that McAllister's testimony, delivered in the action of *Robinson* v. *Sibley*, was false and such as would make him guilty of perjury, if under oath, yet if the defendant failed to prove that an oath was actually administered to him in that trial, the defendant's justification was not made out, and the plaintiff would be entitled to their verdict, and to some damages; and stated to the jury, that the defendant had wholly failed to produce a single witness who had testified that McAllister was actually sworn. And that the burden of proof as to this point, was on the defendant, and he must be held to prove it to their satisfaction. The counsel for the defendant then requested the Judge to instruct the jury, that if the plaintiff, McAllister, actually testified as a witness in the action of *Robinson* v. *Sibley*, without informing the Court, or the parties, that he had not been sworn, he was in this action estopped from denying that he testified under oath, and they ought to presume him to have been under oath. And that, if not, it was competent for the jury to presume, and to find from the evidence in the case, that he was legally sworn, until the contrary was shown. The Judge then remarked to the jury, that he could not alter his instructions to them; and added, that he had not said, nor did he mean to be understood to say, that it was necessary that the defendant should produce a witness to testify, that he actually saw the oath administered. The Judge also instructed the jury, that if the defendant's justification failed solely on the ground, that the defendant had been unable to prove that McAllister had the legal oath administered in the trial of the case, *Robinson* v. *Sibley*, that they might take that fact into consideration in estimating the damages; for it would be evidence of great wrong on the part of McAllister, and he ought not to be entitled to so much damages; and that it would be competent for them to find very small, or even nominal damages. To which instructions and directions, the counsel for the defendant, the jury finding for plaintiff, excepts

and prays the Honorable Court, that this bill of exceptions, being found substantially correct, may be allowed and certified."

The foregoing exceptions were signed by the counsel for the defendant, and certified in the usual manner by the presiding Judge. He, however, made and signed with the exceptions a memorandum, of which a copy follows:—

"To prevent any misapprehension, it is proper to state, that the whole testimony is not here presented; nor the whole instructions on the point of damages, or on other points, stated, but only so much of the testimony and instructions as may present the subject of complaint."

The facts in relation to the motion for a new trial will be sufficiently understood from the remarks on that subject in the opinion of the Court.

This case was argued at some former term by

Ruggles and *J. Williamson*, for the defendant—and by

W. G. Crosby, for the plaintiff.

Ruggles said, it was a common principle, that in civil actions, where matter of personal wrong is complained of, the plaintiff must come into Court with clean hands; and that he cannot recover against good conscience and the justice of his case. 3 Burr. 1353; 1 Chitty on Pl. 486. If a man may falsely palm himself upon a Court as a sworn witness, deliver false testimony, and thereby produce an unjust verdict, and on being told by the injured party, believing that he was under oath, that he swore falsely, maintain an action of slander, it would be a reproach to the law, that should thus reward him for his turpitude. This part of the case is presented in three points of view. 1. If McAllister testified without taking the oath, the words used by the defendant, not necessarily importing perjury, did not amount to a charge of perjury. 2. McAllister is estopped from contending that the words imported perjury, having wrongfully omitted to take the oath, yet assuming to testify as a witness freed from the responsibilities of a witness. 3. If not so estopped, he is precluded by his own misconduct from denying that he was under oath. He cited *Sib-*

ley v. *Marsh*, 7 Pick. 38; 1 Campb. 245; 2 Stark. Ev. 876; 5 Esp. R. 13; 3 Campb. 323; 4 Campb. 215.

The ruling of the Judge was erroneous in admitting the brief statement to be considered as evidence at all, under the general issue, of the speaking of the words. With the exception of two cases, the rule has been uniform, that the plaintiff cannot use one plea of the defendant for the purpose of proving a fact which the defendant denied in another. 5 Taunt. 228; 1 T. R. 125; 2 Phill. on Ev. (Amer. Ed.) 97, note; 2 N. H. Rep. 89; Big. Dig. 593, note; 5 Bac. Abr. 448; *Sperry* v. *Wilcox*, 1 Metc. 267. The decision in the excepted cases, *Jackson* v. *Stetson*, 15 Mass. R. 48; and *Alderman* v. *French*, 1 Pick. 1, he strenuously contended, had neither reason nor authority to support it.

Williamson, in arguing the motion for a new trial, cited 1 Cowen, 221, and note, and 432; 5 Cowen, 283.

W. G. Crosby, for the plaintiff, remarked that the plaintiff introduced testimony to prove, that the defendant had accused him of being guilty of the crime of perjury, and there rested his case. The burthen of proof was then upon the defendant to show that the plaintiff was guilty of the crime alleged; and to do this, he was clearly bound to prove, among other things, that he had made false statements under oath. It is not understood, that the instructions of the Judge thus far are objected to. The complaint is, that he did not give the additional instruction prayed for; and it is contended by the counsel for the defendant, that the plaintiff is estopped from requiring proof, that he was sworn. This position amounts only to saying, that when the defendant charges the plaintiff with the crime of perjury, and a suit is brought in consequence of it, and the defendant pleads that the charge is true, that he is not required by law to prove his plea, but may prevail without proving it. The charge of the Judge was extremely liberal to the defendant, in instructing the jury, that if the plaintiff made statements from the witnesses' place it would be evidence for their consideration in mitigation of

damages, although they might not be satisfied, that he was under oath. *Sawyer* v. *Hopkins*, 22 Maine R. 279; *Stone* v. *Clark*, 21 Pick. 53; *Carter* v. *Andrews*, 1 Pick. 16.

He thought the plaintiff had more cause of complaint, than the defendant, with respect to the ruling of the Judge, "that the jury might take the brief statement into consideration as a circumstance," &c. The Judge refused to consider the cases of *Jackson* v. *Stetson* and *Alderman* v. *French* to be law, and merely admitted the pleading of the truth of the words to be given in evidence as an act of the defendant, to go to the jury with other proof, to establish the fact, that the words were spoken. The counsel was not aware, that those cases had ever been overruled. The jury might properly inquire, whether the defendant would have pleaded that plea, if he had not spoken the words.

The opinion of the Court, SHEPLEY J. attending to the trial of issues to the jury in the County of Washington at the time of the argument, and taking no part in the decision, was drawn up by

TENNEY J. — This is an action for words, alleged to have been spoken by the defendant, charging the plaintiff with the crime of perjury. The general issue was pleaded; and a brief statement filed, alleging the truth of the words.

The plaintiff attempted to prove, and introduced evidence for the purpose, that the defendant said, that at the trial of an action in favor of Charles Robinson against the defendant, in the county of Kennebec in 1839, in which trial the plaintiff was a witness, the plaintiff swore falsely and that he committed perjury.

The defendant introduced evidence to prove, that the plaintiff did commit perjury at the trial referred to; and several witnesses were examined touching the question, whether the plaintiff was under oath or not, when he testified. No witness stated that he saw the oath administered to the plaintiff, but it was in evidence, that when he testified, he occupied the witnesses' stand, and testified as a witness; and there was no

evidence that he was not sworn before he gave his testimony. It was in evidence, that after the trial, the defendant said to the witness, "if you had not sworn falsely," or "if you had not sworn as you did, the cause would not have gone against me"; and it did not appear that any explanatory reply was made, such as that no oath was administered. It appeared also, that the plaintiff spoke of the facts, which he *testified* or *swore* to, at the trial.

The grounds taken for the defendant were: —

1st. If the plaintiff testified without taking the oath, the words used by the defendant, not necessarily importing perjury, did not amount to a charge of perjury.

2d. That the plaintiff is estopped from contending that the words imported perjury, having wrongfully omitted to take the oath, yet assuming to testify as a witness, freed from the responsibilities of a witness.

3d. If not estopped, he is precluded by his own misconduct from denying that he was under oath.

Before the plaintiff could entitle himself to a verdict, he was required to satisfy the jury, that the defendant had made the charge, as alleged in the writ. If the effect of the evidence introduced for the purpose was sufficient, and that it related to a charge made concerning his testimony given in the trial of the action of Robinson against Sibley, and there was no explanatory words used by the defendant in connection, the plaintiff had made out his case. That accusation necessarily embraced all the elements, which constitute the offence, and would occasion all the injury to the plaintiff, which such a charge in any form, coming from the defendant, was calculated to produce. If, however, there were other words used in connection at the time, showing that the defendant did not charge the plaintiff with having committed legal perjury, he could not be holden, unless special damages had been alleged and proved. For instance, if the defendant had said at the same time he uttered the offensive words, that the plaintiff was not under oath, or if that fact was well understood by all present, and the charge was made in distinct reference to the

evidence so given, the plaintiff was not in truth charged with the crime of perjury. But if the defendant had no suspicion at the time of publishing the words, and there was nothing said by any one that no oath was administered to the plaintiff on the occasion referred to, and he accused him of the offence, he surely ought not and cannot be exonerated on account of a doubt, which may have since arisen, whether the plaintiff was testifying under the sanction of an oath. The question arising under the general issue was not what offence was committed by the plaintiff, if the testimony given by him was untrue; but of what offence did the defendant charge him, when he uttered the words complained of.

Did the Judge err in declining to instruct the jury, that the plaintiff was estopped from contending that the words imported perjury, on account of his having wrongfully omitted to take the oath, and yet assuming to testify as a witness, freed from the responsibility of a witness? This request must have been based upon the supposition, that the jury would find, that the plaintiff did wrongfully omit to take the oath, and did give testimony as a witness. Such an omission, we think, could not legally authorize the defendant to charge the plaintiff with the crime of perjury. He would be justified in stating the facts as they were, but by reason of that, he could not with propriety accuse him of what he was innocent. The commission of the crime of perjury is an entirely distinct offence from that of omitting to be sworn before testifying as a witness. And we know of no principle, which takes from a party the remedy for being accused of one offence, by reason of his having committed another and distinct offence. But the case presents no facts on which such a request could have been founded. There is nothing, which tends to show that evidence was introduced in order to satisfy the jury that the plaintiff wrongfully omitted to be sworn. If there was an omission to be sworn, that fact alone presupposes no wrong intention on his part, more than on the part of those who were interested and engaged in the trial. It does distinctly appear from the case, that there was no evidence adduced at the trial, that the

plaintiff was not sworn before testifying as a witness; consequently there could have been nothing to satisfy the jury that he was not qualified by taking the usual oath.

The plaintiff cannot be prejudiced, by having through his counsel, contended to the jury, that the defendant had failed to make out the justification in his brief statement. If the plaintiff had succeeded in proving that the accusation was made, he was required to go no farther. The defendant was at liberty to go to the jury with his case, as it was left by the plaintiff; or offer evidence to rebut that of his adversary, or take the ground indicated by his brief statement. If he undertook the latter, that defence could be made out only by showing that every material allegation was true. He had no right to expect, that the plaintiff would give facilities in doing this, or to omit to present to the jury in argument every defect in the evidence relied upon by him. Under this issue, no admission of any fact, necessary for its support, could be required of the plaintiff. The defendant voluntarily took upon himself this burden, and he cannot complain, because the plaintiff refused to aid him therein. It was material for him to prove under his brief statement, that the plaintiff had been sworn as a witness, and if he failed to do this, his defence was unsuccessful; and if the plaintiff had satisfied the jury that the accusation was made, he was entitled to some damage. But if the defendant had succeeded in showing that, the statements of the plaintiff at the trial of the action between Robinson and Sibley were false, and the plaintiff prevailed only by reason of doubts in the minds of the jury, whether an oath was administered, he certainly ought not to be subjected to the payment of great damages, and such was the remark of the Judge at the trial. The cases cited by the defendant's counsel on this branch of the case, we think not analogous to the action before us. They were those in which a party had held out by acts or declarations, or both, that certain things were true, which, being so, would subject him to some liability. He was not allowed to avoid that liability by proving facts inconsistent with his former acts and declarations. In the case

at bar, there is nothing which shows that the plaintiff represented in any manner, that he did not testify under oath, excepting that he required of the defendant legal proof of the facts alleged in his brief statement.

Exceptions are taken and relied upon, to the instruction to the jury that they might take the defendant's brief statement into consideration as a circumstance, which might have some weight in their minds, on the question, whether the defendant did charge the plaintiff with perjury before action brought, although that alone, would not be sufficient to establish the fact.

Rules of evidence cannot be disregarded in cases, where they are applicable. But there are often presented to the jury, circumstances attending the evidence, but which make no part of that, technically so denominated, and yet they may and do, have an influence upon the minds of the jury. This effect cannot be prevented, and there can be no legal rules laid down of a controlling character one way or the other in relation to such circumstances. A judge cannot demand of the jury their consideration of the matters referred to, neither can he forbid them to give their attention to them. Of this description is the conduct of a party, in reference to the proceedings at the trial of his action. If a defendant in an action upon a note of hand purporting to be made by him, should pronounce the signature a forgery, and introduce evidence of that fact, and at the same time should endeavor to prove, that he paid the note at maturity, without objection; the former point left in doubt, the course taken on the latter, would be a matter proper to consider in reference to the former.

Mr. Starkie, in his treatise on evidence, vol. 1, page 487, 488, says, "The presumption, that a man will do that which tends to his obvious advantage, if he possesses the means, supplies a most important test, for judging of the comparative weight of evidence; it is to be weighed according to the proof which it was in the power of one party to have produced and in the power of the other to have contradicted. If on the supposition of a charge or claim, unfounded, the party against

whom it is made has evidence within his reach, by which he can repel that offered to his prejudice, his omission to do so supplies a strong presumption, that the charge or claim is well founded. It would be contrary to every principle of reason, and to all experience of human conduct to form any other conclusion."

Mr. Justice Foster, in his discourses, vol. 3, c. 2, § 2, remarks, "it must be admitted, that mere *alibi* evidence lies under great and general prejudice and ought to be heard with uncommon caution, but if it appear to be founded in truth, it is the best negative evidence, which can be offered. The failure to support a defence of the kind just referred to, cannot make stronger the testimony offered in support of the prosecution; but it shows a willingness to resort to what is not shown to be true, which is a course not natural for an innocent party to take. In the case of *Millay* v. *Millay & als*, 18 Maine R. 387, which was for an assault upon the person of the plaintiff, and he exhibited at the trial marks of injury; it was attempted to be proved by the defendants, that some of those marks were the consequence of another injury, than that which was in controversy, and the jury were allowed to consider whether the party had attempted to practice imposition upon the jury in presenting the marks, with the other evidence, which was conflicting. The instruction of the Judge was held proper by the whole Court, it not being a declaration of any legal rule, controlling the judgment of the jury.

If the defendant in the case before us had not uttered the words alleged, and there were the means of showing the real facts, as they took place, it is unnatural, that he should undertake to prove that perjury was committed by the plaintiff, when by a failure, he would be exposed to the payment of greater damages, than he would be upon a simple denial of his guilt. If it should however appear, that the evidence in support of the prosecution was of such a character, that no opportunity would seem to be presented, to rebut or explain it, this would perhaps sufficiently account for a defence, founded upon the alleged truth of the charge. The jury were allowed to give

the circumstance such weight as they might consider it to deserve and no more. It might be important, and it might be regarded as totally immaterial. We think the instruction was warranted by authority and principle.

The Judge was requested to instruct the jury, that from the facts shown by the defendant, to prove that an oath was administered to the plaintiff before testifying, they were authorized to presume that such was the case, though no direct evidence thereof was adduced. He had instructed them, that the burden was on the defendant to satisfy them of that fact, but that he did not mean to say, that it was necessary, that the defendant should produce a witness to testify, that he actually saw the oath administered. This was a matter of fact for the jury, and we see nothing erroneous in refusing to give the instruction in the terms requested.

A motion is made, that the verdict be set aside on account of alleged misconduct in two of the jurors, who sat in the trial. There is no positive proof of any want of the strictest propriety in Oliver I. Whitten, one of the jurors referred to in the motion. But if it were otherwise, all the objections to him, were made before the action came on for trial, with a full knowledge of the facts on the part of the defendant, and the juror having been examined touching the matter, was permitted to sit in the trial.

Evidence has been taken, that Rufus Whittam, another of the jury, said in reference to this case after the evidence was out, and before the argument of counsel, that "he had his mind made up, and whatever should be said would not alter it." The juror himself gives a different account of the conversation, and says the language used by him was, "that the Judge would let in no more evidence in the morning, that he had made up his mind about the case, all he wanted was the Judge's charge; that it did not make any odds what counsel said; and he believed this was all the conversation respecting the case." The import of the conversation, as detailed by the two witnesses, is not similar one to the other; but we cannot disregard either. The juror states facts rather additional, than

contradictory to those of the other witness. They can be reconciled by supposing what often is the case, that the juror made remarks, which were not noticed, or were forgotten, by Mr. Patterson.

It is the duty of jurors to listen to the arguments of counsel touching the facts in issue. They are not supposed to have viewed the evidence in all the aspects, in which counsel may present it. The same facts often make a different impression upon the mind, after they have been placed in certain relations to each other, from that which was previously produced. But it would be strange if there were not many cases, wherein the minds of the jury were fully convinced before any thing was said in argument; but it does not therefore follow, that they had resolved to turn a deaf ear to the remarks of counsel.

It was not prudent in the juror to express himself as he did. It does not however appear, that he would not give due attention to the arguments, although he supposed the case so well understood by him, that they would avail nothing. There is nothing showing in whose favor he had formed an opinion, or that he had been influenced by any thing excepting the evidence in the case. If he speaks the truth, he was desirous of hearing the charge from the Court; and when that should be made he believed he should be prepared with an opinion, which would be satisfactory to himself without further aid. We do not think this so objectionable, as to make it proper to disturb the verdict therefor.

Exceptions and motion overruled.

HIRAM O. ALDEN *versus* AARON FITTS.

By Rev. Stat. c. 16, a court martial had power to impose a fine, as the punishment for an offence cognizable by such court; and that power is not taken away by the militia act of 1844, c. 122.

There is no provision in the constitution of this State, which forbids the legislature to confer on courts martial the power to punish by fine.

THIS was an action, brought by the plaintiff as division ad-

vocate of the division of miltia, to recover a fine incurred by a neglect of duty by the defendant as an officer. Copies were furnished, merely, of the demurrer and joinder; and what the declaration was, which was demurred to, does not appear. It seemed to be understood at the argument, that the defendant had been sentenced by a court martial to the payment of a fine for neglect of duty as an officer of the militia; and that the action was brought upon that record by the plaintiff, as division advocate, to recover the fine, exceeding twenty dollars in amount.

The defendant demurred to the declaration, assigning the following special causes: —

1. That the court martial at the time of its sitting, as specified in the plaintiff's declaration, had no jurisdiction of the causes and matters specified in said declaration, nor right to determine and render judgment therein.

2. That the provision of the statute which allows a court martial to impose a fine, to wit, the payment of money, for the neglect of military duty, as alleged in the declaration, is repugnant to the constitution of this State, and null and void.

3. That the declaration doth not allege, that the said court martial was duly constituted according to law.

4. That said declaration is in other respects uncertain, defective and informal.

H. B. Abbott, for the defendant, contended that so much of the Rev. Stat. c. 16, § 120, as authorized a court martial to impose a fine exceeding twenty dollars was unconstitutional and void. He cited and commented upon the constitution of this State, Art. 1, § 20; Rev. Stat. c. 16, § 120; Militia act of 1834, c. 121, § 37; Stat. 1837, c. 276, § 10.

2. The law was repealed before the court martial was holden, by the Stat. 1844, c. 122. The repeal of the law takes away all power to collect any fines incurred under the provisions of the act before the repeal. 11 Pick. 350; 3 Stark. Ev. 1129.

W. G. Crosby, for the plaintiff, said that the Stat. 1844, c. 122, had no bearing whatever upon the present question.

He cited *Rawson* v. *Brown*, 18 Maine R. 216, as conclusive against the positions taken in behalf of the defendant.

Per curiam. — TENNEY J. being absent, holding the Court in Washington County.

The two first causes of demurrer assigned must, in conformity with the decision in *Rawson* v. *Brown*, 18 Maine R. 216, be overruled. The statute of 1837, c. 276, § 10, has been reenacted in Rev. Stat. c. 116 ; and in reference to the doings of courts martial is not affected by the Stat. 1844, c. 122.

The third cause of demurrer was not urged upon our attention in the argument ; and must, therefore, be considered as waived.

The demurrer is overruled, and the declaration adjudged good ; and judgment is to be entered accordingly.

THE STATE *versus* GUY MCALLISTER.

If the warrant is made upon the same paper with the complaint, and expressly refers to it, it is a sufficient compliance with the provisions of Rev. Stat. c. 171, § 2.

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

Southard Phillips made a complaint against McAllister for an assault and battery, in legal form. This complaint was sworn to before a justice of the peace, who made out a warrant for the arrest of McAllister upon the same paper, commencing immediately under the complaint. After the formal part at the beginning, and direction to the officer, the warrant proceeded thus. "Forasmuch as the foregoing complaint hath this day been made upon oath before me, the subscriber, one of the justices of the peace, within and for the county of Waldo, these are therefore in the name of the State of Maine to require you to apprehend the body," &c. containing no recital of the complaint, unless by the above reference thereto.

The counsel for McAllister moved that the warrant and proceedings be quashed, because the warrant did not state the substance of the charges as the law in such cases requires. The District Judge overruled the motion, and directed that the trial should proceed. On the return of a verdict of guilty, McAllister filed exceptions.

W. G. Crosby, for McAllister, said that the gentleman who conducted the defence in the District Court, filed his exceptions on the ground, that Rev. Stat. c. 171, § 2, positively required that the warrant should state "the substance of the charge;" and that it was not so done in this instance.

Moor, Attorney General, for the State.

On the next day, WHITMAN C. J. and SHEPLEY J. being present, TENNEY J. holding the Court for the trial of issues of fact in the county of Washington, it was said by the Court, that as the warrant was upon the same paper with the complaint, and expressly referred to it, it was in substance a compliance with the provisions of the statute.

The exceptions were overruled.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF CUMBERLAND,

ARGUED AT APRIL TERM, 1846.

The Inhabitants of New Gloucester *versus* The Inhabitants of Danville.

Where an action by one town against another is commenced originally before a justice of the peace, and is carried by appeal to the District Court, and a verdict is given, and a judgment rendered thereon in that court, *no appeal* lies therefrom to the Supreme Judicial Court.

This was an action of assumpsit for the support of a pauper, originally commenced by the inhabitants of New Gloucester against the inhabitants of Danville, before a justice of the peace, and carried by appeal to the District Court. There was a trial of the action in that Court, and judgment was rendered there, on the verdict for the defendants. From this judgment the plaintiffs claimed an appeal, and entered into recognizance, &c.

The plaintiffs entered their action in the Supreme Judicial Court, and the defendants moved to dismiss the action because there was by law no right of appeal from the judgment of the District Court, in such case.

O'Donnel, for the plaintiffs.

Fessenden, Deblois & Fessenden, for the defendants.

Per curiam. — The case of *Seiders* v. *Creamer*, 22 Maine R. 558, is in point to show, that no appeal lies in the case at

bar to this Court. We are not aware of any good reason why towns, commencing actions before a justice of the peace, should be in any other predicament than would fall to the lot of other suitors in such tribunals. The statute law has made no distinction between them. It cannot be deemed politic or profitable, or be believed to have been in the contemplation of the legislature, that three trials should be had in actions involving the determination of matters of no greater importance, than such as are within the jurisdiction of a justice of the peace to be tried and decided. Chap. 97, § 13, of the Rev. Stat. has reference merely to actions originated in the District Court. This is evident from the section immediately preceding, and from § 7 of the same statute. That statute was enacted purposely to define the jurisdiction of the District Court, and to regulate proceedings to be had in it, and has no reference to appeals from other tribunals.

Appeal dismissed.

JOHN WINSLOW *versus* JEREMIAH KIMBALL, *Ex'r.*

Statutes are to receive such a construction as must evidently have been intended by the legislature; and to ascertain this, the Court, called upon to give the construction, may look to the object in view; the remedy intended to be afforded; and to the mischief intended to be remedied.

Where the wife of a legatee named in a will is one of the three subscribing witnesses thereto, the devise to the husband is void, and the wife is a competent witness to the will, under the provisions of the fifth section of Rev. Stat. c. 92.

On November 21, 1844, Andrew G. Winslow made his last will and testament, wherein he directed, that the principal portion of his estate should be divided into three equal parts, and that his brother, John Winslow, who now contests the validity of the will, should have one part, and that his friends, Jeremiah Kimball and Edward Wheeler, Jr., who were made executors, should also each have a third. The testator died in December, 1844, and in Feb. 1845, the will was approved and allowed by the judge of probate. John Winslow appealed from that de-

cree. One of the three subscribing witnesses to the will was, at the time, the wife of Edward Wheeler, Jr. one of the legatees. Upon the death of the testator, Wheeler declined to act as executor, and released all his claim under the will to Kimball.

Codman & Fox, for John Winslow, said, that a witness must be competent at the time of the execution of the instrument as a will. *Hawes* v. *Humphrey*, 9 Pick. 350. The release of the interest of the husband of the witness, therefore, does not render her a competent witness to the will.

It has been holden in England, under a similar statute, that such a case as this does not come within the fifth section of Rev. Stat. c. 92. 1 L'd Raym. 505; 2 Strange, 1253; Jarman on Wills, 65; 5 Barn. & Ald. 589. The legacy in the present case is not to the subscribing witness, and is not void. In England this difficulty has been remedied, by statute of 2d Victoria.

W. P. Fessenden, for the defendant, said that a legatee could have no interest under a will until the death of the testator. There was no difficulty at the time known to the witness. She did not know, that her husband was a legatee. When the fact became known, on the death of the testator, the husband released all interest under the will, and removed all interest, which was the only ground of objection to the wife. 3 Stark. Ev. 1690; 1 Burr. 417. She was in all respects a competent witness, if not interested. She had no interest when she signed her name as a witness, and she had none at the time of the hearing before the judge of probate.

