# REPORTS

OF

# CASES DETERMINED

IN THE

# SUPREME JUDICIAL COURT,

OF THE

# STATE OF MAINE.

By JOHN SHEPLEY,
COUNSELLOR AT LAW.

VOLUME XIII.

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# JUDGES

OF THE

# SUPREME JUDICIAL COURT,

## DURING THE PERIOD OF THESE REPORTS.

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

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## ERRATUM.

Page 30, line 5, for *executed*, read *exacted*.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF CUMBERLAND,

ARGUED APRIL TERM, 1846.

*Mem.* — A part of the cases argued in 1846, and decided in 1847, were published in the last volume.

## DANIEL WINSLOW *versus* THE BANK OF CUMBERLAND.

Where the writ sets forth an undertaking on the part of the defendant and a promise to perform it, with an averment of carelessness and neglect by him to fulfil it; and the defendant pleads, that he never promised, and this issue is joined by the plaintiff; and thereupon a trial takes place, and a verdict is returned for the defendant — the verdict will not be set aside, on the plaintiff's motion, for this cause, and a new trial granted.

THE defendants were summoned to answer unto the plaintiff "in a plea of trespass on the case," for that the plaintiff left a note for collection with the defendants, and that they "promised and undertook to collect the same for the use of the plaintiff," and that they "carelessly and negligently omitted and refused" to make a demand upon the maker and give notice to the indorser of the note, "by reason of which carelessness and negligence of the defendants the said indorser has been entirely released and discharged from all obligation and liability to pay said note, and utterly refuses to pay the same."

The defendants pleaded the general issue, that they never promised, and this issue was joined. The jury returned a verdict for the defendants; and thereupon the plaintiff filed a motion "to set aside the verdict in this case, entered upon the docket as rendered therein, because, he says, no issue was joined therein before the case was committed to the jury — and because, he says, there has been a mis-trial therein."

The case was submitted without argument.

*Codman & Fox* and *Neal*, for the plaintiff.

*Haines*, for the defendants.

The opinion of the Court was drawn up by

TENNEY J. — The defendants were called upon to answer to the plaintiff in a plea of trespass on the case. The writ sets out an undertaking on the part of the defendants, and a promise to perform it, followed by an averment of a neglect to fulfil the same. The defendants pleaded, that they never promised, which was joined by the plaintiff; and upon this issue, a trial being had, a verdict was returned for the defendants. The plaintiff filed a motion, that the verdict be set aside, because no issue was joined in the case before the same was committed to the jury, and because, he says, there has been a mis-trial therein.

By Rev. Stat. c. 115, § 9, "No summons, writ, declaration, plea, process, judgment, or other proceedings in courts of justice shall be abated, arrested or reversed for any kind of circumstantial errors or mistakes, when the person and case may be rightly understood by the Court, nor for want of form only and which by law might have been amended." As the object of a new trial is to attain the real justice of the case, and for this purpose it depends upon the legal discretion of the Court, guided by the circumstances of each particular case, whether one shall be granted or not, it follows, that though there is a slip in the pleadings, if the merits of the case are with it, and essential justice has been done, a new trial will not be granted. Story's Pleadings, 72.

If the plea tendered by the defendants had not been in the proper form, advantage could have been taken for that reason, before joining the issue. By adding the *similiter*, the objection may be considered as waived. The plaintiff has had all the benefit under this issue, which he could have had under any other, that would have been unobjectionable in its form; and he is precluded from availing himself of the supposed error which has been productive of no injury to him. If the plea is not in proper form, it may be amended.

*Motion overruled.*

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ROBERT I. ROBINSON & *al. versus* THOMAS R. SAMPSON & *al.*

After a final decree in a bill in equity, a petition for a rehearing will not be granted for the purpose of allowing evidence, touching the merits of the cause, to be introduced, which evidence was fully known to the petitioner before publication of the proofs taken, and might have been produced at the hearing.

A misapprehension of the effect of the evidence taken, or a mistake of the law respecting the admissibility of evidence, either by the party or by his counsel, will furnish no sufficient ground for granting a rehearing after a final decree in a cause in equity.

THIS was a petition by the plaintiffs for a rehearing of the case in equity, between the same parties, reported in 23 Maine Reports, 388. The case, a rehearing of which is now sought, was argued at the April Term of this Court in Cumberland, 1844, and continued *nisi* for advisement. The opinion of the Court was delivered, and a final decree passed, at the following November Term, dismissing the bill, for reasons given in the opinion found in the reported case.

At the April Term, 1845, the plaintiffs presented their petition for another hearing, and after reciting the substance of the original bill and of the evidence, gave several reasons why the prayer of the petition should be granted, among which are these: —

"Because at the argument of said cause it was believed by said complainants, that the proofs taken in said cause were

sufficient to satisfy this honorable Court of the plaintiffs' claim to the relief prayed for in their said bill, without resorting to the testimony of said Mitchell, one of the defendants; and that such belief was entertained until the delivery of the opinion of the Court, and that your petitioners were surprised at the opinion aforesaid," inasmuch as certain testimony, set forth, was alleged to have been in the case.

Because in connexion with that testimony, "said petitioners verily believe, that if said Mitchell was put upon his oath to testify, he would on his oath state the facts aforesaid, and would by his testimony fully substantiate all the material allegations in said bill, and that therefore under the extraordinary circumstances of the case, they are advised, that it is reasonable and proper, that a further hearing should be had for the purpose, that the deficiency in the plaintiff's testimony should be supplied by taking the testimony aforesaid of said Mitchell, one of the defendants in said bill."

Because the deficiency in the testimony can be supplied by said Mitchell who has already stated the same on oath in his answer, and it was "not placed before the Court in his deposition, because the plaintiffs were not advised, that it was absolutely necessary to do so, and no fraud or injustice can be effected by supplying said deficiency, no wrong or damage can be done to the defendants, by allowing said cause to be reheard before this honorable court."

"Because unless said rehearing is granted, the said plaintiffs will greatly suffer by denial of relief in a case of gross fraud and misrepresentations, perpetrated upon them by said Sampson, which relief is granted in all like cases by courts of equity, whose peculiar province it is to protect parties under the circumstances set forth in said bill."

*Deblois* and *O. G. Fessenden,* for the plaintiffs, argued in support of the reasons set forth in the petition, and cited 1 Metc. 78; 4 Metc. 109; 2 Smith's Ch. Pr. 21, 22, 23; 3 P. Wms. 300; 18 Ves. 319; 9 Ves. 172; Hoffman's Ch. Pr. 498 and 567; 2 Russ. 91; 2 Johns. C. R. 436; 1 Vernon,

46; 2 Madd. Ch. R. 483; 10 Ves. 236; 5 Russ. 287; 1 Johns. C. R. 48; 7 Johns. C. R. 256; 1 Paige, 574; 5 Paige, 252; 9 Price, 187; 2 Ves. and B. 401; 1 Smith's Ch. Pr. 344; 3 Atk. 402; Ambl. 583; 1 Keen, 1; 6 Paige, 565; 1 Iredell, 93; 3 Bland, 126.

*Codman & Fox* argued for the defendants, and cited 2 Hill's Ch. 357; 1 Irish Eq. R. 472; 6 Johns. C. R. 255; 1 Pet. C. C. R. 364; 13 Ves. 511; 5 Simon, 554; *Baker* v. *Whitney*, 1 Story's R. 218; Story's Eq. Pl. § 412, 413.

The opinion of the Court was prepared by

TENNEY J. — "A bill of review may be brought upon the discovery of new matter, which would change the merits of the claim upon which the decree was founded." Story's Eq. Pl. sect. 412. "The new matter must be relevant and material, and such, as if known, might probably have produced a different determination." "Not to make a new case but to establish an old one." "The new matter must have come to the knowledge of the party after the time, when it could have been used in the cause at the original hearing." *Ibid.* sect. 413. "The matter must not only be new, but it must be such, as the party by reasonable diligence, could not have known." *Ibid.* sect. 414.

In *Young* v. *Keighley*, 16 Ves. 348, the Lord Chancellor says, "If the decree has been enrolled, a bill of review is necessary; if it has not been enrolled, the mode is by a supplemental bill in the nature of a bill of review. The ground is error apparent on the face of the decree; or new evidence of a fact materially pressing upon the decree, and discovered at least after publication in the cause." The same principle is laid down in the most emphatic terms in the case of *Bingham* v. *Dawson*, 3 Jac. and Walk. 243, by Lord Eldon. In *Wiser* v. *Blackly*, 2 Johns. Ch. Rep. 488, the Chancellor uses the following language. "The bill [of review or a supplemental bill in the nature of a bill of review] must be either for error in point of law apparent on the face of the decree, or for some new matter of fact, relevant to the case, and discovered since

publication passed, and which could not have been discovered by reasonable diligence before." Judge Story says, in *Baker & ux.* v. *Whitney & al.* 1 Story's Rep. 218; after examining the authorities touching an application for a rehearing and for leave to introduce new evidence in a cause, in which there has been a final decree; "It is clear, therefore, that the defendant would be entitled to relief by a rehearing, upon filing a supplemental bill, under the direction of the Court, stating the new evidence, if it be of such a nature, and under such circumstances, as that he might have relief upon a bill of review; but not otherwise. The rule I take to be clear, that such a rehearing and such a supplemental bill, will be granted only, where the party could entitle himself to relief upon a bill of review, or a supplemental bill in the nature of a bill of review after a final decree."

Permission has been given, *at the hearing*, however, to supply defective testimony under special circumstances; and the cause will be ordered *to stand over* for that purpose. 1 Hoffman's Ch. Pr. 498. In *Cox* v. *Allingham*, 1 Jacob, 377, an original lease was the foundation of the suit. At the hearing a motion was made on affidavit for liberty to prove the loss of the deed, which was read at a former hearing; but although the loss was sworn to, yet the fact of a search for the deed was not proved. The answer omitted the deed as set forth, but called upon the plaintiff to produce it. The reference distinctly called for the production. The Master of the Rolls stated his "strong impressions of the dangers, that would arise, if in every instance a party whose case broke down at the hearing were to be at liberty to go into further evidence, and added, that when there is any slip, or mistake, either by counsel or a solicitor, the party must suffer the consequence. But it was further remarked, that the proof offered relates only to a document; there is no danger, that the plaintiff may profit by the publication having passed; it is a mere slip, not new matter, no design, though the cause has come to a hearing, and the interrogatory was allowed to be put, the plaintiff paying the costs of the application, and of the examination and of the cross examination, if any." The decision in the case of *Des-*

*places* v. *Goris & als.* 5 Paige, 252, was upon the authority of that of *Cox* v. *Allingham.* The suit was founded on a written agreement in the French language between the plaintiff and Goris alone, and the bill sought to charge the other defendants through that agreement, a translation of which was set out in the bill; and Goris admitted substantially both the agreement and the correctness of the translation; and the plaintiff supposed this admission sufficient. But upon the hearing after the plaintiff's opening argument, the objection was made, that the agreement and translation had not been proved, so as to entitle it to be read, as against the other defendants. The Vice Chancellor decided that the objection was well taken, and allowed the plaintiff to prove the execution of the agreement and the correctness of the translation before an examiner. An appeal was taken, and the Chancellor affirmed the former decision, remarking that proof of the agreement was matter of mere form, to which the attention of the plaintiff's counsel was first called at the argument. In *Dale & ux.* v. *Roosevelt*, 6 Johns. Ch. Rep. 255, the Chancellor holds that "on a rehearing," "a party may no doubt be let into fresh evidence, not read on a former hearing; but I understand the cases to refer to the evidence duly taken in chief, and *omitted* by negligence or other cause, to be read; or if the evidence be new matter, not before ready, it relates only to papers since found, and which may be proved, *viva voce*, at the hearing, or to testimony going to show the incompetency of a witness in a former deposition." "It is impossible to allow new testimony to the merits." 2 Atk. 408. Mr. Hoffman, in his Equity Practice, says, "I have found no case in which new evidence has been permitted to be taken to be used upon a rehearing, excepting documentary evidence. But he remarks, that the Court has the power to extend the permission to other testimony in a proper case. Page 567.

After a decree and a reference to a master under special circumstances, an order has passed for the examination of a witness. *Winpenney* v. *Courtney*, 5 Sim. 554. In *Paris* v. *Hughes*, 1 Keen, 1, by the decree at the hearing, it was re-

ferred to the master to inquire, whether Brightman at the time of his purchase, had notice that the defendant intended to dispute the validity of the deed, and since the decree Brightman obtained the order now sought to be discharged; and the master of the rolls remarked, "I consider it the settled rule of the Court, that an order of this kind may be obtained *exparte* as well after as before decree." And in *Williams* v. *Goodchild*, 2 Russ. 91, on a rehearing, evidence in the cause may be read, which was not read at the original hearing. But no case has been cited, and it is not believed that any is to be found, which is to be regarded as authority, where evidence has been allowed to be introduced upon a rehearing, after a *final decree*, which evidence was fully known to the party before publication of the proofs taken.

The petition here is for a rehearing of the cause, after the final decree, dismissing the bill. No suggestion is made, that the merits of the suit, as they were before presented, were not fully understood by the Court; but the rehearing is prayed for upon the ground, that sufficient testimony could be produced by the complainants, to sustain all the material allegations in the bill of complaint, and entitle them to the relief sought thereby. The application is for that relief, which could be granted only, when the party could entitle himself thereto upon a bill of review, or a supplemental bill in the nature of a bill of review. We have seen what the rules are, touching such questions, and those rules cannot be disregarded, however much they may bear against an injured party. The rehearing is sought only, that testimony not before the Court at the former hearing may be presented in addition to that, there exhibited. These facts were disclosed in the answer of Mitchell, one of the original defendants; this of course was fully known to the plaintiffs before their proofs were taken, and they could have seasonably availed themselves thereof.

The evidence, which the plaintiffs ask the opportunity to present at a rehearing is unlike that, which has been allowed in the cases cited, where there was a document omitted, or where the evidence to be supplied was of such a character,

that the party making the motion could not profit, by the publication having passed. But the testimony which the plaintiffs would introduce at a rehearing goes directly to the merits of the case, and is that upon which they rely much to show that the other defendants were guilty of the fraud alleged in the bill. This would be no less than reopening the whole case, for the production of evidence, which was not unknown before publication.

When a document has been allowed to be put in, or when such evidence as has been considered, has been taken by an examiner, after publication, it has been done on motion made *at the hearing*, upon an objection from the other side, which was a surprise. In this case, the ground was taken by the counsel for two defendants, that the facts contained in the answer of another defendant were not evidence against them. But the counsel not conceding such to be the law, and relying upon other evidence, made no motion to arrest the proceedings, but the cause was fully heard and passed to a final decree.

*Petition dismissed.*

JACOB G. LORING *& al. versus* JEREMIAH PROCTOR.

The St. 1845, c. 172, "concerning judicial process and proceedings," does not authorize the transfer of an action from the District Court to the Supreme Judicial Court, for the decision of "legal points," upon an incidental or incipient question, which may arise; but only when questions of law are found to have arisen therein, upon the decision of which the final determination of the cause, one way or the other, must ultimately depend.

Where the writ contains but one count, and that upon an alleged agreement to become insurer of a vessel, by a policy to be effected, it may be amended in the District Court, by leave of Court, by declaring, in a new count, upon a policy as actually made for the purpose. But the amendment must be allowed and made in the District Court before the action can proceed to trial on such new count, and questions arising thereon be transferred from the District Court to this Court for decision.

A policy of insurance may be a valid instrument between the parties without any formal delivery of the paper by one party to the other. And what the intentions of the parties may be, as to a writing prepared between them on the subject, with reference to its efficacy, is a question referable to a jury as matter of fact, and not altogether of law referable to the Court.

If the question in the District Court be a mixed one of law and fact, to be decided by the jury, under proper instructions from the Court as to the law, it cannot be transferred from that court to the Supreme Judicial Court for decision, under the St. 1845, c. 172, until the facts have been determined by the jury.

THIS case came into this Court from the District Court upon the following report: —

"*District Court for the Western District.*

"CUMBERLAND COUNTY, MARCH TERM, 1846.

"JACOB G. LORING *& als. versus* JEREMIAH PROCTOR.

"ASSUMPSIT on a contract of insurance. The writ contains one count, setting out an agreement to insure. Before issue joined, the plaintiffs moved to amend by adding a second count, setting out a policy of insurance, as executed on the same contract, which was objected to by defendant.

"It is agreed, that if the amendment was within the discretion of the Court below, it shall be allowed.

"The original count and amendment are annexed to this report.

"Plea the general issue, which was joined.

"Upon the evidence given, *it was proved:* That a voluntary association of underwriters, of whom the defendant was one, was organized, and commenced taking risks, in Portland, in June, 1839. It was on an alleged contract with this company, that the case arose. The defendant was a Director at the time of the alleged contract. John W. Smith was another Director, and was President of the Board of Directors. He was also the Secretary and Treasurer of the company.

"The following were articles of the "Constitution and By-laws" of the company.

"'Art. 5. All policies to be issued by this company shall, (except such variations as shall meet the case of this association,) be printed in the common form, and contain the names of the stockholders, and the Secretary shall have full authority, by a general power of attorney from all the associates, to use their names and sign for each of them; and every policy, so signed, shall be binding on all the associates, the same as if each had placed his own signature to the policy, in proportion to the stock held by each member.

"'Art. 7. All premiums for policies of a less sum than twenty dollars shall be paid when the risk is taken; and for all premiums for risks of twenty dollars and over, the Secretary shall be at liberty to take a note for the same on such time as the Directors may determine.

"'Art. 17. The Directors shall determine as to the value of any vessel offered for insurance, and in no case shall any vessel be insured for more than three fourths of such value.'

"The defendant signed the power of attorney specified in the 5th article, and was the holder of two shares of the nominal stock, making the proportion underwritten by him of any risk one twentieth part of the aggregate amount.

"*It was further proved,* That the company on the commencement of their business, inserted an advertisement in the city papers in the following terms: —

"*Notice.*

"The PORTLAND MARINE INSURANCE COMPANY, a voluntary association, formed for the purpose of MARINE INSURANCE, is now organized and ready to receive proposals for insurance on vessels and merchandize on board the same, not exceeding two thousand dollars on any one risk. Office in the *Mariners' Church Building*, west end, up stairs.

"JOHN W. SMITH, President of
"the Board of Directors."

"Portland, June 20."

"In the printed portion of the policy used by the company is this clause: —

"'And in case of any one or more of the insurers of the property by this or any other policy, should become insolvent, the loss, if any, occasioned thereby shall be borne solely by the insured, and none of the insurers shall be subject to any other loss, or demand, than what he would be liable to if no such insolvency should happen.'

"Also the usual clause of receipt of premium, as follows: —

"'Confessing ourselves paid the consideration due unto us for this insurance, by the insured at and after the rate of ——.'

"The plaintiffs resided in North Yarmouth, and were not members of the association.

"The company kept a Proposition Book, or Book of applications for insurance, and a Duplicate Book.

"It was further proved, that John Yeaton was Director for the week, when Loring, one of the plaintiffs, applied for insurance on the schooner Oxford, of which they were sole owners. Smith, the President and Secretary, consulted with Yeaton on the application. Yeaton knew Loring, and knew the vessel. Smith had done business with Loring at the Custom House. They agreed to take $2000, at ten per cent. for one year, commencing on the 25th of October, 1839, lost or not lost. The application was on the 5th of November. After the consultation with Yeaton, Smith informed Loring that they had agreed to take the vessel, and Loring then signed the terms on the Proposition Book. No objection was made at the time, either by Yeaton or Smith, to Loring's want of authority to effect insurance for the other owners. Afterwards, on the

same day, Smith informed Yeaton that he had taken the Oxford. After signing the Proposition Book, Loring went away. Nothing was said at that time respecting a premium note. Subsequently Smith filled out and executed a policy and recorded it on the Duplicate Book. Four or five days after, Loring came to the Office and inquired for the policy, and was told that it was ready. Smith then filled up a joint note for the premium. Loring said he had not authority to sign the note for the other owners, and left the policy, saying he would take the note out to North Yarmouth, and get it signed and return it in a few days, and accordingly took the note. About the 6th of December, Smith met Loring on the wharf, and requested him to go up to the office and settle that business, meaning to give the note, &c. Loring replied, he would call another time. The loss became known in Portland, December 9th. On the 11th of December, Loring called at the office, mentioned the loss, offered the note, and requested the policy. Smith objected, and on the same day was directed by the Directors not to deliver it. Loring on the same day made a formal demand of the policy and tendered the note signed by the four plaintiffs. Smith asked, why the thing had not been completed before? Loring replied, that it was not convenient to get the names before, and thought it hard the company should object, as he could not often meet the other owners except when they met on the Sabbath for worship.

"The note was produced, and identified at the trial as follows: —

"PORTLAND MARINE INSURANCE COMPANY.

"*No.* 32. Portland, October 25, 1839.

DUE. "For value received we promise to pay the Treasurer of the Portland Marine Insurance Company, or order, two hundred and one dollars, —— cents, at either of the Banks in this city, in fourteen months, with interest after.

"THAXTER PRINCE,

NO. $201, —— "PAUL PRINCE,

"LEVI BLANCHARD,

"ATTEST." "J. G. LORING."

"On the same 11th day of December, Smith made a private memorandum relating to the affair, but before that day he

had made no memorandum, or entries, other than the regular papers and entries relating to the insurance. Before hearing of the loss, he had not in any manner canceled or altered any of the papers or records of the transaction; but after the news of the loss arrived, he did make some such entries or canceling marks on the papers.

"It was further proved (subject to defendant's objection to such proof,) that the custom is uniform with insurance offices and agencies in Portland, to keep Proposition Books. Applicants sign the Proposition Book, and then leave the office considering themselves insured. The contract is regarded as finished at the time of signing the Book. As soon as convenient, the policy and note are made out. It would be impossible to execute and exchange papers at the time of concluding the contract. Very often premium notes lie in insurance offices unsigned, until they are due, and often till after the risk is terminated. Cases occur where the papers are not exchanged before losses happen, but the contracts are held good.

"It was further proved, (by two witnesses not members of the company,) that they had several times effected insurance with this company. The contract in each case was negotiated and concluded in the same manner as the witnesses had always done business at other offices. The party applying, signed the Proposition Book, setting out the subject matter, rate, time, &c. Smith then said, "The insurance was complete," or, "The vessel was then at the risk of the office," and that the insured might call when it was convenient, and take the policy. The same method of proceeding was proved in cases of insurance effected with this company, by one who was a Director in the company.

"*It was further proved*, That Loring had been a ship owner for fifteen or twenty years; that Thaxter Prince and Levi Blanchard, two others of the plaintiffs, were old shipmasters; that Loring was always the managing owner of the "Oxford," from whom the masters received all their orders, and to whom they uniformly made all their remittances.

"Upon the foregoing facts, the following "legal points" were "presented for decision.

"By the plaintiffs: —

"Whether a valid contract of insurance was effected between the parties?

"Whether the amendment is allowable?

"By the defendants: —

"Whether the neglect of the owners, other than Loring, to execute and deliver the premium note, until after the loss was known to the parties, did not invalidate the contract, if it had otherwise been made between the parties?

"Whether the plaintiffs can recover on the count and declaration in their writ, upon the proofs exhibited in the cause?

"Whether the objection taken by defendant to proof of custom, as reported, is sustainable?

"The following agreement of parties, with the assent of the Court, was filed in the cause: —

"For the purposes of this trial, the defendant waives any evidence in respect to the loss, and in respect to any warranties contained in the contract or policy, and the parties agree, that the only issue upon this trial shall be, whether or not a contract of insurance was effected, as alleged by the plaintiffs?

"If this issue is finally determined for the plaintiffs, then the cause shall be open for a new trial, on any other ground of defence."

Here follows a formal count on an agreement by the defendant to insure the plaintiffs to a certain amount "upon a schooner called the Oxford."

"The count offered in amendment recites the policy at length, and is drawn according to the usual precedent in Chitty of a count upon a policy.

"Report agreed.

"Augustine Haines, Att'y for D'f't.

"P. Barnes, for Pl'ffs.

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

"In the trial of this case, the several questions of law presented in the above *Report of facts*, having arisen, the cause

is transferred to your Court for a decision of those questions, or such of them as may be material, for a final decision of the cause. And such disposition is to be made of the case, as you are authorized by law to make from the above report of the facts, and the agreements contained in it, signed by the Attorneys for the respective parties.

"DANIEL GOODENOW, Jus. Dis. Court,

"*Western District.*"

The case was fully argued in writing by

*W. P. Fessenden, Barnes* and *Freeman*, for the plaintiffs, and by

*Haines*, for the defendant.

Among others, the counsel for the plaintiffs claimed to support their action on these grounds.

The original count sets out a contract or an agreement to insure. The subject matter, the consideration, the promise of indemnity and the breach are severally and distinctly stated, so that the relations of the parties can be exactly understood, and the testimony and the judgment can be applied to every allegation with certainty. The contract of insurance subsists practically in a variety of forms, each of which has its appropriate method of proof. The plaintiffs are entitled to recover on the original count. 2 Phillips' Ins. 602, 617; 4 Cowen, 645; Marshall on Ins. 210; 2 Greenl. Ev. § 376; 23 Wend. 18; 1 Pick. 278; 10 Pick. 326; American Precedents, 162.

The amendment is admissible. Both counts are for the same cause of action. 15 Maine Rep. 400; 16 Maine R. 439.

The contract was a valid one. In the relation in which Loring stood to the other owners, he had authority to insure not only for himself but also for them. But where a part owner of a vessel effects insurance for himself and the other owners, they may ratify his act after they obtain knowledge of the loss, and the insurers cannot object to want of authority. 3 Kent, 247; 5 Metc. 192. The delay of ratification did not

render the contract invalid on the ground of want of mutuality. 2 Gill & J. 136.

The case of the plaintiffs depends very little upon proof of custom, yet the evidence on that point was competent and sufficient.

By the well established principles of marine insurance the contract took effect by the transactions between Loring and the company on the fifth of November. Where the minds of the parties have met, and the act of signing the memorandum is performed, the thing is in fact done, the contract is made, and the indemnity is secured. Arrangements and agreements about the mode of securing, or paying the premium, or the form of the credit, are entirely subsidiary and subordinate to the principal contract, and do not affect it, unless expressly and advisedly incorporated with it. 1 Wash. C. C. Rep. 93. The insurers had no right to retract after the loss. Case last cited, and 16 Maine R. 439.

*Haines* argued in support of these, among other propositions.

Unless Loring was authorized by the other owners, at the time he applied for the insurance, to effect insurance for them, there was no valid contract. No forms, or proceedings, or modes of doing the business, could bind the other owners to pay the premium, unless they had authorized Loring in some way to contract for them to pay the same. 5 Metc. 196, and cases there cited. There can be no presumption of authority in favor of the plaintiffs. It is incumbent on them to prove it, and they have failed so to do. So far from their having authorized Loring to make insurance for them, and to make them liable for the premium, it is not shown, that they even knew, that such proposition had been made.

The agreement must be obligatory on both parties, or it will bind neither. Chitty on Con. 15, and cases there cited; 12 Johns. R. 90 and 396.

The principle that where a part owner of a vessel "effects insurance for himself and the other owners" they may ratify the act after the loss, cannot aid the plaintiffs, however sound

the doctrine. Here no insurance of that description was effected. To do this, he must either pay, or make himself liable to pay the premium. This was not done in the case under consideration. 5 Metc. 192; Story on Agency, § 248; 2 M. & Selw. 485; 13 East, 274. Loring alone was not liable. He did not profess to contract alone, but for himself and others jointly. If the others had disavowed the act, no action could have been maintained by the defendant for the premium. There is no proof of the consideration alleged by the plaintiffs in their declaration.

So far as the cases cited for the plaintiffs from the first of Pick. 278, and 10 Pick. 326, are in similitude with the present, they are authorities for the defendant to show there was no contract. In the case cited from Washington's Reports, the agent had previous authority from the principal to contract; here he had not. In the case cited from 16th of our Reports, the insurance was effected by Warren alone, *eo nomine;* and he gave his own note for the original premium, and became personally liable for the additional rate for the healing.

No question was made by the counsel on either side, relative to the mode in which the case came before the Court.