The opinion of the Court was drawn up by

WHITMAN C. J. — This is an appeal from the decree of the judge of probate, for this county, approving the will of A. G. Winslow, deceased. The instrument was subscribed as usual by three attesting witnesses. But one of them was the wife of a legatee in the will. And it is insisted, that this is not a case within the Rev. Stat. c. 92, § 5, rendering bequests to subscribing witnesses void, as the wife was not a legatee; and it must

be admitted, that, nominally, she was not; and, upon a construction strictly literal, the ground relied upon might be tenable. But statutes are to receive such a construction as must evidently have been intended by the legislature. To ascertain this we may look to the object in view; to the remedy intended to be afforded; and to the mischief intended to be remedied. The object in view in the provision in question clearly was to prevent wills from becoming nullities, by reason of any interest in witnesses to them, created entirely by the wills themselves. No one can doubt, if it had occurred to the legislature, that the case before us was not embraced in the enactment, that it would have been expressly included. It was a mischief of the precise kind of that which was provided against; and we think may be regarded as virtually within its category.

Accordingly, in New York, where the statutory provision, in this particular, is the same as in this State, a devise or legacy to the husband or wife, the other being a witness to the will bequeathing it, is held to be void, upon the ground, as expressed by one of the Judges of the Court there; "that the unity of husband and wife, in legal contemplation, is such, that, if either be a witness to a will, containing a devise or legacy to the other, such devise or legacy is void, within the intent of the statute;" and upon the ground, that the statute concerning wills should receive a liberal construction, and one consistent with common sense. *Jackson* v. *Wood*, 1 Johns. Cas. 163; *Jackson* v. *Durland*, 2 *ib.* 314.

The decree of the Judge of Probate affirmed.

WILLIAM H. MORSE, *Adm'r*, *versus* ABIGAIL N. PAGE *& al. Ex'rs.*

The Rev. Stat. c. 109, authorizing the commissioners on an insolvent estate, or the Court on an appeal from their decision to require a claimant against such estate "to submit to examination" in relation to his claim, was designed for the protection of the insolvent estate against contested claims; and does not authorize the admission of the claimant to be a witness, on the motion of his own counsel, to prove his claim.

AT the trial, before WHITMAN C. J. a verdict was returned in favor of the plaintiff, and the counsel for the defendants filed exceptions to the rulings and instructions of the presiding Judge in several particulars. As a new trial was granted with reference to but one, it becomes unnecessary to notice the others. The facts are stated in the opinion of the Court, at its commencement. The admission of the administrator to testify in the case, is thus stated in the exceptions.

"On motion of the counsel for the plaintiff, William H. Morse, the plaintiff, was then admitted by the Court as a witness in the cause, the counsel for the defendants objecting to his admission; and said Morse was sworn in chief to testify in the cause. And being so admitted, the said Morse was examined by the counsel for the plaintiff as a witness in the cause, and on his examination testified that," &c. — giving testimony in support of the claim.

W. P. Fessenden, for the defendants, referred to the statutes on the subject. Stat. 1821, c. 51, § 26; and Rev. Stat. c. 109, § 7, 8, and 23. The eighth and twenty-third sections contain new provisions, not contained in any prior statute.

He then contended, that the Court, in giving a construction to the statute, should look to the intention of the legislature in making the provision, to the design and object of its enactment, rather than to the mere letter.

The design evidently was, that the Court, at the request of the counsel for the representatives of the deceased insolvent, might examine the creditor, who brought forward a claim, in order to ascertain whether it should be allowed. It is only

when the estate is rendered insolvent, that the examination of the claimant is authorized. It could not have been the intention of the legislature, that when the estate is insolvent, the alleged creditor is to offer himself as a witness to prove his own claim, when, without it, he would have failed. It was intended merely for the benefit of the estate. The letter, as well as the spirit of the statute favors this construction. It is only when "*required*" by the Court, or by the commissioners, that the claimant is to testify.

The mode of admission too, was an improper one. He was sworn in chief as a witness generally, when he should have been sworn to make true answers only.

Deblois and *O. G. Fessenden*, contended that the Court decided properly in directing the examination of the administrator in support of the claim. They cited the same sections of Rev. Stat. c. 109, and said, that it was the duty of the Court, so to construe a statute, that it may have a reasonable effect agreeably to the intention of the legislature. 3 Mass. R. 540; 12 Mass. R. 384; 14 Mass. R. 93. The letter of the statute may be enlarged or restrained, according to the true intent of the makers of the law.

The object of the law, on this subject, was to allow the commissioners, or the Court on appeal, to get at the truth in relation to the claim. If the Court orders the examination, it is immaterial who makes the motion, or who puts the questions. It is a mere matter of discretion, whether it shall be permitted or not, and the presiding Judge is to decide it.

The administrator stands in the place of the creditor, and may be regarded as the creditor.

The opinion of the Court was drawn up by

Shepley J. — The defendants are the executors of the will of Jonathan Page, deceased, whose estate had been represented to be insolvent, and commissioners had been appointed to receive and examine claims against it. The plaintiff, as the administrator of the estate of John Howland, deceased, had presented to the commissioners for allowance, three promissory

notes, signed by the testator, and payable to the intestate, one of them bearing date on March 29, 1823, and the other two on September 30, 1823. This claim was disallowed, and the plaintiff appealed and instituted this suit to recover the amount alleged to be due. The plaintiff, although objected to, was, on motion of his counsel, admitted as a witness on trial of the issue, was sworn in chief to testify in the cause, and did so testify.

The question is presented for consideration, whether he ought thus to have been admitted by virtue of the provisions of the statute, c. 109, § 23. That section provides, that "on the trial of such appeal before any Court or referees, the creditor may be examined upon oath as before the commissioners; and if he refuse to take the oath, or to answer fully upon examination, his claim shall not be allowed."

The manner of his examination before the commissioners is provided in these words of the seventh section. "The commissioners may, when they think it proper, require an oath to be administered by either of them to any claimant to make true answers to all such questions, as shall be asked of him by them relating to his claim; and they may thereupon examine him upon matters relating thereto." The eighth section provides, that "if any claimant refuse, when required, to submit to examination as aforesaid, his claim shall be rejected." It does not appear to have been the intention of the legislature to grant to the claimant a right, or to confer upon him the privilege, of proving his claim by his own oath. All the language used exacts and requires a duty of him to be performed on the demand and at the discretion of others, and not at his own pleasure. The commissioners may *require* him to answer "when they shall think proper." He is to be sworn only to make true answers to such questions, *as shall be asked of him by them*, relating to his claim. There is no provision granting to him the right to proceed and give testimony to a matter foreign to the question proposed, although it might be favorable to the allowance of his claim. A right thus to testify, or to be a witness in chief, would be inconsistent with the discre-

tion entrusted to the commissioners to examine him only, when they shall think it proper, and with the provision limiting his testimony to the answers to such questions, "as shall be asked of him by them."

A consideration of the design of the enactment will lead to a like result. The personal knowledge of a deceased person, respecting his debts and credits, and the means of proving them by other testimony than the books and written documents, which he may leave, is in most cases lost. His personal representative is often embarrassed thereby, and finds it to be difficult to prove a claim to be spurious, which he may have good reason to believe to be so. The legislature might reasonably be expected to interpose and to afford him additional means for the protection of the estate against such claims, especially in cases of insolvency, where it may become the interest of those having most intimate knowledge of the affairs of the deceased to bring forward such claims, while the creditors have little power to oppose them. It surely could not be expected to increase the difficulties, with which the personal representative is already burdened in the investigation of contested claims; or to afford claimants greater advantages, than they could have by law in the prosecution of the same claims against the deceased during his lifetime. A construction, which would confer such a privilege upon the claimant, and increase the disadvantages under which the administrator labors, certainly is not required by the language of the statute, if it should be granted that it is not forbidden by it.

The discretion entrusted to the commissioners must be transferred to the Court upon trial of the action there. A court of common law, however, does not of course interpose its authority to aid either party. It is not supposed to be sufficiently familiar with the merits of the claim to be enabled on its own mere motion to decide, when it would be proper to require it as a duty to be performed by the claimant, to answer questions respecting his claim. It would expect to be informed by the counsel representing the insolvent estate, of the necessity of resorting to the exercise of such a power, and to be satisfied,

that there was reason to believe it to be a proper case to call it forth, before it would enter upon the active exercise of it. If the statute was designed for the further protection of the insolvent estate against contested claims, the power should be exercised only for that purpose. To allow the claimant to interpose and to bring that power into active exercise for his own benefit, and against the remonstrance of the legal representative of the insolvent estate, would be to convert, what was designed to be a shield, into a weapon of offence.

In this case both parties are the representatives of deceased persons. The administrator, however, can have no rights superior to those of the creditor, which he represents. He presented the claim for allowance to the commissioners; and he prosecutes it on the appeal; and is, in the language of the statute, the claimant; although the claim is preferred in his representative character.

As it will be necessary to grant a new trial, because the plaintiff was admitted on the motion of his own counsel to testify as a witness in the cause, it will not be necessary to consider the other questions presented by the arguments.

Exceptions sustained,
and new trial granted.

THE STATE *versus* EDWARD NEWBEGIN.

The offence of breaking is a violation of the security intended to exclude; and when coupled with an entrance into a store with a felonious intent, it may constitute the crime described in Rev. Stat. c. 155, § 11.

But when the store is lighted up, and the doors are latched, merely, in the ordinary manner, without any fastening to exclude others, and the clerks are in the store ready to attend upon customers; and before eight o'clock in the evening one carefully lifts the latch and enters the store by the door, with the intention to commit a larceny therein, and does so enter and commit a larceny, secretly and without the knowledge of the attendants in the store; it does not amount to such breaking and entering as to constitute the crime intended to be punished under that section of the statute.

THIS was an indictment against Edward Newbegin and Samuel L. Barnes for breaking and entering the store of

Jeremiah Dow, in Portland, in the night time, and stealing twenty yards of satinett, valued at ten dollars, and was tried at the District Court, Cumberland county, March Term, 1846. Barnes did not appear, and Newbegin was tried alone. There was evidence tending to show, that said Newbegin was seen coming out of the store between seven and eight of the clock in the evening, of the day alleged in the indictment. The store was occupied by Mr. Dow, as a dry goods store, and was open in the evening for selling goods, till after said cloth was taken. There were two entrances to the store, one on Temple street and one on Middle street. The latter was the more frequented, but there was free access through either. There was a sign over each door. It was the door on Temple street into which the evidence tended to show, that Newbegin entered. It was a door with two sides and a glass in the upper part, the right side was the part used, and it was, when shut, held by a common latch, when persons were in the store, and opened and shut by customers as store doors are usually opened and shut; but when the store was left or closed for the night, it was secured by barring and locking. The evidence tended to show, that Newbegin and Barnes watched an opportunity to open the door, so as not to attract observation when they went in; but there was no other breaking than the lifting the latch and opening the door, as was usually done by persons entering the store. The store was lighted and the clerks were in it, when the goods were taken, as alleged in the indictment. The store consisted of but one room extending from Middle to Temple streets; and there was a light on the counter where the cloth which was taken lay. No one saw Newbegin lift the latch.

Goodenow, District Judge, presiding at the trial, instructed the jury, that if said Newbegin opened the door on Temple street and entered into the store for an unlawful purpose, it was breaking and entering, within the meaning of the statute, and would support the indictment upon the facts aforesaid.

On the return of a verdict of guilty, the counsel for Newbegin filed exceptions to the instructions of the Judge.

Wells & Sweat, for Newbegin, said that the store was open for the sale of goods in the usual manner; and that there was no other breaking, than every one commits who lifts the latch of the door, and enters to purchase goods. The store was lighted up, and three clerks were in it to attend to customers. Signs were up over each door, thus by universal custom inviting all to enter without asking permission. When the store was intended to be closed, the doors were fastened, so that there could be no admission without breaking. Whether the accused entered the store with the intention to commit a larceny or not, is entirely irrelevant to this question. There was no such breaking as is necessary to sustain an indictment under Rev. Stat. c. 155, § 11. *Commonwealth* v. *Trimmer*, 1 Mass. R. 476; 2 C. & P. 628; 2 Russ. on Cr. 4 & 5; 2 Stark. Ev. 318; 2 East's P. C. 487; *Commonwealth* v. *Stephenson*, 8 Pick. 354.

Moor, Attorney General, for the State, contended that the instruction of the District Judge was right. The accused opened the store door with the felonious intent to steal goods from it, which custom did not warrant, and the entry therefore was not for a lawful purpose. It was a sufficient breaking and entering. The words, in this respect, are the same as in Rev. Stat. c. 156, § 2; one forbidding the breaking into a store, and the other into a dwellinghouse. The authorities in relation to each, are therefore pertinent. 2 East's P. C. 487; 2 Russ. on Cr. 5, 9, 10, 11, 12; Rosc. on Cr. Ev. 253.

The opinion of the Court was by

Shepley J. — The statute, c. 155, § 11, provides, that if any person, with intent to commit a felony, shall, at any time, break and enter any office, bank, shop, or warehouse, he shall be punished by imprisonment in the state prison. The prisoner was indicted with another person for breaking and entering the shop of Jeremiah Dow, in Portland. He was convicted, and the case is presented on exceptions taken to the instructions, as to what facts were sufficient to constitute the offence of breaking. The facts essential to a decision of the question presented, appear to have been these. The shop had been

occupied for the sale of goods, with two doors opening on different streets for the entrance of persons to trade. The prisoner entered between seven and eight o'clock in the evening by the door opening on the street least frequented, being aided by another person to watch and inform him, so that he did it, when three clerks were seated by the fire, where they could not see that door. The shop was lighted and the clerks were there for trade. The doors and windows had not been closed to exclude persons, although the doors were shut. The prisoner watching for a favorable opportunity, carefully lifted the latch, opened the door, took a piece of cloth, and escaped.

It was doubtless the design of the legislature to use the words, break and enter, when defining this offence, in the sense, in which they are used to define the crime of burglary. To constitute that offence, there must be proof of an actual breaking, or of that, which is equivalent to it. Proof of an illegal entrance merely, such as would enable the party injured to maintain trespass *quare clausum*, will not be sufficient. Nor will proof of an entrance merely, for a purpose ever so felonious and foul, accompanied by any conceivable stratagem, be sufficient, if there be no actual breaking. There must indeed be proof of a felonious intent, but however clearly that may be proved, and however full may be the proof of entrance, the offence is not proved, until there be proof of an actual breaking or its equivalent. It is immaterial, by what kind of violence the breaking is effected. The gist of the offence consists not in the degree or kind of violence used. One, who had obtained an entrance by threats, causing the door to be opened for him; or by fraudulent misrepresentation and falsehood; or by conspiring with a servant within, was considered as guilty of the offence by the commission of acts equivalent to an actual breaking. The lifting of a trap-door, kept down by its own weight and not fastened, was adjudged to be a breaking. *Rex* v. *Brown*, 2 East's P. C. 487. Yet Baron Bolland held that the lifting of such a door, while newly placed and without the fastenings intended to be made, was not a breaking. *Rex* v. *Lawrence*, 4 C. & P. 231. An entrance

effected by cutting away a net work placed around an opening for a glass window, which had been left open, was held to be a breaking. *Commonwealth* v. *Stephenson*, 8 Pick. 354. While the offence will not be committed by an entrance through an open door, window, or other open place usually closed when others are intended to be excluded, it has been decided, that an entrance, by a chimney open, when the intention is to exclude, will be a breaking. *Rex* v. *Brice*, Russ. & Ry. C. C. 450.

The offence of breaking is a violation of the security designed to exclude. And coupled with an entrance into a shop with a felonious intent, it constitutes the crime charged in the indictment. The opening of a shop door in the day time, which had been closed only to exclude the dust or cold air, with a design that it should be opened by all, who should be inclined to enter, could not be a violation of any security designed to exclude, and therefore not a breaking. It would not even be a trespass, for the custom of trade in it would be evidence of a general license to enter. The effect would not be different, if the entrance were made in the evening under like circumstances, while the shop continued to be lighted and prepared for trade. Our statute, in defining this offence, makes no distinction respecting the time of breaking and entrance. The same acts will constitute the offence irrespective of light or darkness. In accordance with the principle stated, it was decided in the case of *Rex* v. *Smith*, Ry. & Moo. C. C. 178, that an entrance through a window left a little open, by pushing it wide open, was not a breaking. The twelve Judges appear to have been equally divided in opinion in the case of *Rex* v. *Callan*, Russ. & Ry. C. C. 157, whether the offence of breaking out of a cellar was committed by lifting a flap door, by which the cellar was closed, when the flap had bolts, by which it was usually fastened, and which were not bolted. If the proof had been, that the door had been closed to exclude, though not fastened by bolts, there would seem to have been a commission of the offence by the violation of that security. But when a door usually fastened for the purpose of exclusion by a lock, bar, or bolt, is entered, when not fastened in that

mode nor in any mode for the purpose of excluding others, one necessary element of the offence of breaking is wanting.

Exceptions sustained and
case remanded to the District Court.

JOHN B. BROWN *versus* ABRAHAM OSGOOD, JR.

As a general rule, a party cannot be permitted to disparage the credibility of a witness introduced by himself, by showing him to be generally unworthy of credibility. But the party calling the witness is not precluded from proving the truth of a particular fact by any other competent testimony, in direct contradiction to what such witness may have testified.

Nor is the right of a party to prove a fact to be different from the statement thereof by a witness introduced by him, restricted to cases where he is surprised by the testimony in that particular. And he may disprove a statement made in a deposition read by him, although he was present at the taking, and knew its contents.

Where a sale of the whole of his property by a father to his son, who gave back a negotiable note with a mortgage, was alleged to have been fraudulent as to the creditors of the former, it furnishes no cause for a new trial, if the presiding Judge, in his charge to the jury, at the trial, states as a circumstance for their consideration, that this note could not be reached by a creditor by the trustee process, without adverting to a remedy which is provided for the creditor by compelling the debtor to make disclosure under the poor debtor act, Rev. Stat. c. 148.

WRIT OF ENTRY. The demandant claimed the land under the levy of an execution in his favor against Abraham Osgood, Sen'r, upon the premises, as the property of Osgood, made on February 13, 1844, the attachment upon the writ having been made in March, 1841.

The tenant claimed under the same Abraham Osgood, by virtue of a deed thereof from him, dated November 5, 1839, and recorded upon the same day.

The demandant contended that this deed was fraudulent and void, as to the creditors of Osgood, Sen'r. Much evidence was introduced by each party, which is set out in full in the exceptions filed by the tenant, he having also filed a motion for a new trial, because, as he alleged, the verdict for the demandant was against the evidence.

One part of the demandant's evidence is thus stated: —

The demandant then called from the hands of the counsel for the tenant the deposition of Abraham Osgood, taken by their client, which he read to the jury as his evidence.

The eighth interrogatory on the part of the tenant, Abraham Osgood, Jr. was: — "Was or not the conveyance made by you to Abraham Osgood, Jr. of Nov. 5, 1839, a *bona fide* conveyance, and for a valuable consideration."

The answer of the deponent was: — "It was."

The counsel for the defendant, on the evidence, contended, that the plaintiff having produced in evidence the deposition of Abraham Osgood, and made him his witness, and thereby negatived all fraud, either actually intended or legal fraud, was estopped from setting up fraud in the sale and conveyance from Abraham Osgood to Abraham Osgood, Jr. as he could not be permitted by law to discredit his own witness, or show that he had testified falsely, and as the said Abraham Osgood had testified positively and unequivocally that the sale and conveyance to his son, Abraham Osgood, Jr. was made in good faith, for a full and fair consideration, which was actually paid, and that the sale was made without any intent to defeat or delay his creditors, the plaintiff was bound by it.

That fraud consisting in the intention with which the sale and conveyance was made, the witness could not be mistaken as to his motives in making the sale and conveyance to his son, Abraham Osgood, Jr. the defendant, and that there was no room for the jury to find that the witness was mistaken.

That the case clearly showed, that Abraham Osgood did not part with his estate, but had a valuable estate in his hands, in the note and mortgage from the son of more than $2000, which was double of all he owed, exclusive of the debts due in Boston, which were secured; and which property appeared to be in him by the public records of the county, and which property could be reached by legal process, inasmuch as his creditors could compel him to disclose it, and might elect to take it on a fair and just appraisement for the payment of their debts.

That the whole evidence showed that the son, Abraham Osgood, Jr. was able to make the purchase, and did pay for the property by the plaintiff's own showing.

And that the presumption of fraud arising out of the connection or relation of father and son, and from the sale and conveyance from the father to the son of all his property, was conclusively rebutted by the plaintiff's own positive proof to the contrary.

And that the presumption which might arise from the immediate sale of the goods purchased in Boston, that the father intended to delay or defeat his Boston creditors, was rebutted by the fact that his Boston creditors were abundantly secured to their satisfaction.

And that it was not on the credit of the goods purchased in Boston, that the debts due in Portland were contracted, as all the debts due in Portland were contracted long before the purchase of the goods in Boston.

And that the fact that the defendant was permitted to remain undisturbed in the open possession of all the property, for years, under the eye of the plaintiff, and the other creditors of Abraham Osgood, was strong corroborative proof of the fairness of the purchase by the son from the father, and that the plaintiff himself was satisfied of the fairness and integrity of the transaction.

The exceptions state, that at the trial, before WHITMAN C. J. the Judge in his remarks to the jury, after stating the several conveyances, charged them, that if the conveyance of the land in dispute, made by Abraham Osgood, Sen'r, to Abraham Osgood, Jr., was made with intention to delay or defraud the creditors of Abraham, Sen'r, or interfere with them in the collection of their debts, the conveyance was void, and the plaintiff, having shown a regular levy on the same, was entitled to recover; that the conduct of a party was oftentimes much stronger evidence of such intentions than their declarations, and more to be relied on by the jury; that beyond all question it had been proved in the case, that the father at the time was deeply in debt, that the defendant being the son of the

grantor, Abraham, Sen'r, they would judge whether there was any reasonable ground to doubt that there existed a great confidence between them; or to doubt, that if the father intended a fraud, the son was conusant of it; that so far as it appears, at the time of the conveyance the father conveyed to the son all the property he possessed, which could be attached; that having taken a negotiable note from the son of $2000, and upwards, that property could not be reached by the trustee process; that the sale of the property was immediately after the large purchase of the goods in Boston; that they would remember that although the grantor, Abraham, Sen'r, received from his son a note for over $2000, yet, so far as appeared, not one cent of any debt, except the Boston ones had been paid; that however fraudulent may have been the intentions of the father, yet if the son did not participate in the fraudulent intention, the sale would be good; and that they would therefore inquire whether or not the son did thus participate; and if they did not find him thus to have participated, they would find for him.

The counsel for the defendant then requested the Judge to call the attention of the jury to the deposition of Abraham Osgood, and to instruct the jury, that inasmuch as the plaintiff had made use of and read the deposition of Abraham Osgood to the jury, and thereby made him his witness, and the said Abraham Osgood had positively denied all fraud, and any intent to defraud or delay his creditors, the plaintiff was not at liberty to deny or contradict the testimony of his own witness; and therefore that the jury ought to take the testimony of Abraham Osgood as true, on the point that he made the conveyance in good faith, and with no design to delay or defraud his creditors.

On which request the Judge stated to the jury, that it was true the plaintiff could not impeach or contradict his witness, but he might show that he, the witness, was mistaken, and the jury had a right so to presume, if they were satisfied of the fact.

The jury returned a verdict for the demandant, and the tenant filed exceptions.

Fessenden, Deblois & Fessenden, for the tenant, argued in support of the legal propositions taken at the trial; and also contended that the verdict ought to be set aside on the motion for a new trial. They cited 1 Greenl. Ev. 442; Buller's N. P. 297; Swift's Ev. 143; Peake's Ev. 135; 3 B. & Cr. 746; 2 Stark. R. 296; 1 Stark. Ev. 147; 8 Bingh. 57; 1 Phil. Ev. 213; 2 Campb. 256; 4 B. & Cr. 25; 1 W. Bl. 365; 4 Barn. & Ad. 193; 5 Wend. 301; 12 Wend. 105; 4 Pick. 179.

Rand, for the defendant, said that he did not contend, that a party has the right to discredit a witness, called by him, by showing his general character for truth to be bad. All that was necessary to establish in the present case was this; that where a party has read a deposition, he is not estopped from showing by other evidence, that a fact stated therein is erroneously or untruly stated. Thus far, the law is well settled. 1 Greenl. Ev. § 443, and cases cited in the note. The only objection to the rulings of the presiding Judge on this point is, that they were too favorable to the tenant. There is no distinction between testimony in a deposition and from a witness. If it was necessary to show, that the party was taken by surprise, in order to introduce such testimony, it would exclude it entirely, in the case of depositions. The best authorities are opposed to any such distinction. The controversy between the parties at the trial, was as to the fact, whether the conveyance was or was not fraudulent. It was no more an inquiry into the motives of the parties to that fraud, than in every other question of that description. Whether the conveyance is fraudulent, or not, is always a question of fact for the jury.

The opinion of the Court was drawn up by

Whitman C. J. — The plaintiff's claim of title depends upon a levy upon the demanded premises as the property of Abraham Osgood, Sen'r; and that of the defendant on a deed thereof made to him anterior to the levy by the said Abraham, Sen'r. The plaintiff contends, that the deed so made was intended to delay or defraud the creditors of the grantor therein, of whom the plaintiff was one; and that the same is therefore

inoperative against him. Much evidence, at the trial, was introduced on the one side, and on the other, in reference to this point, as is fully shown by the bill of exceptions, with a view to support a motion filed by the defendant for a new trial, upon the grounds therein set forth. In the argument of the defendant's counsel, however, the reliance for obtaining a new trial seems to have been placed, almost altogether upon the matter arising under the bill of exceptions. Our attention, therefore, will principally be confined to the consideration thereof.