The opinion of the Court was drawn up by

Whitman C. J. — This cause is brought before us under the belief, entertained by the parties, that it comes within the act of 1845, ch. 172, which provides, that "whenever it shall happen in the trial of any cause in the District Court, that any one or more questions of law arise, it shall be lawful for the Judge, with the consent of the parties, to draw up a report of the case, presenting the legal points for decision, and containing such stipulations as the parties may make, relative to the disposition of the case by nonsuit, default or otherwise;" and that the same shall be transferred to this Court for decision.

It will be important, in the first place, to ascertain the true intent and meaning of the Legislature, as contained in this enactment. Was it intended, that a cause in which some incidental and incipient question might arise, should, thereupon,

be transferred to this Court for its decision; and, upon its decision, that this Court should, thereafter, continue its jurisdiction over the same to its final termination? Or was it intended, that, in a trial in the District Court, the cause should proceed to a full developement, and then, if any questions of law were found to have arisen therein, upon which the decision of the cause one way or the other must ultimately depend, that the same should be transferred to this Court for a final decision? If the former was the intent of the enactment, every cause in the District Court, upon a slight, and even frivolous pretence, however unimportant the amount at stake might be, could be transferred from that Court to this, whereby the manifest intent of the Legislature, in the Rev. Stat. ch. 96 & 97, defining the boundaries between the jurisdiction of the two Courts, would be virtually frustrated. If the latter, then the distinction, in spirit and meaning, would still be maintained. The act itself speaks of "the trial of any cause." There was then to be a trial in the District Court, in which the questions of law might arise. A *report* of the *case* is to be drawn up by the Judge. A report as to one incident, occurring in the first stage of a cause, could not well be denominated a report of a cause, which had been tried. The parties, moreover, are to make stipulations as to the disposition of the cause. What is meant by the disposition of the cause? Must it be other than a final determination of it? This disposition is to be "by nonsuit, default or otherwise." A nonsuit or default would be a final disposition. And what is meant by "otherwise"? Generally, when certain items are specified, and others are said to be included, without particularizing them, they must be of the same kind. Upon this principle "otherwise," in this instance, must necessarily have reference to a disposition of the cause equivalent to what would be effected by a nonsuit or default. Besides, in § 2 of the act, it is provided, that this Court shall "render *judgment* therein, in the same manner, and with the same effect, as on a report made by consent of parties, by a Judge of the Supreme Judicial Court." This Court is to render *judgment* therein. To render judgment would seem to

imply a final disposition. Furthermore, the case is to be reported? Does not this mean a full report, so that the case can be finally disposed of? If all the facts were reported, with the points of law supposed to arise therefrom, there could be no reason for any agreement for a further trial. These considerations alone might be sufficient to authorize us to dismiss the case from our further consideration, as we are presented with but a part of the case for determination.

But there are other weighty objections to our taking cognizance of it. The writ originally contained but one count; and that was on an alleged agreement, on the part of the defendant, with the plaintiffs, to become insurer by a policy to be effected on the schooner Oxford. Before issue was joined a motion was made for leave to amend by declaring upon a policy as actually made for the purpose. This motion was neither granted nor refused; and yet the cause was allowed to proceed to trial, seemingly as if it had been made. And the case states, that it was agreed between the parties, if this Court should be of opinion, that the amendment was admissible, it should be considered as having been made. By the statute it would seem that it was in contemplation, that a trial should be had in the District Court, and that questions of law might arise therein, on which a final decision would depend. Can a cause, when such an amendment was proposed, and undecided upon, be considered as proceeding to trial; especially if the maintenance of the cause depended upon its introduction? It is difficult to perceive why the amendment should not have been admitted. *Barker & al.* v. *Burgess & al.* 3 Metc. 273. And if admitted, it might have constituted the only basis upon which the action could have been maintained; and very clearly the only foundation for the question, which it is said, in the latter part of the report, the parties had agreed, alone, to submit to our decision, viz: "whether a contract of insurance was effected."

But the graver objection to our taking cognizance of the cause is, that the question, as to the efficacy of the contract, is one not of law purely, but a mixed question of law and fact.

It is agreed, and may be regarded as reported by the Judge of the District Court, that a policy was actually made, and duly signed by the agent of the defendant, John W. Smith, as had been contemplated between the parties, and entered, by said agent, upon what was called, his record; and that the defendant and others had, by a public advertisement made by the same agent, held themselves out as having formed a voluntary association, by the name of "The Portland Marine Insurance Company," the said Smith being president and secretary of the same, with power to affix the signatures of each of the associates to policies. But the policy, so made and recorded, was never actually handed over to the plaintiffs. Ordinarily an instrument in writing to be effectual, is expected to be delivered to the obligee therein. But in reference to parol agreements, and policies are not often, if ever, under seal, every thing must depend upon the intention and understanding of the parties. They may consent, that a writing which is intended to contain the evidence of an agreement between them, though it may be left in the hands of the one party, or the other, without any formal delivery of it by either to the other, shall be evidence of their agreement. What the intention of the parties may be, as to a writing prepared between them, in reference to its efficacy, is a question referable to a jury as matter of fact, and not altogether of law, referable to the Court. To ascertain such understanding and intention, resort may be had to the nature of the contract, the subject matter of it, the habits and modes usual in such cases, and to the language and declarations of the parties. The defendant, in this instance, with others, held themselves out as general insurers; and as keeping an office for the purpose, by their agent, Smith, allowing him to style himself president of their board of directors. A jury might infer that they were fully conversant with that business, and that they had adopted the usages incident to it. If it was customary for the insured to be content, that their policies should, when made out, remain in the office of the underwriter, and still be obligatory; and it should appear that such had been the case in the office of the

defendant; and, at the same time, that the agent or insurance broker had all along declared, that the risk had been taken, and was upon the company; and if it should be believed, that, in case there had been no loss, the premium would have been executed and recovered, a jury might conclude, that it was intended, that the policy, so made out should constitute a binding contract. The argument, that Loring, one of the plaintiffs, had not authority to contract for the rest, considering that he would be answerable personally for the premium, if he had not such authority, and considering that this objection was not made during the progress of the contract, nor until a loss had occurred; and especially as the plaintiffs ratified the contract, and never repudiated it, bringing themselves within the decision in *Finney & al.* v. *F. Ins. Co.* 5 Metc. 192, might not affect the claim of the plaintiffs. The not giving of a note for the premium might be made to appear unimportant, as constituting only a reiteration of the promise to pay it, contained or fully implied in the proposition for insurance, signed by Loring in behalf of the plaintiffs.

On the whole, therefore, we cannot regard the question, intended to be submitted to us, as one of law unmixed with matter proper for the consideration of the jury; and the cause must be dismissed from our jurisdiction.

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## The State *versus* Colby Welch.

On the trial of an indictment against a man for the crime of adultery, the husband of the woman, with whom the crime is alleged to have been committed, is not a competent witness to prove the act of adultery.

Welch was indicted for the crime of adultery. On his trial the husband of the woman, with whom the criminal act was alleged to have been committed, was called as a witness in behalf of the State. He was objected to as incompetent, but admitted. The jury returned a verdict of guilty, and the counsel for Welch filed exceptions to the decision of the Judge, admitting the witness.

*Mitchell*, for Welch.

*Moor*, Attorney General for the State.

The opinion of the Court was drawn up by

TENNEY J. — The defendant is indicted for the crime of adultery, and the question is, whether the husband of the woman with whom it is alleged to have been committed, is a competent witness to testify to the act. Neither the husband or wife of the party is competent to give evidence against such party. The reason for the exclusion is founded partly on the identity of interest, and partly on a principle of public policy, which deems it necessary to guard the security and confidence of private life, even at the risk of an occasional failure of justice. 1 Phil. Ev. 64. It has been resolved, that a wife cannot be produced against the husband, as it might be the means of implacable discord and dissension between them and the means of great inconvenience. Co. Lit. 6, (b.) "But though the husband and wife are not admissible as witnesses against each other, when either is directly interested in the event of the proceedings, whether civil or criminal; yet in collateral proceedings not immediately affecting their mutual interests, their evidence is receivable, notwithstanding it may *tend* to criminate or contradict the other, or may subject the other to a legal demand. Greenl. Ev. § 342. In the case of *The King* v. *Cliviger*, 2 Term. R. 263, it was decided, that the husband and wife could not be admitted to give any evidence, which *tended* to the crimination of the other in collateral cases. But in a late case of *The King* v. *Inhabitants of All Saints*, Worcester, 6 M. & S. 194, the case of *The King* v. *Cliviger* was referred to, and the rule therein underwent some discussion, and the Court were of the opinion, that it had been expressed much too general and undefined; and they held that a woman might testify, when her testimony did not directly criminate the husband, in proceedings which related to other matters, and not to any criminal charge against him, nor never could be used against him, nor could he ever

be affected by the judgment of the Court founded upon such evidence.

When neither the husband nor the wife is party to a suit, nor interested in the general result, the husband or wife is competent to prove any fact, provided the evidence does not directly criminate the other. 2 Stark. Ev. 709. On an indictment for adultery the husband of the woman, with whom the crime is alleged to have been committed, cannot be a witness for the prosecution. *The State* v. *Gardiner*, 1 Root, 485. In *Canton* v. *Bently*, 11 Mass. R. 441, Parker C. J. uses the following language, though the decision of the cause did not ultimately turn upon the doctrine expressed: — "It may well be doubted, whether a husband can be a competent witness to prove a fact, which amounts to adultery on the part of the wife; and it certainly would be against good manners and common decency that such evidence should be admitted."

If there is soundness in the reason, which is given, in the books, for holding incompetent the husband or the wife, to give, against each other, evidence, because it may be the "means of implacable discord and dissension between them," it is certainly difficult to perceive how, that discord and dissension will fail to arise, when in collateral proceedings, testimony should be given by one, which charges directly upon the other, the same crime, for the commission of which the party on trial is indicted. On principle and authority we think the witness incompetent.

## The State *versus* Justus C. Keene.

Where a party to a suit, on the trial thereof, presents himself as a witness in support of the charges against the adverse party on his account book, and voluntarily takes the general oath, to tell the truth, the whole truth, and nothing but the truth, legally administered, instead of the more restricted oath, to make just and true answers to such questions as shall be asked by the Court or by the order thereof, and testifies untruly, wittingly and willingly, to matters material and legitimately derivable from him, he will come within the purview of Rev. Stat. c. 158, § 1, and may be convicted of perjury.

And if the trial is before referees, duly authorized in pursuance of Rev. Stat. c. 138, to determine the controversy between the parties, and a party there testifies falsely as to such matters as might legally be drawn from him at common law, he will be liable to the same punishment, as if the oath had been administered in a court of common law jurisdiction.

If the indictment alleges, that the false testimony of the accused was in reference to whether it was his book of original entries of his daily charges; whether the charges therein were or were not copied into it from another book; and whether, in general terms, the account had not been settled on such other book; it is not necessary to specify the particular items of the account to which the testimony related.

It is not necessary, that the indictment should allege that there was a final determination of the controversy by the referees. It is sufficient, if it be alleged that they proceeded to hear the parties, and that the false testimony was given in a due course of proceeding before them.

No copy of the indictment was received by the Reporter. The objections to the indictment, made by the counsel for Keene, appear in the opinion of the Court.

*Wells* and *Sweat*, in their argument for Keene, cited Rev. Stat. c. 158, and c. 133; 12 Mass. R. 274; 11 English Com. L. Rep. 494; 2 Russ. on Cr. 521, 533, 541; 3 Stark. Ev. 1144.

*Moor*, Att'y Gen. argued for the State, citing 2 Russ. on Cr. 522; Rev. Stat. c. 158, § 1; 2 Mass. R. 217; 1 Greenl. Ev. 138; 2 Pick. 65; 1 Fairf. 9; 1 Greenl. Ev. § 424; 10 Pick. 135; 18 Maine R. 117; Chitty's Cr. 307.

The opinion of the Court was drawn up by

Whitman C. J. — The indictment against the defendant contains an accusation of the crime of perjury, alleged to have

been committed before referees, authorized in pursuance of the R. S. ch. 138, to determine a controversy between the defendant and one Stevens. To the indictment the defendant demurs generally. The first ground of exception taken to it is, that the oath set forth, as having been administered to the defendant, was to tell the truth, the whole truth and nothing but the truth; whereas, it is alleged, it should have been only to make true answers, &c. The allegation in the indictment is, that the defendant presented himself as a witness in support of his account, there exhibited, against the adverse party, and was sworn generally to tell the truth, &c. There is no statutory provision as to the oath to be administered in such cases. The practice to allow parties to become witnesses in support of their book accounts, has, in many of the United States, been of long standing, and may now be regarded as a part of their common law. In Massachusetts and Maine, in particular, the usage may be regarded as having existed from the earliest settlement of the country. The practice, however, has, by judicial determinations, been modified and defined, so as to obviate, as far as might be practicable, the danger of imposition, and the perversion of justice.

Before a party can be admitted to testify, in reference to his book accounts, his book may be required by the adverse party, to be submitted to the inspection of the Court, who are to determine whether its appearance is such as to render it proper to admit him to testify at all. It must appear to be free from indications unfavorable to its fairness. It must purport to contain entries made daily, as the occasion may have required, of the items of his accounts, with the opposite party at least, if not with different individuals. 1 Greenl. Ev. note to § 118. In exercising this species of discretion it is often necessary for the Court to have reference to the habits, course of business, and the capacity of the individual to keep accounts. A merchant would be expected to have books very differently kept from those of handicraft mechanics or day laborers. The Court being thus satisfied of the propriety of admitting a party to testify, it has been usual to admit him to what has been

called his suppletory oath, viz: to make true answers, &c., and thereupon to testify that his book, so produced, contained the original entries of the items, charged against his adversary; that those entries were made at or about the times they respectively bear date; and that the articles were then delivered, or the work and labor then performed; and that they have never been paid for. Greenl. Ev. before cited, and cases there referred to.

The practice, without doubt, in Massachusetts and Maine, has been to administer an oath, in such cases, merely to make true answers to such questions as shall be asked by the Court, or the order thereof, as in the case of the *voire dire* to a witness, supposed not to be free from interest in the event of a suit. And, in the case of such witnesses, the practice of administering the *voire dire* has fallen very much into disuse. The general oath is often administered to them, and inquiries are made of them, the same as if under the more appropriate oath, for the purpose of ascertaining whether they are interested or not. If indicted for perjury, in reference to such disclosures, it would not be competent for them to object, that the appropriate oath had not been administered to them; for the general oath would be considered as embracing the obligation to speak the truth, as to their interests in a suit, the same as if sworn in the more limited form. Indeed, it is not uncommon to administer an oath generally, when a restricted inquiry only would be admissible; as in the familiar case of attorneys, and those who are privileged from answering questions tending to their crimination. And, in cases in which parties may be admissible to testify in reference to their book accounts, it may well be doubted, whether the general oath might not with more propriety be administered, for the adverse party has the right to a rigorous cross-examination in reference to the account, and books, of the party producing them. Either party might, perhaps, be allowed to object to the administration of the general oath, or might insist on confining the testimony to the subject of the account and books. But if neither party made any objection to the administering of the oath in general

terms, and the examination be such as would be proper, under the more restricted and usual form, it is difficult to perceive what good reason there could be for allowing a party, taking the oath voluntarily in general terms, to object to his liability to the imputation of perjury, if he should wilfully testify untruly. Surely the general oath would impose upon him, according to its terms, all the obligation that would be included by taking the oath in the more restricted form. Whether the Court might, or might not, deem it more proper in all such cases to administer the oath, as usual to disinterested witnesses, restricting the examination to matters proper to be inquired into; we, on the whole, can have no doubt, if a party in such cases, voluntarily takes the general oath, and testifies untruly, wittingly and willingly, to matters legitimately derivable from him, that he may well be deemed to come within the purview of the Rev. Stat. ch. 158, and be convicted of perjury.

But the proceeding, in which the alleged perjury occurred, was not in strictness at common law: and in *Fuller* v. *Wheelock*, 10 Pick. 135, it was remarked by the Court, in delivering their opinion, that there is no doubt that referees may receive the testimony of incompetent witnesses, if in their judgment the justice of the case should require it. This, however, it is argued, was but an *obiter dictum*. But it is in consonance with the generally received opinion, that referees, not restricted by the terms of the submission, are not restricted by the rules of evidence obligatory in proceedings at common law. And it may be inferred, at least, that, where a party offers himself as a witness before referees, and is sworn generally to tell the truth, without objection on either side, he would be so far a legal witness, that any testimony which he might voluntarily give, knowing it to be false, should be deemed perjury, but more especially should such be the case if he were no otherwise to testify, than to such matters as might legally be drawn from him at common law; and the testimony in question was of this latter class.

It is objected, secondly, that the items of the account, exhibited by the defendant, should have been specified in the

indictment. But the testimony, relative to which the alleged falsehood existed, was not as to the items particularly, but as to the matter offered in evidence, tending generally to establish their correctness in the gross. It was in reference to the book in which the items were contained, viz. whether it was the defendant's book of original entries of his daily charges; whether the charges therein were or were not copied into it from another book; and whether, in general terms, the account had not been settled on such other book. This objection therefore is without foundation.

It is not essential to the maintenance of the indictment, as urged in argument, that there should appear in it to have been any final determination by the referees. It is sufficient that it is alleged, that they proceeded to hear the parties, and that the false testimony was given in a due course of proceeding before them. *The demurrer is overruled.*

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ENOCH LITTLEFIELD *versus* THE CITY OF PORTLAND.

Where an action is brought for an alleged injury to the plaintiff's property, while in the care and keeping of his servant or agent, arising from the negligence or misconduct of such servant or agent, the servant or agent is not a competent witness for the plaintiff, because a verdict for the master would place the witness in a state of security against any action, which the master might otherwise bring against him.

But the liability must be direct and immediate to the party; for if the witness is liable to a third person, who is liable to the party, such circuity of interest is no legal ground of exclusion.

In an action by the plaintiff against a town to recover the value of his goods, alleged to have been lost by reason of a defect in a highway within the town, where the goods at the time of the loss were loaded upon a wagon which, as well as the team, was the property of another, and under the care of, and driven by a man hired by the owner for that purpose, *it was held*, that the driver was a competent witness for the plaintiff.

EXCEPTIONS from the District Court, GOODENOW J. presiding.

This was an action on the case for an injury to the plaintiff's property, occasioned by a defect in a public highway,

which was admitted to be within the limits of said city, and that said city was bound to keep the same in repair.

To sustain his action, the plaintiff called one William Stone, as a witness, who, being previously examined by the defendants on the *voir dire*, testified that he was driver of the team on which the property, a quantity of molasses, was loaded, at the time the accident occurred, by which the same was lost; that the team belonged to one Haskell, and was employed in transporting goods between Portland and Auburn, for hire; that witness was employed by said Haskell, by the month, to drive said team, and was not employed by said Haskell for, or engaged in any other business; and that said Haskell resided in Auburn, where the plaintiff also resides.

The defendants then objected to the admission of said Stone as a witness. The presiding Judge overruled the objection, and the witness was permitted to testify, and did testify to facts material to the issue; and a verdict was rendered for the plaintiff against the defendants.

To which rulings and directions of the Court, the defendants excepted.

*W. P. Fessenden*, for the defendants, contended, that as the witness had the sole direction of the team, and was hired by the owner for that purpose only, he was directly interested in the event of this suit. A judgment against the city would save the witness from all liability. 1 Greenl. Ev. § 391, 394, 396.

*J. C. Woodman*, for the plaintiff, said that all the books on the subject agree, that there must be a direct interest in the result of the suit, or the objection goes only to the credit, not the competency of the witness. Here the judgment will not have the least effect against the witness. At most, this is an interest in the question, and not in the suit.

The opinion of the Court, the parties having agreed that the members of the Court residing in Portland should sit in the case, was drawn up by

Tenney J. — At the time of the accident, which was the

cause of this suit, Stone, the witness for the plaintiff, was driving the wagon on which the property lost was loaded, as the servant of one Haskell, who owned the team.

The rule of law is well settled, that in an action against the principal for damage arising from the negligence or misconduct of his servant or agent, the latter is not a competent witness for the principal; and where an action is brought for an alleged injury to the plaintiff's property, while in the care and keeping of his servant or agent, the servant or agent is not a competent witness for the plaintiff, because a verdict for the master would place the witness in a state of security against any action, which the master might otherwise bring against him. 1 Greenl. Ev. § 394 and 396. But the liability must be direct and immediate to the party; for if the witness is liable to a third person, who is liable to the party, such circuity of interest is no legal ground of exclusion. Ib. § 394. In *Clark* v. *Lucas & al.* 1 Car. & P. 156, the action was against the defendants as sheriffs of Middlesex, for a false return of *nulla bona* on a *fi. fa.* against one Gooding. It appeared, that some of the goods were removed during the time the man remained in possession under the execution, and the defendants insisted, that the removal was by the fault of the plaintiff, and to establish this fact, called as a witness the man who had been in possession; he was objected to on the ground of interest. But Abbott C. J. remarked, that "the judgment in the action by the sheriff against his officer, would be evidence against the witness, but not the judgment in this case;" and the witness was held competent by the Court. *Union Bank* v. *Knapp*, 3 Pick. 96.

The witness in the case at bar, if answerable at all, was so only to Haskell his employer; and the plaintiff's claim would be against the latter. The interest was such as would go to his credit and not to his competency.

*Exceptions overruled.*

SOLOMAN CROSSMAN *versus* SAMUEL MOODY & *al.*

Where a person places his name upon the back of a writ, no liability to pay costs which the defendant in the action may recover, is incurred thereby, unless it is done under such circumstances as make him liable under the provisions of the sixteenth, seventeenth and nineteenth sections of Rev. Stat. c. 114.

The eighteenth section of the same statute has reference merely to cases, where indorsers of writs are made liable under the provisions of the other sections.

If an indorsement be made upon a writ, where no liability under the statute provisions is incurred thereby, by order of the presiding Judge, or as a condition prescribed by him, upon the performance of which a motion, for the benefit of the indorser, should be allowed by the Judge, still no liability is incurred by such indorsement.

CASE against the defendants as indorsers of a writ in favor of Martha Robinson against the present plaintiff and two others, it being an action of trespass.

At the April Term of this Court, in the County of Cumberland, 1845, the defendants in that suit recovered judgment, severally, for costs of suit. Crossman took out his execution and delivered it to an officer, who made return thereon, that he had made diligent search for property of Martha Robinson, and could find none, and that he had demanded payment of the execution of the present defendants, and that they refused to pay the same. This suit was then instituted.

All the parties to the first suit were inhabitants of this State, and the writ originally was not indorsed by any one. When that suit was pending in the District Court, at the October Term, 1844, the then defendants had been ready for trial for several days, and the cause came on in regular order for trial. The plaintiff not being prepared for trial, a nonsuit was entered. On the next day the plaintiff moved, that the nonsuit should be taken off. The District Judge, "by and with the assent of the parties, allowed the nonsuit to be taken off upon the condition, that the plaintiff should furnish a responsible and satisfactory indorser," and an entry to that effect was made upon the docket. The defendants in the present suit then wrote these words upon the back of the writ: —

"Indorsed by subscribers Oct. 8, 3 o'clock, P. M. 1844," and wrote their names under the same.

*Howard & Shepley*, for the plaintiff, contended, that *case* was the proper remedy, and that the action was rightly brought in this Court. Rev. st. c. 114, § 18.

The only question is, whether the defendants are bound by their indorsements. The Court had authority to impose this condition, independent of all statute provisions, and without the assent of the parties. It was like requiring costs to be paid up to that time. It was not an order of court, requiring the indorsement to be made, but a condition imposed for the benefit of the then plaintiff, whereby, by a compliance, she could be entitled to the benefit of a trial. It was a mode of giving security for the payment of the costs the defendants might recover. The statute does not define the character of indorser. It is well known what an indorsement is. The eighteenth section makes all indorsers of writs liable, in the same manner, as if it had said, that whoever writes his name upon the back of a writ, shall be liable to pay any costs the defendant may recover, in case of the inability of the plaintiff. Having availed themselves of the condition, and having had their trial, they should not now be permitted to avoid the responsibilities of indorsers.

They are, however, indorsers under the provisions of the nineteenth section of the statute. That gives authority to the Court to require an indorser, for any sufficient cause, after the action is commenced.

*Wells*, for the defendants, said that indorsers of writs could be made liable only under the provisions of the statute, as there was no such liability at common law.

There are but two cases, where the statute makes indorsers liable. One is where the plaintiffs are not inhabitants of the State at the commencement of the suit; and the other, where they remove out of the State during its pendency. Ordering a new indorser, where the former one becomes insufficient, is

but a continuation of the first, and can only happen, when there has already been one.

If a man supposes, at the time, that by writing his name upon the back of a writ, where the plaintiff lives within the State, that he makes himself liable, his belief does not add to his liability. And if the indorsement be made by order of the Judge, as a preliminary to another order for the benefit of the defendant, it is but a mistake of the court, and does not alter or affect the liability of the indorser.

The eighteenth section refers to the statute liability only, and imposes no new obligation, and gives no additional authority to the Court. It merely regulates the remedy, when the indorser is liable.

There is no obligation incurred, and no contract implied, by the writing of a man's name on the back of a writ. It is only when it is done in cases where the statute says he shall be liable, that liability is incurred.

The opinion of the Court was drawn up by

TENNEY J. — This action is case under the statute c. 114, § 18, against the defendants as indorsers of a writ in which one Martha Robinson was plaintiff, and said Crossman a defendant, who obtained a judgment in that action for his costs. It is only as indorsers, that it is insisted they are liable; and it does not appear that they were parties to any contract, excepting so far as it resulted from the acts of placing their signatures upon the writ, by the procurement of the plaintiff therein named. The names are appended to nothing like an agreement, and it was intended as an indorsement, such as the statute refers to in relation to certain writs and petitions.

The indorsement of a name upon the back of a writ, by one not a party thereto, can have no effect independent of the provisions of the statute; of itself it manifests no intention of the indorser, which can be understood. But the Rev. Stat. c. 114, § 16, provides, that in certain writs and processes therein mentioned, when the prosecuting party is not an inhabitant of the State, the writ, petition, or bill shall be indorsed by

some sufficient person, who is an inhabitant of the State; and by section 17 a power in the Court is implied to order an indorser on motion of the other party, when one or more plaintiffs or petitioners live in the State, and another may not be an inhabitant of the State; and by section 19, if pending the suit or petition any indorser, should in the opinion of the Court, be deemed insufficient, they may require that a new indorser should be furnished, who is sufficient, the defendant consenting that the name of the original indorser should be struck out. In no other case does the statute require an indorser, or authorize the Court to order an indorser upon any writ or other process. By the 18th section "every indorser shall be liable in case of the avoidance or inability of the plaintiff or petitioner to pay all such costs as shall be adjudged against the plaintiff." The 16, 17 and 19th sections having pointed out all the cases, where an indorsement is necessary, the legislature could not by any construction have contemplated, any other, when an indorsement would be made.

The two former sections would be wholly unavailing, were it not for the provisions of the 18th section, which immediately follows, defining what the liability of indorsers shall be. Where the last section prescribes under what state of facts that liability shall attach to the indorsers, it must refer to such indorsers only as the same statute requires. It follows, that if a stranger to a suit voluntarily puts his name upon the back of the writ, when the statute does not require it, and vests the Court with no power to order it, he can be no more liable to pay the costs, which may be recovered against the plaintiff, in case of avoidance or inability of the latter, than he would be, if he placed his name upon the back of the execution recovered, or bond, which might be taken upon the arrest of the debtor therein.

Is it otherwise, where the Court do not order it, but impose it as a condition upon which some other order which they may make or withhold, is granted? The Court, in the exercise of its discretion, sustain a motion on terms; the terms being conditional are sometimes complied with at once, as the payment

of a certain sum in costs; or there may be a restriction as to recovery of costs, which is duly entered, and every thing touching the order and its conditions is done. We cannot presume, that the Court would intentionally impose a condition, which would be attended with no benefit to the party supposed to be placed in a situation, better than he would be, if the order prayed for was granted without terms, but if the terms required were a certain act, which it was believed by the Court, and the parties, and even the one, who performed it, would create a liability, when if done voluntarily, could have no effect, it certainly can have no greater effect, on account of its being done, by an order of Court, merely as the terms necessary to obtain the object sought. If an action upon a note of hand, which had been disposed of by default, should be restored to the docket to be tried, by the order of Court, on the condition, that some responsible person should give his verbal promise to pay the amount of the note, in case of a recovery by the plaintiff, it could not be contended that upon such a promise, given, it could be enforced. The defendants are not legally liable in this action, and according to the agreement of the parties, the plaintiff must become nonsuit.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF YORK.

ARGUED APRIL TERM, 1846.

## Richard Bradley *versus* Amos Davis.

A protest of a bill or note, duly certified by a notary public, is made by statute (c. 44, § 12) legal evidence of the facts stated in it, "as to the notice given to the drawer or indorser in any court of law;' but it is not conclusive of those facts.

The protest ought to be specific, as to the mode in which the notices were given, by stating whether they were verbal or in writing; and if in writing, whether the writing was delivered to the person or persons notified, or despatched by some other mode of conveyance; and if the latter by what mode, and when sent, and to what place addressed. But if the protest be defective, the necessary facts may be supplied by other proof.

It is not essential to the validity of a notice, that it should be stated therein who was the owner of the note or bill, or at whose request the notice was given. When a notice is signed by a notary public, he is to be presumed to have been duly authorized by the holder of the bill or note, whoever he may be.

If notice of the non-payment of a note, though left at an improper place, be, nevertheless, in point of fact received in due time by the indorser, and so proved, or could from the evidence be properly presumed by the jury; it is sufficient in point of law to charge the indorser.

If a witness has before him books, wherein daily entries of the transactions in a certain business are made, and the witness knows that they are the genuine books, and on that ground, only, believes that the facts are truly stated therein, but yet the books are not in his handwriting, nor were the entries made in his sight; and on inspection of the books, he still has no recollection of the facts; the testimony is inadmissible.

Assumpsit upon a note of which the following is a copy: —

"$2292,96. "Boston, May 20, 1835.

"Value received, I promise to pay Amos Davis, or bearer, two thousand two hundred, and ninety-two $\frac{96}{100}$ dollars, at the Suffolk Bank, Boston, in two years, with interest annually.

"Witness, Samuel P. Dutton. "Erasmus Holbrook."

The note was indorsed by Amos Davis.

At the trial before WHITMAN C. J. the signatures were admitted; and the plaintiff, to show that Davis was liable as indorser, read in evidence the protest by Charles Hayward, as a Notary Public; a deposition of Hayward, taken by the plaintiff, Sept. 12, 1844, and another, also taken by the plaintiff, one year afterwards; the depositions of Boyden & Tucker; and the testimony of Leverett, who brought into Court the books of the Tremont House.

The report of the case states, that by the advice of the presiding Judge, and with the consent of the parties, the case was withdrawn from the jury and submitted to the decision of the whole Court. The Court were to draw all such inferences from the testimony, considered by the Court to be legally admissible, as a jury might do; and decide any questions of fact, arising out of the legal testimony, that a jury would be authorized to do; and render such judgment as they shall deem necessary to carry their decision into effect.

Here follows a copy of the protest: —

"Commonwealth of Massachusetts. Suffolk, ss. Boston.

"On this twenty-third day of May in the year of our Lord one thousand eight hundred and thirty-seven.

"I Charles Hayward, Notary Public, by legal authority admitted and sworn, and dwelling in the city of Boston, at the request of Mr. Joseph P. Stickney of Concord, N. H. went with the original note of hand, of which the foregoing is a true copy, to the Suffolk Bank in this city, where the same was payable, and speaking with a clerk there presented said note, and requested payment according to the tenor thereof, the time therein limited and the days of grace having expired; whereto he replied, that the maker had no funds there to pay said note. I then duly notified the maker and indorser of the non-pay-

ment of said note. Wherefore I, the said Notary, at the request aforesaid, have protested, and by these presents do solemnly protest against the drawer of said note, indorser and all others concerned therein, for exchange, re-exchange, and all costs, charges, damages and interest, suffered and sustained, or to be suffered and sustained, by reason or in consequence of the non-payment of said note.

"Thus done and protested in Boston aforesaid, and my notarial seal affixed, the day and year last written.

[L. S.] "Charles Hayward, Notary Public."

A copy of the note was annexed to the protest.

The facts, considered by the Court to have been proved, so far as is necessary to understand the points considered by the Court, are to be found in the opinion.

Extracts from Hayward's deposition.

In reply to the 2d interrogatory of the plaintiff in the first deposition he says: "I have examined the paper" (the protest) "and find it to be in my handwriting. The statements in it are true."

*Interrogatory by Mr. Rowe, for defendant in the second deposition.* "When did you put "J. P. Stickney" there?"(in the protest.)

*Answer by deponent.* "I presume it was about the time I gave my first deposition."

*Question.* "Who directed you to leave the notice?"

*Answer by deponent.* "The person who left the note with me. He was a stranger to me. I mean to say, that I do not now recollect whether Mr. J. P. Stickney delivered the note to me, or employed some agent to do it."

In the first deposition.

*Interrogatory 1st by counsel for defendant.* "At the time you left the notice, did you know, that Davis resided at Bangor in Maine?"

*Answer by deponent.* "I knew that he formerly resided there, but whether that was still his residence, I did not."

*Interrogatory 2d.* "Did you make any inquiries of any one as to his then place of residence?"

*Answer by deponent.* "The instructions received from the holders, whether of this, I will not undertake to say, directed me no doubt to go there."

*Cross interrogation 3d.* "Did any one ever tell you, that Boston was the place of Mr. Davis' residence?"

*Answer by deponent.* "Not to my recollection."

In the second deposition, taken also by the plaintiff a year after the first.

*To Interrogatory 3d, by the plaintiff.* "Was said Davis at the Tremont House at the time you left the notice for him, as you have stated?"

*Answer by deponent.* "I was directed to leave the notice there upon the supposition, that he resided there."

*To plaintiff's 4th interrogatory.* "Did you not satisfy your own mind, that he was at the Tremont House at this time?"

*Answer by deponent.* "I should not have left it there if I was not satisfied, that he was resident there."

*To plaintiff's 5th Interrogatory.* "Is it not your invariable custom to make inquiries in such cases, that are perfectly satisfactory to your own mind? Have you, or not, any doubt, that Davis was at the Tremont House at that time?"

*Answer by deponent.* It is my custom to do so. I have no doubt Davis was there at the time. I considered that his place of residence; he might have been out of town for a day or two, that I do not know. I always ask if that was his place of residence."

*In answer to interrogatory by defendant.* "Did you make any inquiries of any one as to Davis' then place of residence?"

*Answer by deponent.* "Not that I recollect, except at the Tremont House."

*By same.* "Of whom did you inquire?

*Answer by deponent.* "I have no doubt of the man at the bar. I always consider him the proper person to inquire of. I leave many notices a year at public houses and always at the bar."

*By same.* "Did any one ever tell you, that Boston was the place of Mr. Davis' residence?"

*Answer by deponent.* "I have no doubt they did, or I should not have left my notice at the Tremont House. I think that my employer gave me directions to leave the notice at the Tremont House. I was told by the person who directed me to leave the notice, that Mr. Davis resided at the Tremont House."

*By same.* "Who directed you to leave it?"

*Answer by deponent.* "The person who left the note with me. He was a stranger to me. I mean to say, that I do not now recollect whether Mr. J. P. Stickney delivered the note to me or employed some agent to do it."

*By same.* Has any thing occurred since giving your former deposition, to refresh your recollection, and if so, what?"

*Answer by deponent.* "Nothing."

The case was argued by

*Bradley*, for the plaintiff — and by

*J. Shepley*, for the defendant.

The opinion of the Court was drawn up by

WHITMAN C. J. — The parties have agreed, that the Court instead of the jury, shall ascertain the facts legally proved in this case, and decide whether, according to the rules of law, the plaintiff is entitled to recover. This depends upon the question, whether the defendant as indorser of a note, was duly notified of its non-payment by the maker. The defendant's place of abode was at Bangor in this State. The note was payable at a bank in Boston; and was put into the hands of Charles Hayward, who, according to his testimony, had been a Notary Public in that city for twenty-four years, in order that he might make a demand of payment at said Bank, and notify the indorser, the defendant, in case of non-payment. By his protest it appears that he demanded payment at said Bank without effect, and in due season, and he therein says, that he duly notified the indorser of the non-payment.

The statute of this State, c. 44, § 12, has provided, that such notarial certificate shall be legal evidence of the facts stated in it, "as to the notice given to the drawer or indorser, in any court of law." It is not said in the statute that such certificate shall be conclusive evidence of those facts; and it would seem, if it should be taken to be conclusive, that it ought to be specific, as to the mode in which the notices were given, by stating whether they were verbal or in writing, and, if in writing, whether the writing was delivered to the person or persons notified, or despatched by some other mode of conveyance; and, if so, by what mode, and when sent, and to what place addressed. But if it be considered that the certificate is defective, the necessary facts may be supplied *aliunde.* In this case we have the testimony of the notary, contained in two depositions, detailing the particulars of what he did by way of giving notice to the defendant, in which he seems to have undergone a very close and rigorous cross-examination by the counsel of the defendant. And his credibility, in argument, is vehemently assailed upon the ground, that there are discrepancies in his statements. But we cannot doubt, that a man, who has held so responsible a station as that of a notary public, in the city of Boston, for twenty-four years, and whose general character for truth and veracity is not directly impeached, must be a person entitled to some consideration and respect; and the discrepancies pointed out are of a character such as might arise from lapse of time, impairing the distinctness of recollection, and be produced in some measure by the rigor of the cross-examination. As to the facts, essential in the cause, and to which his attention would be more naturally engaged, we do not feel at liberty to withhold our credence to the correctness of his statements. The notice, he says, was given in writing, by leaving it, on the evening after the dishonor of the note, with the bar keeper of the Tremont House, a place so well known, that very few people of any intelligence in the country can be believed to need information as to its location; and that it is in the city of Boston; and that it was directed to the defendant. These facts we consider as satisfactorily proved; and we have no reason to

doubt that the notice contained all that it was essential that a notice should contain; that it contained information under the hand of the notary, that the note had been protested for non-payment.

We do not think it essential, that it should be stated in the notice, who was the owner of the note, or at whose request the notice was given. The late C. J. Parker, in *Shed* v. *Brett*, 1 Pick. 401, in delivering the opinion of the Court, in reference to an objection to a notice for the want of these particulars, says, that there was some show of reason in the objection; but that the Court would require some positive authority in support of it before they would, by listening to it, sanction the mischiefs which would be likely to ensue from sustaining it. And Mr. Justice Story, in delivering the opinion of the Court, in *Mills* v. *The Bank of the U. S.* 11 Wheaton, 431, says, "it is of no consequence to the indorser who is the holder, as he is equally bound by the notice, whomsoever he may be, and it is time enough for him to ascertain the true title of the holder when he is called upon for payment." And again, in the same case, that "it is sufficient that it (the notice) states the fact of the non-payment of the note."

The law merchant, as well as the statute before cited, recognizes the notary, when a note or bill is left with him for the purpose of demanding payment, as an authorized agent to give notice of dishonor to the parties to be rendered liable thereon. *Bank of Utica* v. *Smith*, 18 Johns. 230; *Shed* v. *Brett*, above cited; *Warren* v. *Gilman*, 17 Maine R. 360. When a notice is signed, therefore, by a notary public, he is to be presumed to be duly authorized by the holder, whoever he may be.

But it is contended, if the notice was left at the Tremont House, as stated by the notary, it cannot avail the plaintiff, because it is admitted, that the defendant's place of dwelling was in Bangor, and the text writers upon bills of exchange and promissory notes are quoted, as laying down the law, that if the person entitled to notice does not reside in or near the same town or city, the notice may be sent by mail to the postoffice,

addressed to him, in the place of his dwelling; and it is argued, that unless the holder or his agent can be proved to have delivered the notice into the hands of the indorser, the sending it to him by mail or by some special messenger, at his residence, will be indispensable We think, however, that the rule is not so confined in its operation; and we coincide with the Court, in *The Bank of U. S.* v. *Corcoran*, 2 Peters, 121, that, "if notice of the non-payment of a note, though left at an improper place, was, nevertheless, in point of fact received in due time by the indorser, and so proved, or could from the evidence in the cause be properly presumed by the jury, it is sufficient in point of law to charge the indorser." It is true, however, that it is useful to have general rules, which should be allowed a controling effect in all cases coming within them; but cases will occur, which will form exceptions to them, and to which they cannot be applied without a perversion of justice. The rule that notice, despatched by mail to an indorser, living in a place remote from that of the indorsee, of the dishonor of a note, shall be sufficient to charge him, will not prevent the introduction of other proof, showing that due notice was given to the same effect. The object in this, as in other cases, is to afford proof of the requisite facts that shall be reasonably satisfactory. Circumstantial evidence is more or less relied upon in almost every case; and when it affords a reasonable conviction to the mind of the existence of a fact, it is all that the law holds to be necessary to establish it, in reference to legal proceedings. The presumption that a notice has been received, when sent by mail to an indorser, living remote from the indorsee, is an inference from circumstances, deemed to be reasonably satisfactory. It is an inference from the well known facts, that letters by mail seldom miscarry, and that individuals, to whom they are addressed, will, in almost every instance, sooner or later, receive them; and because it is important to the community that such an inference should be made. But the fact of the receipt of the notice may be made out by cicumstantial evidence, even of a more cogent nature, such as to leave no reasonable doubt of its reception

in due season; and so made out must be receivable, and be allowed to substantiate the fact. If, therefore, we can, in this case, become satisfied from the evidence legally admissible, that it is reasonable for us to come to the conclusion, that a writing was made under the hand of the notary, containing the requisite information of the dishonor of the note, and directed to the defendant, and of these facts it has been seen that we do not feel ourselves at liberty to doubt, and then, that it was placed by the notary for him, where, and under circumstances which should afford a reasonable presumption, that it must have been received in due season by the defendant, we cannot doubt, that it would be proper for us to conclude such to have been the fact.

We must now examine the evidence, and see how cogent its tendency is to prove that the defendant actually received the notice in question. The notary testifies, that he left it with the bar keeper of the Tremont House for the defendant, on the evening of the day on which demand of payment was made; and the landlord, and one of his bar keepers testify, that great care was taken that letters so left should be duly received; that they were at first dropped into an urn standing in the bar, and from thence taken by the persons to whom they were directed, or in the course of an hour or two sent to their respective rooms. If then the defendant was a lodger there, at that time, it can scarcely admit of a doubt that he must have received the notice. Mr. C. J. Shaw, in *Dana* v. *Kimball*, 19 Pick. 112, in reference to a letter left in a similar manner, remarked, that "the evidence that the letter left at the Tremont House, and addressed to Kimball, actually reached him, is of the same nature as a similar presumption, arising from putting a letter, so addressed, into the postoffice, and may even be considered as considerably stronger, inasmuch as there would be less probability of a failure."

That house was a place of great notoriety, and, according to the number of servants kept at it, as stated in the evidence, of great resort; to manage and conduct which, great exactness of method must have been requisite.

We must now inquire whether the defendant, at the time when the notice was left, was an inmate of that house. In regard to this the landlord and his bar keeper cannot testify from mere recollection, and considering the multifariousness of the concerns of such an establishment, as that of the Tremont House was, they could not be expected to testify from memory as to facts, that had transpired there in the ordinary course of business, many years after they had occurred. By recurring to their books, and daily entries therein, they undertake to be positive, that the defendant was a lodger in that house from the second of May, 1837, to the twenty-sixth of the same month. The amount of their testimony on this point is, that those entries were believed to be truly made; and the books containing them were produced in Court. The entries of the items, however, of the account with the defendant, were not made by either of those witnesses; and they have not sworn that they saw the entries made, or that they saw them immediately after or near the time they were made; and they both say, that they could not be sure of the time the defendant left in May, 1837, except from what appears in the books. They of course have perfect confidence in the correctness of the books; and we may feel no doubt that they contain the truth; but unless they were legally admissible to establish the facts to be inferred from them, they must be considered as out of the case. They do not seem to come within the rule, that memoranda, made at or about the time of an event, concerning which testimony is wanted, may be used to refresh the recollection of a witness; for the books do not enable the witnesses to testify from recollection. Nor within the rule, that where a witness is shown a writing, which he recollects before to have seen, when the transaction stated in it was within his recollection, and he then knew it to contain the truth. The testimony of neither of the witnesses is to this effect, and is therefore merely hearsay. Greenl. Ev. § 436. Mr. Greenleaf states, as a third rule, that "where the writing in question neither is recognized by the witness, as one which he remembers to have before seen, nor awakens his memory to the re-

collection of any thing contained in it; but, nevertheless, knowing the writing to be genuine, his mind is so convinced, that he is, on that ground, enabled to swear positively to the fact," he may testify to it. If this rule be adopted according to the import of its terms, it would seem to render the positive testimony of the witnesses in this case as to the time when the defendant left the Tremont House, admissible as legal evidence, for they doubtless knew the books to be genuine. But the case, *Rex* v. *St. Martin's Leicester*, 2 Adol. & El. 210, cited in support of the proposition, is to the effect only, that a witness may have recourse to a writing, perceived by him to be in his own handwriting, to refresh his recollection. This and the other cases alluded to by Mr. Greenleaf, under this head, would seem to limit the generality of his proposition, and confine the operation of the rule to cases in which a person could recognize the genuineness of his own handwriting, without being able to recollect ever having made it, or the purpose for which it was made; and to testimony as to facts necessarily inferable from it. We may be allowed, here, to express our surprise, that, in a work of such rare merit, and so admirably succinct and lucid, as is the Treatise of Mr. Greenleaf, even an obscurity so slightly apparent, should be found to exist.

But the defect in the proof we have just been considering, seems to be obviated by the testimony of Daniel Leverett. He appears to have been a witness in the trial; and it appears also that the books of the Tremont House, which were produced at the trial, so far as the defendant was concerned, were kept by him, and in his handwriting, He, therefore, may well be allowed to refresh his recollection by a recurrence to them, and to state what appears therein to be true. He states, that he, at the time, was a bar keeper at that House, during the month of May, 1837; and on the twenty-third day of that month, the day on which the notice is proved to have been left at the bar there, he charged the defendant with a bill for washing clothes, and also for a bottle of wine furnished him while dining; that on the twenty-fifth of the same month

he charged him with board for six days; and in the account on book, there appears to be a charge on the twenty-sixth of the same month for board for one day; and the witness testifies that he settled with the defendant on that day, and received the amount due on the books, being $133,12, and balanced the books; and that the books contain a true statement thereof; so that it fully appears, by competent testimony, that the defendant was an inmate of that house for twenty-four days next previous, and up to, and inclusive of the twenty-sixth day of May, 1837. The defendant, then, must be believed to have been where, according to the testimony of the landlord and a bar keeper of the Tremont House, the notice must in all human probability have been received by the defendant as early as the twenty-fourth of that month, which was in due season; and we think the inference, that he did so receive it, is one which a jury, under like circumstances, should have drawn.

*Defendant defaulted.*

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NATHAN DORE & *ux. versus* EZRA BILLINGS.

If the instructer of a district school has performed his duties acceptably, and according to his contract with the legal agent, yet if he did not obtain the certificates required by the statute, c. 17, he cannot maintain any suit against the town for the recovery of his wages.

Towns alone are responsible for the support of schools, and they alone are liable for the payment of the instructers. The agent of the school district is the agent of the town for the employment of an instructer in the district.

But if it was not the pleasure of the town to refuse to pay an instructer his wages, because he had neglected to comply with the provisions of the statute as to procuring the required certificates; and if the town has paid to the person who held the place of agent of the district so much money as would be sufficient to pay the instructer and for his use, and it was so received by the agent, it would become the property of the instructer, and he might maintain an action against the agent to recover it. But if it was not so paid and received, the instructer would have no legal claim upon it.

EXCEPTIONS from the Western District Court, GOODENOW J. presiding. The whole of the evidence introduced at the trial

is given in the exceptions, the substance of which appears in the opinion of the Court. It was all on the part of the plaintiffs. The presiding Judge ruled that the action could not be maintained, and ordered a nonsuit. The plaintiffs filed exceptions.

*Clifford & Paine*, for the plaintiffs, said that there appeared to be misapprehension in some towns respecting the powers and duties of towns and school districts and school district agents, and in North Berwick among the rest. The assignment of the amount to which the school districts are entitled, respectively, does not make this the money of the agent or of the district, but it remains the money of the town. When the instructer has performed the service according to contract he is entitled to have his payment from the town.

We do not contend, therefore, that if matters had remained as they were, when the school was finished, that the action could have been maintained against the present defendant. Nor do we apprehend, that it is necessary for us to contend, that the certificate of one of the superintending school committee, acting for the whole with their consent and request, but without their being present, would be sufficient to bind the town. The town had the right to waive any objection, and pay the amount justly due. 7 Greenl. 91; 1 Pick. 123; 12 Mass. R. 307; 16 Mass. R. 102; 3 N. H. R. 38; 15 Maine R. 461; 16 Maine R. 45; 20 Maine R. 37.

The defendant applied to the town for the money to pay the instructress; the town waived any right to object the want of a proper certificate, and paid the money to the defendant for the express purpose of paying her; and he holds it for her use. This is sufficient to enable her to maintain the present action. 9 Mass. R. 272; 12 Johns. R. 385; 17 Mass. R. 575; 2 Kent, 631. The defendant has no right to object to the plaintiffs' certificate as insufficient, and he did not do so. He paid her a part of the money, and objected to the payment of the residue only on account of a difficulty between him and his own mother about the board of the teacher.

The school district has no claim upon him for the money. *School Dis. in Sanford* v. *Brooks*, 23 Maine R. 543; *Weston* v. *Gibbs*, 23 Pick. 20.

The payment of a part of the money is an acknowledgment that he received the money for her use.

*Appleton* and *J. S. Kimball* argued for the defendant, and contended, that Mrs. Dore was not entitled to receive payment for instructing the school, because it was done in direct violation of law. The contract was entirely void, and cannot be a valid foundation for an action against the town or the agent. *Greenough* v. *Balch*, 7 Greenl. 461; *Deering* v. *Chapman*, 22 Maine R. 488; *Wheeler* v. *Russell*, 17 Mass. R. 258.

The school money did not belong to the district, or to the school agent, but to the town. 11 Pick. 260; 23 Maine R. 543.

The whole sum which had been assigned to the district, was put by the town into the hands of the defendant, not to pay the plaintiff, but to be by him appropriated according to law; and he is accountable for it only to the town. *French* v. *Fuller*, 23 Pick. 108. If the money has not been expended according to law, and in this case it is certain that it was not, the district may, and should, go on and expend it; and the town could not resist the payment.

They denied, that there was any express promise to pay the money to the plaintiffs. And even, if there had been, it would have been without consideration; and would have been void also, as an attempt to enforce an illegal contract.

The payment of a portion of a claim set up by the plaintiffs, when they were entitled to no part of it, can give no right to recover the remainder.

There can be no implied promise to pay money, when the transaction is made illegal by a statute.

The opinion of the Court was drawn up by

Shepley J. — The defendant, having been legally chosen agent for school district numbered seven in the town of North

Berwick for the year 1843, employed Dorcas S. Butler, now the wife of the other plaintiff, to teach school in that district during a part of the winter of 1843–4. The district had appropriated its share of the school money for the support of such school. She appears to have performed her duties acceptably and according to her contract. She did not obtain the certificates required by the statute, and cannot therefore maintain any suit against the town for the recovery of her wages.

The bill of exceptions states, "that at the close of the school, the defendant having received from the town the amount of money belonging to said district, for 1843, paid her the wages, but has not paid her the ten dollars for board."

The plaintiffs claim to recover in this suit the balance due to her, as so much money received by the defendant to her use. Towns alone are responsible for the support of schools, and they alone are liable for the payment of the teachers. The agent of the district is the agent of the town for the employment of a teacher in the district. When the service has been performed according to the contract, which he has made, he should make out a certificate directed to the selectmen, stating the facts necessary to enable the teacher to obtain payment. Upon presentment of that certificate, the selectmen, being satisfied that the teacher has complied with the provisions of the statute, should draw an order upon the treasurer of the town in favor of the teacher for the amount due, to be paid out of or charged to the fund assigned to the district.

The town of North Berwick appears to have adopted a different course, and to have paid to the agent of the district the amount of money assigned to it after the teacher had fulfilled her contract. If so much of that money, as would be sufficient to pay the amount due to the teacher, was paid to the defendant and by him received for her use, it would become her property. If not so paid and received, she could have no legal claim upon it. It would not become her money, but would continue to be the money of the town, in the hands of its agent, and subject to its control. If it was not the pleasure of the town to refuse to pay her wages, because she had neglected to

comply with the provisions of the statute by omitting to procure the certificates required, one, who had received the amount due to her from the town for her use, could not make that objection, and thereby relieve himself from the payment.

Whether the defendant has received money of the town for her use would seem to be rather a question of fact than of law. The inquiry would arise, in what character and for what purpose did he receive the money.

There is testimony tending to prove, that the defendant received so much of that amount, as was due to the teacher for her use. He has paid to her the greater portion of it. A witness testified, that he stated, that ten dollars was to pay for her board, and that he should have paid it to her, but for humoring some of his neighbors.

There does not appear to have been any testimony tending to prove, that the money for the payment of her board was not as really received to her use as the amount paid over to her for wages. Or any testimony to prove more clearly the purpose, for which he had received the money.

A jury would have been authorized upon such testimony to conclude, that the defendant had received of the town the amount due to the teacher for her use.

*Exceptions sustained and*
*new trial granted.*

## The Inhabitants of Kennebunkport *versus* The Inhabitants of Buxton.

The notice required to be given by one town to another under the provisions of the twenty-ninth section of the pauper act (Rev. St. c. 32) is the same as the one required to be given under the thirty-fifth section. Such notice should contain the substance of that which the statute requires, but no particular form is necessary.

A notice of the following tenor: — "Selectmens' Office, K., Feb. 1, 1843. Gent., L. S. of B. has become chargeable in this town as a pauper. You are hereby notified, that we are supporting her at your expense and shall continue so to do, until she is removed or otherwise provided for. Per order of the board of overseers of the poor of the town of K., J. H., Chairman. To the overseers of the poor of B." — was holden to be sufficient.

A notice once given is not waived by an after letter, reminding the overseers of the poor of the town notified, of the amount of the expense claimed in consequence of its having been incurred for the support of their pauper, referring to the former notice, and requesting payment.

If a legal notice under the statute is not seasonably answered, the town notified is not entitled, in defence, to show that the settlement of the alleged pauper was in any other but the plaintiff town.

An instruction to the jury — "that in order to constitute a legal settlement of the supposed pauper in K. under the sixth mode of acquiring a settlement, provided in the statute, it must be proved, that she dwelt and had her home there five full years in succession since March 21, 1821, without receiving supplies from any town," — is not erroneous.

This was an action of assumpsit for supplies furnished to one Lavina Smith, an alleged pauper. The plaintiffs proved that the said Lavina fell into distress and stood in need of relief in their town, and that they furnished supplies which were reasonably worth the amount charged. The plaintiffs then proved, that they wrote a notice to the defendants, February 1, 1843, which makes part of the case, which was duly received by the defendants, and it was proved or admitted that no answer thereto was returned within two months. It appeared also in evidence in defence, that another notice was written by the plaintiffs to the defendants, April 15, 1843, to which an answer was returned May 19, 1843. Said notice and answer make part of the case.

The plaintiffs upon this evidence rested the case, and the

defendants thereupon moved, that the plaintiffs should be nonsuited, which motion was overruled by WHITMAN C. J. presiding at the trial.

Various witnesses were then called by the defendants and the plaintiffs for the purpose of proving or disproving the settlement of said Lavina in Kennebunkport, to which point of defence the presiding Judge ruled the defendants were limited, on the ground that their omission to answer the plaintiffs' notice of February 1, 1843, barred them from showing the settlement of the supposed pauper in any other town.