It appears that the deposition of said Abraham, Sen'r, had been taken by the defendant to show, that his conveyance to the defendant was *bona fide*, and for a valuable consideration; at the taking of which the plaintiff was present, and put cross-interrogatories, the answers to which, he deemed important to the maintenance of his action. At the trial the defendant declined using the deposition. The plaintiff thereupon called for it, and agreeing to use it as if taken by him, no objection was made to his doing so, and he read it as evidence to the jury. In it the witness appeared to have been asked by the defendant, whether the conveyance was made by him *bona fide*, and for a valuable consideration or not; and he answered in the affirmative. The counsel for the defendant insisted, that this, being in a deposition, used by the plaintiff as if taken by him, was conclusive evidence, that such was the fact; that, having made the witness his own, it was not competent for him to prove that the fact was otherwise; and more especially so in a case in which the question, as to the intention of the witness, was involved, concerning which no one could have positive knowledge but himself; and requested the Court so to instruct the jury, which was declined. The counsel now argue that the Court erred in not complying with their request.

It is undoubtedly a general rule that a party should not be permitted to disparage the credibility of a witness, introduced by himself, by showing him to be generally unworthy of credibility. But to this, as to most other general rules, there are some exceptions, as stated in Greenl. on Ev. vol. 1, § 443; and he, moreover, adds that, "it is exceedingly clear, that the party

calling a witness is not precluded from proving the truth of a particular fact, by any other competent testimony, in direct contradiction to what such witness may have testified; and this, not only when it appears that the witness was innocently mistaken, but even where the evidence may collaterally have the effect of showing, that he was generally unworthy of belief." And the cases cited under the section, fully sustain the position.

But the counsel insist, that this can be done only when the party is surprised by the testimony of his witness; that if he introduces him, well knowing that his testimony will be adverse to his interest, he will be concluded by it; and, as an authority in support of this distinction, they cite and rely upon the case of *Alexander* v. *Gibson*, 2 Campb. 555; and the marginal abstract of the reporter is to that effect; but the Court make no mention of any such qualification of the rule. The case, however, is in point for the defendant to the effect, that a party shall not be allowed to avail himself of the testimony of his witness in part, and repudiate the residue. But this was a decision at *nisi prius*; and is expressly overruled by the whole Court in this particular, in the case of *Bradley* v. *Ricardo*, 8 Bing. 57; and the rule, as laid down in Buller's Nisi Prius, was recognized as the settled law; and without reference to the matter of surprise. A witness may be called to testify to a great number of facts essential to the interest of the party calling him, who may know, that, on cross-examination or voluntarily, he, from mistaken impression, or from some other cause, will testify incorrectly as to some particular facts. Must he forbear to call him in such case? Such a rule would be productive of no advantage in legal proceedings, but would often tend to the suppression of the truth. Every days experience teaches, that witnesses may testify incorrectly as to some one, out of a great number of facts, accompanying a transaction; whether from misapprehension or a design to favor the other party, it may be very difficult, if not impossible, to determine. At the same time the party producing him may have it in his power to show the incorrectness of the testimony

in such particulars. Surely, in charity he may be allowed to suppose his witness mistaken, and to disprove such statement, though it may tend even to show that the witness' credit is not entirely free from suspicion : and, besides, when found to be stating facts against the interest of the party calling him, which can be proved to be untrue, should tend to fortify his credit as to those which he may state promotive of the interest of such party, as it would thereby be rendered evident, that such testimony was not the result of preconcert or of partiality. Accordingly, Mr. Justice Putnam, in *Brown* v. *Bellows*, 4 Pick. 179, in delivering the opinion of the Court, lays down the law to be, that "a party is not obliged to receive, as unimpeachable truth, every thing which a witness, previously called by him, may swear to ;" and that, "if the witness has been false or mistaken in his testimony, he (the party calling him,) may prove the truth by others." Neither in this case, nor in *Bradley* v. *Ricardo*, before cited, is there a word about surprise. It may well be presumed that no party would introduce a witness to prove a single fact, with full knowledge that he would testify to the contrary.

But, as to the matter of surprise, it is believed to be referable, legitimately, only, to the question whether, when a party has produced a witness, who testifies adversely, he shall be allowed to show that the witness had, on a former occasion, made a different statement. There may be good reason for holding, that, unless the party in such case can make it apparent, that he had good reason to suppose the witness would have testified differently, he should not be permitted to show that the witness had made a different statement at another time. It has been doubted, whether a party should be permitted to do so at all, in reference to his own witness ; but Mr. Greenleaf, (vol. 1, § 444,) thinks the weight of authority is in favor of its admissibility. And the case of *Cowder & al.* v. *Reynolds*, 12 Serg. & R. 281, supports it. A difficulty, however, in such cases seems to present itself, as an issue is made, which the Court must decide, viz. whether the party is surprised by the testimony of his witness. If the Court can-

not be satisfied that he is, he cannot produce the evidence of a different statement at another time. But the difficulty may not be greater, in such case, than in many others, in which the Court may be called upon to consider of the admissibility of testimony. But we need not, in the case before us, decide upon the admissibility of such a rule, as it was not attempted to affect the credit of the witness in any such manner. The question is only glanced at here by way of showing, that, as to the matter of surprise, it is not applicable to the case before us.

And there is another view of this case, which, if it were necessary, might be considered as relieving it from the difficulty, upon which the argument for the defendant is in a great measure based. There can be no question, but that, a party introducing a witness may show, in reference to some one fact, to which he may testify, that he may have been innocently mistaken. It will not be contended, that the witness in this case is versed in the law. When he says his sale was *bona fide*, it may readily be believed that he was ignorant of the legal acceptation of the terms used by him in reference to a sale where the rights of his creditors might be concerned. It often happens that individuals think, that they are doing a very meritorious act by putting their property into a condition, that shall prevent it from being attached. They may fancy that they shall, thereby, avoid a sacrifice consequent upon the levy of a *fieri facias*, and be enabled the better, ultimately, to pay their debts, or to make an equal distribution of their property among their creditors; and this they would call acting *bona fide;* and to one, unlearned in the law, it might seem to be so. But such contrivances, by a person in debt, are deemed in law to be fraudulent; for creditors are not only entitled to have the opportunity of attaching the property of their debtors, but all contrivances to delay the collection of debts are unlawful. The plaintiff, therefore, might well be permitted, in this case, to show that his witness labored under a mistake, in saying that the sale was *bona fide.*

One other ground is relied upon by the defendant's counsel in argument. It is, that the Judge erred in charging the jury,

that the property of the debtor, as it was by the sale converted into a debt due to him, by a negotiable security, could not be reached by a trustee process, without adverting to a remedy, which is provided for the creditor, by compelling the debtor to make disclosure, under the Rev. Stat. c. 148, § 29. But the security so afforded is both remote and contingent and altogether precarious. On commencing his action against his debtor a creditor acquires no lien. He must first obtain his judgment, and then take out his execution, and arrest his debtor, who, by giving a bond, will have six months more, in which he may make a disclosure; or at the end of it go into prison without disclosing. In all this time the creditor is without security, and the debtor at liberty to squander or dispose of his property at pleasure. To consider this as indicating the absence of design to delay or defraud a creditor would be contrary to the teachings of every days experience and observation; and should rather tend to confirm the presumption, arising from other circumstances, to the contrary. There could therefore be no error in omitting to charge the jury as to any such matter as tending to support the defence.

From the evidence disclosed, we are unable to come to the conclusion that the verdict was against evidence, or even against the weight of evidence.

Exceptions and motion for a new trial overruled.

George Turner *versus* The Protection Insurance Company.

If the master of a vessel, which has been insured, in departing from the usual course of the voyage from necessity, acts *bona fide* and according to his best judgment, and has no other view but to conduct the vessel by the safest and shortest course to her port of destination, what he does is within the spirit of the contract of assurance, and the voyage will be protected by it.

The primary purpose of the owner of a vessel and of the cargo, and of others interested, is to have the voyage completed without unnecessary delay. This is known to the insurer when he takes the risk. And if the vessel suffer such injury during the voyage, that she cannot safely proceed to her port of discharge without repair, the master is not compelled to proceed directly to the nearest port, geographically, to make the repair, in order that the voyage should be protected by the policy. So long as she can be expected by an intelligent and faithful master to pursue her voyage in safety, she will be entitled so to do.

When a vessel has sustained damage, the interest of the insurer is not the controlling consideration, that should influence the master to depart from the course of his voyage. That consideration is the safety of life; and next to that is the preservation of the property entrusted to his care. And the pursuit and accomplishment of the voyage can be forsaken or delayed only so far, as it may become necessary for the security of life and property.

When the safety of life and property requires an instant and entire departure from the course of the contemplated voyage, it is the duty of the master to seek the nearest land which he can hope to reach, if the peril be so great as to outweigh all other considerations; and he should proceed directly upon his new course without delay or deviation, unless prevented by some unforeseen obstacle. But if the state of the weather be such that, in the judgment of the master, it would be more safe to seek another port, it would then become his duty to attempt to reach it.

Assumpsit upon a policy of insurance entered into by the defendants on June 26, 1844, by which the plaintiff was caused to be assured the sum of five thousand dollars on freight on board the barque Isadore, at and from Havana to St. Petersburg.

The general issue was pleaded, with a brief statement wherein the defendants alleged: — First. That at the inception of said voyage, the said barque was unsound, leaky, badly found, and unseaworthy. Second. That before and at the time of the loss aforesaid, the said barque had deviated and departed from the true and proper course of the voyage insured against,

in a manner particularly pointed out. Third. That the barque was lost from the ignorance and want of nautical skill of the master and mariners of said barque, and not from any of the perils or dangers insured against in said policy.

The verdict was for the plaintiff, and the defendants filed a motion to set it aside, and grant a new trial, because it was against the evidence in the case, and without evidence. The whole evidence introduced at the trial before WHITMAN, C. J. is given in the report. The facts will be sufficiently understood, from the statement of them in the opinion of the Court.

Upon the evidence, the jury were instructed, that every vessel put to sea, and insured, to entitle the insured to recover, must be seaworthy; must be completely fitted, equipt and manned for the voyage; that a vessel might be seaworthy for a voyage of one description, when she would not be so for another; and to determine, therefore, whether a vessel be seaworthy, or not, the particular employment to which she might be destined must be looked to; that some vessels were fit to carry cargoes of light, bulky articles, which would not be fit to carry cargoes of more solid materials; that when a vessel puts to sea, and without any other assignable cause, immediately proves to be dangerously leaky, the presumption is that she is unseaworthy; that this might happen from a latent defect, not discoverable, even upon a careful examination, before lading her; and if such latent defect actually existed she would not be seaworthy; that from the testimony of the master, if believed, the vessel in this instance, did not immediately after her departure begin to leak badly, nor until bad weather had occurred; and they must determine whether it was reasonable for them to believe that the leak arose from want of seaworthiness, or from causes insured against. That when the captain determined to seek a port at which to refit, it was not, if he may be believed, because he thought it indispensable that he should do so, but because the crew refused to work at the pumps any longer unless he would do so; that in such case he was bound to seek a port the least out of the course of his voyage, and most convenient for the purpose, which could

reasonably be expected to be reached with safety; that he was not bound to turn off directly at a right angle with the course of the intended voyage, to seek a port, though convenient for the purpose of refitting, which at the time might happen to be geographically the nearest; that in case of accident or disaster the master was agent for all concerned, and bound in good faith, and without any sinister purposes of his own, to conduct as his judgment would dictate to be most for the interest of all concerned; and if it should appear, that he had so conducted, and can be believed to have been a master suitable for the voyage, if a loss nevertheless occurred, the defendants would not be exonerated from their liability by reason of his not having instantly, upon finding himself under the necessity of making a port to refit, steered for the port at that time geographically the nearest; and that after he had determined to make for one port and had steered therefor, if he found it would be more judicious for him to attempt to make a different port, he was justifiable in attempting to make such other port.

If these instructions were materially incorrect, the verdict for the plaintiff was to be set aside; otherwise judgment was to be rendered thereupon, unless a new trial should be granted for the cause set forth in the motion of the defendants.

Deblois, for the defendants, argued in support of the following, among other legal positions.

When from necessity the master of a vessel in distress, for the safety of the vessel, deviates from his course, it is his duty to make the nearest convenient port, where the vessel can be repaired, without regard to the fact, that there is a port where she could be more conveniently repaired, although this last mentioned port is not so great a deviation from her course to the port of her original destination, if said port is at a greater distance than the port to which she might run and obtain repairs. Or in other words. The interest of the owner or his convenience, are not to be made paramount to the interest of the underwriters.

By pursuing a different course, a deviation is committed, just as such deviation would be committed by quitting the course of the voyage without being in distress.

When the original voyage was broken up from necessity, the law substituted a new voyage, the point of departure being the place where he bore up for a port of safety, and that port of safety being the other *terminus*, and the voyage the most direct practicable course between them, and should be followed directly and strictly. The vessel was rendered unseaworthy, and should have been restored to seaworthiness, as soon as practicable. 1 Phil. on Ins. 193; *Motteaux* v. *London Ins. Co.* 1 Atk. 556, reported in 1 Marshall on Ins. 410, (Condy's Ed. 344); *Clark* v. *U. F. & M. Ins. Co.* 7 Mass. R. 365; *Guibert* v. *Redshaw*, cited in Marsh. on Ins. 411, and in Park on Ins. 301; 1 Marshall, 413; *Neilson* v. *Columb. Ins. Co.* 3 Caines, 108; *Lavabre* v. *Wilson*, 1 Dougl. 284; 1 Phil. Ins. (2d Ed.) 537. That it is more for the interest of the owners, or nearer to the direct course of the original voyage, furnishes no excuse for not making the vessel seaworthy at the nearest practicable port. When it is said the master may exercise a discretion, it is intended, that such discretion should be exercised as to the necessity of deviating; but when he has determined to deviate, he must follow the substituted voyage directly and expeditiously. *Kettell* v. *Wiggin*, 13 Mass. R. 72; *Robertson* v. *Col. Ins. Co.* 8 Johns. R. 491; *Maryland Ins. Co.* v. *Le Roy*, 7 Cranch, 26; *Phelps* v. *Auldjo*, 2 Campb. 350; Marshall, 522; 1 Phil. Ins. 514, 516.

If it be true that deviating from the original voyage, occasioned by distress, substitutes a new voyage, as we contend it is, then this new voyage is subject to the same restrictions as the original voyage — the law is, that nothing will justify a deviation but a real and imperious necessity. *Stocker* v. *Harris*, 3 Mass. R. 409; *Kettell* v. *Wiggin*, 13 Mass. R. 68; *Brazier* v. *Clapp*, 5 Mass. R. 1; Curtis' Treatise on Maritime Law, 236.

W. P. Fessenden and *W. Goodenow*, for the plaintiff, con-

tended that the law does not require, that the master of a vessel, when he makes a deviation from the purposed voyage from necessity, shall be obliged to make for the nearest port, geographically.

Nor is he bound to determine, when he first makes the deviation, the particular port he will enter. He should and indeed must take into consideration the wind, the fog, and the various other considerations, which would render one port preferable to another, and often must alter his course.

Nor is he required, if he has once fixed upon a port to repair, to persevere at all hazards in attempting to enter it. He might find it inconvenient or dangerous to do so; and it would be misconduct in him to risk his vessel and the lives of those on board in making such attempt, when by changing his course, all might be saved.

The master of the vessel is bound to act for the good of all concerned, according to his best skill and judgment, and not for the benefit of the underwriters only, if he knows the vessel to be insured. He is bound to determine what course to pursue on board his vessel and in time of danger; and if he honestly and fairly decides the matter, as his judgment directs, he is justified in so doing, and the insurers cannot escape from their contract.

They controverted the other positions of the counsel for the defendants; and cited Park on Ins. 294; Marsh. on Ins. 408; 1 Phil. on Ins. (2d Ed.) 516, 520; 11 Johns. R. 352; 2 Strange, 1264; Cowp. 601; 7 Mass. R. 349 and 368.

S. Fessenden, for the defendants, replied.

The opinion of the Court was drawn up by

Shepley J. — This suit is upon a policy of insurance on the freight of goods composing the cargo of the barque Isadore during a voyage from Havana to St. Petersburg, with liberty to go to Matanzas to complete her lading. The vessel appears to have sailed from Matanzas on July 6, 1844, and to have been lost with her cargo on Trundy's reef, near Portland, on the morning of the second day of August following. It was

contended in defence, that the vessel was not seaworthy; and that she deviated from the course of the voyage. The jury having found under proper instructions, that she was seaworthy, that point of the defence is not now presented for consideration. A motion has been made to have a verdict for the plaintiff set aside on the ground, that the testimony does not show sufficient cause for the admitted deviation. It is also insisted, that the instructions did not state the law correctly, respecting the duties of the master in relation to it.

The motion to set aside the verdict on the alleged defect of proof will be first considered. It appears from the testimony of the master, that the vessel after leaving her port met with rough weather and a heavy, short sea. That she soon leaked so much as to require at times three thousand strokes of a pump in an hour to keep her free; that on the morning of the eighteenth of July the crew made a representation to him, that they were exhausted by their labors at the pumps, and that they requested him to make a port. He states, that it was perhaps safe to have kept on their course, and that he should have kept on his course had it not been for the crew's coming aft, as they did, and refusing to pump. That during that day he altered his course with the intention of going into Boston bay to make a port. He then supposed his vessel to be in latitude 34° 13′, and longitude 68½, and to be three or four hundred miles from the Chesapeake bay, and about the like distance from the Delaware. The wind, as he states, was fair for Norfolk, and that was a convenient port for making repairs. That he made Gay-head, on July 29, was within fourteen miles of Cape Cod on July 31, and he might have run into Boston, but the weather was coming on thick and hazy, and he was afraid to, as a southeast wind drives the fog into the bay. That he was twenty or thirty miles nearer to Boston than to Portland. That he thought Portland the most safe and convenient port, and much easier to enter. That in going into Boston he must lay by for a pilot; that he was a sufficient pilot to take the vessel into Portland; that he knew more about the port, than he did about the port of Boston; that he considered the

difference in distance between Boston and Portland more than compensated by his better knowledge of Portland harbor; and that it was as easy to make Portland as any other harbor, after he made the land. The defendants introduced the log-book and the testimony of a couple of masters of vessels. Their testimony does not greatly differ from that of the master in any essential particular.

The counsel contend, that the master should have made the port of Norfolk, and omitting that, the port of New York, or of Newport, or of Boston, as he had opportunity. They have caused a calculation to be made from the log-book by taking the bearing and distance of the vessel from great Bahama isle on July 10, and from Gay-head light, on July 29, to exhibit her position on the ocean during several intervening days, and thereby to show, that on different days she was much nearer to some one of those ports than the master stated her to be. And it is said, that the winds appear by the log-book to have been fair for her to enter them. By that calculation she would appear to have been within 173 miles of Norfolk on July 19; within 39 miles of Sandy Hook on July 25; and within 18 miles of Newport on July 29.

It is insisted, that the master had no right to neglect or refuse to enter either one of them for the purpose of attempting to reach a port in Boston bay or the port of Portland. When the question for consideration is, whether the verdict of the jury was unauthorized by the testimony, the Court must judge of their conduct from the testimony presented for their consideration, and not from calculations, however correct, which were not presented in the testimony, and which they could not be expected to make. To enable a person to make such calculations he must be informed of the latitude and longitude of the several ports and points of land, and the results would still be subject to the uncertainty occasioned by currents in the ocean. Masters or pilots, having a knowledge of these, might be enabled to state the vessel's place on different days with a sufficient degree of accuracy for practical purposes by an inspection of the-log book. But the Court would not be

authorized to consider, that jurors had been negligent of duty, should they make no attempt to ascertain it. Especially in this case, when it appeared from the testimony of one of the masters introduced by the defendants, "that a ship's place could not be accurately ascertained by the log-book;" and from the testimony of both of them, that a master on the deck of his vessel could judge better than any other person, of the propriety of attempting to make a particular port. The Court is not authorized to set aside this verdict for any neglect of duty or misconduct of the jury.

With respect to the law applicable to the case the counsel insist, that the vessel should have proceeded to the nearest port, where she could have been conveniently repaired, in preference to one more distant and more nearly in her course and more convenient for making the necessary repairs; and that the jury should have been so instructed. They contend, that as soon as a vessel becomes unseaworthy, it is the duty of the owner to make her seaworthy with the least possible delay; that his interest to pursue the voyage as nearly as may be, and to find the most convenient port to repair, is not to be preferred to his duty to keep his vessel seaworthy. If this should be admitted, it could not be decisive in this case, as the testimony does not fully prove, that the vessel was in so dangerous a condition, as to make it necessary, that she should seek a port for repair, the master stating that he should have kept on his course, if the crew had continued their labors. If the vessel was not in such peril as to require an immediate departure from the course of the voyage, it could not have been justified, if the crew had not insisted upon it. If the master from prudential considerations should in such case defer to their judgment, influenced perhaps by their fears or desire of ease, he should yield no further, than the circumstances, in which he was placed, seemed to require; and should depart from the course of his voyage as little, as he could and secure their performance of duty; and provide for any anticipated danger.

But it cannot be admitted, that the law is correctly stated in those propositions. The primary purpose of the owner of the

vessel and of the cargo, and of others interested, is to have the voyage completed without unnecessary delay. This is known to the insurer, when he takes the risk. If the vessel suffer injury during the voyage, that risk may be increased by her weakness, or loss of rigging, or of sails, occasioned by stress of weather; and yet that injury may not be so great, that the master would be justified in departing from the course of the voyage for repair. The insurer cannot insist, that the voyage shall be delayed or varied, that the increased risk may not be continued, or that it may terminate as soon as possible. Upon the same principle, if the vessel have suffered such damage, that she cannot safely proceed to her port of discharge without repair, yet so long as she may be expected by an intelligent and faithful master to pursue her voyage in safety, she will be entitled to do so. The interest of the insurer is not, therefore, the controlling consideration, that should influence a master to depart from the course of his voyage. That consideration is the safety of life. Next to that is the preservation of the property entrusted to his care; and the pursuit and accomplishment of the voyage can be forsaken or delayed only so far as it may become necessary for the security of life and property. When this requires an instant and entire departure from that course, the duty of the master is determined, and he must seek the nearest land, which he can hope to reach, if the peril be so great as to outweigh all other considerations. When the vessel cannot safely pursue her course to its termination, and the danger is not imminent, her departure from it should be as little, and her delay as short, as it reasonably can be, for the purpose of making such repairs as may enable her to complete the voyage in safety. To determine what port to seek for repair, the master should consider the extent of the danger, its position as near to or more distant from the course of the voyage, and the facility and speed with which the necessary machinery, materials and labor can be procured and applied to the vessel's use. The master in most cases must necessarily be the principal judge of the degree of peril, to which his vessel is exposed, and of her ability to proceed with safety to

a nearer or to a more distant port, and of the facilities for repairing her at different ports. If he be competent and faithful, his decisions respecting these matters, made in good faith, should be satisfactory to all interested, although he should err in judgment. The position stated by Marshall, c. 12, § 2, has been in substance affirmed by cases decided in this country. *Wiggin* v. *Amory*, 13 Mass. R. 123; *Graham* v. *Commercial Ins. Co.* 8 Johns. R. 352. Marshall states, that one general principle pervades all the cases; that if the master in departing from the usual course of the voyage from necessity, acts *bona fide* and according to his best judgment, and has no other view but to conduct the ship by the safest and shortest course to her port of destination, what he does, is within the spirit of the contract, and the voyage will still be protected by it. In the case of *Lavabre* v. *Wilson*, Doug. 284, Lord Mansfield stated, that a deviation from necessity must be justified both as to substance and manner. Nothing more must be done than necessity requires. This would not authorize a master, who judged, that he was in no imminent peril, to depart entirely from the course of the voyage to seek the nearest port, where he could conveniently refit. In the case of the *Maryland Ins. Co.* v. *Le Roy*, 7 Cranch, 30, the opinion states, that a deviation must be strictly commensurate with the *vis major* producing it. Probably the idea intended to be conveyed was, that the deviation must be as great and no greater than the impending danger required.

It is further contended, that if the master could be permitted to depart from the course of the voyage for a port in Boston bay, that he should have strictly adhered to his newly adopted course and voyage, and should not have departed again to seek the port of Portland. There can be no doubt that it was his duty to pursue that new course without delay or deviation, unless prevented by some unforeseen obstacle. Such he alleges, that he found in the state of the weather, by which the fog was carried into that bay to such extent as to render it dangerous to attempt to enter a port there. In his conclusion, that it was better under the circumstances stated by him to

attempt to reach Portland, rather than Boston harbor, he appears to have been justified by the testimony of the masters introduced by the defendants. One of them states, that "if the weather was thick he would keep off and keep out rather than make for Boston bay. That Massachusetts bay is worse than Casco bay in thick weather." There is no testimony in the case tending to prove that he did not act in good faith in the selection of Portland harbor as the one which he might hope to reach with the least danger. There is no rule of law, which would control him so absolutely as to prevent his acting as he judged to be best for the preservation of the lives and the property entrusted to his care. It will be perceived, that the principles before stated would fully authorize the instructions, which were given, and there must be judgment on the verdict.

GEORGE N. MARWICK *& al. versus* EZRA C. ANDREWS.

If a testator devises his estate to his wife, "to hold the same to her and her heirs forever. On condition, however, that my said wife shall support and maintain in a comfortable and suitable manner my much honored and now aged and infirm mother, should my mother survive me," the devise is upon a condition subsequent, and the estate is subject to forfeiture for neglect of performance.

The devisee became entitled to enter upon and enjoy the estate until forfeited; and no one can take advantage of a breach of such condition, and make an entry to create a forfeiture of the estate, but an heir at law of the devisor.

The Rev. Stat. c. 145, § 6, dispenses with the necessity of an entry in those cases in which a formal entry was required by the common law to restore the seizin to one who had been disseized, or otherwise deprived of it; but does not apply to cases where an entry was required, not as matter of form, but for the purpose of causing a change of title, or a forfeiture of the estate.

In certain cases, courts of equity give relief against forfeiture of title, depending upon the performance of conditions subsequent, when compensation can be made. But whether this Court have that authority under our statutes, may be doubtful.

WRIT OF ENTRY, dated October 25, 1845, to recover a lot of land in Portland.

The report of the trial, before WHITMAN C. J. is as follows: — The demandants read in evidence a deed from Edward Watts to Hugh Marwick and Lydia, his wife, of the demanded premises, dated June 27, 1795.