The defendants contended, and requested the Judge to instruct the jury: — 1st. That the notice of April 15, 1843, was a waiver of the notice of February 1, 1843, and having been answered within two months by the defendants, they were not estopped from denying the settlement of the pauper to be in Buxton, or proving it in any other town.

2d. That the notice of February 1, 1843, is not, in form or substance, such a notice as is required by statute in order to estop the defendants from fully contesting the question of settlement, although it was not answered within two months.

3d. That the notice of February 1, 1843, was not a legal statute notice, except as a notice under § 29, c. 32, Revised Statutes.

These instructions the Judge declined to give, and instructed the jury, that neither of the positions assumed by the defendants in said requested instructions was tenable. He further instructed the jury, that in order to constitute a legal settlement of the supposed pauper in Kennebunkport, under the sixth mode of acquiring a settlement provided in the statute, it must be proved, that she dwelt and had her home there five full years in succession since March 21, 1821, without receiving supplies from any town.

If either of the foregoing instructions in a material point was erroneous, or the requested instructions should have been given, the verdict, which was for the plaintiffs, was to be set aside, and a new trial granted; otherwise judgment was to be rendered on the verdict.

A copy of the notices and answer, referred to in the report, follow.

"Selectmens' Office, Kennebunkport, Feb. 1, 1843.

Gent. — Lavina Smith of Buxton has become chargeable in this town as a pauper. You are hereby notified that we are supporting her at your expense and shall continue so to do, until she is removed or otherwise provided for.

"Per order of the board of Overseers of the Poor of the town of Kennebunkport. Joshua Herrick, Chairman.

"To the Overseers of the Poor of Buxton."

"Selectmens' Office, Kennebunkport, April 15, 1843.

"Gent. — There is a bill incurred against your town of one dollar twenty-five cents per week, from Nov. 1, 1842, for the support of Lavina Smith of Buxton. You having been duly notified on the 1st of February, 1843, that she had become chargeable in this town, you will please govern yourselves accordingly and make provision for the payment of her board.

"Per order of the board of Overseers of the Poor of the town of Kennebunkport. "B. F. Mason.

"To the Overseers of the Poor of Buxton."

"Selectmens' Office, Buxton, May 19, 1843.

"Gent. — We received yours of April 15th in which you say that you are charging the expense for the support of Lavina Smith to our town. We have only to say, that from all the information we have yet obtained we are satisfied she is not a resident of Buxton, she not having lived here but for a short time, and that on a visit, for the last thirty years. She was not in this town, in March, 1821. We are informed that you fix her onto our town in consequence of a bed once belonging to her having been at Mr. Cobbs' for some years past. The facts in regard to the bed are these; it consisted of nothing but the sack and feathers, it was taken from a stranger's house where Mrs. Smith never lived, she having lent or hired it to them, it was taken away by Mrs. Smith's request, fearing it would get injured in the hands of strangers. She did not accompany the bed to Buxton and has never since been here but for a

short time to see her friends. She finally, a few years ago, sold the bed to the person who brought it into our town.

"If it is determined by a jury that the above facts constitute her residence as a pauper in our town, we must abide by it, *but not otherwise.* "Charles Watts, Chairman of the

"Board of Overseers of the Poor of Buxton.

"To the Overseers of the Poor of Kennebunkport."

*Codman* argued for the defendants, contending, that the notice of April 15, 1843, must have been intended as a new notice, and was a waiver of the former one. To this a seasonable reply was made, denying that the pauper had a settlement in Buxton. The defendants, therefore, are not estopped from showing that the pauper had a settlement in any other town. Estoppels are always odious, and are not to be favored. 7 Metc. 212 and 354; 5 Metc. 49 and 186. Corporations may waive legal rights as well as individuals. 12 Mass. R. 370; 3 Fairf. 276.

The first notice is not such as will create an estoppel on the defendant town. It must contain all which the statute requires, or it cannot have that effect. In this, there is no request for a removal, and it does not "state the facts relating to any person, actually become chargeable to their town." Even if sufficient to enable the town to bring a suit under § 29, it is not sufficient, under § 42, to create an estoppel. 4 Mass. R. 180; 4 Greenl. 298; 5 Greenl. 31; 3 Greenl. 453; 1 Mass. R. 518; 8 Mass. R. 104.

The nonsuit should have been ordered. The true construction of the last clause of section 43 is, that the plaintiff town must make out its case against the defendants, unless they can prove the settlement back upon the plaintiffs. The plaintiffs relied on the estoppel merely, without showing any settlement of the pauper in Buxton, which is not enough. 5 Greenl. 31.

The instruction given to the jury was erroneous, calculated to mislead, and did mislead, the jury. It was such, as would allow the jury to find for the plaintiffs, if the pauper went out of the town of Kennebunkport to reside for a mere limited time, with the view and under the expectation of returning.

*Howard* and *Bourne*, for the plaintiffs, said that the second notice, as it was called, was a mere statement, that the plaintiffs had already notified the defendants *according to law*, reminding them of the unpaid bill for the support of the pauper. It excluded any intention of its being a new notice, and cannot be a waiver of the notice already given.

The notice was sufficient. It does, in substance, request the removal of the pauper, for it states, that they shall continue to charge the expense of supporting the pauper to the defendants "until she is removed." It does also state the facts respecting the pauper, that she had become chargeable to the town as a pauper, and that they were supporting her at the expense of the defendants. This, however, is no new question, but has several times been before the Courts. Our statute, in this respect, is a transcript of the Massachusetts statute. The notice in *Quincy* v. *Braintree*, 5 Mass. R. 86, was precisely like this, and was held good. The same point was also decided in 1 Mass. R. 518 and 459; 8 Mass. R. 104; 8 Pick. 388; 10 Pick. 150.

The support of paupers depends entirely upon statute provisions, and no rights can be enforced without complying with them. The one, which the defendants contend is an odious estoppel, is no more so, than any other provision of the pauper law. 4 Mass. R. 180 and 273; 7 Mass. R. 467.

As the pauper was in distress and in need of relief in Kennebunkport, and the relief was furnished, and notice given, and no answer, a *prima facie* case was made out for the plaintiffs. It was then for the defendants to move by proving the settlement of the pauper to be in the plaintiff town. The nonsuit, therefore, was rightly refused.

The instruction was clearly correct. The words of the statute are, *five years together*, of the instruction, *five full years*. They mean precisely the same thing. In other respects, the instruction is in the words of the statute.

The opinion of the Court was drawn up by

Tenney J. — Overseers of the poor in their respective towns

are required to provide for the immediate comfort and relief of all persons residing or found therein, not belonging thereto, but having their settlement in other towns, when they shall fall into distress, and stand in need of immediate relief, and until they shall be removed to the places of their lawful settlements; the expenses whereof, incurred within three months next before written notice given to the town to be charged, as also for their removal or burial in case of their decease, may be sued for and recovered by the town incurring the same in an action at law. Rev. Stat. c. 32, § 29. The written notice required, as preliminary to the commencement of the suit, is the same with that, which it is necessary to give, before resort is had to any mode provided by the statute in section 35, shall state the facts relating to any person, actually become chargeable to the town, to one or more overseers of the place where his settlement is supposed to be, and request them to remove him. Sect. 42. If the overseers of the poor of the town to whom the notice is sent do not cause the removal, as requested within two months after receiving such notice, they shall within that time, send a written answer, stating therein their objections to the removal of the pauper; and in default of sending such answer, the town shall be barred from contesting the settlement with the plaintiff, in such action. Sect. 43.

The notice should contain the substance, of that which the statute requires, but no particular form is necessary. The name of the person for whom relief has been afforded should be given, or be so designated, that it would be understood who was intended. "The facts relating to the person," are those which are important to be known of him, as a pauper, by the town notified; the request of removal is clearly implied from a statement, that the whole expense incurred, and that which was expected to arise afterwards, was claimed till removal. The object of the statute is to give the town attempted to be charged, information that the relief and expense will fall upon them. The letter of notice of Feb. 1, 1843, was as full and particular, as those which have been held sufficient. *Quincy* v. *Braintree*, 5 Mass. R. 86; *Westminster* v. *Bernardstown*,

8 Mass. R. 104; *Ware* v. *Williamstown*, 8 Pick. 388; *Uxbridge* v. *Seekonk*, 10 Pick. 150.

Was the effect of the notice of Feb. 1, 1843, waived by that of the 15th of the following April? The second notice can be construed to mean nothing more, than to remind the overseers of the poor of Buxton of the amount of the expense, which they claimed to be entitled to receive, in consequence of its being incurred for a pauper of Buxton and a notice, which they reported as given on Feb. 1, 1843; and a request that they would make provision for its payment. It does not purport upon its face to be the notice required by Rev. Stat. c. 32, § 42, but by the terms used, they rely upon the former as being legally sufficient, to render the town of Buxton liable for those expenses, which had been incurred for three months next preceding its date, as well as afterwards. The second notice was evidently not intended as a waiver of the first, and it cannot be so regarded in law.

The notice of the 1st of February having all the validity, which the statute contemplates, that a notice should have, was not answered till more than two months after it was received, and therefore the defendant town is not entitled to show that the settlement of the pauper was in any other town than Kennebunkport.

The instruction of the Judge, that in order to gain a settlement in the town of Kennebunkport, of the supposed pauper under the sixth mode, provided in the statute, that she must be proved to have dwelt and had her home in that town five full years in succession, since March 21, 1821, without receiving supplies from any town, was warranted by the statute, and consistent with all the decisions upon the subject, of this State, and Massachusetts, under similar provisions. In the seventh mode of gaining a settlement, c. 32, § 1, Rev. Stat. it is provided, that any person, resident in any town on the 21st day of March, 1821, and who had not within one year previous received supplies or support as a pauper from any town, shall be deemed to have a settlement in the town where he dwelt and had his home. Here it is manifest that being "resident," and

"having his home," mean the same thing. And where residence is mentioned in the preceding mode of gaining a settlement, it was intended to have the same force as dwelling and having his home. A residence of five *full years*, does not exclude the idea, that the person having it, might have been absent for a longer or shorter period at different times for business or pleasure. It might have been so, and his residence, or dwelling, or home, might notwithstanding continue.

*Exceptions overruled.*

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF OXFORD.

ARGUED MAY TERM, 1846.

## THE STATE *versus* SIMON FURLONG.

A justice of the peace has no jurisdiction or power to try and decide finally upon the guilt or innocence of persons accused of having committed a riot; and has no legal authority to administer an oath to a witness on a trial where he assumes such jurisdiction.

If it appears in an indictment for perjury, that the accused was sworn only by and before a justice of the peace who had no jurisdiction of the case before him, and therefore had no authority to administer the oath, such indictment is bad, on demurrer, and will be quashed.

Where it appears from the indictment, reciting the record of the justice, that the accused "was put upon trial"; that the justice "proceeded to hear and determine the matter of said complaint"; "that upon the trial of said complaint", it became necessary to prove certain facts; and that the witness on that trial, now indicted for perjury, testified falsely "to cause the accused to be convicted of the offence charged", it must be understood, that the justice had assumed jurisdiction to try and decide finally upon the guilt or innocence of the accused, and not that he assumed only to examine into the guilt or innocence of the person complained of, for the purpose of deciding, whether he should be bound over to appear before some other tribunal for trial, or be discharged.

FURLONG was indicted for perjury, alleged to have been committed in giving his testimony before a justice of the peace, on the trial of a complaint against Robinson and others, charged with having been guilty of a riot. That the questions

of law might be raised without the expense of a jury trial, the whole record of the justice was set out in the indictment. The counsel for Furlong demurred generally.

*Codman & Fox*, for Furlong, said that the demurrer was based upon the ground, that the oath was not lawfully administered, the justice not having the power to place the respondents to the complaint on trial.

Rev. St. c. 158, § 1, defining perjury, requires that the oath or affirmation should be "*lawfully administered.*" If the justice had no jurisdiction of the offence, then the oath he administered, was not lawfully administered. 4 Com. Dig. (Day's Ed.) 936, Title, Justices of the Peace; 1 T. R. 69.

The record of the justice, set forth in the indictment, shows a trial and acquittal. It is as formal as the record of a higher Court would be, which had jurisdiction, and indeed is in the same language. The trial before the justice was a mere nullity, as he had no authority to convict or acquit; and the record thereof would be no bar to an indictment in a court having jurisdiction. 13 Mass. R. 245 and 455; 1 Stark. R. 511; Peake's Cases, 112. It must appear, or be alleged, in an indictment for perjury, that the oath was administered, by authority of a competent tribunal having jurisdiction, or it is bad. 2 Russ. on Cr. 541, 638; 7 Dane, c. 210, Art. 4, § 5; 8 Pick. 455.

By the Revised Statutes a justice of the peace has no power to put persons charged with having been guilty of a riot on trial. He could only examine and bind over to appear at another tribunal, or order his discharge. Having exceeded his jurisdiction when the justice put the accused on trial, and the oath having been administered only on such trial, it was not lawfully administered.

*Moore*, Att'y Gen'l, for the State, contended that the justice had jurisdiction in the complaint against Robinson and others. If the justice had no power to act as he did, it is admitted that the indictment cannot be supported.

By Revised Statutes, c. 170, § 2 and 4, the justice may try and punish for "all assaults and batteries and other breaches

of the peace, declared criminal by any statute or town by-law, when the offence is not of a high or aggravated nature." A riot is declared to be a criminal offence by Revised Statutes, c. 159, § 2 and 3, and is to be punished by imprisonment in the county jail, or "by fine not exceeding five hundred dollars." The fine may be as low as one dollar, according to the degree of criminality found to exist. If then the justice finds the offence, which technically may be a riot, "is not of a high or aggravated nature," it becomes his duty to try and punish by a small fine within his jurisdiction.

But the record does not show that this was any thing more than an examination. It is in the usual form of the records of justices, when the accused is bound over for his appearance at another Court, or discharged. In such cases, the inquiry always is, whether guilty or not guilty. If the plea be not guilty, then the justice is to proceed to an investigation, which is a trial, where both parties may be heard. At the close of such trial, if there be sufficient evidence to warrant it, the accused is bound over to appear before a higher Court; and if not, then he is found "not guilty" as alleged in the complaint, and is "discharged." This is believed to be according to the usual practice. The inquiry must necessarily be, whether the accused is guilty or not guilty. Here he was found not guilty and discharged. Had the evidence been different, he would have been bound over.

The opinion of the Court was drawn up by

Shepley J. — To an indictment for perjury the accused has demurred generally. The causes assigned in argument, are, that by the indictment it appears, that a justice of the peace, who administered the oath, assumed jurisdiction of the offence, a riot, for the purpose of trial and conviction or acquittal of the persons then before him, to answer to a complaint for that offence. That by law he had no such jurisdiction, and that the oath was not therefore lawfully administered to the accused.

The indictment recites a complaint made by the accused to

Stephen Greenleaf, Jr., a justice of the peace, against John G. Robinson and seven other persons named, in which complaint it is alleged, that they "did unlawfully and in a violent and tumultuous manner assemble and gather together to disturb the peace of said State; and being so assembled and gathered together" "they did violently, riotously, tumultuously, unlawfully, and with force and arms, and with a strong hand, break open and enter the meetinghouse, situated in Greenwood aforesaid, which house is occupied as a house for the public worship of God, of which the complainant owned a part, to the great injury and damage of said house."

There can be no doubt that the offence described in that complaint is a riot, as defined and to be punished by statute, c. 159, § 2 and 3, by imprisonment in the county jail not more than one year, and by fine not exceeding five hundred dollars.

The indictment further recites, that a warrant was duly issued by that justice; that the persons named were apprehended and were present before another justice of the peace, Jonathan B. Smith, before whom the warrant had been returned; that the complaint was read to them by him, and that they were severally asked, whether they were guilty or not guilty. That they "severally pleaded not guilty of the said offence charged upon them in the said complaint; and thereupon the said Jonathan B. Smith, as such justice as aforesaid, proceeded to hear and determine the matter of said complaint in the presence of the said John G. Robinson, one of the defendants named in said complaint, who by the consideration of said justice was put upon trial to answer the matters and charges contained in said complaints separately." "And that upon the trial of said complaint and the charges contained therein," it became material to prove certain facts. That the accused, having been sworn by the justice, "maliciously and wrongfully intending and devising to cause the said John G. Robinson to be convicted of the offence charged and alleged against him in said complaint," testified as therein stated.

It will be perceived that the indictment alleges, that Robin-

son "was put upon trial"; that the justice "proceeded to hear and determine the matter of said complaint"; that the accused testified falsely "to cause the said John G. Robinson to be convicted of the offence charged."

This language is suited to describe proceedings before a magistrate, who has assumed jurisdiction to try and decide finally upon the guilt or innocence of the accused, and not appropriate to describe proceedings, when the magistrate assumes only to examine into the guilt or innocence of the accused for the purpose of deciding, whether he should be committed or bound over to appear before some other tribunal for trial. The indictment must therefore be considered as describing a case, over which the magistrate had assumed jurisdiction for the purpose of a trial for the conviction or acquittal of Robinson.

In behalf of the State it is contended, that the justice had jurisdiction of the offence, for such a purpose, by virtue of the statute, c. 170, § 2 and 4. The second section provides, that a justice of the peace may punish by fine not exceeding ten dollars all assaults and batteries and other breaches of the peace declared criminal by any statute, or town by-law, when the offence is not of a high and aggravated nature. The fourth section provides, that all persons arrested by process conformable to the provisions of the constitution for any of the offences before mentioned, shall be examined by the judge or justice, before whom they are brought, and may be tried by him. The argument is, that a riot must be embraced by the second section as one of the other breaches of the peace declared criminal by statute, and that when not of a high and aggravated nature, it may be tried by the justice and punished by fine not exceeding ten dollars.

Those other breaches of the peace must be understood to be such as are within the jurisdiction of a justice of the peace, and not punishable more severely than by a fine, not exceeding ten dollars. That language was not intended, nor was the fourth section, to enlarge the jurisdiction of the justice. The design of the language alluded to in the latter section, was only to declare, that the person might be tried by the judge or

justice having jurisdiction of the offence. The sixth section provides, that a justice of the peace shall examine into all treasons, felonies, high crimes and misdemeanors, and commit or bind over for trial all persons, who appear to be guilty. Riot, as described in this indictment, has been considered a high misdemeanor punishable by the common law by fine and imprisonment. It is not an offence within the jurisdiction of a justice of the peace for final trial and adjudication.

As the justice in this case had no such jurisdiction as he appears by the indictment to have assumed, he could have no legal authority to administer the oath, and the accused could not on that occasion have committed the crime of perjury.

*Indictment quashed.*

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THE STATE *versus* ISAAC HARLOW.

*Scire facias*, in favor of the State, upon a recognizance entered into by the defendant to prosecute an appeal in a criminal process, is an action; and the defendant, if he be the prevailing party, is entitled to his costs against the State under the provisions of Rev. St. c. 115, § 91.

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

This is *scire facias*, sued out upon a recognizance, entered into by the defendant to prosecute an appeal taken from the judgment of a justice of the peace in a criminal proceeding. The writ and recognizance were adjudged bad on demurrer; whereupon the defendant moved to be allowed costs, which were not granted by the Court. To this ruling of the Court the defendant excepted.

*Walton*, for Harlow. The claim of the defendant for costs is founded upon the ninety-first section of c. 115, Revised Statutes. It provides, that costs shall be allowed to the prevailing party in all civil suits instituted by the State, and directs the mode of payment.

*Scire facias* is recognized as an action by § 26, c. 114, of Revised Statutes; and in Howe's Practice, 54, 137, 173, it is

classed as a civil action. An indorsement is required. Rev. St. c. 114, § 16. And property may be attached on *scire facias*. It was decided in *McLellan* v. *Lunt*, 14 Maine R. 254, that *scire facias* was a civil action.

*Moor*, Att'y Gen'l, for the State, said that the statutes cited, as well as the decision in the eighth of Greenleaf, 105, were not designed to apply to processes to carry out the administration of criminal justice. Sections 90 and 91 should be taken together. They were not intended to embrace any action arising out of criminal proceedings, as this was.

The opinion of the Court was drawn up by

TENNEY J. — In criminal prosecutions in behalf of the State, no costs are allowed in favor of the accused, if he be discharged or acquitted. But in all actions, the party prevailing shall be entitled to costs. R. S. c. 115, § 56. Under a similar provision in c. 59, § 17, of the statutes of 1821, on the return of a verdict for the defendants in an action of trespass *quare clausum fregit*, in favor of the State of Maine and the Commonwealth of Massachusetts *v.* Webster & al. the Court were moved to allow costs, but they were not allowed. The Court say, "justice seems to require, that the State in such a case should pay costs, but we are not aware, that we can rightfully enter the judgment moved for." "It may be a very proper subject for the consideration of the legislature."

By c. 115, § 91, R. S. it is provided, that in "any civil suit instituted by the State, and for the use and benefit of the State, the State shall be liable for the defendant's costs, and judgment shall be rendered for them against the State, and the treasurer of the county, in which the trial is had, shall pay the amount to the defendant, on his production of a certified copy of the judgment, and the same shall be allowed to such treasurer in his account with the State."

It is well settled, that a *scire facias* is a suit or action. *McLellan* v. *Lunt*, 14 Maine R. 254. And when brought upon a recognizance is always an original proceeding, though otherwise when upon a judgment. 6 Dane's Abridgment, c. 190, art. 1, § 8; Howe's Practice, 72.

A recovery of judgment upon *scire facias* upon a recognizance, entered into to prosecute an appeal from a judgment in a criminal process, and a satisfaction thereof, is not satisfaction of the judgment, from which the appeal was taken. Rev. Stat. 170, § 10. The *scire facias* is merely to obtain the forfeiture, and is often against those not implicated in the criminal offence charged. The action must be regarded as of a civil nature, equally with one in another form upon a note which may be given to the State in satisfaction of the costs, which are a part of the sentence on conviction of a crime.

The case before us is a civil suit instituted by the State, for its own use and benefit, and the defendant prevailed, and is entitled to his costs.

*Exceptions sustained.*

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MOSES HUTCHINS, JR. *versus* NATHAN DRESSER.

In this State the guardian of an infant has by statute the care and management of the estate of his ward, and may sell and transfer his ward's personal estate, subject to certain statute limitations and restrictions. But the choses in action of the ward do not become the property of the guardian, and are not transferred to him, on his appointment, either by the common law, or by statute.

The provisions of the Revised Statutes, (c. 110, § 21,) do not authorize the guardian of an infant to maintain a suit *in his own name* to recover a chose in action of his ward.

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

Assumpsit by the plaintiff, describing himself as guardian of Richard Eastman, a minor, to recover the wages due for three months labor of Eastman, and the amount which Dresser received for a gun, sold by him, the property of Eastman.

The plaintiff proved, that he was the guardian of Eastman; that Eastman performed the labor for the defendant; that Dresser sold a gun, belonging to Eastman, and received for it twelve dollars; and that he had called upon the defendant for payment, and it was refused.

The presiding Judge ruled, that to recover, the plaintiff must prove an express promise to himself; that upon this evidence a promise to the plaintiff, could not be implied; and that the action could not be maintained. A nonsuit was ordered.

The counsel for the plaintiff filed exceptions.

*Gerry*, for the plaintiff, contended that upon the evidence the action could be maintained.

The guardian is entitled to the possession of the personal estate of his ward. Trover could be maintained, most clearly, for the gun. And the defendant having sold the gun, and received payment for it, the plaintiff may waive the tort, and recover in assumpsit.

Guardianship is a trust coupled with an interest. *The people* v. *Byron*, 3 Johns. Cas. 53. The guardian may lease the land of the ward, avow, or bring trespass in his own name. *Byrne* v. *Van Hoesen*, 5 Johns. R. 66. A guardian may submit to arbitration on behalf of his ward. 3 C. R. 253.

*Hammons*, for the defendant, said that a guardian derives all his rights and powers over the property of his ward in this State from the statute. The statute, c. 110, does not vest the property of the ward in the guardian; it merely gives him the care, custody and possession of the property. The guardian is a mere statute agent, having a power coupled with no interest. 7 Mass. R. 6; 13 Pick. 206.

I do not find, that this question has been directly decided, as no such action seems to have been brought before. The precedents of declarations have no form for such action. And there are cases wholly inconsistent with the maintenance of it. 4 Mass. R. 435; 14 Mass. R. 207; 5 Mass. R. 300.

The opinion of the Court was prepared by

Shepley J. — The plaintiff commenced this suit in his own name, as guardian of Richard Eastman, an infant, to recover for labor performed by the infant for the defendant; and for money received for the price of a gun belonging to the infant and sold by the defendant. In the district court a nonsuit was ordered, and the case is presented on exceptions.

By the common law a guardian in socage was entitled to the possession of his ward's estate; and he might maintain trespass or ejectment, make an avowry for damage feasant, or a lease during the existence of his guardianship, in his own name. *Osborn* v. *Carden*, Plow. 293; *Wade* v. *Baker*, 1 Ld. Raym. 131.

The guardian of an infant has by statute in this State the care and management of the estate of his ward, and while in possession of his ward's real estate may have similar powers. He may also sell or transfer the personal estate of his ward, subject to certain statute limitations and restrictions. The choses in action of the ward do not become the property of the guardian. They are not on his appointment transferred to him, either by the common law or by statute.

The provision of the statute, c. 110, § 21, that a guardian may "demand, sue for, and receive all debts due" to the ward, cannot be construed to authorize him to maintain a suit in his own name to recover them. That such was not the intention is apparent from the last clause of that section, which provides, that he shall appear for and represent his ward in all legal suits and proceedings. In such cases he has no personal interest in the suit; is but a statute agent, which may be changed pending the suit without abating it. *Davies* v. *Lockett*, 4 Taunt. 765.

*Exceptions overruled.*

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GEORGE W. MILLET *versus* THE INHABITANTS OF STONEHAM.

Where a collector of taxes employs the proprietor of a newspaper to publish such collector's notice of an intended sale of lands on account of the non-payment of taxes thereon, the inhabitants of the town, within which the lands are situated, are not liable to pay the expenses of such publication.

THE case was submitted upon the following statement of facts.

It is agreed by the parties to this action, that the writ and account sued may be referred to, by either party, but only the

account annexed is to be copied and made a part of the case; that the plaintiff performed the services sued for; that when the two first charges were made, Oris Parker was collector of taxes for said Stoneham; that when the last charge was made, James McAllaster was collector of taxes for said Stoneham; that said Parker and McAllaster were both duly chosen and qualified as collectors, and had given bonds in the usual form; and that the said Parker employed the plaintiff to perform the services in the two first items of the account, and the said McAllaster to perform the services charged in the third item of the account. And the parties hereby agree, that upon the foregoing statement of facts, the Court may render such judgment as they may deem legal and proper.

The name of the town was formerly Usher, and was changed by the Legislature to Stoneham.

Copy of the account annexed.

"Inhabitants of Stoneham, to George W. Millet, Dr.

| | | |
|---|---|---|
| "Jan. 11, 1841. | To publishing in the Oxford Democrat Collector's notice for the town of Usher for the year 1841, | 8,75 |
| | "Oris Parker, Collector. | |
| "Nov. 9, 1841. | To publishing in the Oxford Democrat Collector's notice for the town of Usher for the year 1840, | 7,50 |
| "Jan. 11, 1842. | To publishing in the Oxford Democrat, Collector's notice for the town of Usher for the year 1840, | 7,50 |
| | "James McAllaster, Collector." | $23,75 |

*Gerry* and *J. Goodenow* argued for the plaintiff, and contended, that selectmen, overseers of the poor, treasurer and collector of taxes were agents of the town, and that contracts made by them as such, within the scope of their authority, respectively, were binding upon the town. There are many acts which they may do, though no special authority is given by the town for that purpose, which will make the town liable for their acts. Although no special authority is given, yet

when town officers are acting for the town in the discharge of their duty, the town is liable to any person rendering services at their request. Such officers are agents of the town. As the taxes were not paid, it became the duty of the collectors to publish notices previous to the sale of the land in some newspaper. It was for the benefit of the town, that the plaintiff's services were performed, and at the requests of their agents, the collectors. Both upon principle and authority, the defendants are liable. The counsel cited in support of their argument, 1 Pick. 123; 3 N. H. Rep. 32; 7 Greenl. 399; 16 Maine R. 45; 17 Maine R. 444; 1 Fairf. 189; 4 Greenl. 44; 20 Maine R. 154; 1 Hill, 545; 7 Pick. 118; 8 Pick. 178; 19 Pick. 511; 1 Metc. 284; 2 Kent, 243 and 235; 7 Greenl. 76 and 118; Chitty on Con. 276; Angel & Ames on Cor. 239 and 250; 6 Wend. 475.

*Hammons* argued for the defendants, contending that it was the collector's duty to collect the taxes in any way, he chose, and pay them over to the town. If he neglects to collect and pay over the amount of the taxes committed to him, the town has a remedy upon the bond, and it is no excuse to the collector, that he has neglected to perform his duty. The town, therefore, is not benefited by any expenses incurred by the collector in obtaining payment of his taxes. If the collector should take property and sell it for the purpose of obtaining payment, or should advertise the land, the town would not be holden to the person, who should keep the goods or should publish the notice. Such expense is a charge upon the goods or upon the land. Nor does the collector's bond to the town cover any expenses of this description.

But the case finds, that the collectors employed the plaintiff to perform the services charged, without attempting to make the town liable. This excludes the supposition, that the town is liable.

In the collection of taxes, the collector acts on his own account, and is no more the agent of the town, than the sheriff of the county would be, in case he collected them.

The opinion of the Court was prepared by

TENNEY J. — The plaintiff was employed by the collectors of the town of Stoneham, for the years 1840 & 1841, respectively, to advertise in a newspaper, published by him, sales of land for unpaid taxes assessed thereon. The defendants are attempted to be charged in this action for those services, on the ground that they were the contracting party, the collectors acting merely as their agents. The proposition, that the town is liable, cannot be maintained. By chap. 116, sect. 23, of the statutes of 1821, towns could choose a collector of taxes, and agree upon what sum should be allowed and paid to such collector for his services; he was to have a warrant from the selectmen or assessors, empowering him to collect such taxes as should be committed to him; he was required to pay in the same, according to the direction of his warrant; he was to be under bond, conditioned for the faithful discharge of his duty as collector. By the 25th section of the same chapter, it was necessary for his qualification, that he should be under oath to make collections of the taxes committed to him, for which he should have sufficient warrant, according to law, rendering an account thereof, and paying the same, according to his warrant.

The modes in which collections could be enforced, were various, according as resort was to be had to distress, the body of the delinquent, or the lands, upon which the assessment was made. In each of these modes, it might be necessary that expense should be incurred in addition to the personal services of the collector; but for this he was entitled to reimbursement from the person arrested, or from the avails of the distress, or lands sold. Chap. 116, sect. 26, 30 and 31.

When the assessments and a sufficient warrant are put into the hands of the collector, he is responsible for the amount; he has certain specific duties to perform and is entrusted with no discretionary power in their exercise; he is bound, by virtue of his office, his warrant, his bond, his oath and the consideration to be paid, to collect the taxes committed to him, and when necessary to resort to the different modes, which the law prescribes, to compel payment. When he has performed his

whole duty, if by the inability of any one upon the assessment, or error, or accident, in matters over which he had no control, collections fail, he is entitled to allowance, which becomes to him, tantamount to a payment.

The collector holds a relation to the town very different from that of selectmen, assessors, overseers of the poor, and others, whose duties are more of a fiduciary character, and who are clothed with a discretionary power to see that all the different obligations of towns are discharged, and their interests properly guarded and protected, so far as they fall within the respective spheres of such officers. If the town by a corporate vote, or the overseers of the poor for an agreed price, employ an individual to take charge of, and to support the paupers of the town for a given time, with food and clothing, during sickness and health, he becomes in one sense the agent of the town for that purpose, as much as the collector is the agent of the town for another purpose; the fact that the office of the latter is one established by the statute does not in this respect create a distinction. If a physician should be employed by the person, who had so contracted, to administer professionally to one of these paupers, would it be contended that the town would be liable to the physician for the services rendered? The Legislature have been careful to require security for all moneys, which should legally come into the hands of officers of towns, belonging to the towns in their corporate capacity. The bonds which the statute requires have been broad enough to cover every thing to which the town had a claim, that the officer is entitled by virtue of his office to receive. Collectors are authorized to demand from the persons, who have been arrested on account of non-payment of taxes, the expenses incurred in the arrest as well as the taxes; when goods have been taken in distress, or lands advertised for the same purpose, and the taxes have been paid before a sale, he had the same claim for the moneys expended, and charges made against him for the necessary services rendered, that he had for the tax itself; and a sale would be for the failure in obtaining the like expenses as well as for the sum named in the assessments. Neither

the collector's warrant, oath, or bond required him to pay to the treasurer these expenses, which he was obliged to incur, and which he had received. If the town were bound, notwithstanding the receipt of the money by the collector, to pay the persons who may have been employed to do some service for the collector in the performance of his legitimate duties, it is deprived of the security, in this instance, which the statute has made ample for other official neglects of a similar character. It cannot be doubted, that the collector, being bound to collect the rates committed to him in consideration of the sum agreed upon for his services, has no power to contract in the name of the town, and at the expense of the same, for such services as those rendered by the plaintiff. It does not appear from the case, that it was the expectation, either of the plaintiff or the collectors, that the town was holden for the service performed by the plaintiff. The collectors employed him, and they were under an implied promise to pay him. It is a well established rule, that although an agent may be duly authorized, and although he might avoid personal liability by acting in the name and behalf of his principal, still, if by the terms of his contract, he binds himself personally, and engages expressly in his own name to pay, he is responsible, even though he describe himself as agent. *Simonds* v. *Heard & al.* 23 Pick. 120.

*Judgment for the defendants for their costs.*

WALTER L. BRYANT *versus* JONATHAN MOORE.

The limitation of the authority of a general agent may be public or private. If it be public, those who deal with him must regard it, or the principal will not be bound. If it be private, the principal will be bound, when the agent is acting within the scope of his authority, although he should violate his secret instructions.

A special agent may have a general authority, or it may be limited in a particular manner. If the limitation respecting the manner be public, or known to the person with whom he deals, the principal will not be bound, if the instructions are exceeded or violated. If such limitation be private, the agent may accomplish the object in violation of his instructions, and yet bind his principal by his acts.

If one person knows, that another has acted as his agent without authority, or has exceeded his authority as agent, and with such knowledge accepts money, property, or security, or avails himself of advantages derived from the act, he will be regarded as having ratified it. But this will not be the case, when the knowledge that the person has exceeded his authority is not received by the employer so early as to enable him, before a material change of circumstances, to repudiate the whole transaction without essential injury.

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

This was an action of assumpsit on a note of hand, dated March 30, 1844, given by the defendant to Peter H. McAllaster for fifteen dollars. The plaintiff to sustain his action read the note to the jury.

The defence to the note was a want of consideration and a breach of warranty. To maintain this defence the defendant proved that sometime prior to March 30, 1844, McAllaster exchanged a pair of oxen with the defendant, which were the property of the plaintiff, for a pair of steers, receiving the defendant's note for twelve dollars, as difference between the cattle. That on the same day McAllaster returned the steers to the defendant, together with the note, and said he did not consider it a trade, as said Bryant would not consent to so swap; and that Bryant had directed him to say to the defendant that the defendant must send him a note of fifteen dollars, or change back. Whereupon some conversation ensued in relation to a bunch then on the jaw of one of the oxen, and

McAllaster said that the bunch would not injure the ox, and that he would warrant the bunch never to injure or hurt the ox; that the defendant then said, that if McAllaster would warrant the bunch not to injure the ox, he would give the fifteen dollar note; and thereupon the defendant gave the fifteen dollar note in suit, upon condition that McAllaster would warrant the bunch not to injure the ox, and the warranty was so made; that the defendant worked the oxen some in the months of April, May and June following; that about the middle of said June, and prior to the commencement of this suit, the defendant told the plaintiff that McAllaster warranted the bunch not to injure or hurt the ox, and proposed to give the plaintiff three dollars and give up the trade, or refer the matter to three disinterested men; that McAllaster was present and denied that he made the warranty aforesaid, and Bryant made no reply; that the bunch became worse and the ox began to fail in said May, and continued to fail; that the ox was so injured by the bunch that in September following the said defendant killed him; and the defendant suffered damage by reason of the bunch.

McAllaster did not make any warranty, when he first traded, nor was there any evidence, that he had at that time any authority from the plaintiff to make any trade whatever with the defendant.

Upon this evidence the counsel for the defendant insisted, that McAllaster was authorized by Bryant to make the warranty aforesaid, so as to make the said Bryant liable for said warranty; and if not, the acts and doings of the plaintiff in putting the fifteen dollar note in suit was an adoption and ratification of the acts and doings of McAllaster in taking said note, and rendered the plaintiff liable for the warranty made as aforesaid.

The Court instructed the jury, that although under a general authority to sell or exchange, an agent might be enabled to make a warranty which would be binding on his principal, yet under the circumstances of this case, it was the opinion of the Court, that such an authority could not be reasonably inferred,

and that the receiving the note without knowledge of any such warranty was not an adoption or ratification of it; and that the suit on the note, after the defendant stated in June to the plaintiff that McAllaster made a warranty, and it was denied by McAllaster, was not an adoption or ratification of the warranty.

The verdict was for the plaintiff, and the counsel for the defendant filed exceptions to the opinions and rulings of the Court.

*Gerry* argued for the defendant — and

*Hammons*, for the plaintiff.

The opinion of the Court was drawn up by

Shepley J. — This suit is upon a promissory note made by the defendant on March 30, 1844, and payable to Peter H. McAllaster or order. The bill of exceptions in substance states, that McAllaster on that day exchanged a pair of the plaintiff's oxen with the defendant for a pair of steers, and received of the defendant a note for twelve dollars for the estimated difference in value. That he returned the steers and note to the defendant on the same day, and informed him, that the plaintiff would not consent, that the exchange should be thus made, but directed him to say, that the "defendant must send him a note for fifteen dollars or change back." That they then spoke of a bunch on the jaw of one of the oxen, and defendant said, he would give the note for fifteen dollars, if McAllaster would warrant, that the ox would not be injured by the bunch, that McAllaster did so warrant, and thereupon the note in suit was made.

The question presented is, whether the plaintiff is bound by that warranty.

The authority of a general agent may be more or less extensive; and he may be more or less limited in his action within the scope of it. The limitation of his authority may be public or private. If it be public, those who deal with him must regard it, or the principal will not be bound. If it be private, the principal will be bound, when the agent is acting

within the scope of his authority, although he should violate his secret instructions.

A special agent is one employed for a particular purpose only. He also may have a general authority to accomplish that purpose, or be limited to do it in a particular manner. If the limitation respecting the manner of doing it be public or known to the person, with whom he deals, the principal will not be bound, if the instructions are exceeded or violated. If such limitation be private, the agent may accomplish the object in violation of his instructions, and yet bind his principal by his acts.

The case of a servant of a horse dealer, who on sale of a horse warranted him to be sound in violation of his instructions, and yet bound his principal, is an example of the kind of agency last named.

This case differs from it in this respect only, that the manner, in which he was to perform the particular act, was communicated to the defendant. But that makes an essential difference; for, in such case, the principal is not bound. After the first bargain the defendant was informed, that McAllaster had acted without authority, and of the terms, upon which the plaintiff would make the exchange; and he had no right to conclude, that McAllaster had any authority to vary them. There being no warranty in the first bargain, he could not be authorized to infer, that McAllaster might make one as a part of the second. On the contrary he should have been admonished, by what had taken place, that he had no general authority to make an exchange.

There is no doubt, that if one person knows, that another has acted as his agent without authority, or has exceeded his authority as agent, and with such knowledge accepts money, property, or security, or avails himself of advantages, derived from the act, he will be regarded as having ratified it. This will not be the case, when the knowledge, that the person has exceeded his authority is not received by the employer so early as to enable him, before a material change of circumstances, to repudiate the whole transaction without essential injury. If,

for instance, a merchant should authorize a broker by a written memorandum to purchase certain goods at a price named, and the broker should exhibit it to the seller, and yet should exceed the price, and this should be made known to the merchant, when he received the goods; if he should retain or sell them, he would ratify the bargain made by the broker, and be obliged to pay the agreed price. But if he had received the goods without knowledge, that they had been purchased at an advanced price, he would not be obliged to restore them, or pay such advanced price, if he could not, when informed of it, repudiate the bargain without suffering loss. In such case he would not be in fault. The seller would be, and he should bear the loss.

When the plaintiff in this case was first informed, that his agent had exceeded his authority, he had lost the services of the oxen for two months and a half; and the agent was present and denied, that he had made the warranty. The defendant appears to have been sensible, that the plaintiff would then suffer loss by a rescission of the contract, and to have offered compensation therefor. Whether the offer was a reasonable one or not, is immaterial, for the plaintiff under such circumstances was not obliged to rescind. He does not appear to have made any movement in the first instance to effect the exchange, or to have desired it, or to have been in fault, when first informed of the warranty. The defendant could not at that time prescribe the terms, upon which the contract should be rescinded, or insist upon it. *Exceptions overruled.*

JOHN BAILEY *versus* STEPHEN DAY *& al.*

The payment in money of a sum less than the full amount, of a debt due and payable in money, by the debtor, at the place where he was bound to make it, and at the same time an agreement of the creditor to discharge the residue, will not operate as a defence to a suit for the balance of the debt — because the agreement of discharge is without consideration.

DEBT on a judgment recovered against the defendants, Day and Farrington, by the plaintiff and his deceased partner,

Walter W. Bailey, at the Supreme Judicial Court for the county of Cumberland, November Term, 1837, for $80,27, debt, and $7,86, costs of suit.

The defendants, with the general issue, pleaded by brief statement:—1. That the judgment had been paid in full before the commencement of the suit. 2. Accord and satisfaction. 3. That the balance due on the judgment, if any, was paid July 5, 1841.

The record of the judgment being shown by the plaintiff, the defendants then introduced in evidence, a writing, signed by the plaintiff, of which the following is a copy.

"Portland, July 5, 1841. Received of Stephen Day and John L. Farrington the sum of ten dollars, for which sum, I hereby fully discharge a judgment recovered against them by myself and Walter W. Bailey at the November Term of the Supreme Judicial Court, A. D. 1837. Said judgment is recorded in the records of said Court, for Cumberland County, vol. 11, page 515. Amount of debt $80,27, and costs, amounting to $7,86. John Bailey, for W. W. & J. Bailey."

No proof was offered of the payment of any other sum, excepting as appeared by said receipt, in discharge or satisfaction of the judgment.

After the introduction of this evidence, the parties agreed to put the same into a statement of facts, signed by them; agreeing, that the Court should render such judgment in the action, as should be deemed legal.

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

*Codman* and *Fox*, for the plaintiff.

The only question presented in this case, is, whether a payment of $10, in full discharge of a judgment for about $90, proved by a common receipt, is a bar to the recovery of the residue of said judgment in an action of debt brought thereon.

This question seems to be as well settled as any question that could be presented to this Court, and it would seem that the *District* Judge, in order to decide according to his notions of

the *equity* of the case, (knowing, however, no fact in relation to it except the judgment and the receipt!) overruled all decided cases, and *made law for himself*, as in his written opinion, he does not cite a single authority to sustain him!

In *Pinnell's case*, 5 Coke's R. 117, it was resolved by the whole Court, "that the payment of a lesser sum in satisfaction of a greater, *cannot* be any satisfaction for the whole, because it appears to the Judges, that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum. When the whole sum is due, by no intendment, the acceptance of parcel, can be satisfaction to the plaintiff."

In *Fitch* v. *Sutton*, 5 East's R. 230, the marginal note, is "acceptance of a less, cannot be a satisfaction in law, of a greater sum, then due, nor can it operate as an extinguishment of the original cause of action, though accompanied by a conditional promise to pay the residue, when of ability." And Lord Ellenborough says, "it cannot be pretended that a receipt of part only, though expressed to be in full of all demands, must have the same operation as a release. It is impossible to contend that the acceptance of £17, 10s, is an extinguishment of a debt of £50. *There must be some consideration* for the relinquishment of the remainder."

The same doctrine is established in *Heathcote* v. *Crookshanks*, 2 T. R. 24; *Cumber* v. *Ware*, 1 Strange, 426; *Adams* v. *Tapling*, 4 Modern, 88.

"Where the condition is for payment of £20, the obligor cannot, at the time appointed, pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum cannot be a satisfaction of a greater." Coke Litt. § 344, Commentary, "*thirdly.*"

So in *Steinman* v. *Magnus*, 11 East's R. 393, this *principle* is recognized, but a distinction is made from the fact, that a third person is induced to become security for the payment of the dividend, which Lord Ellenborough says "makes all the difference in the case!" No such difference exists in the case at bar. It was held in *Down* v. *Noyes*, 10 Adolph. &

Ellis, 121, "that a plea alleging the acceptance of a less sum in satisfaction of a larger sum, was bad *after verdict*, and that plaintiff was entitled to judgment," "*non obstante veredicto.*"

Spencer J. in *Harrison* v. *Close & Wilcox*, 2 Johns. R. 449, says, "the payment of a part, without a release by deed, is no bar to the demand." In *Boyd* v. *Hitchcock*, 20 Johns. R. 78, Pratt J. says, "the general rule is well settled that a payment of a less sum of money than the whole debt *without a release* is no satisfaction of the plaintiff's claim."

To the same principle we cite, *Rowley* v. *Stoddard*, 7 Johns. R. 209; *Kellogg* v. *Richards*, 14 Wendall's R. 116. Dewey J. in *Brooks & al.* v. *White*, 2 Metc. R. 285, says, "the general principle that the acceptance of a less sum in money than is actually due, cannot be a satisfaction and will not operate to extinguish the whole debt, *although agreed by the creditor*, seems to be recognized in books of unquestionable authority. The foundation of the rule, seems to be, that in the case of the acceptance of a less sum of money in discharge of a debt, inasmuch as there is no new consideration, no benefit accruing to the creditor, and no damage to the debtor, the creditor may violate, with legal impunity, his promise to the debtor, however freely and understandingly made.

There is nothing in the facts of the case to indicate, and the Court cannot infer, that the $10, was a "*balance*" due on said judgment, there is no proof of any payments other than the $10, and the receipt is not for the balance of the judgment, but reads "in full discharge of a judgment," for such and such sums, thus admitting the *fact* that the whole amount of said judgment was then due and unpaid.

The Court will perceive that we have not presented the objection that the receipt cannot operate a discharge of the judgment because not of so high a nature as the judgment, not being under seal. This point is submitted without argument, as we are satisfied that on the main point, in the case, we are entitled to judgment.

It is now submitted to the Court to decide whether they will be governed by the current of high unquestioned authorities

now cited, or by the isolated opinion of a single Judge of an inferior Court.

*Hammons*, for the defendants.

The only question in this case is, whether the receipt given by the plaintiff and introduced by the defendants is a defence to this action.

The defendants insist that it is a contract, discharge, or release executed, and not executory. It is an agreement carried into effect, and which the Court will not attempt to nullify. The ten dollars were paid by the defendants and received by the plaintiff in full for the judgment, and the judgment thereupon "fully discharged."

It does not appear, but the defendants paid the amount due on the judgment; the one party having paid, and the other received a certain sum in full for the judgment, it is for the plaintiff to show that the ten dollars was not the whole amount due. The burthen of proof is on him. It is true that the case finds that the amount of the judgment recovered was $80,27 debt and $7,86 cost, but it does not find whether or not any payment or payments had been made prior to the date of the receipt. The receipt purporting to be in full for debt and cost, the presumption is that there had, and it is for the plaintiff to show that there had not.

The present action is not strictly within the principle laid down in *Fitch* v. *Sutton*, 5 East, 230, and *Heathcote & al.* v. *Crookshanks*, 2 D. & E. 24, and recognized in *How* v. *Mackey*, 5 Pick. 44. In none of those cases was the contract executed, but there was merely an agreement to execute. In *Fitch* v. *Sutton*, there was a promise to pay the balance. *Pinnel's* case turned on a question of pleading.

But supposing nothing but the ten dollars named in the receipt was ever paid, and that this case is within the principle laid down in *Fitch* v. *Sutton*, then we ask this Court to overrule that case, and instead of letting a technical rule prevail over common sense and moral honesty in this State, we ask them to establish the rule, that common sense and moral ob-

ligation shall govern, or prevail, instead of a mere technical absurdity.

1. It is decided to be law then, that acceptance by a creditor of a less sum than is owing, in full satisfaction of the debt, will be a good satisfaction, if made in the note of a third person.

2. That payment of ten dollars will be a satisfaction of a hundred, if so received by the creditor, before the debt becomes due.

3. That payment and acceptance of a horse, worth ten dollars only, will be a good payment of a hundred dollar debt, if so agreed by the parties. *Brooks* v. *White*, 2 Metc. 283.

4. That payment of a less sum at a different place than that named in the contract, shall be a full satisfaction of a greater, if so agreed by the parties. *Brooks v. White*, 2 Metc. 283; *How* v. *Mackey*, 5 Pick. 44; *Stienman* v. *Magnus*, 11 East, 391.

5. The conveyance of a man's interest in real estate, although he had no title whatever, and nothing passed by the deed, the deed being by a third person. *Reed* v. *Bartlett*, 19 Pick. 273.

Now if payment by the *note* of a third person for a less sum is good, why should not the payment and acceptance of a less sum than is due *in money* be good also?

The answer is, that a less sum can never be a payment of a greater. If so, then can the promise of a third person *to pay* a less sum than is due, be a payment of the greater sum? If the creditor gets a sum of money he has it. If he gets the promise of a third person to pay the same sum, he may never get it.

How then can an uncertainty be of more value to the creditor than a certainty, a promise to pay a sum of money than the money itself? And yet the decisions are that ninety-five dollars in cash would not pay a debt of a hundred, nor be a discharge of the same, while the note of a third person for ten dollars would. The note might net the creditor more than its nominal value; so might the cash.

The delivery and receipt, the payment and acceptance of a specific article, worth only five dollars, will be a complete payment and satisfaction of a demand of five hundred dollars, if so agreed by the parties, while the payment under the same agreement of four hundred and ninety-five dollars would not. And this because the parties may estimate the value of the specific article *ad libertum.*

If the demand is payable at a certain counting room on one side the street, on a certain day, the payment and acceptance of a less sum at the time and place can be no discharge, although received in full; but if the parties will step across the street into a different counting room, and there carry into effect the same agreement, why this will be a full and complete discharge, because it might have been some advantage to the creditor to have the payment made in the second counting room; and further than this, while the payment of ninety-nine dollars made in the first counting room would be no discharge, the payment of twenty-five, nay, five, would be a complete one in the second. What more absurd? What more repugnant to common sense? I had almost said what more ridiculous?

And even worse yet; a third person's deed of nothing, of his interest in a piece of land where he had no interest whatever, will be a good satisfaction, if so received, while the payment of $\frac{75}{100}$ in cash will not. *Read* v. *Bartlett,* 19 Pick 273.

Will this Court attach so much consequence to a technical rule of law, as to make it ride over common sense, and common honesty? Will they say that it is of such importance, that it should be preserved, although it should enable a person to violate his contract, fairly, fully, and understandingly made, and by which he is morally bound, with legal impunity? Will they dispense with the substance and retain the shadow? They have not yet adopted such law; and it is hoped, they will not. The Courts of neither Maine nor Massachusetts have ever directly decided the question.

The Court in Massachusetts is evidently inclined to discoun-

tenance the doctrine. In *Kellogg* v. *Richards*, 14 Wend. 116, the Court say, "The rule that the payment of a less sum of money, though agreed to be received in full satisfaction of a debt exceeding that amount, shall not be so considered, in contemplation of law, is technical and not very well supported by reason; Courts, therefore, have departed from it on slight distinctions;" and this is quoted by the Court, with approbation, in *Brooks* v. *White*, 2 Metc. 286.

Legal fictions are adopted in furtherance of justice; technical rules should yield in furtherance of justice.

Nothing is more common with commercial men and merchants, than for creditors to compound with their debtors at a discount; at the date of the receipt, introduced in this case, a general state of embarrassment existed in the commercial community; a bankrupt law was in agitation and contemplation, and soon afterwards was passed.

Thousands of compromises, under these circumstances, were entered into by creditors and debtors. Now will this Court say, that all these compromises were mere nullities, and that the creditors still have the right to enforce their claims; and this too, when debtors have disposed of all their effects in order, as they supposed, to get released from their embarrassments? When they have been lulled into supposed security, by these invalid discharges, and have thus let the opportunity, afforded them by the bankrupt law, to rid themselves of their embarrassments, go by! Creditors undoubtedly entered into these arrangements in good faith, and with no intent or design to trick or entrap their debtors. Will this Court now permit them, by virtue of a technical rule of law, repugnant to moral obligation and common sense, to make that, no discharge, which was supposed by the parties to be a full one, and resuscitate demands, which have been supposed to be dead for years?

The opinion of the Court was prepared by

Tenney J. — The plaintiff and another person, who is now dead, recovered judgment against the defendants for the sum of $80,27, debt or damage, and of $7,86, costs of the same

suit. The present action is upon that judgment, and is defended upon the ground, that the judgment had been fully paid before the commencement of the suit; but if otherwise, it was satisfied by the written acknowledgment by the plaintiff of the receipt of ten dollars, paid July 5, 1841, and a discharge of the judgment.

The receipt, which is in the case, does not show that any sum was paid upon the judgment, besides the ten dollars therein mentioned. The judgment is evidence of the indebtedness and the amount, and the burden is upon the defendants to show a payment of the balance, before they can avail themselves of this ground of defence.

The authorities are numerous, and it is believed uniform, that the payment in money, of a debt due and payable in money, by the debtor, at the place, where he was bound to make it, of a sum less than the full amount, and at the same time an agreement of the creditor to discharge the residue, will not operate as a defence to a suit for the balance. The reason is obvious; the agreement of discharge is without consideration. The apparent injustice of the rule in many cases has been presented in a strong light by the defendant's counsel. But to allow the argument to prevail would be subversive of the principle that in a simple contract, a promise without consideration is a *nudum pactum.* It is immaterial how small the consideration may be to make the contract binding, but if without any, it is void.

If without consideration a creditor makes a simple contract in writing, by which he agrees with his debtor, that his debt is discharged, it is quite manifest, that the rights of the parties remain unchanged; it is equally so, where is connected with such agreement no act of the debtor, which he was not in all respects previously bound in law to perform.

By the payment of a part, the defendants laid no foundation for an obligation in the plaintiff, but merely made discharge, *pro tanto,* of their own which they had long omitted.

*Judgment for the plaintiff.*

JOHN M. EUSTIS *versus* TYLER KIDDER.

In an action against a constable to recover the penalty incurred by serving a writ before having given a bond in conformity with the provisions of the thirty-fifth section of the one hundred and fourth chapter of the Revised Statutes, every fact and averment necessary, to show that the defendant has incurred the penalty, must be found in some one count of the declaration, or it will be insufficient.

It is a fatal defect, if the declaration does not allege that the defendant, at the time of the service of the writ, was a constable. And an allegation that he then had a writ in his custody "in the capacity of a constable," and that he did then and there "in the capacity of a constable as aforesaid make service of said writ," is not an averment, that he was one. A man may act as a constable without being one.

A constable does not incur such penalty by serving a writ, if he has conformed in all respects to the provisions of Rev. Stat. c. 104, § 35, relative to giving bond, saving that the approval of the selectmen of the town has not been indorsed thereon; that provision being merely directory to them.

THIS case came before the Court on a demurrer to the declaration. The defects considered by the Court, in their opinion, will be found therein. It therefore becomes unnecessary to notice the other causes of demurrer, or the arguments in relation thereto.

*Walton*, for the defendant, in support of the demurrer, said that this was a penal action, and that the declaration should contain every averment material to sustain the action, or the declaration must be adjudged bad, on demurrer. *Barter* v. *Martin*, 5 Greenl. 76.

The first count is defective, because, it does not allege that the writ was of the description which a constable is authorized to serve; nor does it state, that the defendant was a constable when he served the writ. No one but a constable is required by law to give bond, as a constable.