The demandants then called Abigail Marwick, who testified, that Hugh Marwick died previous to the year 1834; that there are no children of Hugh and Lydia Marwick living; and that the demandants are the only living grandchildren of Hugh and Lydia Marwick, and are the sons of George Marwick. On cross-examination, she stated that she is the mother of the demandants; that her husband died in 1821 or 1822; that Lydia Marwick died in March, 1844; that witness' husband had two brothers, Andrew S. and Frederick Marwick, and one sister, Nancy, all of whom are dead; that Andrew S. Marwick died in 1833 or 1834; that Lydia Marwick was in possession of the demanded premises till her death; that witness was married in 1816; and that Hugh died many years before she knew the family.

The tenant read in evidence a deed of the demanded premises from Lydia Marwick to Andrew S. Marwick, dated Oct. 25, 1830. Also a copy of the will of Andrew S. Marwick, approved and allowed on the first Tuesday of February, 1833, which is to make part of the case. Also a deed of the demanded premises from Elizabeth and John McKenney to the tenant, dated May 3, 1834, the said Elizabeth McKenney being the widow of Andrew S. Marwick, and the devisee named in his will.

The demandants then offered to prove, that neither Elizabeth, the wife of Andrew S. Marwick, nor her grantees of the demanded premises, ever supported and maintained, in a comfortable and suitable manner, Lydia Marwick, the mother of Andrew S. Marwick, according to the provision in the will of said Andrew, but that said Lydia, after the death of said Andrew S. had been dependent almost entirely upon charity for a support. This testimony the presiding Judge ruled to be inadmissible.

If the testimony offered by the demandants, and ruled out

by the presiding Judge, was inadmissible, then the demandants were to become nonsuit; otherwise the case was to stand for trial.

The following is a copy of the will referred to in the report of the case: —

"In the name of God, amen, I, Andrew Scott Marwick of Portland, in the county of Cumberland, and State of Maine, yeoman, being out of health but of sound, disposing mind and memory, do make, ordain and publish this my last will and testament.

"I give and bequeath to my beloved wife, Elizabeth Marwick, all my estate, real and personal, after paying out my just debts and funeral charges, to hold the same to her and her heirs forever. On the condition, however, that my said wife shall support and maintain in a comfortable and suitable manner, my much honored and now aged and infirm mother, should my mother survive me. And from the kind disposition heretofore manifested by my wife to my mother, I have great confidence, that the care and support of my mother cannot be trusted, under God, to better hands. And my dear wife will accept this sacred charge, in the fulfilment of which, in a spirit of kindness and meekness and forbearance to my much loved mother, God will reward her. And I do constitute my wife sole executrix of this my last will and testament. In testimony," &c.

Rand argued for the demandants.

The conveyance of the demanded premises was made to Hugh Marwick and to his wife, Lydia, jointly. As she survived her husband, she became sole seized of the estate. *Shaw* v. *Hearsey*, 5 Mass. R. 521. She conveyed the estate to Andrew S. Marwick. The demandants are heirs to Andrew S. Marwick and to Lydia Marwick; and unless the widow of A. S. Marwick can hold the estate under his will, the demandants are entitled to recover.

The widow of Andrew Marwick took an estate on condition, merely, which condition has never been performed. On failure to comply with the condition, the land went to the heirs

of the testator. 2 Jarman on Wills, 740, 796, 801; 1 Jarman on Wills, 411, and note; Sheph. Touch. 450; Com. Dig. Devise, M and N; Com. Dig. Condition, A 2, 4; *Baker* v. *Dodge*, 2 Pick. 619; *Taft* v. *Morse*, 4 Metc. 523. The testator had the land by gift from his mother, and his intention, clearly expressed, was that she should have her support from it. The condition of the will was to be performed within a reasonable time, or the land reverted. *Hayden* v. *Stoughton*, 5 Pick. 528; *Clapp* v. *Stoughton*, 10 Pick. 463.

The case shows, that Lydia Marwick was in the occupation of the premises at the time of her death. The possession was according to her title. She was, therefore, to be considered as having entered into the possession on account of the non-performance of the condition of the devise. But there was no necessity for any such entry, since the Revised Statutes went into operation. If there be a right of entry, it is enough to maintain the action. Rev. Stat. c. 145, § 6.

W. P. Fessenden, for the tenant, contended that the provision in the will for the support of the mother of the testator, was a mere charge upon the executrix and devisee, and not a condition requisite to be performed in order to hold the estate. Unless it were so, all after the first clause in the devise would be insensible. The words *on condition*, do not constitute a condition, when there are other words showing, that such was not the intention. Cruise, Title Devise; *Baker* v. *Dodge*, 2 Pick. 619.

It is the heir at law only who can enter for condition broken to create a forfeiture. Cruise, Title Estates on Condition, § 37, 44; 2 N. H. R. 202. The mother of the testator was his heir, and she never entered to create a forfeiture. And by not doing so during her life, she waived any right to do it. Her heirs do not take her right to make an entry for that purpose.

But if the demandants had been heirs to Andrew S. Marwick, they have never entered to create a forfeiture, or for any other purpose. Unless such forfeiture was perfected by an entry for that purpose, they derived no title to the land by inheritance.

The opinion of the Court was prepared by

SHEPLEY J. — The estate demanded in this action was conveyed by Edward Watts to Hugh Marwick and Lydia his wife, on June 27, 1795. The wife survived the husband, became entitled to hold the estate in fee, and conveyed it to her son, Andrew S. Marwick, on October 25, 1830. The son, by his will, approved in February, 1833, devised all his real and personal estate to his wife Elizabeth, after payment of his debts and funeral charges, "to hold the same to her and her heirs forever. On condition, however, that my said wife shall support and maintain in a comfortable and suitable manner my much honored and now aged and infirm mother, should my mother survive me." The mother survived her son and died in March, 1844. The demandants claim to be heirs at law of the mother and the son, and allege, that the estate has been forfeited by neglect to maintain the mother according to the provisions of the will.

The tenant claims the estate by a conveyance from the devisee and her second husband, made on May 3, 1834. His counsel contends, that the will should not be so construed as to give to the wife an estate on condition subsequent and subject to forfeiture for neglect to perform, because the testator has used other language indicating an intention to rely upon the strong injunctions to the wife for the performance of the duties required of her. He does express in the will great confidence, that the care of his mother could not be trusted to better hands, and that she will accept it as a sacred charge, for the fulfilment of which God will reward her. He does not, however, by his will charge the estate with her maintenance. When a devisor uses words suited to create an estate upon condition subsequent, and charges the same estate with the performance of all the duties and acts required by the conditional words, courts may, as they often have done, conclude, that it was the real intention of the devisor to make the estate continue to be security for the performance, and not to subject it to forfeiture for neglect. And words, which were apparently designed to create an estate upon condition, have been constru-

ed to have no such effect, when performance was required of the only person, who could legally make an entry to create a forfeiture of the estate. There is nothing in the present case, which would authorize a court to refuse to give effect to an express condition, upon which the devise to the wife was made. It being clearly a devise upon condition subsequent, the devisee became entitled to enter upon and enjoy the estate until forfeited. Her grantee would have the same rights.

No one can take advantage of such a condition, and make an entry to create a forfeiture of the estate, but an heir at law of the devisor. Litt. § 347; Co. Litt. 214. (b) & 218. (a); *Newis & ux.* v. *Lark*, Plow. 413. There is no proof in this case that an heir at law has ever made an entry for the purpose of causing a forfeiture of the estate.

The counsel for the demandants insists, that the action can be maintained in this State by virtue of the provisions of the statute, c. 145, § 6, without proof of such an entry. That section 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, and that he has a right of entry therein, shall be deemed sufficient proof of the seizin alleged. The cases provided for by that section are those, in which a formal entry was required by the common law to restore the seizin to one, who had been disseized, or otherwise deprived of it. The statute does not in terms, and was not intended to apply to cases, where an entry was required not as matter of form, but for the purpose of causing a change of title, or a forfeiture of the estate, such as an entry under a mortgage for condition broken, or an entry upon a conditional estate to cause a forfeiture. The statute contemplates a case, where the party has already acquired a title, and an entry is necessary only to perfect the remedy. In this case the demandants can make no title to the estate, but by proof of neglect to perform the condition, followed by an entry made by an heir at law for the purpose of causing a forfeiture. They could not therefore bring their case within the terms of that section, if it had been applicable, for they

could not, without such an entry, prove their title to the estate. They could not therefore have been benefitted by the admission of the testimony excluded.

It appears, that the mother had deceased without an entry to create a forfeiture, and before this action was commenced, and it does not in this case appear, that she ever made any complaint, that she had not been maintained according to the provisions of the will. Whether the heirs at law may not be considered as having waived their right to do it by their omission to make an entry until after her decease, under such circumstances, is not now presented for consideration.

In certain cases courts of equity give relief against forfeitures of title depending upon the performance of conditions subsequent, when compensation can be made. Whether this would be a proper case for such relief; or whether this Court has power to relieve in a proper case, are also questions not now before the Court.

Demandants nonsuit.

JABEZ C. WOODMAN *versus* JOSEPH FREEMAN, ABIEZER S. FREEMAN, PETER HASKELL, JR. REUBEN B. DUNN, *and* DANIEL CUMMINGS.

A court of equity may rescind a conveyance of land or a contract therefor, which has been procured by fraud, when a proper case for it is presented. But no such relief can be given, where no conveyance, or written or other legal contract or bargain for the conveyance, of any part of the land by the defendant to the plaintiff is proved to have existed at any time.

One who has been induced to purchase land of another and to pay him for it by the fraudulent representations of a third person, interested to effect such sale, cannot, in a court of equity, recover the amount so paid of such third person, and require him to receive a conveyance of the land.

The jurisdiction of the Court to give relief in equity by compensation in damages, where the facts do not authorize the Court to give any other relief is considered, and conclusions drawn in manner following: —

The cases which declare, that the Court "had an undoubted jurisdiction to relieve against every species of fraud," must be received with some limitation.

If fraudulent representations have been made respecting personal property or personal rights, relief for injuries thereby occasioned can only be obtained by an action at law; and a court of equity will not entertain jurisdiction.

That the Court may rightfully entertain jurisdiction in equity, and may give such relief as is incidental to other relief granted, to make it complete, in the following cases: —

1. In cases of fraud and mistake, when there does not appear to be a plain and adequate remedy at law.
2. When relief against a forfeiture or penalty is sought and obtained.
3. When a contract or conveyance is properly set aside or rescinded under circumstances requiring that some compensation should be made to one of the parties, to adjust the equities, and do complete justice.
4. When specific performance is sought and decreed, in whole or in part.
5. When specific performance ought to have been, and could have been decreed upon the state of facts existing when the bill was filed, but cannot be decreed on a hearing of the cause, because the defendant, pending the suit, has voluntarily disenabled himself to make a conveyance.
6. When by a bill of discovery and relief the discovery sought is obtained, the Court having acquired jurisdiction of the case for the discovery, will retain it and give relief, and if necessary, by an assessment of damages. But the Court can give relief as consequent upon discovery, only upon a bill for discovery and relief, containing in substance a statement of the facts, a discovery of which is desired; an averment that they rest in the knowledge of the defendant alone and are incapable of other proof; and that a discovery of them is material to enable the plaintiff to obtain relief.
7. When necessary to adjust the accounts, claims and equities between a *cestui que trust* and a trustee, chargeable for delinquency or unfaithfulness.
8. When necessary for the adjustment of equities between mortgagor and mortgagee.
9. When necessary for the liquidation and settlement of the concerns of a partnership, when one of the partners is chargeable with misconduct or fraud.
10. When necessary to give complete relief in cases of nuisance.

In a court of equity objections to the jurisdiction of that Court, in the case before it, may be taken at the hearing.

THE facts in this case, so far as they are pertinent to the question on which the decision is founded, sufficiently appear in the opinion of the Court.

It was agreed by the parties that the case should be argued in writing.

As the arguments approach to nearly eight hundred pages, the space required for them is, obviously, too great for their admission into a volume of Reports.

S. Fessenden, Howard & Shepley, and *Cooper & Robey* were said at the close of the opening argument for the plaintiff to have been counsel for him; but both the opening argument and the reply appear to have been made by the plaintiff himself, who is a counselor at law.

Daveis & Son, W. P. Fessenden, and *Jacob Hill* for the defendants.

The counsel for the defendants, in support of their point, that the Court, as a court of equity, had no jurisdiction, cited *Russell* v. *Clark's Ex'ors,* 7 Cranch, 69; *Todd* v. *Gee,* 17 Vesey, 277; *Jenkins* v. *Parkinson,* 2 Mylne & Keene, 559; *Tenham* v. *May,* 13 Price, 749; 1 Sug. Vend. & Pur. (6th Am. Ed.) 286; 2 Story's Eq. § 794, 796, 799; *Russ* v. *Wilson,* 9 Shepl. 207; and *Ferson* v. *Sanger,* in the U. S. Circuit Court for the Maine District, not yet reported.

The opinion of the Court, WHITMAN C. J. not sitting in the case, and taking no part in the decision, was drawn up and delivered at the April Term, 1847, by

SHEPLEY J. — This suit in equity is presented upon bill, answers, and proof. The plaintiff seeks relief from the effects of an executed contract; made during the year 1835, for the purchase and sale of an undivided portion of a tract of land situated in the town of Carroll in the State of New Hampshire. The printed record of the case is voluminous, containing three hundred and twenty octavo pages. The case has been argued very elaborately and with great research. The opening argument for the plaintiff has been presented in a printed volume containing more than four hundred and twenty octavo pages; the closing one containing one hundred and seventy-two written pages. The counsel for the defend-

ants have presented arguments, containing one hundred and eighty-two written pages.

The outlines and general aspect of the case may be briefly exhibited. It appears, that Alfred W. Haven and Lory Odell by a contract in writing had agreed to convey to Andrew Gilman a tract of land, containing twelve thousand or more acres, at the price of four dollars per acre. Gilman engaged by a written contract to convey the same to Abiezer S. Freeman and Daniel Cummings at the price of six dollars per acre, provided they elected to purchase within a short time. Several other persons were interested with Gilman in the sale of the lands; and the defendants, Joseph Freeman and Peter Haskell, Jr. appear to have been connected with A. S. Freeman and Cummings in the purchase and sale of them. Ira P. Woodbury was employed by some of these defendants to assist them in effecting a sale. They appear to have proceeded to Portland for that purpose, where, on or about the first day of August, 1835, a conditional contract for the sale of them was drawn, by which A. S. Freeman and Cummings proposed to sell to those persons, who should become parties to it as purchasers, on condition, that there should be found on examination or exploration, as it was called, a standing growth of pine timber sufficient to make seven thousand feet of merchantable boards to the acre, and also a certain quantity of spruce timber not ascertained by the proof; and that the average distance to haul the same to water, suitable to float it, should not exceed two and a half miles. The exploration was to be made by a person to be selected by those, who should become parties to the contract as purchasers. It was signed by Oliver B. Dorrance by subscribing it "O. B. Dorrance & als." explained by him as including Marshall French, as the purchaser of one fourth part; and by the following persons as purchasers; Nathaniel Crockett of one fourth, Ward and Willis of three sixteenths, Samuel Pearson of one sixteenth, and Enoch Gammon and Hiram H. Dow of one eighth each. Allen Kent appears to have been selected by Dorrance and French with the approbation of part, if not of the whole of

the other proposed purchasers, to make the exploration. This duty he performed to a certain extent, being accompanied by the Freemans and Haskell. It does not appear, that he made any written report of the result of his exploration, but the information obtained from him appears to have been so favorable as to induce those, who had signed the conditional contract, to believe, that it had become absolute, and to sign the same anew, agreeing to become the purchasers according to their respective proportions, at the price of seven dollars per acre. Thereupon A. S. Freeman and Cummings appear to have notified Gilman of their election to purchase at the price of six dollars per acre, and of their readiness to make the payments and required securities at Portland. This was to have been done, probably, on August 17, 1835, as notes given for the purchase money in part were to be on interest from that day, although not made until the twenty-first day of August. Conveyances and notes were accordingly prepared to be signed and executed by the respective parties, with the exception of Dorrance and French, who appear to have made certain arrangements, by which performance on their part was not required. Ward and Willis, perceiving by an inspection of the papers, that Dorrance and French were not to become purchasers, demanded an explanation, which was not made in a manner satisfactory to them, and they refused in the presence of Crockett to become purchasers of any portion; and they also communicated this, as one of them states, to Dow; and Crockett and Dow neglected or refused to perform the contract on their part. It then became necessary for those, who had agreed to purchase of Gilman, if they would perform their contract with him, to procure other persons to take these portions, or to become themselves the purchasers of them. The plaintiff was induced to become a purchaser jointly with Joseph Freeman, of one eighth part. Haskell sold his interest to Cummings, who sold the same to Reuben B. Dunn, who became a purchaser jointly with Job Haskell of three sixteenth parts. Haven, Odell, and Mark W. Pierce conveyed the lands

to Gilman who by conveyances bearing date on August 21, 1835, conveyed the same as follows: —

To the plaintiff and Joseph Freeman, one eighth part.

To Reuben B. Dunn and Job Haskell, three sixteenth parts.

To Samuel Pearson, one sixteenth part.

To Enoch Gammon, one eighth part.

To Joseph Freeman, one fourth part.

To Joseph Freeman, A. S. Freeman, Daniel Cummings and Reuben B. Dunn, one fourth part. The purchasers made their promissory notes for the amount not paid in cash, payable to Gilman or order. Several of these notes, including all those made by the plaintiff and Joseph Freeman, jointly, were immediately indorsed by Gilman and delivered to Haven and Odell in part payment for the same lands. The plaintiff and Joseph Freeman, to secure the payment of the notes made by them, conveyed their proportion of the lands to Haven and Odell in mortgage.

The bill alleges, that the plaintiff was induced to make that purchase with Joseph Freeman by certain fraudulent acts and representations of the defendants set forth. There is no allegation of fraud or misconduct made in the bill against either Haven, Odell, or Gilman; and neither of them is made a party to the suit. There is no proof, that either of the defendants received at any time any portion of the purchase money paid, or of the securities made for it by the plaintiff and Joseph Freeman.

The prayer of the bill is, "that the defendants may be compelled and required to take up and procure to be canceled the remainder of the notes aforesaid given by the said Joseph and your orator;" "that the land may be set free and discharged from the aforesaid mortgage;" that the defendants, "may repay unto your orator all of one half of the seven notes which your orator and Joseph Freeman gave said Andrew Gilman," together with interest and sums paid for taxes assessed upon the land; "and receive from your orator such conveyance of said sixteenth part of said land," as may be directed; and for

further and other relief "in the premises by compensation in damages or otherwise."

The first question presented for consideration is, whether a court of equity can give relief, even if the alleged fraud should, on examination, appear to be established. The relief prayed for will be noticed under two aspects of the case.

The first mode of relief proposed is in substance, that the Court should decree, that the defendants pay and cause to be discharged all incumbrances upon the land, repay to the plaintiff the amount which he has paid on account of it, and receive from him a conveyance of his title to it. The second is, that the defendants may be decreed to make compensation in damages for the loss occasioned by their fraudulent acts and representations.

A court of equity may rescind a conveyance or contract, which has been procured by fraud, when a proper case for it is presented. No such relief can however be given in this case, for no written or other legal contract or bargain for the conveyance of any part of the tract of land by the defendants, or either of them, to the plaintiff is proved to have existed at any time. The mode, in which the plaintiff became the purchaser of a part is stated in the bill to have been, that, "he was induced to and did then and there join in the purchase of a portion of said land, and by the appointment of these defendants, received his deed in conjunction with the said Joseph Freeman, in common and undivided, of one eighth part of the aforesaid land from Andrew Gilman, who took a deed from said Haven and Odell." The only mode, in which the defendants can be regarded as in effect the vendors of the land, is, that they undertook, by virtue of the right of preemption secured to them by the contract of Gilman with A. S. Freeman and Cummings, to assure the plaintiff, that he might become a purchaser of a part at the price stated by them. The Court cannot decree a restoration to the plaintiff of any money paid by him, for neither of the defendants appears now to have, or to have had at any time, any money paid by him on account of the land. The plaintiff contends, that

the amount paid or secured by him, was for their benefit. If so paid in any legal sense of the terms, there would seem to be an adequate remedy at law. But the securities were made as the consideration for land conveyed to the plaintiff, for his own use and benefit. They could not be considered as made for the benefit of the defendants in any other sense, than as operating to occasion a sale of the whole tract, by which sale of the whole tract the defendants received a benefit secured to them by other purchasers. The doctrine necessary to be maintained to obtain relief in the mode first proposed, may be more clearly comprehended by a statement of it in the form of a definite proposition; viz:— one, who is induced to purchase lands of another and to pay him for them by the fraudulent representations of a third person interested to effect such sale, may in equity recover the amount so paid of such third person and require him to receive a conveyance of the lands. The plaintiff relies upon the cases, *Daniel* v. *Mitchell*, 1 Story's R. 172; *Doggett* v. *Emerson*, 3 id. 700; *Warner* v. *Daniels*, Law Rep. vol. 9, No. 4, and *Mason* v. *Crosby*, decided in the Circuit Court of the United States, in the Maine District, not yet reported. But these cases, so far as they have application to the mode of relief now under consideration, are very distinguishable from the present case.

In the case of *Daniel* v. *Mitchell* there was a written contract made between one of the defendants, who was considered as acting in the capacity of agent for the others, and the plaintiff, by which one party agreed to sell and the other to purchase the land. The purchase money also was paid, or secured to be paid, in performance of that contract to the defendants, although the conveyance of the land was made by a third person. The decree was, "that the contract of sale, and the conveyance of the premises, and the notes of the said Daniel thereupon," "ought to be set aside and held null and void." It also required the defendants to pay back to the plaintiff such portions of the purchase money, as they had respectively received; but no one was held liable for any of the purchase money received by another person. This last clause is worthy

of especial notice, as it shows, that the Court did not consider itself authorized to grant further relief in a case of alleged fraud, than to restore to the injured party the purchase money received by each defendant, although the plaintiff might not thereby obtain full compensation for losses sustained.

The case of *Doggett* v. *Emerson*, was essentially the same in principle, although it does not appear, that there was any written contract between the parties for the sale and purchase of the land. The opinion indicates, that the decree must have been similar. It is said however in argument, that the master stated in his report, that one of the defendants had not received any part of the purchase money paid by the plaintiff; and that Mr. Justice Woodbury decided, that as he had been proved to have been guilty of actual fraud, he must be held liable for the purchase money paid to the other defendants. If so, it is not perceived, that he could have come to such a conclusion upon any other principle, than that of granting it as incidental to other relief; or than that stated by him in the case of *Warner* v. *Daniels*, that it is competent to give relief in such a case by the assessment of damages.

In both the other cases, of *Warner* v. *Daniels* and *Mason* v. *Crosby*, there appear to have been written contracts made between the parties, or some of them, for the sale and purchase of the lands. The elements necessary to enable the Court to rescind the contracts and conveyances, if in its judgment a proper case was made out, were before the Court.

Not so in this case. The Court cannot act upon, annul, or rescind, any conveyance, contract in writing, or security, made respecting the land, without attempting to affect the rights of persons not before it as parties. Nor can it decree the restoration of any of the purchase money paid by the plaintiff, without a like vain attempt. To decree, that the defendants shall repay to the plaintiff the amount, which he has paid, and receive a conveyance of the lands from him, is but another mode of making them responsible to make up to him all losses, which he has sustained by reason of their fraudulent conduct. If the Court can make such a decree upon any legal or sound

principle, it may do it in a less circuitous and less objectionable manner by adopting the second mode of relief proposed by a decree, that the defendants shall make compensation in damages for losses occasioned by their misconduct, being governed by the same rules, as a jury should be in an action on the case brought to recover damages occasioned by fraudulent representations.

This introduces an inquiry into the jurisdiction of a court of equity to entertain a case to give such relief, not as incidental or auxiliary to other relief granted to make it complete, but in a case where no other relief can be given. This will be a task of no ordinary delicacy and difficulty; for it will be in vain, if an attempt be made, to reconcile all the judicial opinions and judgments. Some of them must yield to the clearer principle or the better reason. A correct conclusion is most important and desirable; and if it can be attained even by a prolonged discussion of cases, legal minds may be willing to endure it with more patience.

To give relief in cases of fraud is one of the elementary grounds of the jurisdiction of a court of equity. An eminent chancellor has declared, that the court "had an undoubted jurisdiction to relieve against every species of fraud." *Chesterfield* v. *Jansen*, 2 Ves. 155. If this general language be understood to assert, that the jurisdiction extends to all possible cases, in which a Court of law may give relief, it must be received with some limitation. For the jurisdiction arose out of the inability of the common law tribunals to afford plain and adequate remedies in certain cases. The general rule has ever prevailed, and been recognized in the formal part of every bill, that a court of equity will not entertain jurisdiction, when the party appears to have a plain and adequate remedy at law. Story, (in 2 Eq. Com. § 794,) speaking of damages to be awarded for wrongs as well as for breaches of contract in certain cases, says, "the just foundation of equitable jurisdiction fails in all such cases, as there is a plain, complete and adequate remedy at law." This rule is especially to be regarded in this State, where the jurisdiction is conferred by statute

subject to that limitation. Ch. 96, § 10. Very numerous cases might be cited to prove, that it was but the adoption of an existing rule. Such was declared to be the effect of a similar clause in the act of Congress of September 24, 1789, to establish the Judicial Courts of the United States. *Boyce's Ex'rs*, v. *Grundy*, 3 Peters, 215. Mr. Justice Baldwin, however, regarded it as something more than declaratory of the existing law; and as especially guarding and preserving the right of trial by jury from any infringement. *Baker* v. *Biddle*, 1 Bald. 403.