The second count alleges, that the defendant, before he served the writ, did not give the proper bond, *with the approval of the selectmen, indorsed thereon.* The bond might have been given conformably in all respects to law, unless the constable was liable to the penalty, because the approval of the selectmen was not indorsed upon the bond. The statute, c.

104, § 35, only requires that the constable shall not serve a process "before giving such bond," without incurring the penalty. The making and delivering a sufficient bond to the selectmen is all he could do, and all the law requires of him. He could not know, whether the selectmen did, or did not indorse their approval after they had accepted the bond as a sufficient one. It was their business, not his. The statute does not require it of him.

*Howard* and *Shepley*, for the plaintiff, said that if either count in the declaration was good, it was sufficient. Gould's Pl. c. 4, § 5, 6; 1 Saund. 286, note 9. Both are good.

It was contended in argument, that the first count did allege, that the defendant was a constable, and as such served the writ before giving the bond required by law.

The second count alleges, that the defendant was a constable at the time he served the writ, in direct language; and instead of saying generally, as in the first count, that he had not then given bond as required by law, gives the very language of the statute, and alleges that the defendant had not given bond conformably thereto. This, it is said, is not sufficient, because he was not bound to do all which the statute requires, should be done, to qualify him to serve writs. The statute requires, that the bond should be "sufficient in the opinion of the selectmen," and points out the mode in which that opinion shall be made known, by indorsing "their approval on said bond and in their own hands." The defendant might have seen that this was done; and until it was done, the provision of the statute was not complied with, and the defendant incurred the penalty by serving the writ.

The opinion of the Court was drawn up by

Shepley J. — The action is debt to recover a penalty alleged to have been incurred by a violation of the statute, c. 104, § 35. There is a special demurrer to the declaration, which contains two counts. Every fact and averment necessary to shew, that the defendant has incurred the penalty,

must be found in one of the counts. If found in either, that one will be sufficient.

The first count alleges, that the defendant "did then and there, in the capacity of a constable of the town of Dixfield aforesaid, have in his custody a writ of attachment in a personal action;" and after describing it, further alleges, "did then and there, at Dixfield aforesaid, in the capacity of constable, as aforesaid, make service of said writ." It does not allege, that he was a constable of the town of Dixfield. This is a material defect. A person may, without being a constable, act in the capacity of one, and thereby commit an offence punishable by statute c. 158, § 28. But if he should do so, he would not incur a forfeiture under c. 104, § 35, by neglecting to give the bond required of a constable.

The second count alleges, that the defendant was a constable of that town, that in that capacity he made service of a writ of attachment in a personal action described, and that "the said Kidder did not at any time before the service of said writ and process execute a bond in manner and form as required by the statute in such case made and provided, to wit, that the said Kidder did not then or before that time, and before service of said writ as aforesaid, give bond to the inhabitants of his said town of Dixfield in the sum of five hundred dollars, with sureties sufficient in the opinion of the selectmen of said town, with their approval indorsed on said bond in their own hands, for the faithful performance of the duties of his office as to all processes by him served or executed."

The allegation made in general terms, that he had not executed a bond as required by the statute, is restricted by the *scilicet* and the subsequent language. *Stukely* v. *Butler*, Hob. 171; *Skinner* v. *Andrews*, 1 Saund. 170, and note 2.

If the latter allegation may be true, and yet the constable may have performed all the duties required of him by the statute, this count also will be defective, for it may be, that the defendant has not incurred the forfeiture.

The words of the statute are: — "Every constable, before he shall serve any writ or execution, shall give bond to the in-

habitants of his town in the sum of five hundred dollars with two sureties, sufficient in the opinion of the selectmen of the town, who shall indorse their approval on said bond and in their own hands, for the faithful performance of the duties of his office as to all processes by him served or executed."

All the duties required to be performed by the constable will be prescribed, if the words, "who shall indorse their approval on said bond and in their own hands," be omitted. Those words were not introduced to prescribe his duties; and they might with entire propriety have been introduced in a separate clause. It could not have been the intention to make the constable responsible for the performance of duties required of the selectmen; and to subject him to a penalty for their neglect. It is not essential to the validity of the bond, that the approval of the selectmen should be indorsed upon it. That provision is directory to them, and intended to be beneficial to the constable by affording evidence, that his sureties had been adjudged to be sufficient, and also to those, who might become interested in the bond by shewing, that such adjudication had been formal and deliberate. A provision merely directory cannot constitute a part of the contract, which may be enforced, should the officers required to perform such duty neglect it. *Bank of the United States* v. *Dandridge*, 12 Wheat. 81. That case and others alluded to in the opinion of Mr. Justice Story, exhibit instances, where clauses or phrases in statutes have been held to be directory in cases liable to much more of doubt than the present.

*Declaration adjudged bad.*

SARAH PERLEY *versus* LEWIS JEWELL *& al.*

It is not essential to the validity of the proceedings of two justices of the peace and of the quorum, who may administer an oath to the principal in a poor debtor's bond, that the justices should be selected and organized as a Court *within the hour* appointed in the notice, as the time of the intended disclosure. There may be cases where the proceedings will be upheld, although the selection and organization did not take place until after the hour named in the citation had passed.

To save a forfeiture, a liberal construction should be given to a statute.

STATEMENT of facts by the parties: —

This was an action brought upon a poor debtor's bond, given by defendant to the plaintiff, according to the provisions of the statute of Maine entitled "Of the relief of poor debtors."

It is agreed by the parties that the said Lewis Jewell, the debtor, within six months from the date of said bond, did cite the creditor before two justices of the peace and of the quorum, and did submit himself to examination and take the oath prescribed in the twenty-eighth section of the one hundred and forty-eighth chapter of the Revised Statutes, and the said justices gave him a certificate prescribed by law. And it is further agreed, that Levi Brown, Esq., one of the justices aforesaid, was chosen by the said debtor, and Daniel Brown, Esq., one of said justices, was chosen or appointed by John C. Gerry, a deputy of O'Neil W. Robinson, Sheriff of said county, the said creditor declining to make a selection of a justice.

It is further agreed that the citation to the said creditor to attend to hear said disclosure was for him to attend at ten o'clock A. M. on the day appointed. Both of the justices, who finally acted, had been requested by the debtor to attend at said examination and hearing, but Levi Brown, who was finally selected by the said debtor to act in the premises, did not arrive until after eleven o'clock, A. M.; Daniel Brown appointed as aforesaid, did arrive before eleven o'clock. But the court was not organized until after eleven o'clock, when it was organized by the debtor's selecting Levi Brown, and the said deputy's appointing Daniel Brown, which fact appears of record. And it is further agreed by the parties, that

the whole proceedings were correct and according to law, and every requirement of law in such cases was complied with to discharge said bond, except the time of selecting said justices and organizing said Court, and the creditor agrees and does hereby waive all other objections to the proceedings of said Court.

Now if the said selection of a justice by the debtor and appointment of a justice by said officer, in time and manner aforesaid, and the organization of the Court after eleven o'clock, when the creditor was cited to appear at ten, were legal, the plaintiff is to be nonsuited, otherwise the defendants are to be defaulted.

*Deblois*, for the plaintiff, contended that upon the facts agreed, the plaintiff was entitled to judgment in her favor.

There was no tribunal or court organized at the time and place, mentioned in the notice of the debtor, by law authorized to administer the oath and give him a legal discharge.

The case shows, that the justices were not selected until after the hour had expired mentioned in the notice, and of course, the Court could not have been organized and capable of acting until after that time.

The proceedings are invalid unless the steps pointed out by the statute shall have been followed most strictly. *Williams* v. *Burrill*, 23 Maine R. 144; 2 Pick. 436; 3 Shepl. 337; 2 Salk. 475. And it is competent to show by parol, that the justices were not organized and had no jurisdiction. 23 Maine R. 144; 2 Pick. 436; 21 Maine R. 441. But the fact, that there was no selection of the justices until after eleven o'clock, is admitted in the agreed statement.

If the debtor wishes to avail himself of the benefit of an examination and of the poor debtor's oath, it is for him to take such measures, that a legal tribunal for the purpose be obtained. The whole responsibility is on the debtor to see that this is done. *Burnham* v. *Howe*, 23 Maine R. 489.

Inasmuch as the tribunal was not organized until after the hour of ten, mentioned in the citation, had passed, and it was after eleven, the magistrates had no jurisdiction, and their pro-

ceedings are wholly void. If it had passed the hour, it is immaterial how much or how little. Admit the license at all, and no limit can be fixed. 21 Maine R. 440; 19 Johns. R. 39; 11 Mass. R. 513; 19 Maine R. 454.

Tribunals of this description, have *their hour*, and *not their day*, as Courts, which have their stated terms established by law. Unless the tribunal is organized, and capable of acting, within the hour mentioned in the notice, no valid act can be performed under that notice. 11 Johns. R. 407; 10 Wend. 497; 8 Wend. 569; 15 Johns. R. 477; 21 Pick. 165; 12 Conn. R. 385; 23 Maine R. 489.

*Gerry*, for the defendants, considered that there was but one question in this case; whether a formal selection and appointment of the justices, and a formal organization of the Court, must of necessity be made, before eleven o'clock, when the creditor had been cited to appear at ten o'clock, in order to give the justices jurisdiction of the case. Unless such stern necessity does exist, the defence is made out.

The statute provides, that notice of the time and place shall be given, but does not fix any time within which the organization must take place, to prevent a discontinuance. A reasonable time then is to be given for that purpose, under all the circumstances of the case.

The creditor must first have his reasonable time to select and have present his magistrate. Would eleven o'clock be too late for him? After the creditor has so long neglected to make his selection, as to entitle an officer to select the other, it then, and not before, becomes the duty of the debtor to procure an officer and have a selection made, and when selected, to procure the attendance of such magistrate.

The counsel adverted to the facts in the case, and contended, that not only was the selection and organization of the magistrates' court made within a reasonable time, but that unnecessary exertion had been made in procuring the attendance of an officer, and magistrate before the right of the debtor had accrued to have the selection made, so that no possible delay could take place.

He cited as authorities, 4 Greenl. 298; 3 Metc. 568; 18 Maine R. 144; 11 Johns. R. 459; 12 Johns. R. 217.

The opinion of the Court was drawn up by

TENNEY J. — The question here presented is, whether the justices of the peace and of the quorum, who administered to the principal in the bond in suit, the poor debtor's oath, had jurisdiction of the matter. If their proceedings were at the time appointed in the citation, the answer must be in the affirmative, otherwise in the negative. It does not appear that the delay which happened in this case was in any degree prejudicial to the interests of the creditor. She declined to make the selection of a justice of the peace and quorum; hence it is to be inferred, that she could have proceeded to examine the debtor, if she had wished to do so. This circumstance, however, could not give jurisdiction to the magistrates, but it is a reason for the application of the principle, that to save a forfeiture, a liberal construction should be given. *Windsor* v. *China*, 4 Greenl. 298.

It is contended by the plaintiff's counsel, that the next hour after that named in the citation having arrived, without the organization of the proper tribunal, the justices had no jurisdiction whatever. Statutes must be so interpreted, that they may accomplish, and not defeat their obvious purposes. Where certain things are required to be done on a certain day, and such is their character, that more or less time is necessary for their completion, and the whole cannot be done on that day, it will not be contended, that if done within a reasonable time afterwards, the demands of the law have not been fulfilled.

By c. 148, § 46, Rev. St. it is the privilege of the debtor and the creditor each to select a magistrate to take the examination of the former, as a poor debtor, and to administer to him the oath, if he is entitled to take it. If the parties, or either of them, decline to exercise the privilege, the duty of making the selection devolves upon the sheriff, deputy sheriff, coroner or constable. The justices must be of the quorum and disinterested. These rights of the parties are deemed

important; they should be respected in practice, and a reasonable opportunity should be given for their exercise. In the selection, and in procuring the attendance of the justices, some space of time is necessary. The creditor is not bound to make a selection, or employ an officer to make it; but if the debtor should be at the place appointed, at the earliest moment of the time mentioned, it would not be reasonable for him to presume, that the creditor did not intend to make the selection. If acting upon such a presumption, the magistrates, chosen by the debtor, and an officer, should proceed at once to the examination, and in half an hour after the precise time fixed in the citation, the creditor should present a magistrate of his own selection, properly qualified, and demand that he should be associated, with the one chosen by the other party, and be refused, would a certificate of the two former, be sufficient evidence of a fulfilment of the condition of the bond? One party may object to the qualification of the justice selected by the other, on the ground of interest or for other cause; time would necessarily be consumed in the discussion of the question, in hearing and answering the reasons offered; if the objection should prove valid in the opinion of the justice selected and others interested, would it be contended, that reasonable time would be denied for the choice of another? The statute has pointed out no length of time that one party should wait for the other. It has not provided that the rights of the parties remain unaffected during one full hour, and after that, the notice becomes an entire nullity. If some time may be allowed within which a tribunal may be organized, after the hour named, has arrived, and it does not seem reasonable that there should not be, we see no good ground to hold, that it might not be extended beyond an hour, if in the honest and prompt endeavors of the parties, the selection of justices and their attendance could not be sooner obtained. No decision has been referred to, which establishes the rigorous rule contended for, on the part of the plaintiff. If the parties are entitled to one hour, in which to procure the attendance of the competent tribunal and no more, and an organization should

fail within the time, nothing could be legally done, however desirous the debtor and creditor might be to proceed, for their consent could not confer jurisdiction. When it should appear, that both had been making use of proper efforts, from the time appointed, but without succeeding, in the organization, till the next hour should strike; would that sound annul every thing which had been done, and render abortive any further attempt to accomplish the object, honestly intended? On what principle is it, that one hour should be the limit, after which no organization can take place? If instead of the hour, there should be the minute, as for example fifty minutes after ten, would the same principle be insisted on?

There is some difficulty in drawing with precision the line of time, after which a discontinuance would take place. Want of careful attention to meet legal provisions should not be encouraged, neither should a strictness, founded upon no good reason, or settled principle be required.

As was said by the Court in *Niles* v. *Hancock & al.* 3 Metc. 568, "we do not think there is any inflexible rule, that every case of this kind shall be proceeded in within the hour appointed." Each case must stand upon the peculiar facts attending it. If the debtor should take no measures to obtain magistrates, be absent from the place appointed, till after the expiration of an hour from the time mentioned, and the creditor should have made his appearance, and waited a considerable time, and had gone away, we are not prepared to say that such negligence and delay, and perhaps loss would not operate as a discontinuance.

In this case, it being admitted, that every thing was done in strict accordance with the requirements of the law, excepting in the single particular, which has been considered, we infer that the debtor was present in time; he had requested the attendance of both magistrates, who had the proper qualifications as justices of the peace and quorum, and who acted in the matter. One was present within the hour, and the other came afterwards, when both were appointed by those legally authorized. The debtor was not regardless of his duties and his in-

terests; but took seasonable measures to accomplish the object sought. Under the particular facts and circumstances of the case, we are of the opinion, that the proceedings were at the time appointed in the citation.

*Plaintiff nonsuit.*

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STEPHEN HOLT *versus* TIMOTHY WALKER.

The declarations of a person while in possession as the owner of personal property, may be received as evidence against the title of another person, who has afterwards derived his title through him. And they may be received, although the person, who made them, might have been called as a witness.

And if the title of such person had passed to his assignee in bankruptcy, he remaining in possession of the property, his declarations, made immediately before the sale, and at the request of the assignee, are admissible to affect a title afterwards acquired through the assignee.

EXCEPTIONS from Western District Court, GOODENOW J. presiding.

Trespass for a pair of oxen. The plaintiff proved, that he was in the possession of the oxen, and that they were taken and driven away by the defendant. The plaintiff also proved that he was assignee in bankruptcy, of one Parlin, and alleged, that the oxen were his property at the time of the bankruptcy.

Walker proved, that the oxen were originally his property, and contended that they went into the hands of Parlin only upon a condition, which had never been performed. With other testimony, the defendant offered to prove the declarations of Parlin, in relation to the ownership thereof.

The exceptions state, that "to the introduction of the foregoing evidence on the part of the defendant to prove the terms of the original contract between Parlin and Walker in relation to the property in the steers, Parlin being present in Court, and being a competent witness, having been released by the plaintiff in this suit, the counsel for the plaintiff objected; but the objection was overruled by the presiding Judge, and the evidence admitted as to the declarations of Parlin while he was in possession of the oxen."

After the bankruptcy, Parlin remained in possession of the oxen, until the sale thereof by the plaintiff, as assignee. Some of the declarations were made, at the request of the plaintiff, immediately before the sale. The residue were made before the bankruptcy.

The jury returned a verdict for the defendant, and the counsel for the plaintiff filed exceptions.

*Walton*, for the plaintiff, contended that the declarations of Parlin should not have been received, because Parlin himself was a competent witness, and being then present in Court. They were not the declarations of an agent, nor part of the *res gesta*, and could not have been received as evidence of intention, for no such question was raised. Nor were they received for the purpose of impeaching Parlin's testimony as a witness, as he had not been examined; nor to show fraud, for no such question arose. Stark. on Ev. Part 3, § 10; Part 4, page 60: 1 Greenl. Ev. Part 2, c. 5, § 110, 123, 124; *Greene* v. *Harriman*, 14 Maine R. 32; *Abbott* v. *Hutchins*, ib. 390; *Pool* v. *Bridges*, 4 Pick. 378; *Bridge* v. *Eggleston*, 14 Mass. R. 250; *Haynes* v. *Butler*, 24 Pick. 242.

The declarations of one who is a competent witness in the case, and whose testimony can be obtained, are never admissible in evidence. Minot's Dig. 303.

But the declarations made at the assignee's sale ought not to have been admitted. In this the authorities all agree. Declarations are never admitted, unless the person making them, had "a complete and entire control over it, as his property." *Russel* v. *Doyle*, 15 Maine R. 115.

*Howard & Shepley*, for the defendant, said the exceptions presented but a single point; were the admissions of Parlin, under whom the plaintiff claims as assignee, made before the assignment, and while he was in possession of the oxen, and in explanation of his own title, admissible, and proveable without calling him as a witness? We contend, that they were properly admissible, as original evidence. The plaintiff, claiming under him subsequently, is bound by such admissions. These admissions may be proved by any competent evidence,

without calling Parlin. 1 Greenl. Ev. § 190, 191; 1 Stark. Ev. 47, 48; 24 Pick. 245; 16 Mass. R. 108; 2 Greenl. 242; 8 Greenl. 194; 24 Maine R. 565; 5 Metc. 223; 23 Maine R. 238; 2 N. H. Rep. 387; 12 Conn. R. 1; 4 Johns. R. 230; 7 Wheat. 59; 10 Johns. 377; 2 T. R. 53; 4 Taunt. 16; 1 Ad. & Ellis, 114; 5 B. & A. 223.

The opinion of the Court was drawn up by

SHEPLEY J. — The only question presented for consideration is, whether the declarations of Simon Parlin respecting his title to the oxen were legally admitted as evidence.

They were made at two different times. The bill of exceptions states, that testimony was admitted "as to the declarations of Parlin, while he was in possession of the oxen," and that he was then present in Court.

When a person in possession as the owner of an estate, makes declarations respecting his title, those declarations are admissible as evidence against the title of another person, who has derived his title through him. And they may be received, although the person, who made them, might have been called as a witness. *Woolway* v. *Rowe*, 1 Ad. & El. 114.

Upon the same principle the declarations of a person, while in possession as the owner of personal property, may be received to affect the title of one claiming under him. *Hatch* v. *Dennis*, 1 Fairf. 244. This rule does not apply to negotiable paper indorsed before it becomes payable.

The cases of *Green* v. *Harriman* and *Abbott* v. *Hutchins*, cited by counsel, are not at variance with this doctrine. The only point decided in the former was, that the declaration of one made while in possession of the property, not respecting his title to it, but that he had received money of the defendant, was not admissible. In the latter, the person against whom it was proposed to give the declarations in evidence, did not claim or derive title from the person, who made them.

When Parlin made the last declaration received in this case, his title appears to have passed to his assignee in bankruptcy, although he remained in possession of the property. But that

declaration equally affected the title derived through the assignee, it having been made at the time of sale and at his request.

*Exceptions overruled.*

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DAVID S. STONE *versus* ALPHEUS TIBBETTS *& trustee.*

A contract made in Massachusetts between resident citizens thereof, during the time the insolvent law of that State of April 23, 1838, was in force, and there to be performed, is discharged in that State, and no suit can be further prosecuted thereon, if the debtor, by a course of proceedings in due form of law, obtains his certificate of discharge, and pleads the same in bar of an action on such contract.

The discharge of a contract in the State where the parties resided, and where it was made and to be performed, is a discharge thereof in every other State.

THE parties agreed, that the action should be determined upon a statement of facts.

The plaintiff and defendant are citizens of Massachusetts, and were so at the time of the commencement of this suit. The action was for labor done and materials furnished, to the alleged amount, $1090,94, in that State, after the passage of the insolvent law of Massachusetts in 1838. The writ was dated Oct. 17, 1844, and was served upon Joseph Tibbetts, as trustee, on Oct. 18, 1844, he then being, and still continuing to be an inhabitant of this State.

At the June Term, 1845, in the District Court, the trustee made a disclosure wherein he admitted that he had in his hands effects to the amount of $102, belonging to the principal, and also that in December, 1844, he had been notified of the assignment of the debt by the principal to A. C. Spooner under the insolvent law of Massachusetts. The principal defendant made an assignment of this debt to Spooner, and was discharged under the insolvent laws of Massachusetts. That act is evidence in the case. Spooner, the assignee, appeared in Court and claimed the property in the hands of the alleged trustee. Alpheus Tibbetts, the defendant, appears in Court and

pleads his discharge under the insolvent laws of Massachusetts.

If the Court shall be of opinion, that said discharge of Alpheus Tibbetts is a bar to this action, it is to be dismissed; if the suit can be maintained, the parties are to go to trial, to ascertain the amount due; and if the attachment vacated the assignment, and said Spooner, the assignee, is not entitled to the property in the hands of the trustee, judgment is to be rendered against him to the amount of said sum of one hundred and two dollars.

*C. S. & E. H. Daveis* argued for the defendant and the assignee. After remarking that Spooner, the assignee, appeared and was admitted as a party to the suit under Rev. St. c. 119, § 35, 37, and filed his claim, as assignee, to the property in the hands of the trustee, they said that the insolvent law of Massachusetts passed the property in the hands of Joseph Tibbetts to the assignee, notwithstanding the trustee process. The assignment operates in that State to cut off attachments in such cases. *Bigelow* v. *Pritchard*, 21 Pick 169. The parties being both citizens of Massachusetts, and the contract having been entered into there, their rights are to be determined by the laws of that State; and the subject of the attachment here, being a chose in action, passes by the assignment. 11 Pick. 25; 16 Pick. 235; 5 Mason, 174.

The discharge of the defendant under the insolvent law of Massachusetts, under the circumstances disclosed in this case, is a bar to this action. *Baker* v. *Wheaton*, 5 Mass. R. 509; *Blanchard* v. *Russell*, 13 Mass. R. 1; *Hall* v. *Williams*, 6 Pick. 243; *Bradford* v. *Farrand*, 13 Mass. R. 18; *Walsh* v. *Farrand*, 13 Mass. R. 19; *Betts* v. *Bailey*, 12 Pick. 572; *Watson* v. *Bourne*, 10 Mass. R. 337; *Braynard* v. *Marshall*, 8 Pick. 194; *Towne* v. *Smith*, in the Circuit Court, *U. S.* 9 Law Rep. 12; 7 Greenl. 337.

*Fessenden, Deblois & Fessenden*, argued for the plaintiff, and advanced these, among other legal propositions.

The contract is not discharged by the insolvent act of Massa-

chusetts of 1838. *Bigelow* v. *Pritchard*, 21 Pick. 172. And the act would have been unconstitutional, if it had. 4 Wheat. 122. The contract remains unimpaired.

The *lex loci* applies only to the interpretation or validity of contracts; and a discharge under the insolvent laws of another State, of which both parties are citizens, but not impairing the contract itself, cannot affect a remedy pursued in this State. *Judd* v. *Porter*, 7 Greenl. 337.

An assignment under the insolvent laws of another country, does not operate as a legal or equitable transfer of the debts or property of the insolvent in another State, so as to prevent a creditor here from resorting to such property or debt for payment. 6 Pick. 286; 9 Mass. R. 337; 11 Mass. R. 25; 13 Mass. R. 146; *Fox* v. *Adams*, 5 Greenl. 245; Story's Conflict of Laws, c. 2, § 20.

A certificate obtained under the insolvent laws of another State, is no bar to an action on a debt, due from the insolvent in this State. 8 Pick. 186; 15 Mass. R. 419; *Towne* v. *Smith*, Law Reporter for May, 1846.

Such discharge affects the remedy merely, and has no operation in this State. *Coffin* v. *Coffin*, 16 Pick. 323.

The opinion of the Court was by

Shepley J. — It appears from the agreed statement and documents, that the services were performed and the materials furnished, which are sued for in this action, since the act of the Commonwealth of Massachusetts, passed on April 23, 1838, took effect; and that the plaintiff and defendant then were, and have continued to be, resident citizens of that State.

This suit was commenced on October 17, 1844, and the defendant was discharged from the payment of such debts by proceedings in due form of law in that State, on May 21, 1845, and pleads his certificate of discharge in bar of the further prosecution of this action.

This then, was a contract, made and to be performed in that State, between resident citizens of that State. It was legally discharged in that State. *Bigelow* v. *Pritchard*, 21 Pick. 169; *Ogden* v. *Saunders*, 12 Wheat. 213.

That the discharge of a contract in the place, where the parties resided, and where it was made and to be performed, is a discharge every where, is a doctrine fully admitted in this State, and too well established to be the subject of a useful discussion.

After judgment for the defendant nothing will remain to prevent the property attached, from passing to the assignee by the act of that State and the proceedings under it.

*Plaintiff nonsuit.*

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF LINCOLN.

ARGUED AT MAY TERM, 1846.

## THOMAS McLELLAN *versus* ASA WALKER.

If the creditor draws an order on an attorney with whom he has left a demand for collection, therein requesting him to pay the amount to the order of the creditor; and this order is accepted by the attorney, payable when the money should be collected and come into his hands, and is assigned by the creditor; and the assignee gives notice thereof to the attorney, who says nothing at the time, of any demand of his own, against the assignor; and the money is afterwards collected by the attorney; the assignee may maintain an action in his own name against the attorney to recover the money collected; and the attorney will not be entitled to set off his own demand against the original creditor, existing at the time of the acceptance of the order, and arising out of other transactions.

ASSUMPSIT. The writ was dated Sept. 27, 1843, and contained a special count on the paper hereinafter mentioned, and a count for money, had and received.

At the trial before SHEPLEY J. the plaintiff introduced a paper in evidence, a copy of which follows: —

"Bangor, June 7, 1838. Asa Walker, Esq. Sir, — Please pay to my own order the amount of the judgment recovered in my favor, against Warren and Brown, at the last October Term of the Supreme Judicial Court, being nine hundred and thirty $\frac{25}{100}$ dollars, with the interest that has accrued thereon, and oblige Your ob't serv't, William McLellan."

This was accepted by the defendant, on the same paper, in these words. "Accepted, payable whenever the amount of

the judgment so recovered and interest shall be collected and come into my hands. Asa Walker." On the back of the paper was this indorsement.

"Pay Thomas McLellan. William McLellan."

The plaintiff also introduced in evidence the depositions of C. A. McLellan, J. McIntire and J. W. Carr. The defendant introduced in evidence a letter from William McLellan to him, dated Jan. 20, 1842. The report states, that "the papers introduced in evidence, together with the writ, are made a part of the case, and may be referred to by either party, without copying." No copies of them have been received by the Reporter, and the counsel differed as to what they proved. It seemed to be admitted, however, that an execution had issued upon the judgment, and had been put into the hands of an officer for collection; that a suit had been commenced in the name of William McLellan against the officer for neglect of duty, in omitting to collect the money; and that the whole claim against the judgment debtors and the officer had been settled by the defendant on receiving three hundred dollars and costs of the suits, by the direction of either William McLellan or of the plaintiff. From the view taken of the evidence by the Court, it seems to have been proved, that the acceptance of the order and assignment to the plaintiff were before the collection of the three hundred dollars, and that the compromise was made by the defendant under instructions from the plaintiff.

If upon the evidence introduced, or upon so much thereof as is legally admissible, the Court should be of opinion that the plaintiff was entitled to recover, the defendant was to be defaulted; and if not entitled to recover, the plaintiff was to become nonsuit.

*E. & S. E. Smith* argued for the plaintiff, and among other grounds, contended, that the plaintiff was entitled to recover on the principle, that an equitable right and interest in the demand, left with the defendant for collection, was assigned by William McLellan to the plaintiff, and for a good consideration, and notice thereof given to the defendant.

The evidence in the case shows, that the defendant assented to the assignment of the demand to the plaintiff, if he did not, as we say the fact is, expressly promise to pay the money to the plaintiff. But without an express promise, when the money was received by the defendant, it was money in his hands, equitably belonging to the plaintiff, and this action can be maintained to recover it. 4 Esp. R. 204; 12 Johns. R. 276; 2 Blackst. R. 1269; 15 Maine R. 289; 21 Maine R. 489; 17 Mass. R. 579; 11 Maine R. 388.

When the assignment of the demand, in favor of William McLellan, against Warren and Brown, was made to the plaintiff, nothing had been collected by the defendant, and no debt was due from him to the assignor. When notice of the assignment was given to the defendant he became the agent or attorney of the plaintiff as the owner thereof, in the collection of this demand. If he had made the compromise without the plaintiff's consent, he would have been liable to him in an action in his own name. The money was received as the plaintiff's, on a compromise by his direction, and the defendant is bound to pay it to the plaintiff. The action is rightly brought in his own name. 4 Greenl. 384; 3 Greenl. 346; 1 Pick. 462; 5 Wheat. 277; 1 Caines, 363; 3 Johns. R. 72. To the amount received, interest should be added since the demand upon him was made.

*M. H. Smith*, for the defendant, said this was not a mere technical objection, for William McLellan was insolvent, and the defendant had a claim in his favor against him, which he would be entitled to set off, when the action was brought, as it should have been, in the name of William McLellan. The balance due, merely, could be assigned.

The condition of this acceptance has never been fulfilled. The amount of the judgment against Warren and Brown, has never been collected, and no money has ever come into the hands of the defendant from them, but merely a much smaller amount by a compromise of a suit against the officer for neglect of duty.

The order and acceptance, do not constitute a negotiable

instrument. 1. Because an instrument, to be negotiable, must be payable absolutely and at all events, and not on a contingency, which may never happen. 15 Mass. R. 387; 5 T. R. 582; 4 Mod. 244; 2 Strange, 1151; 2 B. & P. 413; 6 Cowen, 108; 22 Pick. 83; 20 Pick. 132; 11 Mass. R. 143; 6 Cowen, 151; 2 Wheat. 233; 3 Hawks, 458; 7 Metc. 588; Chitty on Bills, 55, 60, 65; Bayley on Bills, 16 to 22.

2. Because it was to be paid from an uncertain fund.

3. Because it was to be paid only from a particular fund. 7 Metc. 588; 2 Strange, 1211; 6 Mod. 265; 1 Strange, 591; 2 B. & P. 413; 1 Hammond, 274; 6 Munf. 3; 1 Bibb, 502.

4. Because it does not involve the personal responsibility of the drawee at all events. 1 Bibb, 490.

A note not negotiable, although assigned, will not enable the assignee to recover on the money counts in his own name. 5 Wend. 595; 10 Johns. R. 418; Bayley on Bills, 390, 393.

He contended, that the defendant acted entirely under the direction of William McLellan, in effecting the compromise, under which the money was received, and never made any promise to pay the money to the plaintiff, nor gave any assent whatever to his claim for it.

The opinion of the Court was drawn up by

WHITMAN C. J. — One count in the plaintiff's declaration is for money had and received; and on that, it seems to be conceded, that he must recover, if he can recover at all. The order, acceptance and assignment was undoubtedly an equitable transfer of the demand in question to the plaintiff. Authorities need not be cited to establish this position; and it is not understood to be questioned in the defence. And in an action for money had and received no more can be recoverable, than in equity and good conscience may be found to be due. The defendant has received three hundred dollars from the source indicated by the transfer; and cannot detain it, unless he has some cross equities to set off against it. The order was drawn without allusion to any thing of that kind, and accepted accordingly. The plaintiff, therefore, on looking at the order,

was not given to understand, that he had occasion to be upon his guard against any thing not therein alluded to; and, when the defendant was notified of the transfer, it does not appear that he expressed any dissatisfaction at its having been done; and at that time he had not received the three hundred dollars. He now claims to have a demand against the estate of William McLellan, the original creditor, and the assignor of the order, which had accrued, it would seem, long before the acceptance by him, indorsed upon the order. Under these circumstances it does not seem to us equitable, that he should be allowed to avail himself of any such set-off.

After he received notice of the transfer of the demand to the plaintiff, he became his agent in making the collection. The plaintiff had, before, become authorized to control the concern. The defendant could act no longer as the agent of William McLellan in the matter, although he might be bound to continue the suit in his name. Whatever he received thereafter, was not William's but the plaintiff's; and the three hundred dollars received in pursuance of instructions from the plaintiff, by way of compromise for the claim, was the money of the plaintiff, the same as if the demand had been originally put into his hands by the plaintiff for collection, in the name of William. Clearly, money so collected for an equitable assignee, would be money received to his use, and not to the use of the assignor or nominal plaintiff.

Moreover, at the time the demand was assigned it was not a demand against the defendant; it was against a third person. William had a perfect right to assign it to whom he pleased, saving to the defendant his lien upon the judgment obtained, for his expenses in the suit, and its incidents; and those, we understand, were paid by Carr, in the compromise with him, over and above the three hundred dollars received as above stated. With such a reservation, or after exercising power over the demand to that extent, the defendant could have had no right to question the validity of any assignment, which the nominal plaintiff might see fit to make. If the debt had been collected before the assignment, the defendant would have be-

come the debtor; and a different case would have been presented, concerning which we give no opinion.

*Defendant defaulted.*

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ZENAS LOTHROP & *al. versus* JESSE PAGE.

Where exceptions may be alleged in the District Court, questions arising at the term of the Court at which the exceptions are taken, can alone be presented. The regularity of the proceedings at any former term of the Court cannot be presented by exceptions at a subsequent term.

Every Court of record has power over its own records and proceedings, to make them conform to its own sense of justice and truth, so long as they remain incomplete, and until final judgment has been entered.

The authority to vacate a final judgment, irregularly entered at a former term, has also been asserted and exercised. And it is the well established practice and course of proceedings in such Courts, to regard all actions in which a final judgment has not been entered, whether on the docket of the existing or a former term, as within the jurisdiction and control of the Court.

EXCEPTIONS from the Middle District Court, REDINGTON J. presiding, filed at the December Term, 1843, of that Court.

The facts are stated in the opinion of the Court.

*Harding*, for the plaintiff in review, contended that after the District Court had accepted the first report of the referees, it had no further power over the case. The question as to costs was one arising after the judgment, and could not affect it. The plaintiffs in review objected to the bringing forward of the action, and to the recommitting of the report of the referees, which had once been accepted. The Court had no power to do either. There was no action to bring forward. It is said to be an action until judgment is entered, but not after. 1 Dane's Abr. 143. The Court having accepted the report, was bound by it. 2 Mass. R. 164. Even the Supreme Court has no power to correct or vacate an award. 6 Pick. 269, 274.

It was also contended, that the referees, by their own showing, had conducted erroneously.

*Bulfinch*, for the defendant in review, contended that before final judgment and the record of the same, the Court has the control of its proceedings and records, and may so amend and order the same as justice shall require.

In this case the referees had certified to the Court, that they were not satisfied with the award, and it was within the discretion of the Court to order the action to be brought forward on the docket, and to recommit the report of the referees. The recommitment of a report of referees is merely an act of discretion on the part of the Judge, and is not the subject of a bill of exceptions. 8 Greenl. 288.

The opinion of the Court was prepared by

Shepley J. — It appears from the bill of exceptions, that this action had been referred in the District Court; that the referees made a report at the term of that Court holden in this county, in the month of April, 1841, which was accepted; that an appeal from a decision of the clerk, respecting costs, was made. It does not appear, that any decision was made thereon, by the Judge, or that any final judgment was entered. On motion of the counsel for the defendant in review, an order was made at the next term, that the action should be brought forward from the docket of the last term; that the acceptance of the report should be stricken off; and that the report should be recommitted to the referees. A report was again made at a term of that Court holden in the month of August, 1842. The action was continued from term to term, to the term holden in the month of December, 1843, when the last report was accepted. To these proceedings the counsel for the plaintiffs in review objected.

Questions arising at the term of the Court, at which the exceptions are taken, can alone be presented. The regularity of the proceedings at the term of the Court holden in August, 1841, cannot properly be presented by a bill of exceptions allowed at the term holden in December, 1843. The counsel for the plaintiffs in review, insists, however, that the report could not be legally accepted at the December term, in 1843,

because the first acceptance was final, and the Court had no further power over the action. But the acceptance or rejection of the report was the only matter presented for the consideration of the Court in December, 1843; not the regularity of its proceedings at a term holden more than two years before that time. If there were any irregularity in the former proceedings, to which exceptions were not then taken, they could be presented to this Court only by a writ of error. There does not, however, appear to have been any error in those proceedings. Every court of record, has power over its own records and proceedings to make them conform to its own sense of justice and truth, so long as they remain incomplete, and until final judgment has been entered. The authority to vacate a final judgment irregularly entered at a former term, has also been asserted and exercised. It is the well established practice and course of proceeding in such courts to regard all actions, in which a final judgment has not been entered, whether on the docket of the existing, or a former term, as within the jurisdiction and control of the Court. *Commonwealth* v. *Moore*, 3 Pick. 194; *Sawtell, Pet.* 6 Pick. 110; *Delaney* v. *Brownell*, 4 Johns. R. 136. The like power has been asserted and exercised by the courts in this State.

*Exceptions overruled.*

MATTHIAS P. SAWYER *& al. versus* WINNEGANCE MILL CO.

Where it appeared by an agreement in writing, that certain individuals named, "as proprietors of the Lilly Cove Township, on the one part, and W. M. R. and J. A. as owners of the Winnegance Mills, of the other part, have agreed to submit all claims existing between said proprietors and said Mill Company to the determination of "three persons (named) as referees;" "and said parties further agree, that said referees shall take into their account, and include in their award, all claims of said proprietors and of said company against each other, although other persons beside these parties may be or may have been joint proprietors or members of said company; and these parties severally agree to be accountable therefor;" which writing was signed by "R. & W. att'ys to said Mill Co." and by "J. S. S. att'y to Lilly Cove Township Pro."— In an action against the "Winnegance Mill Company," as a corporation, and which corporation owned the "Winnegance Mills," on an award, made by the arbitrators; — *it was held*, that the *corporation* was not a party to the agreement of submission, and was not bound by an award made by authority thereof.

THIS was an action of debt on an award of referees.

At the trial before SHEPLEY J. the plaintiffs offered in evidence, an agreement to refer, bearing date on September 15, 1843, and signed by Messrs. Randall and Whitman, as attorneys for one party, and by J. S. Sewall, for the other party. Its introduction was objected to, by the counsel for the corporation, on the ground, that Messrs. Randall and Whitman were not authorized to sign it for the corporation; and also, on the ground that it was not a contract between these parties. It was admitted, that Messrs. Randall and Whitman signed the contract by the direction of William M. Rogers. The parties agree, that the records of the corporation may be referred to, to show the authority of said Rogers to act for the corporation, and extracts from the records may be introduced by either party.

The plaintiffs then offered the award of the referees. This was objected to, as not made between the parties, and not in conformity to the submission.

The defendants submitted to a default, which was to be taken off, and a nonsuit entered, if the plaintiffs are not entitled to recover.

The following is a copy of the agreement, referred to in the report.

"This agreement, made this fifteenth day of September, A. D. 1843, witnesses, that William Hales, Samuel H. Babcock, Samuel Hunt, M. P. Sawyer, Henry B. Rogers, Samuel F. Coolidge, William Whitney, William Eager and William Tucker, all of Boston, Commonwealth of Massachusetts, as proprietors of the Lilly Cove Township, on the one part, and William M. Rogers of Bath, State of Maine, and John Agry of Hallowell, State of Maine, as owners of the Winnegance Mills, of the other part, have agreed to submit all claims existing between said proprietors and said Mill Company, to the determination of Joseph Berry, William M. Reed and John Henry, as referees, the decision of whom, or a major part of whom, to be final.

"And said parties further agree, that said referees shall take into their account, and include in their award, all claims of said proprietors, and of said company, against each other, although other persons beside these parties may be, or may have been, joint proprietors or members of said company; and these parties severally agree to be accountable therefor. Also that the notes given by said proprietors to said Rogers for two hundred and ten dollars and interest, dated Nov. 10, 1837, and May 9, 1838, which notes have been indorsed by said William M. Rogers to Otis Kimball, shall be included in this reference, and their validity determined, and if allowed, to be credited to said company, and in determining the validity of said notes, William M. Rogers shall be admitted as a legal witness.

"Randall & Whitman,
"Att'ys to said Mill Company and Kimball.
"J. S. Sewall,
"Att'y to Lilly Cove Township Pro."

The following is a copy of the award: —

"The referees agreed upon between the proprietors of the Lilly Cove Company and Wm. M. Rogers and the Winnegance Mill Company, after having heard the parties and the

evidence and arguments by them produced, do award and make this their final award and determination in the premises, to wit: — that the said William Hales, Samuel H. Babcock, Samuel Hunt, M. P. Sawyer, Henry B. Rogers and others, as members and proprietors of the said Lilly Cove Company, do recover of the said Wm. M. Rogers, John Agry and others, who may be owners and proprietors of the Winnegance Mill Company, the sum of sixteen hundred dollars. —And this sum shall, when paid by the said Rogers, Agry, or the proprietors of the Winnegance Mill Company, be in full of all notes and demands between the said Lilly Cove Company, and also in full of the notes belonging to Otis Kimball mentioned in the agreement of submission made by the parties.

"Bath, Dec. 19, 1843.

"Joseph Berry,
"Wm. M. Reed, } Referees."
"John Henry,

The material parts of the records, to which reference is made in the report of the case, are given in the opinion of the Court.

*H. W. Paine*, for the defendants, contended, in the first place, that the plaintiffs were bound to show *in limine*, that the defendants agreed to submit the matters in controversy between them, to the determination of arbitrators, and to abide by and perform their award. In other words, that the defendants were a party to the submission. The only proof, they offer, of any such agreement is the contract of September 15, 1843. He examined this paper, and went into an argument to show, that the defendants were not a party to it. He cited *Arfridson* v. *Ladd*, 12 Mass. R. 173; *Simonds* v. *Heard*, 23 Pick. 120.

But the plaintiffs are bound to show not only that the defendants were made parties, but that they were made parties with their consent, that whoever undertook to represent them in the premises, and submit their claims, and make them liable, and bind them to the performance of the award, was duly empowered. He contended, that Rogers had no authority

whatever, in any capacity, or by virtue of any office in the company, held by him, to authorize the making of this submission.

The award itself is not against the defendants, but merely against certain individuals who agreed to perform the award.

*Sawyer* and *Sewall*, in their argument for the plaintiffs, contended that Messrs. Randall and Whitman had sufficient authority to sign the agreement for and in behalf of the defendants. They signed the paper as attorneys for the corporation; and the case finds, that they were employed as attorneys of the company by Rogers, the agent of the defendants. And they contended that Rogers had full power and authority to prosecute, defend and settle claims in favor and against the Mill Company, and to employ attorneys to act for and in the name of the company for that purpose. The power to refer to others the determination of controversies follows as a necessary consequence of the other powers. But were there any doubt about the authority of Rogers under the by-laws and votes of the company, the defendants have held him out to the world as their general agent, and they are bound by contracts made for them through him. 13 Mass. R. 178; 17 Mass. R. 129 and 479; 1 Pick. 215; 6 Mass. R. 193; 2 Metc. 163; 23 Pick. 120; 2 Pick. 345; 22 Pick. 85; 11 Maine R. 267; 23 Pick. 24; 19 Pick. 511; 2 Kent, 613.

The defendants were a party to the agreement of reference The attorneys, Messrs. Randall and Whitman, in signing the paper, did not act for the individuals named, but for the company. The whole subject matter of the reference was the concerns of the company, and the individuals named had no personal transactions whatever with the plaintiffs. With the other circumstances called to the attention of the Court, to show the correctness of the position contended for, was that the Kimball notes, if allowed, should be credited to the Mill Company. Unless they were parties to the reference, this could be of no avail whatever.

They also argued that the award was against the Winnegance Mill Company, and no one else.

*Randall*, for the defendants, replied.

The opinion of the Court was drawn up by

TENNEY J. — The defendants are a private corporation, and were duly organized under their charter, and established a code of by-laws for their regulation. The officers, who are chosen annually, are a president, secretary, treasurer and a board of five directors, the president being one, *ex officio*. "All notes given by the agent, for the purchase of logs, or other property connected with the business of the company, shall be countersigned by a majority of the directors, provided the same shall exceed five hundred dollars." Nothing further appears in the charter or by-laws, of the corporation, touching the appointment of the agent and his duties, than the language above quoted from the by-laws. William M. Rogers, who resided in Bath, about two miles from the place where the mills are situated, and where most of the business is done, has been a stockholder, since the time of the organization of the company, and other stockholders at the time of the trial lived in Hallowell and Augusta. He was duly chosen treasurer, director and agent, from the year 1839 to that of 1845, inclusive, and it did not appear by the books, that any other person was ever chosen or appointed agent of the company, or acted as such.

By the direction of Rogers, Randall and Whitman signed the name of their firm, "Randall and Whitman, Attorneys of said Mill Company," to an agreement dated Sept. 15, 1843, which is also signed by "J. S. Sewall, attorney of said proprietors," wherein the plaintiffs, as proprietors of the Lilly Cove Township, are one party, and William M. Rogers, and John Agry, the latter being president of the Mill Company, "as owners of the Winnegance Mills," are the other, submitting to the determination of three men named, all claims existing between said proprietors and said Mill Company; and the referees were authorized to take into their account and include in their award all claims of said proprietors, and of said Mill Company against each other, although other persons besides these parties may be or may have been joint proprietors, or

members of said company, and these parties, severally agree to be accountable therefor. The referees awarded against "William M. Rogers, and John Agry and others, who may be owners and proprietors of the Winnegance Mill Company, the sum of sixteen hundred dollars."

Upon this award, the present action is brought against the defendants as a corporation; and they contend, that it cannot be maintained, insisting that they were not a party to the submission; 1st, Because Rogers had not authority to give direction to those, who executed the agreement, to bind the company. 2d, Because the submission itself does not make them a party to it. Another ground of defence is, that the award does not follow the submission.

Whether the first or the last grounds of defence would avail, we give no opinion. But we are satisfied, that upon a fair construction of the submission, the defendants are not a party thereto. By its terms, the parties are the proprietors of the Lilly Cove Township, individually named, on the one side, and William M. Rogers and John Agry, as owners of the Winnegance Mills, on the other. The agreement states that the referees were to consider "*the claims of said proprietors, and of said Mill Company, although other persons besides these parties, may be, or may have been proprietors, or members of said company, and the parties to the agreement severally agree to be accountable therefor.*" This language cannot be misunderstood; it is free from doubt or ambiguity. If it were the intention of Rogers to bind the company acting as agent, why was the name of Agry inserted, who it is not contended, could bind any other than himself? Although Rogers and Agry were owners in the mills, and the words follow their names in the submission, "as owners of Winnegance Mills," yet the agreement shows that others were interested as stockholders; there was a propriety in its appearing that Rogers and Agry were owners, because if they were entire strangers to the company, it might be doubtful whether the agreement could have validity, for want of consideration.

The addition to the names of "Randall and Whitman,"

upon the submission, is at least equivocal in its meaning. But this can have no greater effect, than would the name of Rogers with the addition of *Agent of the Mill Company;* which, on the authority of numerous cases, would not control language in the agreement, clearly indicating, that Rogers intended to be individually bound, and not otherwise.

By the agreement of the parties, the default is to be taken off and a nonsuit entered.

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JOHN LOW *versus* FRANCIS KNOWLTON.

By the common law of this State, as at first adopted by a colonial ordinance, and continued by usage after the ordinance had been virtually abrogated, the beds of creeks, less than one hundred rods in width, where the tide ebbs and flows, became the property of the owners of the land through which they passed, except that such proprietors are not allowed "to stop or hinder the passage of boats, or other vessels, in or through any creeks or coves to other men's houses or lands."

Any such proprietor, therefore, may make use of the land forming the bed of such creek, and of the space above it, provided he does not obstruct such navigation. Any such obstruction would be a public nuisance; and though abateable by any one, or indictable as such, could not form the subject of an action at the suit of an individual, unless he could make it appear, that he had sustained special damage thereby.

THE parties agree to the following statement of facts, viz:—

"This is an action on the case for obstructing a water passage claimed by the plaintiff on a creek emptying into Kennebec river in the village of Bath, into which the tide flows above the plaintiff's lot, which is about 85 rods from said river.

"Feb. 10th, 1797, Edward H. Page, conveyed to John Low, the plaintiff, and one Elijah Low, a lot of land in Bath, fronting seven or eight rods on Washington Street, and ten rods on Centre Street, which has ever since been occupied by them and others under them, and which covered said creek, near the upper part. Sept. 15, 1817, McLellan and Turner levied their execution by metes and bounds, on said John Low's undivided half part of said lot bounded six rods on Washing-

ton Street, and 105 feet on Centre Street, which covered the water passage in said creek; reserving however in said levy, "the water privilege through the same, of eighteen feet width as heretofore used, to be kept open for the use and benefit of the said McLellan and Turner, and all persons interested therein." Jan. 29th, 1819, said McLellan and Turner levy their execution on said Elijah Low's undivided half of the same lot last described, reserving in said levy "the water way through the same, of eighteen feet width as heretofore used, to be kept open for the benefit of all persons interested in the premises." In April, 1824, McLellan and Turner conveyed the lot levied upon to Tileston Cushing with the same reservation as in the levy on Elijah's half, from whom said Knowlton has had so much of the same as he occupies, and as includes said water way conveyed to him with the same reservation as last before. On the 17th of Feb. 1834, said Elijah's half of so much of said purchase from Page as had not been thus levied upon, was conveyed to said John Low.

"Said Knowlton's lot is next below the plaintiff's on said creek, through both of which the tide flows, and ebbs out entirely at about half tide. At the time of the purchase from Page there was no obstruction in any part of said creek. About forty years ago, Centre Street was made, with a bridge over said creek, leaving a passage under the same, eighteen feet wide, a few rods below said Knowlton's lot. Soon after, about forty years ago, Front Street was made with a bridge over said creek, with a similar passage way, about 50 rods below Centre Street. After this, within two or three years, Washington Street was built, with a similar bridge and passage adjoining said Knowlton's lot below. All these roads were laid out as county or town roads.

"In a deed from Page to the Lows, was the following reservation, "excepting and reserving to the said Edward H. Page and his heirs, liberty at all seasons of the year, to pass to and from the landing place in the way used by the grantees." Said Lows, and all claiming under them, have used to pass up and down said creek, every year to the date of the writ, and have

had a landing place on the remainder of said Page purchase, now owned by said John Low.

"The passage on the lots of the plaintiff and defendant was always kept open till April, 1824, when Cushing, who then owned the defendant's lot, laid some string pieces across it, to pile boards upon, who was however forbidden by the plaintiff. In March, 1843, the defendant moved a building on to his lot, covering said passage, wholly across the same. There is, however, a passage way under said building, as high as that under the adjoining street, being two feet above high water mark, and eighteen feet wide.

"Now the parties agree, that if on the above facts, with such as a jury might reasonably infer therefrom, the plaintiff is entitled to recover, judgment shall be rendered in his favor for one dollar damages, and costs; otherwise, for costs for the defendant.

"Randall & Booker, Att'ys to plaintiff.

"Tallman & Richardson, Att'ys to defendant."

*Randall & Booker*, for the plaintiff, contended that as the obstruction complained of, was over a tide water creek, navigable for valuable purposes, and which had been navigated for many years, those obstructions, whether caused by counties, towns or individuals, were a nuisance. *Arundel* v. *McCullock*, 10 Mass. R. 70; *Com.* v. *Charlestown*, 1 Pick. 180; *Kean* v. *Stetson*, 5 Pick. 492. The erection of the bridges, therefore, afford no justification to the defendant. But were those bridges legally placed there, every new obstruction would increase the difficulty, and render the property of those above, of less value.

The defendant claims under levies on land of the plaintiff in which an open passage is reserved. An open passage means an uncovered passage. Besides, this was navigable water, and the passage was an open one by the common law, and by usage. As the defendant had no right to place the obstruction where he did, the plaintiff is entitled to recover.

*Tallman & Richardson*, for the defendant, said that the plaintiff, to maintain this action, must show, that he has a

private right in the passage way alleged to have been obstructed and that the defendant has injured him in the enjoyment of it.

The defendant contends, in the first place, that the plaintiff has no rights in the water passage. Here the counsel examined the deeds and levies, and insisted that this position was correct.

But if any right was attempted to be reserved to others in the levies, such reservation is inoperative and void. A levy merely passes a debtor's estate to the creditor, but cannot pass property to a third person.

In the second place, it is contended, that if the plaintiff has a right of passage over the defendant's lot, it has not been obstructed by the defendant. All the right the plaintiff can claim is, that of using tide water flowing over the premises of the defendant, when there is water sufficient for him so to do. When the water ceases to flow over the land of the defendant, all right of the plaintiff to pass over ceases also. The plaintiff's supposed right, is subject to the beneficial use of the owner of the land. Here the building placed over the water by the defendant was as far above the surface of the water as either of two bridges below, and could not injure the plaintiff, as whatever could pass under the bridges could also pass under the building above. *Atkins* v. *Boardman*, 20 Pick. 291, and same case, 2 Metc. 457.

And in the third place, the plaintiff cannot recover, because he has not shown, that he has been injured in, or prevented from, using said passage way, or shown any special damage on account of the pretended obstruction. It is well settled, that no action will lie, against any one obstructing tide waters or any other public highway, by an individual, unless he alleges and shows some special damage to himself by reason of said obstruction.

The opinion of the Court was drawn up by

WHITMAN C. J. — By the agreed statement of facts it appears, that this is an action of the case, alleging an ob-

struction of a water passage, claimed by the plaintiff, on a creek, into and from which the tide ebbs and flows, extending about eighty-five rods from Kennebec river, through the lands of both the parties, the plaintiff's being next above and contiguous to the defendant's. The creek, it also appears, is empty, at about half tide, and at full tide, is navigable for boats and gondolas, to the plaintiff's land, where he has a landing place. The defendant, it appears, has erected a building on his land extending across the creek, the sills and sleepers of which, are about two feet above the water, at full tide.

Such creeks, according to the common law of England, would belong to the public; and individuals could acquire no property, in the bed of them, except by legislative grant, or prescription; and whoever should obstruct the navigation of them would be indictable, as the author of a public nuisance. But by the common law of this State, as at first adopted by a colonial ordinance, and continued by usage, after the ordinance had been virtually abrogated, the beds of such creeks became the property of the owners of the land through which they passed, except that such proprietor is not allowed "to stop or hinder any passage of boats or other vessels in or through any creek or cove to other men's houses or lands." Any such proprietor, therefore, may make use of the land forming the bed of such creek, and of the space above it, provided he does not obstruct such navigation, over and upon it. Any such obstruction would be a public nuisance; and though abateable by any one, or indictable as such, could not form the subject of an action at the suit of an individual, unless he could make it appear, that he had sustained special damage thereby. 3 Black. 219.

But in this case it does not appear, nor is it clearly inferable from the facts stated, that the erection in question, is a public nuisance; and it is not understood to be alleged, that the plaintiff has sustained any particular injury therefrom. The reservations contained in the conveyances, under which the parties claim, cannot aid the plaintiff. These seem to be, to the extent to which the law would have furnished security, and

nothing more. The subjects here alluded to, are fully discussed and elucidated in Angell on Tide Waters, ch. 8.