The Court has, undoubtedly, jurisdiction to give relief in cases of fraud, when the party has not a plain and adequate remedy at law. And it may vary its mode of relief to meet the ever varying fraudulent devices. And it may often in such cases find it necessary, through its own agency or by the aid of a jury, to assess damages and to decree payment of them. But these cases are exceptions to a more general rule, that there is a plain and adequate remedy at law for the recovery of damages occasioned by fraud or fraudulent representations, whether made concerning personal property or real estate, and whether the person making them, be or be not the vendor, or be or be not benefited thereby. *Pasley* v. *Freeman*, 3 T. R. 51; *Foster* v. *Charles*, 6 Bing. 396; S. C. 7 Bing. 105; *Crocker* v. *Lewis*, 3 Sum. 1; *Medbury* v. *Watson*, 6 Metc. 246.

It has accordingly been decided, and the law may be considered now as conclusively settled, that if fraudulent representations have been made respecting personal property or personal rights, relief for injuries thereby occasioned can only be obtained by an action at law, and a court of equity will not entertain jurisdiction. *Clifford* v. *Brooke*, 13 Ves. 131; *Newham* v. *May*, 13 Price, 752; *Russel* v. *Clark's Ex'rs*, 7 Cranch, 89; *Hardwick* v. *Forbes*, 1 Bibb, 212; *Blackwell* v. *Oldham*, 4 Dana, 196.

When the only relief, which can in such cases be obtained, is the recovery of damages, it will rarely happen, that the elements for the estimation of them are so simple, clear, and free from conflicting testimony, and from embarrassment occasioned

by differences of opinion respecting the extent of the injury and the value of property, that the Court can, even by the aid of a master, properly estimate the damages without depriving a party of a right designed to be secured to him to have twelve men, having experience in the common transactions of life, determine both the extent of the injury and the measure of damages. This remark will apply with equal force to cases of fraud, whether the injury has been occasioned by misrepresentations respecting personal property and rights, or respecting real estate. If a court of equity should retain such a case only to make up an issue and send it to a jury for decision, it would be merely the instrument to accomplish, what it is the peculiar duty of a court of law to perform, thereby in effect admitting, that it was entertaining jurisdiction in a case, which did not properly appertain to it. The reasons for refusing to entertain jurisdiction, when there appears to be a plain and adequate remedy at law, are as cogent, and the principle is as clear, when damages are claimed to compensate an injury occasioned by fraudulent representations respecting real estate, as respecting personal property. If however the weight of authority strongly preponderates in favor of making a distinction, and of entertaining jurisdiction in the one case, and of refusing to do so in the other, it will be proper to yield to it.

There are many decided cases in which damages or compensation has been awarded, when the party did not appear to have any adequate remedy at law. There are many more cases, where damages have been awarded as incidental and auxiliary to other appropriate relief in equity, that such relief might be complete. This exercise of jurisdiction is legitimate and appropriate. For it would be an unsuitable and unworthy exercise of judicial power to require a party to multiply suits by resorting to two different tribunals to obtain a partial redress in each. This is not required by the rules and course of proceeding either in equity or at law.

Courts of equity may, it is believed, rightfully entertain jurisdiction and give relief by compensation or damages in the following classes of cases.

1. In cases of fraud and mistake, when there does not appear to be a plain and adequate remedy at law. *Dacre* v. *Gorges*, 2 Sim. & Stu. 454; *Thaxter* v. *Bradley*, 3 Shepl. 376; *Chapman* v. *Butler*, 9 Shepl. 191; *Sherwood* v. *Salmon*, 5 Day, 439; *Coe* v. *Turner*, 5 Conn. R. 86. And as incidental and auxiliary to other relief.

2. When relief against a forfeiture or penalty is sought and obtained. *Errington* v. *Aynesly*, 2 Bro. Ch. 341; *Eaton* v. *Lyons*, 3 Ves. 690; *Sanders* v. *Pope*, 12 Ves. 283; *Hill* v. *Barclay*, 16 Ves. 401; S. C. 18 Ves. 56; *Rolfe* v. *Harris*, 2 Price, 206, in note; *McAlpine* v. *Swift*, 1 Ball and Beat. 293; *White* v. *Warner*, 2 Meriv. 459; *Skinner* v. *Dayton*, 2 Johns. Ch. R. 526; S. C. under name of *Skinner* v. *White*, 17 Johns. R. 357.

3. When a contract or conveyance is properly set aside or rescinded under circumstances requiring, that some compensation should be made to one of the parties to adjust the equities and do complete justice. *Clinan* v. *Cooke*, 1 Sch. & Lef. 22; *King* v. *King*, 1 Myl. & Keene, 442; *Witherspoon* v. *Anderson's Ex'ors*, 3 Desau. 245; *Young* v. *Hopkins*, 6 Mon. 25; *Wickliffe* v. *Clay*, 1 Dana, 591; *Taylor* v. *Porter*, id. 423; *Williams* v. *Rogers*, 2 Dana, 375; *Lytel* v. *Breckinridge*, 3 J. J. Marsh. 670; *Bolware* v. *Craig*, Litt. Sel. Ca. 407.

4. When specific performance is sought and decreed in whole or in part. *Mortlock* v. *Buller*, 10 Ves. 292; *Dyer* v. *Hargrave*, id. 506; *Halsey* v. *Grant*, 13 Ves. 73; *Cann* v. *Cann*, 3 Simon, 447; *Carneal* v. *May*, 2 A. K. Marsh. 594; *McConnel's Heirs* v. *Dunlap*, Hard. 41; *Sims* v. *Lewis*, 5 Munf. 29; *Evans* v. *Kingsbury*, 2 Rand. 120. Relief is given in this mode in a variety of ways. As when the estate is subject to quit rents, or rent charges, or reliefs on descents, specific performance may be decreed against the purchaser, and compensation be made to him for them. *Esdaile* v. *Stephenson*, 1 Sim. & Stu. 122; *Cudden* v. *Cartwright*, 4 You. & Coll. 25. Compensation may also be allowed under such a decree for deterioration of the estate. *Ferguson* v. *Tadman*,

1 Sim. 530. And to a lessee, who cannot obtain a lease in exact conformity to his contract. *Hanbury* v. *Litchfield*, 2 Myl. & Keene, 629.

Vendors, who could not convey titles to the extent of their contracts, have been required to do so to the extent of their ability, and to make compensation for the deficiency. *Hill* v. *Buckley*, 17 Ves. 395; *Besant* v. *Richards*, 1 Tam. 509; *Horner* v. *Williams*, 1 Jones & Carey, 274; *Jones* v. *Shackleford*, 2 Bibb, 411. A vendor may be decreed to make compensation for rents and profits received since he ought to have conveyed. *Sibert* v. *Kelly*, 6 Mon. 674. So specific performance has been decreed against purchasers, who could obtain substantially, what they bargained for, with compensation for the deficiency. *Dreeve* v. *Hanson*, 6 Ves. 675; *Magennis* v. *Fallow*, 2 Moll. 561; *Weems* v. *Brewer*, 2 Har. & Gill, 390.

5. When specific performance ought to have been, and could have been decreed upon the state of facts existing, when the bill was filed, but cannot be decreed on a hearing of the cause, because the defendant, pending the suit, has voluntarily disenabled himself to make a conveyance. *Denton* v. *Stuart*, 1 Cox, 258; *Todd* v. *Gee*, 17 Ves. 279; *Woodcock* v. *Bennett*, 1 Cow. 755. The Court will not permit itself to be ousted, by fraud or contrivance of a jurisdiction rightfully and legally acquired, but will proceed against him who thus attempts to injure another and to impose upon the Court, and will, by the assessment of damages, compel him to make compensation for the injury. To do this is not to assume a jurisdiction, which does not legitimately belong to it, for the jurisdiction had already become rightfully vested and fixed there. If the much contested case of *Denton* v. *Stewart*, as Lord Eldon states in *Todd* v. *Gee*, was decided upon these principles, it would not seem to be liable to the strong disapprobation of it, expressed in other decided cases. In the case of *Warner* v. *Daniels*, Law. Rep. vol. 9, No. 4, Mr. Justice Woodbury is reported to have said, "some cases hold, that if either party, pending the proceedings, sells the property, so that he cannot convey, damages alone should

be given, though not in other cases." To allow a plaintiff, who was in a condition to rescind, when he filed his bill, to put it out of his power to do so pending the suit, and thus to elect to retain the fruits of the bargain, and to subject the other party to make compensation for any injury sustained according to the estimate to be made by a Court or jury, is to allow him to act inequitably, and to change his suit in effect into an action on the case for damages, thereby making the Court a mere instrument for the assessment of unliquidated damages. So far as the remark, if made, has application to a plaintiff in equity, it is believed, that it cannot be sustained by any decided case; and that it must have been inadvertently made.

6. When, by a bill for discovery and relief, the discovery sought is obtained, the Court having acquired jurisdiction of the case for the discovery, will retain it and give relief; and if necessary, by an assessment of damages. *Walmsley* v. *Child*, 1 Ves. 344; *Russell* v. *Clark's Ex.*, 7 Cranch, 89; *Middletown Bank* v. *Russ*, 3 Conn. R. 135; *Miller* v. *McCann*, 7 Paige, 451; *Sawyer* v. *Belcher*, 3 Edw. 117. It is insisted, that this case is within this rule. That a discovery of certain facts has been obtained, and that the Court should therefore retain the case and give relief by the assessment of damages, if necessary. This argument is founded on a misapprehension of the nature and character of a bill for discovery and relief. The word discovery is used in the books in connexion with bills of different classes or kinds. It is used in connexion with bills containing no averments to distinguish them as being bills of discovery. With reference to bills of this description, STORY says, "every original bill in equity may in truth be properly deemed a bill of discovery; for it seeks a disclosure of circumstances relative to the plaintiff's case." 2 Com. on Equity, § 689. The word is also used with reference to bills technically called bills of discovery, which do not pray for any relief; and seek a discovery only in aid of an action at law. This Court cannot entertain bills of this description, its jurisdiction for discovery being limited by statute, (c. 96, § 10) to cases, in which it can

give relief, and to other cases, in which the power to require a discovery is specially conferred. The word is also used with reference to bills properly denominated bills for discovery and relief. This class of bills is distinguished from that first alluded to, by containing certain statements, averments, and prayers. Such, in substance, as a statement of the facts, a discovery of which is desired; an averment, that they rest within the knowledge of the defendant alone and are incapable of other proof; and that a discovery of them is material to enable the plaintiff to obtain relief. These allegations are not formal merely, but essential to enable defendants to put the point in issue, and to have a decision upon it, if desirable, whether the discovery sought is such, that it ought to be granted. And if the answer distinctly denies the facts thus definitely stated and sought to be discovered, the bill cannot be retained for relief on the ground of discovery, but must be dismissed. STORY states, that the necessity of obtaining the discovery constitutes in such cases the sole ground of equity jurisdiction. 2 Com. on Eq. § 690. And "Hence, (he says) to maintain the jurisdiction as consequent on discovery, it is necessary in the first place to allege in the bill, that the facts are material to the plaintiff's case, and that the discovery of them by the defendant is indispensable as proof." 1 Com. on Eq. 3d ed. § 74. These doctrines are sustained by the cases cited by him and by other cases. *Duvalls* v. *Ross*, 2 Munf. 290; *Bass* v. *Bass*, 4 Hen. & Munf. 478; *Emerson* v. *Staton*, 3 Mon. 117; *Bullock* v. *Boyd*, 2 A. K. Marsh. 323; *Baker* v. *Biddle*, 1 Bald. 394. This bill is not therefore a bill for discovery and relief, and is not framed in such a manner as to enable the Court to grant relief consequent upon discovery. The plaintiff in his argument prays, that he may be permitted to amend his bill, if found to be necessary. The amendments necessary to bring the case within this rule for relief, could not be made without opening the whole case for new or amended answers. And if the facts alleged to be incapable of other proof were definitely stated, they might be denied by the answers to be of that character, or to have existence. And although relief may be, and usually

is given, consequent upon a discovery, it has been held, that such relief ought not to be given, when to obtain the verdict of a jury is the most appropriate proceeding to ascertain the extent of the relief. *Lynch* v. *Sumrall*, 1 A. K. Marsh. 469; *Handly's Ex'ors* v. *Fitzhugh*, id. 25. This rule applies very strongly to this case, if the only relief, which can be granted, is the assessment of damages.

7. When necessary to adjust the accounts, claims, and equities between a *cestui que trust* and a trustee, chargeable for delinquency or unfaithfulness. *Mucklow* v. *Fuller*, Jacob, 198; *Wilson* v. *Moore*, 1 Myl. & Keene, 337.

8. When necessary for the adjustment of equities between mortgagor and mortgagee. *Wragg* v. *Denham*, 2 You. & Coll. 117; *Pratt* v. *Law*, 9 Cranch, 456; *McCarthy* v. *Graham*, 8 Paige, 480.

9. When necessary for the liquidation and settlement of the concerns of a partnership, when one of the partners is chargeable for misconduct or fraud. *Twyford* v. *Trail*, 7 Simon, 92; *Stoughton* v. *Lynch*, 1 Johns. Ch. R. 467; *Hadfield* v. *Jameson*, 2 Munf. 53.

10. When necessary to give complete relief in cases of nuisance. *Hammond* v. *Fuller*, 1 Paige, 197.

The cases usually relied upon to maintain the position, that courts of equity have jurisdiction concurrent with courts of law, to assess and decree the payment of damages in cases of fraud, when there is a plain and adequate remedy at law, are yet to be examined, as well as those opposed to such a position. *Hollis* v. *Edwards* and *Deane* v. *Izard*, 1 Vernon, 159. The bills were for specific performance of verbal agreements for leases of houses; and they alleged, that the plaintiffs had paid the consideration, and expended money on the premises. The statute of frauds was pleaded. The lord keeper is reported to have said, "that he thought clearly, the bill would hold so far as to be restored the consideration." "That though the estate itself is void, yet possibly the agreement may subsist, so that a man may recover damages at law for the non-performance of it; and if so, he should not doubt to decree it in equity; and

therefore directed, that the plaintiff should declare at law upon the agreement, and the defendants were to admit it so as to bring that point for judgment at law; and then he would consider what further was to be done." As might be expected, the bills were afterward dismissed. Whether this be a correct report of the case, may be doubtful, both from intrinsic evidence and from the language of lord Loughborough, who speaks of "the usual inaccuracy of the cases in Vernon." *Parsons* v. *Thompson*, 1 H. Bl. 326. The impression, if entertained by the lord keeper, that an action at law might be maintained to recover damages, was incorrect. *Norton* v. *Preston*, 3 Shepl. 14. The remedy proposed was but a useless, expensive, and incongruous mode of proceeding, to make the action of a common law court effectual by a decree in chancery.

Cud v. *Rutter*, 1 P. Wms. 570. The bill was for the specific performance of an agreement to transfer South Sea stock. The plaintiff obtained a decree at the Rolls, which was reversed by Chancellor Parker, who is reported to have observed, "a court of equity ought not to execute any of these contracts, but to leave them to law, where the party is to recover damages." It is stated in a note to the case, that he directed, that the defendant should pay the plaintiff the difference of the stock. If he did so as directing a decree, and not as advisory merely, he must have acted contrary to his recorded opinion. However this may be, it is now settled, as has been already shown, that damages are not decreed in cases respecting personal property.

Colt v. *Nettervill*, 2 P. Wms. 303. The bill was also for specific performance of an agreement to transfer stock, to which there was a demurrer, which was overruled. The Chancellor is reported to have said, it may "appear to be attended with such circumstances, that may make it just to decree the defendant either to transfer the stock according to his express agreement, or at least to pay the difference." The last remark respecting the last case is equally applicable to this.

The *City of London* v. *Nash*, 3 Atk. 512. Bill for spe-

cific performance of an agreement in a building lease of some old houses made by the city to one Greaves, and by him assigned to the defendant, who had rebuilt two of the houses and repaired and put the others in good condition. Greaves had deceased. Lord Chancellor Hardwicke decided, that the covenants required, that all the houses should be rebuilt; and this was insisted upon by the plaintiffs. The defendants insisted, that they ought to be left to their action at law, if they had suffered damages. His lordship is reported to have said, "I shall not direct an action, because all proper parties are before me, the representative of the original lessee, and the assignee of the lease, but I shall order an issue." "The relief must be by way of inquiry of damages before a jury." The Court could have rightfully decreed a specific performance, and this clearly gave it jurisdiction. No suit at law could have been maintained against the personal representative of the lessee and the assignee; and the remedy at law against each separately might have been quite imperfect.

Arnot v. *Biscoe*, 1 Ves. 95. Biscoe as agent for the other defendant, Stephens, made a bargain with the plaintiff for the sale of a leasehold estate. Stephens signed the contract and received five hundred pounds in part payment. Before any conveyance the plaintiff discovered, that the estate had been encumbered by a mortgage, which had been foreclosed; and he brought his bill against defendants, alleging, that Biscoe made false representations respecting the title. The chancellor was of opinion, that the plaintiff might have his relief in a court of equity, if the facts were proved; and he sent the case to a jury to have the facts determined. It does not appear in the report, that the object sought by the bill was to have the contract rescinded as well as restoration of the money paid. It certainly was the appropriate course, and in such case there could be no doubt, that the Court had jurisdiction.

Edwards v. *Heather*, Sel. Ch. Ca. 3. Bill for a specific performance of an agreement for the sale of a copyhold estate. Defendant had entered upon the estate, cut down timber, stocked the land and acted as owner. There was proof, that

he was disordered in mind. The Lord Chancellor was of opinion, that the estate was greatly overvalued, that the cutting down of the timber was proof of folly, it being a forfeiture of title; but said it was a matter merely at law; and dismissed the bill.

Forrest v. *Elwes*, 4 Ves. 493. The contest arose out of a bond made by Forrest to transfer to Elwes old South Sea annuities. Forrest had deceased. "By the decree, made in this cause, the will of Commodore Forrest was established and the accounts were directed." One of the trustees of the will "was charged in respect of a loss sustained by the estate in consequence of consignment by his permission" to another trustee, who had become bankrupt. "An account was also directed to be taken of what was due from the testator, Forrest, in respect of the bond debt to Elwes." The only questions presented for decision and reported, arose out of exceptions taken to the master's report. A court of law could have no jurisdiction to charge one trustee for losses by his course of dealing with another; and the case appears to have been one, where the jurisdiction could not be questioned.

Denton v. *Stewart*, 1 Cox, 258, & 17 Ves. 275, note (b). As reported in the note by Sir Samuel Romilly, the bill was for specific performance of an agreement to assign a lease. The agreement was a parol one, but it had been partly executed. His counsel stated in their argument, that the defendant had since assigned the lease to another person for a valuable consideration and without notice; but this fact did not appear by the answer or proof. Lord Kenyon, as master of the Rolls, referred the case to a master, and decreed, that the defendant should pay to the plaintiff such damages, as should be thus ascertained. According to this report the case was strictly and appropriately one of equity jurisdiction; first, because it appertains to that jurisdiction only to give relief by enforcing such parol contracts, on the ground, that they have been partly executed; and secondly, because the case, as presented by bill, answer, and proof, required a decree of specific performance, or at least exhibited a case appropriate for one. It would

seem therefore, that the true objection to the case is not, that jurisdiction was improperly assumed, but that it was incorrectly and unusually exercised in the mode of giving relief, because the master of the rolls was induced, by the suggestions of counsel, to travel out of the record.

Greenaway v. *Adams*, 12 Ves. 395. The case was in substance like that of *Denton* v. *Stewart*, with this difference; the contract does not appear to have been a parol one. Sir William Grant expressed an opinion, that the decree awarding damages, in the case of *Denton* v. *Stewart*, was incorrect in principle; and that the party in such case, "must seek his remedy at law." He stated also, that as it had not been overruled, he felt bound to yield to its authority; and he made a like decree.

Guillim v. *Stone*, 14 Ves. 128. The bill was brought to have a contract for the purchase of an estate rescinded and for compensation for losses sustained by a failure to perform. Sir William Grant directed the contract to be delivered up, and did not decree compensation, stating that it was "more proper for an action." It would seem, as has been already stated under the third head of jurisdiction, that compensation might, upon correct principles, have been decreed in this case.

Todd v. *Gee*, 17 Ves. 274. Bill was for the specific performance of an agreement for the sale of an estate; and if that relief could not be granted, that compensation might be made. Lord Eldon commented upon the cases cited, and spoke of the case of *Denton* v. *Stewart*, as not according to the principles of the court, unless the defendant had made the assignment to another pending the suit; and stated, that it was "not according to the course of proceeding in equity," to file such a bill with a prayer in the alternative, with a view to damages, except in very special cases. That "the plaintiff must take that remedy, if he chooses it, at law." It was conceded by the chancellor and by counsel, that the jurisdiction to give relief in damages depended upon the prior cases of *Denton* v. *Stewart*, *Greenaway* v. *Adams*, and *Guillim* v. *Stone*.

There are two other cases in Vesey's Reports, which have

been occasionally cited to sustain the position now under consideration, but which, it is believed, can have no such effect.

Evans v. *Bicknell*, 6 Ves. 174. The bill was brought by a mortgagee against a mortgagor and a trustee of the mortgagor to have the mortgaged estate sold, and to have the trustee charged with the payment of any deficiency of the debt, on the ground, that he had allowed the mortgagor, whose wife was the *cestui que trust*, to have the title deeds, by which the plaintiff had been deceived respecting the extent of the mortgagor's title. Lord Eldon did not consider, that a case of fraud had been made out against the trustee, but offered to permit an issue to be made, that a jury might decide upon it. He expressed his disapprobation of the case of *Pasley* v. *Freeman*, which is now admitted to have been correctly decided; and stated, that he did not mean to say, that if an action would lie against the trustee at law, the court of equity would not maintain its jurisdiction. This was a case clearly within the equity jurisdiction; and with respect to the ground of fraud, his larger experience and more matured judgment were exhibited in *Todd* v. *Gee*.

Burrowes v. *Lock*, 10 Ves. 471. Bill against one, who was entitled under a will to a part of the testator's personal estate, and who assigned his interest to the plaintiff to secure a debt, and also against one, who was trustee, and who represented, that the assignor was entitled to a certain sum of money, although he knew, that he had before made an assignment of a tenth part of it. The master of the rolls, upon the authority of the last case decreed, that the trustee should pay over to the plaintiff the residue of the trust fund, after deducting the tenth part, which had before been assigned; and in case of the inability of the assignor to do it, that he should make good the deficiency.

Clifford v. *Brooke*, 13 Ves. 131. The bill alleged, that the defendant made fraudulent representations respecting the condition of a partnership, by which the plaintiff was induced to advance money to enable his brother to become a partner. The chancellor said, this case "answers the description given

by Mr. Richards, of the case of *Evans* v. *Bicknell*, viz. merely an action for money." "The law gives relief in all these cases of fraud." "But where the party can have an action, I will not give this relief on that ground."

Blore v. *Sutton*, 3 Mer. 247. Bill for specific performance of an alleged agreement for a lease from one, who had deceased. Plaintiff had entered into possession, and expended money in building. Sir William Grant decided, that the agreement was not binding, and that the plaintiff was not entitled to compensation, stating that the jurisdiction for such a purpose was doubtful.

Newham v. *May*, 13 Price, 752. Bill praying that the vendor might be decreed to make compensation to the purchaser of an estate for a difference between its value, as represented at the time of sale by a reference to the rent roll, and its actual value. Chief Baron Alexander, while speaking of the jurisdiction in such cases, said, "This, however, appears to me to be no more than a common case of fraud by means of misrepresentation, raising a dry question of damages, in effect a mere money demand."

Jenkins v. *Parkinson*, 2 Myl. & Keene, 5. In this case Lord Brougham speaks of the right to give relief by way of damages, and of the cases of *Denton* v. *Stewart* and *Greenaway* v. *Adams*, and says, "the current of all the previous authorities against it, to which Lord Eldon refers, in *Todd* v. *Gee*, may therefore be considered as restored, after a temporary and dubious interruption, and it may now be affirmed, that those two cases are no longer law."

Sainsbury v. *Jones*, 2 Beavan, 464. Bill for specific performance of an agreement for the sale of an estate made by Mr. Chitty, an attorney, representing himself to be the agent of the other defendants. The bill prayed, that in case it should appear, that the agreement could not be enforced for want of authority in the attorney to make it, or because Jones was a lunatic, that the attorney might be decreed to reimburse the deposit money received by him, and also moneys expended in building on the premises and to investigate the title. The

lunacy of Jones, and the want of authority in the attorney, were proved. Lord Langdale, as master of the rolls, said, "The question is, whether where a party having no sufficient authority enters into an agreement, the disappointed purchaser can come here for the recovery of damages, which he has been put to. No authority was produced, and I believe, that none exists, for such an interposition by this Court. Judges have always in modern times thought, that this was not the Court for the recovery of damages; and that the proper mode of obtaining relief was by an action at law; and it is reasonable, that it should be so."

Same case. 5 Myl. & Cr. 4. The case came before Lord Cottenham by appeal, who observed, the plaintiff "then knew, that he could not compel a specific performance of the contract, and having sought compensation for damages in a Court, which had not jurisdiction to award them, I think the decree of the master of the rolls dismissing the bill with costs as against Chitty, was correct."

The question under consideration would seem, therefore, to be settled and at rest in England, unless a distinction can be made between cases of relief, when the damages are occasioned by fraud, and when they are occasioned by breach of contract, there being an adequate remedy at law in each case. No such distinction appears to have been made in the decided cases under such circumstances; and it is not perceived, that there can be any in principle.

The question has arisen, and has been discussed in this country, occasioning difference of opinions.

McFerran v. *Taylor*, 3 Cranch, 270. Bill for specific performance of a bond made for the conveyance of lands. The case came before the Court by writ of error to the District Court for the District of Kentucky, which had made a decree for specific performance. Marshall C. J. delivered an opinion, in which he did not fully concur, and which states, "he sold that, which he cannot convey; and as he cannot execute his contract, he must answer in damages. He stated the grounds of his dissent, and while doing so, said, "the person claiming

damages in such a case should, I think, be left to his remedy at law."

Russell v. *Clark's Ex'rs*, 7 Cranch, 69. The bill was filed to obtain payment of certain bills of exchange alleged to have been indorsed by the plaintiff on the faith of two letters addressed to him by Clark and Nightingale, who were alleged to be liable to pay them on the ground, that the letters amounted to a guaranty, or that they were written with the fraudulent intent to be so understood, or that they contained a misrepresentation of the character and solidity of the drawers. In defence, it was contended, that the remedy at law was adequate and complete. This was denied, because, as was said, some of the facts were exclusively within the knowledge of the defendants; because there was a trust fund to be subjected to their claim; and because fraud was alleged and proved. Marshall C. J. in the opinion says, "On the question of fraud, the remedy at law is also complete; and no case is recollected, where a court of equity has afforded relief for an injury sustained by the fraud of a person, who is no party to a contract induced by that fraud."

Pratt v. *Law*, 9 Cranch, 456. This case is worthy of particular and careful examination and notice, because it has been supposed to be at variance with the doctrines of the last case, and because Story states, in a note under § 798, 2 Com. on Eq. that "the Supreme Court of the United States seem to have entertained no doubt, that though a specific performance might not be decreed, an issue of *quantum damnificatus* would be within the competency of the court." This case is there referred to as his authority for the remark; and it has been referred to recently by a member of that court, as an authority, that a court of equity may give relief in a case of fraud by the assessment of damages. There were, as the report states, four suits before the court, which were decided by one opinion, delivered by Mr. Justice Johnson, and which has usually been cited by the name of *Pratt* v. *Law*. Morris, Nicholson and Greenleaf, having agreed to sell to Thomas Law 2,400,000 square feet of land in the city of Washington, made

their bond on Dec. 3, 1794, in the penal sum of $100,000, to secure the performance of that agreement; and on Sept. 4, 1795, they conveyed to Law in mortgage, 857 lots and 3333 feet of land, to secure performance according to the bond and according to the agreement, as it had been subsequently varied by an arrangement between the parties.

Morris, Nicholson and Greenleaf made subsequently a mortgage to Duncanson, conveying portions of the same lands included in the mortgage to Law. After this, on June 26, 1797, they conveyed all their interests in lands in the city of Washington to Pratt and others. The first bill was filed by Pratt and others, praying that Duncanson and one Ward might be enjoined from selling the lots mortgaged to Duncanson, for certain reasons stated in the bill. The second suit was by the same against Law, and against William Campbell, "who had attached the equity of redemption of some of the squares, which were included in the mortgage to Law." The object of the bill was to compel Law to release portions of the lands mortgaged to him, to vacate releases made by him to Campbell, and to compel him to make a selection of the lands to be conveyed to him by Morris, Nicholson and Greenleaf. The third suit was by Law against Pratt and others, to have his mortgage, made to secure a conveyance of the 2,400,000 square feet, foreclosed for neglect to convey about 400,000 square feet. The fourth suit was by Campbell against Pratt and others, and Duncanson and Ward, to obtain a release of the mortgage made to Duncanson. It will be noticed, that neither of these bills was for specific performance. The Court decided, that there had been a partial failure to perform the agreement to convey to Law 2,400,000 square feet of land.

It was contended by the counsel in defence, in the suit by Law, for a foreclosure of his mortgage, that he ought then to take a decree for specific performance of the agreement to convey, or that he ought to receive compensation for the failure in part to perform, by an issue of *quantum damnificatus*, and that he ought not to obtain a decree of foreclosure for such a partial failure. In answer to this argument the

opinion says, "to obtain a specific performance is no object of Law's bill; it is incumbent on the opposite party, therefore, to show some ground of right to force such a decree upon him. But considering, as we do, that Law is not in fault, there can be no reason to decree a specific performance, when every thing shows, it would be productive of nothing but loss." — "An issue of *quantum damnificatus* it is certainly competent to this Court to order in this case; but it is not consistent with the equity practice to order it in any case, in which the Court can lay hold of a simple, equitable and precise rule to ascertain the amount, which it ought to decree." The Court then proceeds to assess the amount to be paid to Law to satisfy his mortgage and prevent a decree of foreclosure. And the decree is accordingly, that upon payment of the ascertained sum, the mortgage may be redeemed. The remarks of the Court respecting its right to frame an issue to ascertain the damages, and its right to ascertain them without it, were made not respecting its power to do so in a case, where specific performance was sought and could not be decreed, but respecting its right to do so to liquidate the amount to be paid to redeem a mortgage, and to adjust the equities between mortgagors and mortgagee. The remarks respecting specific performance were made by the Court only in reply to the counsel to resist such a proposed decree as wholly inappropriate to the case. The idea, that the case can be an authority for a decree to enforce the payment of damages in a case of specific performance or of fraud, appears to be an erroneous one, and founded upon a misapprehension, or upon an inattentive examination of the case. The Supreme Court, therefore, for aught that appears, holds an opinion in accordance with that of the Court of Chancery in England, respecting the right to award damages in such cases.

Phillips v. *Thompson*, 1 Johns. Ch. R. 132. Bill for specific performance of a parol contract to make compensation for the use and enjoyment of certain rights in a portion of the plaintiff's estate. Chancellor Kent held the contract to be invalid, retained the case, and awarded an issue of *quantum*

damnificatus on the authority of the cases of *Denton* v. *Stewart*, and *Greenaway* v. *Adams*. But he says, "I am apprehensive he would be remediless without the aid of this Court."

Hatch v. *Cobb*, 4 Johns. Ch. R. 559. Bill for the specific performance of an agreement for the sale of land. This was refused, as were also damages for the non-performance. The chancellor noticed the last and other cases, and said, "though equity in very special cases may possibly sustain a bill for damages on a breach of contract, it is clearly not the ordinary jurisdiction of the Court."

Kempshall v. *Stone*, 5 Johns. Ch. R. 193. Bill for a similar purpose with a like result. The chancellor said: — "The remedy is clear and perfect at law by an action upon the covenant; and if this Court is to sustain such a bill, I do not see, why it might not equally sustain one in every other case sounding in damages and cognizable at law."

Bacon v. *Brown*, 7 Johns. Ch. R. 194. Bill by a mortgagee, who had been induced to take a mortgage without information of the extent of the prior incumbrances by the alleged fraudulent practices of the mortgagor and of the attorney, who made out the mortgage deed. The estate had been sold by virtue of the unknown prior incumbrance, and had been purchased by the same attorney. The bill, among other matters, prayed, that the defendants might be required to release to the plaintiff their title acquired under that sale to the land, mortgaged to the plaintiff. The chancellor decreed a sale of the land subject to the prior incumbrances, notwithstanding it had been before, thus purchased, by the attorney, and that the attorney should be held responsible for any deficiency. This is clearly a case of equity jurisdiction, where relief was given in damages as incidental to other equitable relief granted to make such relief complete. And it is in no degree opposed to the opinion expressed in the two last cases.

Woodcock v. *Bennett*, 1 Cow. 755. In this case Mr. Justice Woodworth expressed an opinion, that "where the defendant has put it out of his power to perform the contract, the bill will be retained, and it will be referred to a master to assess

the damages." He referred to the case of *Denton* v. *Stewart*, as authority for the remark. It was but the expression of his own opinion, for the bill was dismissed.

Sherwood v. *Salmon*, 5 Day, 439. Bill alleged that the original plaintiff was induced to purchase lands by the fraudulent representations of the defendant. The Court had decreed, that the contract of sale and purchase should be rescinded and the purchase money restored. The case was presented by a writ of error to have that decree reversed. Swift J. delivered the opinion, and said, "Where a court of law can furnish adequate and complete relief, equity cannot interfere; but where this cannot be done at law, it is the proper province of equity to grant redress." The judgment was affirmed. The same doctrine is reasserted in *Coe* v. *Turner*, 5 Conn. R. 86.

Sim's Adm'r v. *Lewis, Ex'r*, 5 Munf. 29. Defendant's testator conveyed lands to Amistead, of whom the plaintiff's intestate purchased, and procured a bond from the vendor to make the title good. Bill alleged a failure of title, and sought satisfaction for it. The other defendants were the grantees of the vendor and of his widow and children in trust. The question of jurisdiction was presented, and the Court entertained jurisdiction only on the ground that the vendor had conveyed away his property in trust.

Berry v. *Van Winkle*, 1 Green's Ch. 269. Bill for specific performance of an agreement contained in a lease, that improvements made by the lessee should, at the end of the term, remain the property of the lessor upon his making a fair compensation for them. The Court entertained jurisdiction and carried the agreement into effect by an assessment of their value, and a decree of payment. The chancellor remarked, "In all cases resting in damages it is certainly more in accordance with our system of jurisprudence, that they should be ascertained at law, where a jury can pass upon them and the witnesses are seen and examined in open Court."

Warner v. *Daniels*, Law Rep. vol. 9, No. 4. Mr. Justice Woodbury is reported to have said, "in order to make the redress perfect, if third persons have since become interested in

the property, so that the fraudulent sale cannot be set aside and a reconveyance made of the whole, the relief for damages becomes necessary and proper, either in part or in full." The decided cases there referred to for this doctrine have been already noticed.

Ferson v. *Sanger*, a case not yet reported, but decided in the Circuit Court of the United States in the Maine District, since the decision of the last case. The opinion of the Court, both judges, as it is said, being present, was drawn and delivered by the District Judge. The question now under consideration was examined with his usual learning and ability, and the conclusion was, that "courts of equity will not entertain jurisdiction of a suit for damages arising out of a fraud, when damages are the sole object of the bill, for the remedy is complete at law."

Bean v. *Herrick*, 3 Fairf. 262. The report of the case shows, that there was an assessment of damages by a jury in a case in equity, as compensation for an injury occasioned by fraudulent representations inducing the purchase of land. The case upon its merits appears to have been correctly decided. The course adopted in sending the case to a jury to find all the facts, though not usual in modern times, may have been taken on the authority of *McFerran* v. *Taylor*, 3 Cranch, 270, where it is said to be the practice in Kentucky; and the same practice is said to have been continued there to this day. A similar course was pursued in the case of *Arnold* v. *Biscoe*, 1 Ves. 95; and in the case of *Evans* v. *Bicknell*, Lord Eldon offered to the plaintiff an issue of a similar kind. In the case of *Bean* v. *Herrick*, it is obvious that the court did no more, than it could have done in an action at law, except so far as it regulated the testimony to be exhibited to the jury. It does not appear, that any discovery was sought or obtained by the bill. The question of jurisdiction does not appear to have been raised or noticed, either by the counsel or by the court. The case would seem to belong to that class of cases not unfrequently found in the books, in which courts have inadvertently and erroneously entertained jurisdiction, when the point

was not raised or presented for consideration. It cannot be regarded as a decision or even as the expression of any opinion on the question under discussion, for it was not introduced to its consideration.

After this examination, suited to exhaust the patience both of writer and reader, the conclusion is irresistible both upon principle and upon authority, that the jurisdiction of a court of equity to give relief by the assessment of damages in the manner before stated, cannot be sustained.

The plaintiff insists, that the objection to the jurisdiction comes too late, according to the determination in the case of *Clark* v. *Flint*, 22 Pick. 237. The court in that case appears to have decided only, that it would not regard the objection, that the plaintiff had an adequate remedy at law, when made at that stage of the proceedings, "provided it be competent to grant relief, and have jurisdiction of the subject matter." The numerous cases already referred to in this discussion show, that the usual practice has been to make the objection on this very point at the hearing.

The bill is dismissed; but under the circumstances of this case without prejudice, and with costs for defendants.

The State *versus* John Williams.

Since the Revised Statutes, (c. 5, § 6 and 7,) have prescribed particularly what shall be done by those who may be required to warn town meetings, and what their returns of their doings shall contain; the person warning a town meeting, when the town has prescribed no mode of calling meetings therein, must state in his return on his warrant, that he has warned and notified the inhabitants of the town, qualified by law to vote at such meeting, to assemble at the time and place and for the purposes therein mentioned, by posting up an attested copy of the warrant at some particular place, and that the same was a public and conspicuous place in said town, and it must appear in the return, that the same had been done at least seven days before the meeting; or the meeting will be illegal.

An indictment against a person for voting twice at one balloting for the choice of a selectman at a town meeting cannot be sustained, unless such meeting was warned and notified in manner prescribed by the Rev. Stat.

This was an indictment against Williams for voting twice

at one balloting for the choice of a selectman, at a town meeting holden at Falmouth, on April 14, 1845, against the provisions of Rev. Stat. c. 6, § 63.

The return on the warrant to call that meeting, which alone was relied upon to show that the meeting was legally called, was as follows: —

"Pursuant to the within warrant to me directed, I have notified the said inhabitants to meet at the time, place and for the purposes within mentioned, by posting four copies in public places in said town.

"Lemuel Hicks, Constable of Falmouth.

"Falmouth, April 5, 1845."

There was no evidence, that the town had by vote directed any mode of calling town meetings, or that they had not so done.

The counsel for Williams objected that the return on the warrant was defective and insufficient to constitute a legal meeting. GOODENOW, District Judge, overruled the objection; and Williams, on the return of a verdict against him, filed exceptions to the ruling.

Howard & Shepley, for Williams, said that the Revised Statutes, (c. 5, § 7,) positively require, that "the person, who notifies the meeting, shall make his return on the warrant, stating the manner of notice, and the time it was given." This has not been done. They also insisted, that there had been an omission to comply with the provision of the same statute, (§ 6), that the meeting should be called "by his posting up an attested copy of such warrant in some public and conspicuous place in said town, seven days before the meeting."

The statute has prescribed what notice shall be given, and that the warning officer shall state his doings in his return. There was no evidence of any legal meeting, and the indictment cannot be sustained.

Moor, Attorney General, for the State, said that the law presumes, that all officers of towns do their duty; and if they do not, the omission should be shown by the party objecting. Each town has the power to direct the manner in which meet-

ings may be called. As the constable, in this case, has returned generally, that he has notified the meeting according to law, it is to be presumed, in the absence of all testimony on the subject, that the meeting was called in the mode adopted by the town. The posting up of four notices, instead of one, fortifies this presumption. The evidence to prove that the meeting was legally called, was sufficient.

The opinion of the Court was drawn up and delivered at the April Term, 1847, by

WHITMAN C. J. — The indictment against the defendant is for voting twice at one balloting, in the election of a selectman, in the town of Falmouth, at a meeting held for that purpose, upon which, in the Court below, a verdict of guilty was found against him. The cause is before us upon exceptions taken to the decisions, in matters of law, of the Judge there presiding. The grounds of exception appear to be threefold. It is not obvious that two of them, viz. — as to the sufficiency of the facts set forth in the indictment, and of the warrant for calling the meeting, are sustainable; but of these we do not think it important that we should form a definite opinion. The third, which is grounded upon defects apparent in the return of the doings of the constable in warning the meeting, we think must prevail.

To a more full understanding of the validity of this exception, it will be useful in the first place, to examine the law, and the decisions of the courts in regard to it, anterior to the passage of our Revised Statutes. Previous thereto there was no regulation by statute, explicitly prescribing how town meetings should be warned, nor as to what the person warning the meeting should return in reference to his doings. The statute of 1821, c. 114, § 5, merely prescribed, that the person warning the meeting should summon and notify the inhabitants of the town to assemble at such time and place as might be ordered in the warrant for the purpose; the manner of giving the notice to be such as the town had agreed upon. This provision is the same as was contained in the statute of Mas-

sachusetts, enacted on the same subject in 1786. The decisions under these statutes are not perfectly in harmony with each other. Prior to our separation from that State, the Supreme Court, in *Sexton* v. *Nimms*, 14 Mass. R. 320, held, that a return by a person who had warned a school district meeting, "that he had warned all the inhabitants of the district as the law directs," was *prima facie* sufficient. And, after the separation, in *Thayer* v. *Stearns*, 1 Pick. 107, the person warning an annual town meeting, having returned, that "he had warned the inhabitants by posting up copies," without saying when, where, or for how long a time, it was held sufficient; and that every presumption should be made in favor of the regularity of such meetings; they being prescribed by law. And in *Gilman* v. *Hoyt*, 4 Pick. 258, in reference to the legality of the choice of a town officer, it was held, that the warning of the meeting, at the time and place, when and where it was holden, would be presumed to have been legal in the absence of proof to the contrary.

But in *Perry* v. *Dover*, 12 Pick. 201, the return of a person, appointed to warn a school district meeting, was held bad, because it stated merely that "he had warned all the legal voters to meet at the time and place and for the purposes within mentioned." It was considered, that it should have stated the mode in which the notice had been given; and also the time it had been posted up. Mr. Justice Morton, in delivering the opinion of the Court, remarked, that "the return on warrants for town, district, and other corporate meetings, may sometimes be treated with greater lenity than returns upon writs, and other judicial precepts; but the principles applicable to both are essentially the same." And in *Tuttle* v. *Cary*, 7 Greenl. 426, it seems to have been held, that the return of the person warning the meetings, is the only proper evidence of his doings; and that it must state the manner in which the meeting may have been warned.

In *Briggs* v. *Murdock*, 13 Pick. 305, however, it was held, that the returns, "pursuant to the warrant I have notified;" "that he had notified as the law directs;" and that "agree-

able to the within warrant, I have notified the inhabitants of, &c. of the time, place and purpose of the within meeting," on three several warrants for town meetings, were sufficient. And Mr. Justice Wilde, in delivering the opinion of the Court, remarked, that objections to such returns, in case of sheriffs on common writs or precepts, would prevail; yet that it did not follow that such strictness was to be required in returns of warrants for town meetings; and cited, with approbation, the remark of C. J. Parker, in *Welles & al.* v. *Battelle & al.* 11 Mass. R. 481, that too much strictness, in subjects of this nature, would throw the whole body politic into confusion. And in *Houghton* v. *Davenport*, 23 Pick. 235, in which the return of a warrant, for an annual town meeting, was, that the officer "had warned the inhabitants of the town;" objection being taken to the return as being insufficient, it was remarked by Mr. Justice Dewey, in delivering the opinion of the Court, that the cases of notices of judicial proceedings were different from those of warnings of town meetings, and especially of annual meetings; and the objection was overruled.

The experience of all our judicial tribunals must have gone far to teach the necessity of not being hypercritical in reviewing the proceedings of our multiplied municipal corporations. We all know that those, necessarily, or at least ordinarily, employed to transact the affairs of those corporations, cannot be expected to be possessed of much, if of any, legal acumen. Certainty to a common intent, and such as would suffice for all practical purposes, would seem to be all that could be expected in such cases, or be reasonably required. But, however this may be, the legislature of this State have deemed it expedient to prescribe particularly what shall be done by those, who may be required to warn town meetings, and what their returns of their doings shall contain. Whenever, therefore, it shall hereafter be found, that there was any deficiency in any such particulars, there would seem to be no alternative but to consider the meetings, held under any such defective return, to be void, whatever may be the consequences resulting from

such a determination; and it may well be doubted, if many of the town meetings, since the enactment of those regulations, could be held to be valid.

Those regulations are to be found in c. 5, § 6 & 7. They require, that the person, warning a meeting, shall post up an attested copy of his warrant in some *public* and *conspicuous* place in the town, seven days before the intended meeting; unless the town shall have prescribed a different mode, and it is not pretended that any such had been prescribed by the inhabitants of Falmouth; and that the person so giving the notice shall return, on his warrant, "the manner of notice, and the time it was given." The person, therefore, who warned the meeting, at which the defendant voted, to render it a legal meeting, should have returned on his warrant, that he had notified the inhabitants to appear at the time and place and for the purposes therein mentioned, by posting up an attested copy of the warrant, at some particular place, and that the same was a *public* and *conspicuous* place in said town; and it should appear that the same had been done at least seven days before the meeting. The constable, who returned the warrant for the meeting in question, merely says, that he posted up four copies, meaning of his warrant no doubt, in four public places in the town. The manner, therefore, of giving the notice, as returned, was not that required by the statute. It does not appear, that the copies were attested; or that either of them was posted in a conspicuous place; and as to the time when posted the return is silent.

Exceptions sustained and a new trial granted.

APPENDIX.

OPINION

OF THE

JUSTICES OF THE S. J. COURT,

IN ANSWER TO A REQUEST OF THE GOVERNOR.

BELFAST, Nov. 6, 1845.

TO THE HON. JUSTICES OF THE SUPREME JUDICIAL COURT.

The opinion of the Justices of the Court is respectfully requested upon the following questions: —

1st. — Is it competent for the Governor and Council in counting votes for county officers, under the provisions of the act providing for the election of county officers, approved Feb. 22, 1842, to receive from the town clerk and selectmen, evidence to show that the return made by them does not correspond with the records?

2d. — If it be competent for the Governor and Council to substitute for the return, a copy of the record properly authenticated by the town clerk and selectmen, is it also competent to receive what purports to be a copy of the record, amended by the clerk upon a day subsequent to the town meeting, the clerk and selectmen certifying upon oath, that the amended record in their opinion corresponds with the facts, and contains a true list of the persons voted for; such certificate being deposited in the office of the secretary of state within thirty days from the date of town meeting, and the amendment made by the town clerk in his record being the insertion of the middle name of a candidate, alleged by him to have been accidentally omitted both in the record and return?

H. J. ANDERSON.

OPINION OF THE COURT.

Having had the foregoing questions propounded to us by his Excellency the Governor of this State, we have deliberated thereon, and have, in reply, come to the following conclusion.

By the statute of 1842, c. 3, it is provided, that the votes to be collected in the different towns, for the choice of county officers, "shall be received, sorted, counted and declared in like manner as the votes for representatives," that "the names of the persons voted for and the number each person had shall be recorded by the clerk in the city, town or plantation books," and that "true copies of said records, attested in the same manner as the returns of votes for senators, shall be returned to the office of the secretary of state."

By turning to the constitution, article iv, part 2, § 3, we find, that "the votes (for senators,) are to be received, sorted, counted, declared and recorded in the same manner as those for representatives"; and that fair copies of the lists of votes, shall be attested by the selectmen and town clerks of towns, and the assessors and clerks of plantations, and sealed up in open town and plantation meetings." And by turning to part 1, § 5, of the same article we find, that, in choosing representatives, the votes are to be received, sorted and counted by the selectmen, and declared "in open town meeting, and in the presence of the town clerk, who shall make a list of the persons voted for, with the number of votes for each person against his name;" and that he "shall make a fair record thereof, in the presence of the selectmen, and in open town meeting.

The foregoing constitutional and statutory provisions, taken together, make it requisite in choosing county officers, that the votes of towns and plantations should be received by their selectmen and assessors respectively, in the presence of their respective town and plantation clerks; and that the clerks should make a list of the persons voted for, with the number of votes for each against his name; and that the same should be recorded in the presence of the selectmen and assessors respectively, in the open town and plantation meetings; and that fair copies of the lists of votes should be attested by the

selectmen and assessors of their respective towns and plantations, and by the clerks of each, and sealed up in open town and plantation meetings. And the votes, so sealed up, are to be transmitted to the Governor and Council, within thirty days thereafter, who are to "open and count the votes returned." The act makes no provision, that they shall be otherwise the judges of these elections; nor that they shall receive any other evidence in relation to the votes, than what the certificates, so prepared, transmitted and received, may contain. They are to compare the votes, and in so doing, to ascertain who, if any one, is elected, and if any one is thereupon found to be elected, it will become the duty of the Secretary of State to issue notice to him of his election; and if no one shall be ascertained to be elected, the Governor with the advice of the Council, must make an appointment to fill the vacancy.

The powers conferred upon the Governor and Council are specific and precise; and it is believed, that it would be irregular to go beyond them, or in any manner to deviate from them. If they could receive evidence that the certificates were erroneous in one particular, they might, with equal propriety, do so in another; and so exercise the powers of judges of those elections generally, and without restriction.

The powers, delegated to the Governor and Council, in reference to the election of senators, seem to be precisely similar to those required to be exercised in regard to the election of county officers. It is presumed the returns alone, are to be examined by the Governor and Council in regard to senatorial elections. If any error occurs, by being so guided, it will be corrected by the senate, who are constituted judges generally of their own elections. It can make no difference that no other tribunal is constituted, having general powers as judges of the elections of county officers. It would seem very clear, if the returns are conclusive upon the Governor and Council in regard to senatorial elections, that they should be so deemed in regard to those in reference to the election of county officers.

It is perfectly well understood, that officers and political bodies are restricted to the exercise of such powers, and such

only, as are by law clearly conferred. It is true that powers are sometimes to be inferred; but this happens only when those to be exercised necessarily include others in order to accomplish the purpose clearly in view. In reference to the election of county officers, the Governor and Council can perform all that is specifically required of them, without having recourse to the exercise of additional powers. The duty required of them is simple and plain; and there is no indication that any thing was intended to be required of them beyond what is expressed. If the Legislature had deemed it expedient, and had actually intended to constitute the Governor and Council, judges generally of the elections of county officers, it would have been easy for them to have been explicit to that effect; not having done so, it must be presumed that nothing of the kind was intended. We are therefore brought to the conclusion that both of the questions propounded must be answered in the negative.

EZEKIEL WHITMAN.
ETHER SHEPLEY.
JOHN S. TENNEY.

A TABLE

OF THE

PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

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2. When the question is, whether the agent did or did not exceed the authority given to him as agent, he is equally liable to the losing party, if he exceeds his powers, for the damage done thereby; and is a competent witness without a release. *Ib.*

3. An agent was sent by the plaintiff with a note in her favor against the defendant, with authority only to receive a sum of money thereon and return the note, but in fact he received the money and made an arrangement with the defendant, in pursuance of which he gave up the note and received certain other papers; the agent carried the money and papers to the plaintiff, who "took the money and was displeased with the papers, saying she was cheated out of the money;" *it was held*, that this was not a ratification of the acts of the agent. *Ib.*

4. And *it was also held*, that it was not necessary that the plaintiff should first return those papers to the defendant, to enable her to maintain an action to recover the amount due on the note. *Ib.*

See CONTRACT, 1, 2, 3.

AMENDMENT.

A declaration so defective, that it would exhibit no sufficient cause of action, may be cured by an amendment, without introducing any new cause of action. The intended cause of action, when defectively set forth, may be as clearly perceived and distinguished from another cause of action, as it would be, if the declaration had been perfect.

Pullen v. *Hutchinson*, 249.

See BANKRUPTCY, 5. EXECUTION, 4. MILITIA, 1, 4. OFFICER, 5.

APPEAL.

Where an action by one town against another is commenced originally before a justice of the peace, and is carried by appeal to the District Court, and a verdict is given, and a judgment rendered thereon in that court, *no appeal* lies therefrom to the Supreme Judicial Court.

New Gloucester v. *Danville*, 492.

APPROPRIATION OF PAYMENT.

See PAYMENT.

ASSIGNMENT.

See ACTION, 5, 6. ASSUMPSIT, 2. CONTRACT, 4.

ASSUMPSIT.

1. It is generally true, that if one of two joint contractors pays money, for which they may have made themselves jointly liable, an implied undertaking on the part of the other is inferred, that he will reimburse his co-promisor for the one half of the amount so paid. But if the debt were originally due from some third person, and the security had been given therefor by the co-promisors in consideration of funds furnished by him, sufficient for the purpose, with which it was agreed the debt should be paid, and such funds had been entrusted to the management of him who had been compelled to pay the amount in discharge of the joint promise, and he had not been careful to appropriate the funds according to agreement, no promise could be implied, that he should be reimbursed for any portion of the amount he might have been compelled to pay on the joint contract.

Rollins v. *Taber*, 144.

2. Where co-promisors, being assignees of the property of an insolvent man, give their note to a third person, as such assignees, in payment of a debt before due from their assignor, with a reliance for the means of paying it upon the funds in their hands by virtue of the assignment, specially appropriated for that purpose, equity would consider the assignees as substituted for such third person in reference to such funds, and the law could not consider them otherwise. *Ib.*

ATTACHMENT.

1. Where an officer attaches goods, and takes a receipt for the redelivery thereof on demand, or payment therefor, and leaves them, without remov-

al; if he has the power to retake the property by virtue of the same precept without the consent of the owner or the receipter, which may well be doubted; he must, in order to preserve the attachment, retain the control thereof himself, or by his servant, or have the power of taking immediate possession. If the possession is abandoned, the attachment is dissolved. *Weston* v. *Dorr*, 176.

2. If the receipter has become the *bona fide* purchaser of the same goods, subject to the attachment, and has taken possession thereof, he does not forfeit his rights thereto by suffering the officer to take possession of the same, without resistance, by virtue of another writ against the same debtor, put into his hands after the purchase; nor by taking the receipt, when handed to him by the officer, without any agreement or understanding in relation thereto, and immediately thereupon offering to the officer to restore the receipt to him. *Ib.*
3. If all the goods are taken into the possession of the officer as attached by virtue of the second writ, but a part only are returned on that writ as attached, the officer is liable for the portion of the goods not returned, as well as for the rest, without any previous demand by the owner. *Ib.*
4. Where the goods of one man are attached and taken by an officer on a writ against another person, and afterwards again attached and taken in the same manner on a writ in favor of a different creditor, a release by the owner of all claim to damages in consequence of the second attachment, in consideration of its relinquishment, has no effect upon a suit to recover damages caused by the first taking. *Ib.*
5. Where goods are tortiously taken by an officer, he is liable to the owner for all the damages sustained thereby. *Ib.*

See Officer.

AUCTION SALE.

1. All fraudulent acts and all combinations, having for their object to stifle fair competition at the biddings at auction sales, are unlawful. *Gardiner* v. *Morse*, 140,
2. Where the parties agreed, that if the defendant would not bid upon a note against the plaintiff, at an auction sale which was to be had thereof as part of the effects of a bankrupt, that the plaintiff would discharge a demand in his favor against the defendant, *it was held*, that such agreement was unlawful and void. *Ib.*

BANKRUPTCY.

1. The Bankrupt Act of the United States of 1841, was constitutional, and equally affected debts contracted before its passage, as well as those of a subsequent date; and as well in case of voluntary, as involuntary bankruptcy. *Loud* v. *Pierce*, 233.
2. In an action upon a promissory note, where the bankruptcy of the maker is alleged in his defence, and the certificate of discharge is attempted to be impeached on the ground of a prior fraudulent sale of goods to a third person, which he did not include in his schedule of effects, the purchaser is a competent witness. *Ib.*
3. An omission by the bankrupt to insert some articles of property in his schedule of effects by accident or mistake, is not evidence of "fraud, or wilful concealment of his property," within the meaning of the Bankrupt Act. *Ib.*
4. If one of several joint promissors, after a suit against all is pending on the contract, file his petition and obtain his discharge under the bankrupt law of the United States, and plead it, and its validity is denied by the plaintiff on the ground that it was obtained by fraud, a verdict and judgment may be legally rendered in favor of this defendant, and also in favor of the plaintiff against the other defendants. *Coburn* v. *Ware*, 330.
5. Where one of several defendants pleads his bankruptcy, an amendment of the writ may be permitted, by striking therefrom the name of the bankrupt defendant. *Ib.*

BETTERMENTS.

See Seizin and Disseizin, 6. Writ of Entry, 2.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. When the maker of a promissory note dies before it becomes payable, the indorsee should make inquiry for his personal representative, if there be one, and present the note, on its maturity, to him for payment.
Gower v. *Moore*, 16.
2. If it should be made to appear, that the indorser knew that the note would not be paid on presentment, and that the maker had deceased and his estate was insolvent, such knowedge would not relieve the holder from his obligation to make presentment and give due notice of its dishonor. *Ib.*
3. In an action upon a promissory note, made payable at a place certain and on demand after a specified time, no averment or proof of a demand on the part of the plaintiff is necessary, to entitle him to maintain his suit.
Gammon v. *Everett*, 66.
4. If a joint note be made by four, payable on time, and before it was payable two of the promissors pay "two thirds of the within note, principal and interest, being their part," and it is thus indorsed thereon, they are not thereby discharged from the payment of the sum still remaining unpaid.
Coburn v. *Ware*, 330.
5. If at the time when an accepted bill, payable at a fixed time, and guarantied to be paid according to its terms, became payable, the acceptor was solvent, and so continued to be for four months thereafter, and then became insolvent; and no notice of the non-payment was given to the guarantor during the next four years; he is by such neglect, discharged from the payment thereof. *Globe Bank* v. *Small*, 366.
6. Parol evidence of statements made by the indorser at the time of a blank indorsement of a promissory note, is not to be received to contradict or vary the legal contract implied by such indorsement; but such evidence is admissible for the purpose of showing a waiver of the necessity of making a demand or giving notice. *Sanborn* v. *Southard*, 409.
7. If a note is indorsed when overdue, a demand is sufficient, if made within a reasonable time after the indorsement. *Ib.*

See Consideration. Set-off.

BOND.

See Equity, 5.

BREAKING, OFFENCE OF.

1. The offence of breaking is a violation of the security intended to exclude; and when coupled with an entrance into a store with a felonious intent, it may constitute the crime described in Rev. Stat. c. 155, § 11.
State v. *Newbegin*, 500.
2. But when the store is lighted up, and the doors are latched, merely, in the ordinary manner, without any fastening to exclude others, and the clerks are in the store ready to attend upon customers; and before eight o'clock in the evening one carefully lifts the latch and enters the store by the door, with the intention to commit a larceny therein, and does so enter and commit a larceny, secretly and without the knowledge of the attendants in the store; it does not amount to such breaking and entering as to constitute the crime intended to be punished under that section of the statute. *Ib.*

CERTIORARI.

See Ways, 2.

COLLECTOR'S SALE.

See Taxes.

COMMISSIONERS.

See Insolvent Estate, 3.

CONSIDERATION.

1. When the defence of failure of consideration is set up to an action upon a note, expressing therein that it was for value received, given as the consideration for a deed of land, the burthen of proof is upon the maker of the

note to show the facts which would exonerate him; and if it be left doubtful whether he acquired the title intended, the defence fails.

Sawyer v. *Vaughan*, 337.

2. If one person bargains with another for the release and conveyance of a title, equally known to both to be a doubtful one, and takes such conveyance and gives his note for the price; he does not show a failure or want of consideration, by proof that the grantor had no valid title. *Ib.*

3. If a note be given to prevent the sale of an equity of redemption, so that a clear title to the same land under a deed, should be obtained by a relative of the maker; or if the payee parted with a right which he had under an attachment of land, by omitting to levy thereon, in consequence of the note; such note is not void for want of consideration.

Bradbury v. *Blake*, 397.

See CONTRACT, 1, 5.

CONSPIRACY.

See EQUITY, 25.

CONSTITUTIONAL LAW.

1. It is not competent for the Governor and Council in counting votes for county officers, under the provisions of Stat. 1842, c. 3, to receive from the town clerk and selectmen, evidence to show that the return made by them does not correspond with the records. 567.

2. Nor is it competent for them to receive what purports to be a copy of the record, amended by the clerk upon a day subsequent to the town meeting, the clerk and selectmen certifying upon oath, that the amended record in their opinion corresponds with the facts, and contains a true list of the persons voted for; such certificate being deposited in the office of the secretary of state within thirty days from the date of town meeting, and the amendment made by the town clerk in his record being the insertion of the middle name of a candidate, alleged by him to have been accidentally omitted both in the record and return. *Ib.*

See INSOLVENT ESTATE, 2. MILITIA, 14, 18.

CONSTRUCTION.

See STATUTE.

CONTRACT.

1. If a contract in writing be made by one as agent for another, to convey an interest in certain lands on the payment of a promissory note, given as the consideration therefor, and the contract does not bind the principal to make the conveyance, but the agent is personally responsible for the payment of any damages sustained by any breaches of the contract, the payment of the note cannot for that cause be avoided for want of consideration.

Dyer v. *Burnham*, 9.

2. A contract, not under seal, to convey an interest in real estate upon the performance of certain conditions, made by an authorized agent of the proprietor of the estate, may bind the principal, as it would if made by himself. *Ib.*

3. If from the whole instrument it can be collected, that the object and intent of it are to bind the principal, and not merely the agent, Courts will adopt that construction of it, however informally it may have been expressed. *Ib.*

4. The assignment of a contract to convey an interest in real estate upon the performance of certain conditions, vests an equitable interest therein in the assignee, which will be protected and made available by courts of law. *Ib.*

5. And if the contract be to convey an interest in an undivided half of the land upon the payment of one half of certain notes given to a third person, as the consideration of a former purchase of the same estate, and both parties fail to make their respective payments of those notes, but the maker of the note, given as the consideration of the contract, sustains no injury thereby, but both he and the owner of the land treat it as still subsisting until canceled by them; such neglect of payment furnishes no defence to the maker of the last mentioned note, on the ground of failure of consideration. *Ib.*

6. And if the maker and payee of the note suffer the contract for the conveyance of the land, in which they are both interested, to become forfeited by reason of the neglect by each of performance on his part; and the payee afterwards joins with others in obtaining a new contract for the conveyance of the same.

land to them upon more favorable terms, this can furnish no defence to a suit upon the note. *Ib.*

7. Every contract must have an interpretation governed in some measure by the subject matter to which it relates; and at the same time, with reference to any known usage connected therewith. *Robinson* v. *Fiske*, 401.
8. Where the plaintiff entered into a written contract with the defendants to cut and haul sound timber, suitable for boards, from their land to the river, to be by them run from thence and sawed at their mills, at an agreed price per thousand feet, "the timber to be scaled," before put into the river, by one of certain persons named, to be selected by them; such survey, no fraud appearing, is conclusive between the parties to ascertain the amount to be paid for cutting and hauling; although it might appear by a re-survey at the mills, that the first surveyor made an over estimate, caused by not making a sufficient allowance for defective timber. *Ib.*
9. It is competent to the parties to a written contract, by a parol agreement, made afterwards, to substitute a mode different from that contained therein, for the discharge of its obligations. And proof of the fulfilment of such parol agreement will be a defence to a suit brought upon the original contract. *Richardson* v. *Cooper*, 450.
10. But the mere agreement to change the written contract in this respect, when some act is to be done to carry the arrangement into effect, is insufficient; unless performance of the substituted agreement has been prevented by the party attempting to enforce the obligation of the written contract. *Ib.*

See Assumpsit. Auction Sale. Equity, 2, 6, 7, 8, 10, 11, 12.

CONVEYANCE.

1. Where the grantors, for a certain consideration, "give, grant, bargain, sell and convey" to the grantee, his heirs and assigns, "a certain gore or strip of flats" described in the deed, "the said strip or gore to begin at the lower end of Milk Wharf, so called, and to run four hundred and eighty feet towards the channel. And the said (grantors,) for the consideration aforesaid, hereby release to the said (grantee) or to any other person or persons that may build any wharf on the western line of said strip of flats and in the continuation of the said new wharf and on the line thereof to the eastward, all our right, title and interest to the said gore of flats to the channel, or so far as our right extends, for the use and benefit of the proprietors of the wharf which may be built as aforesaid. To have and to hold the said granted and bargained premises, with the privileges and appurtenances thereof, to the said (grantee,) his heirs and assigns, to his and their use and behoof forever." After this follow the usual covenants in a warranty deed. — *It was held*, that by the first description was conveyed to the grantee named, and to his heirs and assigns, an absolute estate in fee of the premises so described; and that by the second, all the right, title and interest of the grantors in the premises thus described, be the same more or less, passed to the grantee named in the deed, and not "to the use and benefit of the wharf which might be built."
Decring v. *Long Wharf*, 51.
2. If the language used in a deed of land indicates clearly the intention of the parties, that intention will stand, notwithstanding the law may prevent its being carried into effect. *Ib.*
3. Although neither the habendum nor the covenants in a deed can control the premises, when the latter are free from doubt; yet upon a question of intention of the parties in reference to the premises, the language used in the habendum and covenants may be important and sometimes decisive, and may appropriately be taken into consideration. *Ib.*
4. Where the tenant granted to the demandant "a certain lot of land situate on my home farm in W. on the west side of the road," containing twenty acres, "the said lot to contain one acre in such shape as the said (demandant) may choose," and "said one acre is supposed to contain a ledge of limestone or marble;" and at the time of the conveyance there was upon the twenty acres a ledge of limestone or marble, and at a distance therefrom a dwellinghouse, barn and other buildings; *it was held*, that the demandant had no right so to locate his acre, as to include a ledge of limestone and marble, and from thence to run a narrow strip of land to the

buildings, and include within his one acre lot the land on which the buildings stood. *Grover* v. *Drummond*, 185.

5. In the absence of any proof on the part of the grantee of the payment of the consideration for a conveyance of land, other than that it was so expressed in the deed, a jury are authorized to infer, that the conveyance was fraudulent and void as to creditors of the grantor, on proof that he was at the time of the conveyance embarrassed and indeed insolvent; that it was a conveyance of all his real estate; that it was to two individuals, neither of whom wanted the estate for his own occupation; that both grantees were sons-in-law of the grantor; and that he was permitted to continue his occupation afterwards as before the conveyance. *Rollins* v. *Moores*, 192.
6. If a conveyance be made to secure for the grantor and his wife a maintenance from the grantee, it is fraudulent and void as to prior creditors of the grantor. *Ib.*
7. If the consideration of the conveyance of land is security for the maintenance of the grantor during life, without any intention thereby to defraud or delay creditors, the conveyance is invalid against prior creditors, but may be good against subsequent ones. *Webster* v. *Withey*, 326.
8. When the deeds affecting the title are all on record, one purchasing of a second purchaser by deed of warranty, must be deemed to have had constructive notice of their contents, and can stand in no better condition than his grantor. *Cushing* v. *Ayer*, 383.
9. If the bound first named in a deed cannot be found, it is competent to ascertain it by first ascertaining the position of some other bound named therein, and tracing the line back from that to the first bound.
Noyes v. *Dyer*, 468.

See Dower, 4. Evidence, 3, 4. Seizin and Disseizin, 3, 4, 7, 8.

CORPORATION.

See Equity, 23, 24.

COSTS.

1. If the prevailing party summon witnesses to prove certain facts under the direction of his counsel, yet if the testimony they would have given on the trial be inadmissible, and therefore rejected, he will not be allowed to tax their travel and attendance against the other party in his bill of costs.
Grover v. *Drummond*, 185.
2. The Rev. Stat. c. 105, § 35, which provides, that "in all cases that are contested, either at a probate court of original, or appellate jurisdiction, the said courts, respectively, may, at their discretion, award costs to either party," authorizes only the allowing of costs to the parties to the litigation.
Reed v. *Reed*, 242.

COUNTY COMMISSIONERS.

See Mandamus. Ways.

COURT MARTIAL.

See Militia, 16, 17, 18.

COVENANT.

See Action, 3.

DAMAGES.

To enable one to recover damages for a false representation, it is essential that there should be some proof, that he has been thereby injured.
Fuller v. *Hodgdon*, 243.

See Law of the Road, 4, 5. Ways, 12, 13.

DECLARATION.

See Amendment. Militia, 2, 3.

DEPOSITION.

1. Where a notice is issued on the day of the date of the writ, and served upon the defendant on the day of the service of the same writ, there being no

the testimony of one credible witness that the facts stated in the bill are not true; and the plaintiff, in such case, must adduce proof sufficient to overcome such denial and fully establish his allegations.

Appleton v. *Horton*, 23.

2. The defendant in a bill in equity, in good faith and without design to defraud any one, contracted to convey a tract of wild land, situated at a great distance from him, and which he had never seen, to a third person, or his assigns, upon the payment of a certain sum in money and giving security for the payment of an additional sum at a future day, within a stipulated time; and such third person, by means of fraudulent representations and contrivances, made a contract of sale thereof to the plaintiff in equity at a greatly enhanced price; and at the request of such third person the defendant in equity made a conveyance of the land to him, and he to the plaintiff in equity; and the defendant, being wholly ignorant that any fraud had been practised, received out of the money and security given by the plaintiff sufficient to pay the consideration of his conveyance thereof. *It was held*, that the bill, under such circumstances, could not be sustained.

Ib.

3. In equity, the Court can grant relief only *secundum allegata et probata;* and under the prayer for general relief, it can give such relief only, as the case stated in the bill and sustained by the proof will justify.

Scudder v. *Young*, 153.

4. Where, therefore, the bill contains no allegation not applicable to a bill seeking relief on the ground of a fraudulent conveyance of real estate; and the proof fails to establish the fraud alleged; the Court cannot reach an equitable interest growing out of property conveyed without fraud, and grant relief on that account under the general prayer therefor. *Ib.*

5. If the grantee of land to which his grantor had no other right than under a bond, afterwards assigned to the grantee, containing an agreement to convey the same on the payment of a certain note, brings his bill in equity against his grantor and the obligor in the bond and a creditor of the obligor who had levied an execution upon the land as the obligor's property, seeking a conveyance of the land to him, he will not be entitled to relief, unless he shows a performance, or tender of performance, of the conditions of the bond before the institution of his process. *Furbish* v. *White*, 219.

6. In a bill in equity wherein the plaintiff sought for the specific performance of a contract for the conveyance of real estate, made between the defendant and one whose interest in the contract the plaintiff had purchased at a sale on execution under the act of amendment to Rev. Stat. c. 94, § 50, which contract provided for the conveyance of one fourth part of a cotton factory upon the payment of certain sums at certain times, and which also contained stipulations for the advancement of money by the execution debtor for the purchase of cotton to be there manufactured, the sale of the manufactured goods, the compensation for these services, and for the services of other owners who were to be employed in conducting the business, these acts, or some of them, to be performed after the payments for the fourth part of the factory should have been made: —

It was held, that the conveyance was to be made whenever the money was paid for the fourth of the factory, although the other stipulations in the agreement might not have been performed on his part: —

Halsted v. *Little*, 225.

7. That although the defendant might waive any forfeiture by reason of a failure by the other party to make one payment according to the agreement, by an offer afterwards to convey upon the payment of the amount then unpaid, yet that this would be no waiver of the right to insist upon a forfeiture upon failure to make the next payment according to the agreement: —

Ib.

8. And that the plaintiff could not avail himself of any balance which might be due to the execution debtor on settlement of the concerns of the parties under the other stipulations in the agreement, in part payment of the sums agreed to be paid for the fourth of the factory, by virtue of his purchase at the execution sale, no appropriation having been made of such balance for that purpose. *Ib.*

9. Where a bill in equity is founded upon a supposed trust in the defendant

ESTOPPEL.

EVIDENCE.

7. Where a note secured by a mortgage has been indorsed by the payee, and the mortgage assigned; and the indorsee, without indorsing the note, by an instrument in writing on the mortgage, conveys all his "right, title and interest in and to the within mortgage and the premises described therein, and also the mortgage note named therein," to the plaintiff; the assignor is a competent witness for the plaintiff, in an action upon the note.
Fuller v. *Hodgdon*, 243.

8. In an action founded on Rev. Stat. c. 148, § 49, against one alleged to have aided the debtor in a fraudulent concealment of his property, if the plaintiff would give in evidence a bill of sale of goods from the debtor to the defendant, it does not fall within any exception to the general rule, that instruments in writing should be proved by the attesting witness, if the testimony of such witness can be had. *Pullen* v. *Hutchinson*, 249.

9. A written instrument, not attested by a subscribing witness, is sufficiently proved to authorize its introduction, by competent proof that the signature of the person whose name is undersigned, is genuine. The party producing it is not required to proceed further, upon a mere suggestion of false date when there are no indications of falsity upon the paper, and prove that it was actually made on the day of its date. *Ib.*

10. On exceptions from the District Court, it cannot be considered, that the District Judge acted erroneously in the admission of testimony, authorized by an opinion of this Court, which has not been overruled; although the correctness of that opinion may well be doubted.
State v. *Blake*, 350.

11. Whether the testimony has a direct tendency to prove or disprove the issue, is not always the true criterion, by which to determine whether such testimony be material and relative to the issue to be tried. When a witness has been introduced and has testified, it may become very material to ascertain whether confidence can be reposed in the veracity of his statements; and therefore testimony to contradict the witness, or to show that the statements made by him should not be believed, is not to be excluded as hearsay, or as contradicting that which is collateral and irrelative. *Ib.*

12. If a witness be inquired of whether he has not testified falsely in a former case in which he had been called by the same party, he may refuse to answer, because it might criminate himself; but if he consents to answer, and states that he had not, his declarations to the contrary may be received to discredit him. And as the present practice in this State does not require the previous examination, his declarations that he has sworn falsely may be received, without any previous inquiry of the witness, whether he had made such statements. *Ib.*

13. If the vendee of personal property calls the vendor as a witness to prove the property to be in himself, the declarations of the witness, that he owned the property and not the plaintiff, may be given in evidence to discredit him; but are not to be taken by the jury as evidence of property in the witness. *Fiske* v. *Small*, 453.

14 As a general rule, a party cannot be permitted to disparage the credibility of a witness introduced by himself, by showing him to be generally unworthy of credibility. But the party calling the witness is not precluded from proving the truth of a particular fact by any other competent testimony, in direct contradiction to what such witness may have testified.
Brown v. *Osgood*, 505.

15. Nor is the right of a party to prove a fact to be different from the statement thereof by a witness introduced by him, restricted to cases where he is surprised by the testimony in that particular. And he may disprove a statement made in a deposition read by him, although he was present at the taking, and knew its contents. *Ib.*

See Agent and Factor, 1, 2. Bankruptcy, 2. Bills and Notes, 3, 6. Consideration, 1, 2. Contract, 9. Deposition. Equity, 1, 23, 24. Insolvent Estate, 3. Landlord and Tenant, 3. Militia, 5, 8, 10, 12, 13. Mortgage, 8. Replevin. Retailing, 2. Seizin and Disseizin, 9. Slander. Tenancy in Common, 4. Trespass. Ways, 6, 7. Will, 3.

EXCEPTIONS.

1. It furnishes no ground of exception, if a judge at a trial states what he

See Evidence, 10.

EXECUTION.

the same may be distinctly known and identified." Inconvenience in ascertaining the boundary, if it be susceptible of ascertainment, can form no objection to the levy. *Rollins* v. *Moores*, 192.

6. Where the officer certifies, that the appraisers of land set off on execution were indifferent and discreet men, the return is conclusive of that fact, when the validity of the extent is in question. The remedy, if any there be, for an erroneous certificate in that respect, must be sought against the certifying officer. *Ib.*
7. If there be no direction in the execution to any officer of the county wherein the land lies, a levy of such execution thereon by an officer of the county is without authority, and void as to a subsequent attaching creditor. *Pillsbury* v. *Smyth*, 427.
8. The sale of an equity of redemption of real estate is void, if there was no mortgage upon the land, and the debtor had an unincumbered title thereto, at the time of the seizure on the execution. *Ib.*
9. The remedy by *scire facias*, under the provisions of Rev. Stat. c. 94, § 23, does not extend to a case, where there has been a sale of an equity of redemption of real estate, and no interest in the land has passed thereby, because there was no mortgage upon the estate at the time of the seizure on the execution. *Ib.*
10. But where there has been a return of satisfaction of an execution by an officer from the proceeds of the sale of an equity of redemption of real estate, when no right or interest passed by such sale, from a mistake in the mode of proceeding, the creditor has a remedy at common law, by a writ of *scire facias*, to obtain a new execution upon the judgment. *Ib.*

See Seizin and Disseizin.

EXTENT.

See Execution.

FLATS.

1. The owner may lawfully erect wharves upon his own flats, for his own use and benefit; but the public have the right equally with him to pass and repass with vessels and boats upon and over the water where there is no occupation with wharves or buildings. *Deering* v. *Long Wharf*, 51.
2. The owners of upland to which flats adjoin may sell the upland without the flats, or the flats without the upland. *Ib.*

FLOWAGE.

1. Priority of appropriation of the water of a stream confers no exclusive right to the use of it. A riparian proprietor who owns both banks of a stream, has a right to have the water flow in its natural current, without any obstruction injurious to him, over the whole extent of his land, unless his right has been impaired by grant, license, or an adverse possession for more than twenty years. *Heath* v. *Williams*, 209.
2. The common law affords the owner of land a protection against the flow of water back upon his own land to the injury of his mill by the acts of another, without showing any priority of appropriation, or statute provision to aid him. And failing to obtain relief from the continuance of such an injury without it, he may lawfully enter upon the land of the person causing the injury, and remove, so far as necessary, the obstruction which occasioned it; unless his title to the water power which he claimed should prove to be defective, or his full right of use should prove to be impaired. *Ib.*

See Mills.

FORCIBLE ENTRY AND DETAINER.

See Landlord and Tenant, 4, 5, 6.

FOREIGN ATTACHMENT.

See Trustee Process.

FRAUD.

See ACTION, 4. AUCTION SALE. BANKRUPTCY, 3. CONVEYANCE, 5, 6. DAMAGES. EQUITY, 2, 4, 15, 16, 28, 29, 31, 32, 33. EVIDENCE, 8. PRACTICE. SALE, 2. SEIZIN AND DISSEIZIN, 3. TRUSTEE PROCESS.

GUARANTY.

See BILLS AND NOTES, 5.

HUSBAND AND WIFE.

See DOWER, 1, 2, 3. EQUITY, 20, 21, 22.

INDICTMENT.

See EVIDENCE, 6. RETAILING. TOWN MEETING, 2. WAYS, 6, 7, 8.

INSOLVENT ESTATE.

1. The *estate*, as the word is used in the Stat. 1838, c. 322, "to be absorbed, or used up, in paying the bills of last sickness of such deceased person and the funeral expenses, and the allowance made to the widow by the Judge of Probate," is such estate only as is included in the inventory; and does not embrace rights or credits accidentally or designedly omitted in taking the inventory. *Longfellow* v. *Patrick*, 18.
2. That statute is not unconstitutional. *Ib.*
3. The Rev. Stat. c. 109, authorizing the commissioners on an insolvent estate, or the Court on an appeal from their decision to require a claimant against such estate "to submit to examination" in relation to his claim, was designed for the protection of the insolvent estate against contested claims; and does not authorize the admission of the claimant to be a witness, on the motion of his own counsel, to prove his claim.

Morse v. *Page*, 496.

INSURANCE.

See SHIPPING.

INTEREST.

See EVIDENCE, 5.

JURORS.

It is the duty of jurors to listen to the arguments of counsel touching the facts in issue, as they are not supposed to have viewed the evidence in all the aspects in which counsel may present it. But if a juror says, "that the Judge would let in no more evidence, that he had made up his mind in the case, and that all he wanted was the Judge's charge, and that it did not make any odds what counsel said," without stating in whose favor he had made up his mind, it is not such misconduct in the juror as should require the Court to order a new trial for that cause. *McAllister* v. *Sibley*, 474.

LANDLORD AND TENANT.

1. When the owner of a dwellinghouse, having a right of entry therein, but in which the plaintiff had recently been dwelling, and which he and his family had then left, finds the doors open and no one in the house, he may lawfully enter into the possession thereof, remove what furniture there was therein belonging to the plaintiff, in a careful manner, and store it safely near by for his use; and the owner may afterwards lawfully retain the possession thereof, thus acquired. *Rollins* v. *Mooers*, 192.
2. While one continues to occupy land as the tenant of another, he will not be permitted to deny the title of his landlord; but after that relation ceases to exist, his rights to the land are not impaired thereby.

Heath v. *Williams*, 209.

3. Where a written lease was made by the plaintiff to the defendant of certain real estate, to hold for the term of one year, parol evidence is inadmissible to prove, that on the day on which the lease was made, but after its execution, it was verbally agreed between them, that the defendant should occupy the premises until the affairs between the plaintiff and a third person were settled; and that those affairs had not then been settled; although two years had elapsed. *Wheeler* v. *Cowan*, 283.

4. Where the occupant of land has holden the same under a written lease from the owner for the term of one year, and has holden over, after the expiration of that term, for nearly two years, and has neglected to pay any rent therefor, according to the terms of the lease or otherwise, his right to remain in possession will terminate in thirty days after written notice to quit, given to him by the owner; and at the expiration of the thirty days, he will be liable to the process of forcible entry and detainer, under Rev. St. c. 128, § 5. *Ib.*
5. A tenant at will has an estate which must first be terminated, before he will cease to have a right to continue in possession; and until such termination he does not begin to hold unlawfully, and is not liable as for forcible entry and detainer under Rev. Stat. c. 128, § 5. *Wheeler* v. *Wood*, 287.
6. Where a lease of a farm was given by the plaintiff for the term of one year, and the lessee underlet a portion thereof to the tenant, who held over after the expiration of the year, but the plaintiff never treated him as his tenant or exacted rent of him; the tenant had no estate under the plaintiff; is a mere tenant at sufferance; and is not liable under the fifth section of the statute "of forcible entry and detainer." *Ib.*

LAW OF THE ROAD.

1. The father of a minor daughter, living with and performing labor for him may, under the provisions of Rev. Stat. c. 26, maintain an action against an individual to recover damages sustained by the plaintiff in the loss of the services of the daughter, occasioned by an injury caused by the negligence or misconduct of the defendant, whereby a collision took place between his wagon and that in which the daughter of the plaintiff was, upon the public highway, by which she was thrown from the wagon and injured. *Kennard* v. *Burton*, 39.
2. Evidence of the complaints of suffering made by the daughter of the plaintiff, after receiving an injury from the collision of two wagons upon the public highway, but during the time when it was material to prove such suffering to have existed, is admissible. *Ib.*
3. When persons meet and pass each other upon the public highway, it is, by Rev. Stat. c. 26, the duty of each "to drive to the right of the middle of the traveled part of the road or bridge, when practicable." And when it is not practicable, that is, when it is difficult or unsafe for him to do so on account of his vehicle being heavily loaded or for other cause, he should stop a reasonable time at a convenient part of the road, to enable the other person to pass, and without any request from him. *Ib.*
4. Where two persons meet when traveling in their respective wagons upon the public highway, and a collision takes place, and one of them is thereby thrown from his wagon and injured; in order that the person injured should maintain an action for the damages sustained by him, the injury must not have been caused by any want of ordinary care on his part to avoid it, although he was traveling in the manner prescribed in Rev. Stat. c. 26, and the other party was not. *Ib.*
5. The rule is, that if the party injured, by want of ordinary care contributed to produce the injury, he will not be entitled to recover; but if he did not exercise ordinary care, and yet did not by the want of it contribute to produce the injury, he may recover. *Ib.*

LEASE.

See LANDLORD AND TENANT, 3, 4, 6.

LEVY ON LAND.

See EXECUTION.

LICENSE TO RETAIL.

See EVIDENCE, 6. RETAILING.

LIMITATIONS.

See USURY, 4.

MANDAMUS.

1. A private individual can apply to the Supreme Judicial Court for a writ of

MILITIA.

MILLS.

that the defendant acquired the right to the use of water from the upper as well as from the lower dam, when it could be taken without injury to the rights previously granted to the plaintiff for the use of the grist mill: — *Elliot* v. *Shepherd*, 371.

2. That the defendant had the right to draw water for the use of his shingle mill, whenever such drawing did not thereby injure the plaintiff in the use of his grist mill, although "there were reasonable grounds to believe the water would be needed for the use of the grist mill:" — *Ib.*
3. That when the grant of the right of water for the use of the shingle mill was made in express terms, there was granted also by operation of law the right to use the means necessary to the enjoyment of the right: — *Ib.*
4. And, therefore, by the grant to the defendant he had the right to enter upon any land then owned by his grantor, when and where necessary, to enable him to obtain his just supply of water. *Ib.*

See FLOWAGE.

MORTGAGE.

1. The distinction between the actions of trespass and trespass on the case having been abolished by statute, the mortgagee of personal property, where there was in the mortgage a stipulation that the mortgagor should retain the possession until default of payment, but with a condition, that "if the same or any part thereof shall be attached at any time before payment by any other creditor or creditors of the mortgagor, then it shall be lawful for the mortgagee to take immediate possession of the whole of said granted property to his own use," may maintain trespass against an officer for attaching such mortgaged property in a suit against the mortgagor, and carrying it away. *Welch* v. *Whittemore*, 86.
2. A mortgagee, while he permits the mortgagor to retain the possession, can have no just cause to interfere, or to complain, if the mortgagor be found making improvements upon the estate; and his rights cannot be impaired by his neglect to do so. *Heath* v. *Williams*, 209.
3. It is the duty of a mortgagor in possession, who has conveyed with covenants of warranty, to pay the taxes and prevent a sale of the estate; and if he acquires a tax title by means of a sale for the payment of such taxes, that enures to the benefit of the mortgagee. *Fuller* v. *Hodgdon*, 243.
4. If a mortgagee, upon a demand being made by the assignee of the mortgagor "to render a true account of the sum due," (under the provisions of Rev. Stat. c. 125, § 16,) renders an account, wherein he states that two separate items are both due, and claims to be paid the amount of both in order to a redemption, when he is entitled to receive one of those sums, but not the other; this is not "a true account of the sum due," and amounts to such refusal to render an account, as will enable the assignee of the equity of redemption to maintain a bill in equity to redeem the mortgage without having first tendered payment. *Cushing* v. *Ayer*, 383.
5. If the mortgagor, for an adequate consideration, conveys a part of the mortgaged premises, and afterwards conveys the residue to another person, it would seem, that the estate last conveyed, if of sufficient value for that purpose, is charged in equity with the redemption of the mortgage. *Ib.*
6. Where a part of a lot of land, the whole of which is encumbered by a mortgage, is sold to one for an adequate consideration; and afterwards the residue is sold to another, and a sufficient amount of the consideration is kept back and reserved to redeem the mortgage, under an express agreement to apply the same for that purpose; and the last purchaser pays the amount due on the mortgage, and takes to himself from the mortgagee a quitclaim deed of the premises; so far as it respects the first purchaser, this is a redemption of the mortgage. *Ib.*
7. Where notice of foreclosure of a mortgage by advertisement has been given, in pursuance of the first mode provided in the fifth section of Rev. Stat. c. 125, by the mortgagee, after he has sold and assigned the mortgage, and has ceased to have any interest therein, such proceeding is wholly ineffectual, and cannot enure to the benefit of any one. *Ib.*
8. If a mortgage be made of all the property "now in the shop occupied by me in said B." and is without date, parol evidence is admissible to show the day of the execution and delivery of the instrument; the description is sufficient to convey the property; and if such mortgage be duly recorded,

PAYMENT.

When a legal appropriation of a payment has been made upon one of two or more claims of one creditor against the same debtor, one of the parties, alone, cannot change that appropriation, but it may be changed by the consent of both; and in such case the indebtedness first discharged is revived by implication of law, where there is no express promise.
Rundlett v. *Small*, 29.

PHYSICIAN.

See ACTION, 1, 2.

PLEADING.

See TENANCY IN COMMON, 1, 2. TRUSTEE PROCESS, 1, 2.

POOR DEBTORS.

1. 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.
Moulton v. *Jose*, 76.
2. A surety in a poor debtor's bond cannot maintain an action against the officer for neglecting to return the execution whereon the arrest of the principal was made, with the bond, into the clerk's office from which it had issued, within the time prescribed by law. *Ib.*
3. And it would seem also, that the principal in the bond could not support an action for such neglect. *Ib.*
4. If a surety in such bond, before the condition had expired, applied to the officer for information as to its date, and the officer stated to him, as the date, a time later than the true one, the surety cannot maintain an action against the officer in consequence of such erroneous statement, unless he knew it to have been false, or made it with an intention to deceive. *Ib.*
5. To avoid the forfeiture of the condition of a bond given by a debtor, in accordance with the provisions of Rev. Stat. c. 148, to obtain a release from arrest on execution, he is bound to comply with one of the alternatives contained in the condition, unless prevented by the obligee, or the law, or the act of God, from so doing. *Fales* v. *Goodhue*, 423.
6. The poor debtor's oath should be taken before the expiration of the six months next after the giving of the bond, or it will not furnish a legal defence to an action thereon. *Ib.*
7. When the two justices of the peace and of the quorum are legally authorized to act in taking the examination of a debtor, who has been arrested on an execution and has given a bond under the provisions of Rev. Stat. c. 148, they may adjourn from time to time; but if their adjournments "exceed three days in the whole, exclusive of the Lord's day," their power to act ceases, and any oath administered by them to the debtor, after the expiration of the three days, is inoperative, and cannot furnish a defence to an action on the bond. *Ib.*

See ACTION, 4.

PRACTICE.

Where a sale of the whole of his property by a father to his son, who gave back a negotiable note with a mortgage, was alleged to have been fraudulent as to the creditors of the former, it furnishes no cause for a new trial, if the presiding Judge, in his charge to the jury, at the trial, states as a circumstance for their consideration, that this note could not be reached by a creditor by the trustee process, without adverting to a remedy which is provided for the creditor by compelling the debtor to make disclosure under the poor debtor act, Rev. Stat. c. 148. *Brown* v. *Osgood*, 505.

See CONTRACT, 3, 4. DEVISE, 3. EQUITY, 13, 15, 16. EVIDENCE, 10. EXCEPTIONS. JURORS. REPLEVIN, 2. STATUTE. TENANCY IN COMMON, 2. TRUSTEE PROCESS, 6. WAYS, 2.

PROBATE.

See INSOLVENT ESTATE.

REAL ACTION.

See SEIZIN AND DISSEIZIN. WRIT OF ENTRY.

RECEIPTER.

See ATTACHMENT.

REFEREES.

See EXCEPTIONS, 3.

RELEASE.

See ATTACHMENT, 4.

REPLEVIN.

1. In an action of replevin, where *non cepit* only is pleaded, the right of property is not put in issue; and it is but necessary, that the plaintiff should prove, that the defendant was in possession of the property, at the place named, when the suit was commenced. And without such proof the action cannot be maintained. *Sawyer* v. *Huff*, 464.
2. Where a nonsuit was entered by consent, to be taken off if the evidence was sufficient to maintain the issue, the question for consideration is not, whether there was testimony which might have had a tendency to maintain the action, but whether the testimony was sufficient to authorize a jury to find the issue for the plaintiff. *Ib.*

RETAILING.

1. If an indictment under Rev. St. c. 36, § 17, allege, that the accused did presume to be a common retailer of the liquors mentioned in that section of the statute, without license, within the time specified, in less quantities than twenty-eight gallons, and that he did sell such liquors to divers persons, without license, within the time specified, but one offence is charged. *State* v. *Churchill*, 306.
2. On the trial of such indictment, it is not necessary for the prosecuting officer to introduce proof in support of the negative allegation, that such selling was without license. If the accused would defend himself on the ground, that he was licensed, he must show it. *Ib.*

See EVIDENCE, 6.

RIPARIAN RIGHTS.

See FLATS.

SALE.

1. When a seller has set apart property for a purchaser by the survey or assortment of a person other than the one agreed upon, and such property has been received by the purchaser, or by any one to whom his right to it has been transferred, the seller cannot, by denying the validity of his own acts, reclaim the property, on the ground, that there is no proof, that the purchaser consented to such a survey or assortment. *Frost* v. *Goddard*, 414.
2. Where there has been a sale of property for the purpose of defrauding creditors, a creditor must take measures to avail himself of his rights, if he would defeat the title thus acquired. He is not, however, restricted to the single mode of proceeding on legal process, but may obtain a satisfaction of his debt by a subsequent purchase of the debtor in good faith and for a valuable consideration. *Ib.*

SCIRE FACIAS.

See EXCEPTIONS, 5. EXECUTION, 9, 10. TRUSTEE PROCESS, 3.

SEIZIN AND DISSEIZIN.

1. If the debtor has the title to land and a right of entry therein, although he may be disseized at the time, such land, by Stat. 1821, c. 60, is liable to be taken on execution for the payment of his debts; and when the execution is legally extended upon the land, and the proceedings are duly returned and recorded, the creditor becomes thereby actually seized thereof, who-

SET-OFF.

SHERIFF.

SHIPPING.

safest and shortest course to her port of destination, what he does is within the spirit of the contract of assurance, and the voyage will be protected by it. *Turner* v. *Protection Ins. Co.* 515.

2. The primary purpose of the owner of a vessel and of the cargo, and of others interested, is to have the voyage completed without unnecessary delay. This is known to the insurer when he takes the risk. And if the vessel suffer such injury during the voyage, that she cannot safely proceed to her port of discharge without repair, the master is not compelled to proceed directly to the nearest port, geographically, to make the repair, in order that the voyage should be protected by the policy. So long as she can be expected by an intelligent and faithful master to pursue her voyage in safety, she will be entitled so to do. *Ib.*

3. When a vessel has sustained damage, the interest of the insurer is not the controlling consideration, that should influence the master to depart from the course of his voyage. That consideration is the safety of life; and next to that is the preservation of the property entrusted to his care. And the pursuit and accomplishment of the voyage can be forsaken or delayed only so far, as it may become necessary for the security of life and property. *Ib.*

4. When the safety of life and property requires an instant and entire departure from the course of the contemplated voyage, it is the duty of the master to seek the nearest land which he can hope to reach, if the peril be so great as to outweigh all other considerations; and he should proceed directly upon his new course without delay or deviation, unless prevented by some unforeseen obstacle. But if the state of the weather be such that, in the judgment of the master, it would be more safe to seek another port, it would then become his duty to attempt to reach it. *Ib.*

SLANDER.

1. In an action of slander, wherein it was alleged, that the defendant charged the plaintiff with being guilty of the crime of perjury, and in which the defendant pleaded the general issue, and by brief statement alleged that the plaintiff, "after being duly sworn, did falsely and corruptly testify," in a certain manner stated, and that the statements so made by the plaintiff, were known to him at the time to have been untrue, "and that the plaintiff committed the offence of perjury on said trial;" if the defendant proves, that the plaintiff, upon the former trial, made statements as a witness from the place where witnesses usually stand when testifying, this is not conclusive evidence, that the oath was taken, and the plaintiff is not thereby estopped from denying that he was sworn, although such evidence may properly be taken into consideration by the jury in determining whether he was sworn, or in mitigation of damages, if the justification was not fully made out. *McAllister* v. *Sibley*, 474.

2. In such action, the brief statement of the defendant, wherein he alleges that "the plaintiff committed the offence of perjury," may be taken into consideration by the jury, with other testimony, as one of the facts, merely, from which they may infer, that the defendant did speak the words as set forth in the declaration. *Ib.*

STATUTE.

Statutes are to receive such a construction as must evidently have been intended by the legislature; and to ascertain this, the Court, called upon to give the construction, may look to the object in view; the remedy intended to be afforded; and to the mischief intended to be remedied. *Winslow* v. *Kimball*, 493.

STATUTES CITED.

TAXES.

1. To make out a valid title to land sold to obtain payment of taxes assessed thereon, the purchaser under the collector's sale must show, that the provisions of law preparatory to and authorizing such sales, have been punctiliously complied with. *Brown* v. *Veazie*, 359.
2. In determining the validity of a title under a collector's sale of land, on account of the non-payment of taxes thereon, the case must be governed by the law as it stood at the time of the assessment and sale. *Ib.*
3. Collectors have no power to sell lands, by reason of the non-payment of taxes thereon, except in pursuance of the provisions contained in the statutes; and can sell only in the precise cases in which it has been so authorized. *Ib.*
4. Property taxed to an individual, must be understood to be taxed to him by name, and not as to a person unknown. *Ib.*
5. A collector of taxes, before he can proceed to sell real estate taxed to persons unknown, must ascertain whether the owner lives out of the State or not; if he lives within the State, then the collector must, before proceeding to sell his land for the payment of taxes, give him two months previous notice in writing of his liability; or the sale will be unauthorized and void. *Ib.*

See MORTGAGE, 3.

TENANCY IN COMMON.

1. The general rule is, that tenants in common must join in an action to recover damages for an injury to the common property; but where there is no joint injury, and the tenants in common are not jointly interested in the damages, the remedy may be by a several action. *Lothrop* v. *Arnold*, 136.
2. But in such case if the action is several, when it should have been joint, and there is no plea in abatement, the objection cannot be taken upon a hearing upon the merits. *Ib.*
3. One tenant in common occupying the estate does not oust or disseize another tenant in common, or one who claims to be such, unless he denies the right of the other to the possession, or does some notorious act indicative of a holding adversely to him. *Colburn* v. *Mason*, 434.

4. If the tenant, on being informed by the demandant of his claim to be the owner of one fourth part thereof, merely admits that he is in possession of the demanded premises, and adds, "it is hard to pay twice;" — this is not evidence of an ouster or disseizin. *Ib.*

TENANCY AT WILL.

See LANDLORD AND TENANT.

TOWN.

See APPEAL.

TOWN MEETING.

1. Since the Revised Statutes, (c. 5, § 6 and 7,) have prescribed particularly what shall be done by those who may be required to warn town meetings, and what their returns of their doings shall contain; the person warning a town meeting, when the town has prescribed no mode of calling meetings therein, must state in his return on his warrant, that he has warned and notified the inhabitants of the town, qualified by law to vote at such meeting, to assemble at the time and place and for the purposes therein mentioned, by posting up an attested copy of the warrant at some particular place, and that the same was a public and conspicuous place in said town, and it must appear in the return, that the same had been done at least seven days before the meeting; or the meeting will be illegal.
State v. *Williams*, 561.
2. An indictment against a person for voting twice at one balloting for the choice of a selectman at a town meeting cannot be sustained, unless such meeting was warned and notified in manner prescribed by the Rev. Stat.
Ib.

TRESPASS.

1. In trespass *quare clausum*, where the plaintiff is in possession of the land, and brings his action for an injury thereto, and on the trial each party sets up title to the land, the burthen of proof is on the defendant to make out, that the title is in himself. If each party shows an independent title thereto precisely equal in strength to that of the other, the defendant fails.
Heath v. *Williams*, 209.
2. If the plaintiff, being the owner of several closes in the same town, brings an action of trespass *quare clausum*, and declares generally, that the defendant broke and entered his close in that town, and thereon committed certain acts, he may prove such acts of trespass to have been committed on any one close of his in that town; but if he introduces and relies upon testimony to prove a trespass upon one close, he must be confined to the close thus selected; and cannot support his action by the introduction afterwards of testimony to prove acts of trespass upon a different close, whether such testimony be objected to or not. *Elliot* v. *Shepherd*, 371.
3. Possession of personal property in the plaintiff is sufficient evidence of title, to enable him to maintain trespass therefor, unless the defendant exhibits a superior title. *Brown* v. *Ware*, 411.
4. In an action of trespass *de bonis asportatis* a mere stranger cannot set up an outstanding title in a third person, without showing some authority under it to justify the taking. *Fiske* v. *Small*, 453.

See MORTGAGE, 1. OFFICER, 3. SEIZIN AND DISSEIZIN, 6. WAYS, 3.

TROVER.

See MORTGAGE, 9.

TRUST.

See EQUITY, 9, 10, 11, 12, 23.

TRUSTEE PROCESS.

1. If the plaintiff, after the person summoned as trustee had disclosed, files an allegation, or plea, under the provisions of Rev. Stat. c. 119, without stating therein any specific facts, that the conveyance of certain chattels, therein mentioned, by the debtor to the trustee, was made in fraud of the plaintiff's

USURY.

VENDOR AND PURCHASER.

See SALE.

VERDICT.

See BANKRUPTCY, 4.

WAYS.

1. The County Commissioners have power under the Revised Statutes, (c. 25, § 34,) to approve and allow of a town way, as laid out by the selectmen, leading from one town road to another town road and passing through the land of the applicant under his possession and improvement, if the town shall unreasonably refuse or delay to approve thereof.
North Berwick v. *County Com'rs York*, 69.
2. As a petition for a writ of *certiorari* is addressed to the discretion of the Court, the writ will not be granted on account of errors in mere matter of form. The Court, therefore, will not grant such writ, where there is an omission to state upon the record of the commissioners, that the refusal of the town to confirm the doings of their selectmen was unreasonable, when the application to the commissioners stated that the refusal was unreasonable, and where it does not appear that the laying out of the road was inexpedient or injudicious. *Ib.*
3. Where a surveyor of highways was required by the selectmen of a town to put a road therein, then lately laid out and running through land of the plaintiff, in a condition to be traveled with safety and convenience; and, in doing it, he and those acting under his direction, took for the purpose, from the plaintiff's land lying contiguous to the way, "not planted nor inclosed," a quantity of stone, necessary for the proper repair of the road; an *action of trespass quare clausum* cannot be maintained against the surveyor, or those acting under him; such act being authorized by Rev. Stat. c. 25, § 72, and the remedy for compensation being in a different mode.
Keene v. *Chapman*, 126.
4. Where a road extends into two counties, and the majority of the commissioners of both counties, at a legal meeting thereof, under the provisions of Rev. Stat. c. 25, "shall adjudge it to be of public convenience and necessity to lay out such highway," it is not left discretionary with the commissioners of one county, to locate the highway within their county, or not; but it is their duty to proceed and lay it out in conformity to the adjudication. *Sanger* v. *County Com'rs Kennebec*, 291.
5. And if a county or town road has been previously laid out over a part of the same route, it furnishes no sufficient excuse for a refusal to locate the highway there under the adjudication of the commissioners of the two counties. *Ib.*
6. To sustain an indictment, charging a town with neglecting to keep in repair a *public highway* within its limits, there must be proof of the existence of such a way. It cannot be sustained by proof of the existence of a town or private way. *State* v. *Strong*, 297.
7. Proof that a way has been used as a road for more than thirty years, encumbered all the time with gates and bars in the summer seasons, without its having ever been fenced on its sides, is not sufficient to show, that it is a *public highway*. *Ib.*
8. The one hundred and first section of the twenty-fifth chapter of the Revised Statutes, does not prevent a town from denying the existence of a public highway within its limits, when indicted for neglecting to repair such highway. *Ib.*
9. The County Commissioners, by the statute of 1821, c. 118, had jurisdiction of the question, whether a new county road was or was not opened and made according to the return of its location; and their decision is conclusive until vacated by some legal process or proceeding.
Woodman v. *Somerset*, 300.
10. Where the return of the road states, that stone monuments had been set up and marked at the angles of the road, and also gives the courses and distances, and there is disagreement between them and the monuments, the courses and distances may be corrected by the monuments named in the return. *Ib.*