*Plaintiff nonsuit.*

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JOHATHAN D. WHEELER *& al. versus* HALE EVANS *& al. & Trustees.*

While the Statute of April 1, 1836, concerning assignments, was in force, all assignments, which provided only for such creditors as should consent to release the assignors from all claims and demands, saving under the assignments, were void.

Where such void assignment was made, and the assignors drew an order on the assignees, requesting them to pay the amount in their hands to their creditors who had become parties to that assignment, and the same was accepted by the assignees, *it was held*, that this was an assignment of such funds to those creditors, and that the assignees could not be charged as trustees of the assignors by reason of having such funds in their hands, in a process commenced after such acceptance.

The thirty-fifth and thirty-seventh sections of c. 119 of Revised Statutes include assignments of every description.

THE defendants were defaulted, and the only question in the case was, whether Ebenezer Clapp and Charles Clapp, Jr. should be charged as the trustees of Evans & Co. on their disclosures.

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

The order referred to, was in these terms:—

"Bath, August, 21, 1843.

"Messrs. Charles Clapp, Jr. and Ebenezer Clapp, — Please pay to our creditors, who have signed our assignment, the amount of property now in your hands, belonging to us individually or in company, and charge the same to your obedient servants, Hale Evans & Co."

The order was accepted, on the back thereof as follows: —

"Bath, August 21, 1843. Accepted when in funds.

"Charles Clapp, Jr., Ebenezer Clapp."

At the time this order was drawn, accepted and delivered, the creditors who had then become parties to the assignment,

had legal claims against Evans & Co. to an amount much greater, than the funds in the hands of the assignees.

*Randall*, for the plaintiffs, said that the Court had decided, that while the assignment act of 1836 was in force, an assignment which, like this, contained a discharge of all debts to the creditors, who should become parties, was void, and therefore this point was at rest.

The drawing and acceptance of the order to pay the same funds named in the assignment, to the same creditors, is no more than changing the form of the assignment. This is but an attempt to effect indirectly what is forbidden to be done by law. The object of the act of 1836 was mainly to prevent the preference of one creditor before another. The object of the assignment and order was the same. If there is any doubt on this ground, the rule of law settles it against the trustees. 4 Mass. R. 206; 5 Mass. R. 201; 14 Mass. R. 271; 6 Pick. 474; 12 Pick. 383; 18 Pick. 360; 3 Pick. 1.

The principle is well established, that trustees shall be holden, unless sufficient appears in their answers to discharge them. 2 Mass. R. 503; 5 Mass, R. 503; 14 Mass. R. 144; 4 Pick 265; 17 Pick. 435; 21 Pick. 160; 2 Metc. 376.

There was no such assignment, in this case, as would authorize the summoning of the assignees under the statute. The assignees were agents of the creditors, and had notice.

*Tallman & Richardson*, for the trustees, contended that the plaintiffs had advised and assented to the assignment, and were not in a situation to contest its validity.

But if the assignment is invalid, the supposed trustees had become legally bound, by their acceptance of the order, to pay over the funds in their hands to certain creditors named in another paper to which reference was made. This acceptance was prior to the service of the process upon them.

If the assignment was invalid, then the property was in their hands subject to any legal disposition thereof by the assignors. It was an order drawn for the whole funds in their hands, and operates as a legal assignment thereof. 1 Pick. 462; 6 Verm. R. 666; 5 Wheat. 285; 3 Cranch, 346; 16 Maine R. 252.

The opinion of the Court was drawn up by

SHEPLEY J. — The question presented is, whether the persons summoned as trustees should be charged on their disclosure. That disclosure states, that the principals made an assignment of their property to them for the benefit of such of their creditors, as should become parties to it, thereby releasing their debts, on January 21, 1843. It was decided in the case of *Pearson* v. *Crosby*, 23 Maine R. 261, that such an assignment was void by our statute then in force.

This process was served upon the trustees on June 3, 1844. On August 21, 1843, the principals drew an order upon the trustees, requesting them to pay to those of their creditors, who had signed the assignment, the amount of property in their hands; and the trustees accepted that order to pay when in funds. This order operated as an assignment of that fund to those creditors. *Legro* v. *Staples*, 21 Maine R. 252.

Counsel insist that to permit this order to be effectual, would be to allow the object, intended by the assignment of the property for the benefit of such creditors, to be accomplished indirectly. That assignment being void, the assignors could dispose of their property in the hands of their assignees to pay such of their creditors, as they pleased; and if they did so in good faith, such a disposition of it would be valid. The order appears to have been made to pay so much of the debts due from the drawers to their creditors, ascertained by their signatures to the assignment. There is no suggestion that those debts were not really due, or that there was any fraud in the transaction.

It is also contended, that the accepted order was not such an assignment of the fund as would authorize the plaintiffs to summon those creditors by virtue of c. 119. It is there provided, that when goods or effects "are claimed by a third person, in virtue of an assignment from the principal debtor or in some other way," the claimant may be summoned to appear to defend his rights. This language is sufficiently comprehensive to include assignments of every description.

*Exceptions overruled.*

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF KENNEBEC.

ARGUED AT JUNE TERM, 1846.

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## FRANKLIN BANK *versus* OTIS SMALL.

Where an attachment of additional personal property was made upon a writ by the direction of persons liable upon the note in suit, but not parties to the action, and the officer declined to make a return of the attachment unless the property was receipted for by a receipter approved by them, and such receipter was procured by them, and the return of the attachment made, and afterwards, the plaintiff, finding the return of the attachment upon the writ, but having no knowledge of the circumstances under which the attachment was made, claimed the benefit of it, *it was held*, that the officer was responsible to the plaintiff for the safe keeping of the property, so that the same might be taken on execution to satisfy the judgment.

CASE against the defendant, late sheriff of the county of Penobscot, for the neglect of one of his deputies in not having kept safely certain pine mill logs, attached by him on a writ in favor of the plaintiffs against Dwinell and Tibbets, so that they might be taken on execution for the satisfaction of the judgment recovered in that suit. The suit in which the attachment was made, was upon a note made by Dwinell and Tibbets and Sinclair to M. P. Norton, and indorsed by Norton to the plaintiffs. On April 22, 1837, Haynes, the deputy of the defendant, attached real estate and bank shares. On May

3, 1837, Haynes attached as the property of Dwinell and Tibbets, "pine mill logs, sufficient to make four hundred thousand of boards," describing the place where they were and the marks upon them.

Sinclair, called by the defendant, testified, that he was present when the logs were attached; that Haynes refused to attach them, unless they could be receipted for, by some person, satisfactory to the plaintiffs; that M. P. Norton, was present, and another gentleman whom he did not know; that, being on the note, he was anxious to have it secured by an attachment of the property of Dwinell and Tibbets, and he pointed out the logs, and in order to cause the attachment to be made, he obtained Rufus Dwinell to receipt for them; that Norton and the other gentleman agreed to take his receipt; and thereupon Haynes consented to make the attachment of the logs.

There was evidence tending to show, that at the time of the attachment there was a lien upon the logs for the payment of the stumpage.

The defendant contended, at the trial before SHEPLEY J. that if the logs were under a lien at the time of the attachment, that they were not attachable as the property of the debtors, unless the plaintiffs or the officer, should first pay or tender payment, of the amount for which they were thus holden. The Judge instructed the jury, that although such lien might exist, still if the owners of the land did not interfere to prevent the attachment, if they allowed it to be made, if they never interfered to take the whole of the lumber, but only as much of it as would pay the amount due to them, and the rest was left in the hands of the officer, he could not interpose the lien of the owners, but would be liable for the amount of the property left in his hands.

The defendant also contended, that as the deputy only consented to attach and did attach the logs upon the consideration, that they should be receipted for by Rufus Dwinell, not having been directed to make said attachment by the plaintiffs, as this was assented to by Norton, who was holden on the note,

and by some other person who was present, aiding and directing therein, and as the plaintiffs had claimed the benefit of the attachment, made under such circumstances, and as Rufus Dwinell did receipt for the logs, the defendant was not responsible for the safe keeping of them. The Judge instructed the jury, that there was no proof, that the plaintiffs, or any authorized agent of the plaintiffs, ever assented to this agreement, and that it constituted no defence to the suit. And he further instructed them, that if any lien did exist upon the logs, which was enforced upon them, or upon the boards sawed from them, it should be deducted from the value of the logs at the time of the demand made for them. The jury returned a verdict for the plaintiffs, and the defendant filed exceptions to the ruling and instructions of the presiding Judge, and also filed a motion for a new trial, because the verdict was against the evidence.

*Evans* argued for the defendant — and

*Wells*, for the plaintiffs.

The opinion of the Court was drawn up by

WHITMAN C. J. — The Judge, at the trial, ruled, that there was no evidence, that the plaintiffs agreed, that Rufus Dwinell's receipt, for the property attached, should be taken by the defendant's deputy; and we do not see how he could have ruled otherwise. It was not in evidence that it had been done by their attorney in the action. Norton and Sinclair, who induced the deputy to make the attachment, were not the agents of the plaintiffs. They were both on the note in suit, one as promisor, and the other as indorser, and interested in having the debt secured from the property of Tibbets and Dwinell. In what they did, they acted independently of the plaintiffs, and with a single view to their own interests. The plaintiffs do not appear to have had any knowledge of their interference; and much less, is there any reason to suppose that they knew of any receipt taken for the property attached. It would seem that, finding the deputy had made the attachment by recurrence to his return, they required him to have it forthcoming to satisfy the execution, which they subsequently obtained.

The argument, that the plaintiffs, by availing themselves of the attachment, became affected by all the incidents attending the making of it, is not well founded. Such incidents, further than appeared in the deputy's return, were affairs exclusively between him and Norton and Sinclair; as much so, as if any stranger to the suit had, by his interference, induced the deputy to do the same or similar acts.

As to the motion for a new trial, there is more ground for dissatisfaction with the decision. The complaint is, that the verdict is against evidence, or the weight of evidence. Its amount cannot be accounted for, but by supposing that the jury must have disregarded the defence set up, that the logs attached were encumbered, at the time, by what is called a lien, in behalf of the proprietors of the land, from which the timber was cut, for the value of it, as it was, when standing; which had been agreed to be at the rate of four dollars per thousand feet. And it has been surmised, that the jury were induced to do so, upon the supposition, that no such lien could exist, unless the permit of the proprietors to cut the timber, was in writing, with a reservation therein, of such lien; which is but a refusal on the part of the proprietors to part with their property in the timber, to the persons cutting it, till paid for its value as when standing. However it may have occurred, that they did so disregard the lien, is, perhaps immaterial, provided the evidence was such that they should not have disregarded it; and provided, also, it can be clearly ascertained that they did disregard it.

That they must have disregarded it, would seem to be satisfactorily inferable from the following data. None of the testimony can fairly be considered as estimating the value of the timber, when demanded of the deputy, who attached it, as it was, when cut and hauled and turned into the Penobscot river, at more that six dollars per thousand feet; and the quantity got into the river did not exceed 465 thousand feet. The value of the timber, in such case, could have amounted to only $2790. The amount of the lien, as subsequently enforced by the agent of the proprietors of the land, was not less than $1965. This would leave but $825, for the net

value of the timber, which, with interest thereon from the time of demand upon the deputy, to the time of trial, would have amounted to not exceeding twelve hundred dollars, whereas the verdict returned was for $3185,32.

The next question is; should the jury, from the evidence, have been satisfied, that the timber, when attached, was encumbered with the lien. It is believed to be quite a matter of notoriety, that proprietors of timber lands seldom, if ever, grant permits to cut timber on their land, without previous payment, or good security therefor, unless with a reservation of the lien for the value. Indeed, it may be regarded as seldom, that any other security is ever obtained or relied upon. And a proprietor, and especially an agent of a proprietor, would be regarded as acting very indiscreetly in omitting to be so secured. Hence it might, upon slight evidence, be believed that such precaution had been taken. But, independent of any such presumption, the evidence in this case was such, that it would seem to have been unquestionable, that the permission had been granted with the usual reservation of the right of lien; and that it had been enforced by the agent of the proprietors. Wadleigh, one of their agents, is positive, that, in granting the permit, whether it was verbal or in writing, the right of lien was reserved. Luther Dwinell says the permit was in writing, and in possession of himself and his partner for more than a year, though now lost; and that the right of lien was reserved in it. And Sinclair says, if the permit was in writing, it contained the reservation. And Wadleigh and Sinclair both, have the impression that the permit was in writing. And Bennet, and some of the other witnesses, speak unequivocally to the enforcement of the lien as reserved. With such a mass of evidence, all directly tending to establish the existence of the lien, and its enforcement, we think the jury should not have hesitated to admit it; and whether the reservation was in writing or by verbal agreement, was unimportant. We think, also, that there cannot reasonably be a doubt, that the jury, by some means or other, were induced to think it inadmissible.

*Exceptions overruled; but a new trial granted upon the motion filed.*

JAMES A. THOMPSON *versus* ELISHA HALLET, JR.

Where fraud is alleged, and all the representations made by the party to the witness were in letters to himself, and the letters are introduced in evidence, the statements of the witness, of their contents, his motives and inferences, are all inadmissible, and are to be disregarded.

If there be any just ground of complaint that the agent to make sale of a mortgage on real estate, who had stated that a certain price was the most he could obtain for it, when it was of much greater value, and it was sold for that price, had in fact himself become the purchaser, the proper mode for the principal to obtain redress, in a court of equity, for such an injury, is not to make an allegation of fraudulent representation, but to call upon the agent to annul the assignment, or to account to the principal for the true value.

BILL IN EQUITY. The whole case appears in the opinion of the Court.

*Bradbury*, for the plaintiff.

*Vose*, for the defendant.

The opinion of the Court was drawn up by

SHEPLEY J. — This bill is filed by the plaintiff, claiming to be the assignee of a second mortgage, and to be also the owner of the estate, to redeem it from the first mortgage. The case is presented upon bill, answer and proof. Certain facts are not disputed. Respecting others there is a contest. And the parties mutually charge upon each other fraudulent acts.

The parties admit, that the defendant being the owner of the estate, on June 18, 1839, conveyed it to Jonas G. Holcomb, who on the same day reconveyed it in mortgage to secure the payment of a part of the purchase money; that the Citizen's Bank caused Holcomb's right to redeem it to be attached on August, 1, 1840, on a writ made on a draft drawn by Solomon W. Bates on Daniel Wilder, Jr. and by him accepted, and indorsed by the firm of Spaulding & Holcomb; obtained judgment, and caused the right to be sold on the execution issued thereon, on October 22, 1842, to James L. Child for the sum of two hundred dollars. That Holcomb conveyed the same estate in mortgage to John A. Conant in

trust for the Brandon Iron Company, on April 12, 1842. That Conant, on January 25, 1843, assigned that mortgage to the plaintiff. This assignment was recorded on the second day of February following. The defendant alleges, that it was obtained by misrepresentation and fraud; that Conant, by a deed bearing date on May 27, 1844, conveyed all his right to redeem the premises to the defendant. The plaintiff alleges, that this conveyance was obtained by misrepresentation and fraud. The plaintiff alleges, that the right to redeem from the defendant became absolutely vested in the purchaser of it at the sale on execution; that he conveyed it on June 12, 1844, to Thomas W. Smith, who, on July 9, 1844, conveyed it to him. The defendant alleges, that the plaintiff paid the amount due to Child to redeem the estate from that sale, on October 20, 1843, and that these subsequent conveyances were fraudulently made to avoid the effect of that payment and redemption.

It appears, that Holcomb made an assignment of his property to the plaintiff for the benefit of his creditors on June 20, 1842. The total amount of his debts appears to have been about $16000, and the amount due to the Iron Company $12178,22, as stated in the assignment, which was said to contain a clause requiring a release from his creditors, which would destroy its validity. But that instrument has not been proved or introduced in the case.

The first and most material matter in contest is, whether the assignment of the second mortgage, made by Conant to the plaintiff, was fraudulently obtained.

Conant in his testimony states, that he never saw the plaintiff, that all the representations made by him respecting the estate were made in letters to himself, of course his statements of their contents, his motives, and inferences, are all inadmissible, and are to be disregarded, for those letters are produced in evidence.

The first letter is from Conant to the plaintiff, on June 28, 1842, ratifying the acts of John C. Merriam in making the Iron Company a party to the assignment of Holcomb, and in

signing a paper relinquishing to Holcomb furniture named; and waiving further notice. Conant had by a power of attorney, executed on May 11, 1842, authorized Merriam to complete and execute for the Iron Company any business connected with or growing out of their business with Holcomb.

The first misrepresentation insisted upon as contained in the correspondence between the plaintiff and Conant, relates to the value of the estate and the amount, which could be obtained for the rights of the company.

The plaintiff, in his letters of December, 1842, states, that there would be due upon the estate on October 22, 1843, $1074,34, which must be paid to redeem it; and that if he should get nothing from the Bates demand, on which it was sold to Child, "it would be as much as the property would fetch now, if a purchaser could be found." And in his letter to the same, of January, 1843, he says, "I have had an offer of thirty-five dollars for a full discharge of the mortgage; that is a small sum, but is as much, as I can get offered, which will make the property stand $1134, which is as much as it will fetch now."

The only testimony introduced by the defendant, to prove these representations to be false and fraudulent, is the deposition of Loring Cushing, who expresses no opinion respecting the value of the estate, but states its valuation on the assessors' books to have been in the year 1842, $1500, and in the years 1843 and 1844, $1300, and the valuation of the buildings, made on December 23, 1843, by the plaintiff in an application for a policy of insurance upon them.

The plaintiff introduces on this point the testimony of John Dorr, who says, that some two or three years ago the plaintiff informed him, that the right of the Iron Company could be purchased for $50, and the property for about $1100, and advised him to purchase; that he told him he would inform Mr. Wheeler of the chance; that some days after this, the defendant inquired, if he thought of purchasing, and observed that he had a claim against Holcomb, which he should lose, unless he could get the house, and expressed a wish, that he

would not interfere. Dorr states that the house, for a man to live in, was worth more than $1100, but to buy to let or sell again was no object. Ephraim Ballard also states, that late in the fall of 1842 he wished to purchase a house, that the plaintiff informed him of the situation of that house and of the claims upon it, and that he thought, they would come to between $1000 and $1100, and advised him to purchase; that he did not purchase, because he did not then consider it to be worth the money; that the value from the fall of 1842, to the fall of 1843 was less than $1100. James L. Child states, that he offered the plaintiff $35, for the right of the Iron Company, and that it was offered to him for $50, and declined. James W. Bradbury states, that when the property was sold on execution he thought it worth $1200, to a person who wished to live in it, but not more than 1050, to let or sell again. The defendant in his answer states, that he was willing and offered to give $300 for the right to redeem. But this was not responsive to any allegation contained in the bill; it is wholly unsupported by proof, and cannot be easily reconciled with the testimony of Dorr, shewing, that the defendant was informed, that it had been offered for much less, and that he might apparently so have purchased it by the agency of Dorr, if he had been disposed to do it. The plaintiff, in one of his letters, referred Conant to Merriam for the value of the property, and Merriam, while acting as the agent of the Iron Company in May or June, 1842, appears to have boarded in that house, then occupied by Holcomb, two or three weeks. The valuation made by the plaintiff was to continue as a valuation in the policy for six years; it was made nearly a year after his representations of value were made, and not for the purpose of sale or purchase, and after he had procured a cistern to be made. The Court would not be authorized to conclude from such testimony, that the plaintiff misrepresented the value of the property and the amount, for which the right of the Iron Company would be sold.

It is further insisted, that the plaintiff made representations respecting the debt, upon which the sale on execution was made.

In his letter of December, 1842, the plantiff says, "I believe the drawer of the draft has property, but in such a way, that it cannot be found at present." In a postscript to his letter of January, 1843, he says, "I like to have forgotten to mention, that there is no hopes of getting any thing from the debt, for which the house has been recently sold."

Bates states, that the plaintiff called upon him several times before he was able to make any arrangement; that they negotiated for a long time, that the plaintiff tried to get the money, that he was willing but not able to pay; that they finally made an arrangement about the middle of May, 1843, by plaintiff's making a discount, and he turned out to him certain notes named, payable in the fall of 1843, without interest, amounting in the whole to $236,50, and that the balance of these notes over about $220, "went as boot between carriages." A witness, who states, that he was willing and unable to pay, may be expected to have made strong statements of that inability, while bargaining with one for a discharge of a debt at a discount; and the plaintiff may have stated to Conant in the postscript to his letter only, what Bates told him, and what he then believed to be true. At least there is no satisfactory proof to the contrary.

It is said, that the claim against Bates was the property of the Iron Company, and that the plaintiff collected it as their agent, and with the proceeds redeemed the property from Child to their use. This position cannot be sustained. He does not appear to have been authorized at any time to redeem it for the company. If the assignment of the mortgage from Conant to the plaintiff is not avoided by the allegations of fraud, it had been perfected by a payment made and accepted in June, 1843, and the plaintiff could not have redeemed the estate for the company in October following. It may not be material for this purpose, whether the money received for the notes obtained of Bates was used to redeem from Child or not, for in such case it would at most be but a misappropriation of their funds, for which he would be accountable. Upon a careful examination of the testimony, however, it becomes

quite apparent, that the only title of the Iron Company to the claim of Holcomb against Bates was acquired by Holcomb's assignment. Bates states, that the plaintiff told him, the funds were going to the Iron Company; and Holcomb states, that the plaintiff told him, that he supposed the demand against Bates was the property of that company. But both Conant and Holcomb were examined as witnesses for the defendant, and appear to have been disposed to aid him. If there had been any other assignment or conveyance of that claim they, it would seem from the mode of transacting business, must have been parties to it; and yet they do not state or allude to any other. Holcomb states, that the plaintiff told him, when he saw, what he calls a power of attorney to the plaintiff, that he had put the Bates demand among his assets assigned, and that some of his friends told him, it ought to be placed there. Holcomb makes no complaint, that it was improperly placed there, but says that it had not been placed among his assets at an earlier period, and that he had not "primarily received any intimation from Thompson, that the creditors had any claim to the Bates demand." The statements of the plaintiff to Bates and Holcomb, and his remarks in his letters to Conant respecting it, may be accounted for by the fact, that the Iron Company appears to have been entitled to receive three fourths of the proceeds of the property assigned by Holcomb to the plaintiff for the benefit of his creditors.

Conant, when he sent an assignment of his mortgage to the plaintiff and received payment for it, knew, that he had been acting as his agent to make sale of it for the benefit of the company. If under such circumstances there was just cause of complaint, that the agent to sell had become the purchaser, his proper mode to obtain redress for such an injury was not to make an allegation of fraudulent representation, but to call upon him to annul the asssignment or to account to him for its true value.

The plaintiff, having purchased and paid for an assignment of the second mortgage, became entitled to redeem the estate from Child and from the defendant. He paid to Child the

amount due to redeem it from him, on October 20, 1843, and proceeded to expend money upon it, employing Bicknell to build a cistern, only four days after he paid the money to Child. On the twenty-third of December following, he applied to the agent of the Maine Mutual Fire Insurance Company to obtain a policy of insurance upon the buildings for $800, on a valuation of $1500, for the term of six years, and obtained the policy on January 10, 1844. Nine days afterward he made a request in writing to the Insurance Company to transfer $500, of that policy to the defendant, who at the same time agreed in writing to apply whatever he should receive thereby to cancel so much of his mortgage.

Thus far all persons interested appear to have known the state of the title and to have acted accordingly. All the present difficulties have a subsequent origin. Holcomb fancied, that he had seen a power of attorney from Conant to the plaintiff, it may have been the power from Conant to Merriam, and says, that in the winter of 1844 the defendant in conversation informed him, that he had understood from the plaintiff, that he had obtained the right of Child, but should like to ascertain the fact; that he had offered the plaintiff a larger sum, than he gave for the Brandon Iron Company's right, before he bought it, and requested him to ascertain, whether the plaintiff had actually come into possession of their right. According to this account the defendant had been informed, that the plaintiff had obtained both those rights, and appears to have known, that he had insured the buildings for six years as his own, and yet wishes to employ Holcomb to ascertain the facts, some of which were to be found in the registry of deeds. Holcomb and the defendant then commence a correspondence with Conant. Their letters are not produced, but the effect of them was, as Conant states, to induce him to believe, that the fifty dollars paid for the assignment of his mortgage was not a fair price for it, and that the plaintiff had obtained a conveyance of it by fraudulent misrepresentations. Thereupon the defendant, and Holcomb and Conant, without informing the plaintiff of any cause of

complaint, concoct and execute the following arrangement to defeat that assignment. Conant executes a deed, bearing date on May 27, 1844, conveying all his rights to redeem the estate to the defendant for the consideration of $310, and transmits it to Holcomb, who on the twenty-third of the same month, by order of Conant, tenders $53, to the plaintiff to avoid the assignment, and demands it of him. The defendant, as Holcomb states, pays $310,50 for the deed to himself, and Conant states, that $247, were remitted to him, and that he had sent to the defendant a bond with sureties bearing date on May 15, 1844, to indemnify him against any right the plaintiff might have acquired by the assignment of the mortgage. This bond was subsequently cancelled, and Conant and Holcomb become the principal witnesses to prove, that the assignment was procured by fraudulent representations. The defendant cannot be aided by these proceedings.

After the plaintiff became informed of the attempt to avoid the effect of his assignment of that mortgage, he appears to have been apprehensive of danger, whether from a consciousness, that he had not conducted fairly in all respects, does not appear, and to have first conceived the purpose of countermining and defeating the arrangements made to destroy his title by appropriating the money paid to Child, to redeem the estate from the sale on execution, to pay a demand, from which he had obtained a discharge in bankruptcy, that the rights of the second mortgagee, and of those holding under him, might be foreclosed, Child become the absolute owner, subject to the mortgage of the defendant, and convey to some friend, who would convey to him. Thus allowing himself to devise and execute by the assistance of others a stratagem to prevent the effect of a like attempt upon his own title. It will be useless to state the facts and develope the execution of it through the conveyances from Child to Smith and from Smith to the plaintiff; who appears to have furnished the funds to carry it through.

The result appears to be, that the assignment of the mortgage from Holcomb to Conant, is not proved to have been fraudu-

lently obtained; that the plaintiff redeemed the estate from the sale on execution; made a demand of the defendant for an account of rents and profits, on July 9, 1844, which was refused, and thereby becomes entitled to maintain this bill to redeem the estate from him. A decree may be drawn up accordingly, that the plaintiff is entitled to redeem; a master may be appointed to take account and report the amount due on the mortgage to the defendant; and the case stand continued for further proceedings.

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DANIEL DENNY *& al. versus* NATHANIEL GILMAN *& al.*

Where a bill in equity alleges, that the plaintiffs were induced to relinquish a portion of their original just and legal demand, against the defendants, upon payment and security of the balance, by reason of false and fraudulent representations by the latter of the amount and condition of their property; but does not ask, that the contract of settlement should be rescinded, nor that the contract as originally existing, should be restored, nor asks for discovery, but seeks only to recover compensation in money for the injury sustained by the fraudulent representations of the defendants; this Court as a court of equity, cannot entertain jurisdiction, there being a perfect remedy at law.

The statute of limitations applies to suits in equity as well as at law.

Fraud cannot be imputed, where no design to deceive, is manifest.

But although the statement of what another said, in relation to property liable to the payment of the debt, was literally true; yet if the persons making such statement knew that it was false, and made it with the intention to deceive, and to induce those to whom it was made to give up a portion of their claim, and the statement did deceive, and the party was defrauded thereby; the literal truth of the statement of what was said furnishes no excuse.

THIS was a bill in equity brought by Denny & Dutton, merchants of Boston, against Gilman, Williams & Dow, formerly merchants in the city of New York.

The facts appear in the opinion of the Court.

*Weston* and *H. A. Smith* argued for the plaintiffs, —

*Evans*, for Williams & Dow, — and

*F. Allen*, for Gilman.

As the arguments of the counsel required nearly fourteen hours for their delivery, it is obvious, that the limits permitted to any single case preclude the publication of any sketch which would do them justice.

The opinion of the Court was drawn up by

TENNEY J. — The plaintiffs allege in the bill, that Williams & Dow, as a firm, being their debtors for merchandize delivered in January, 1837, in the sum of $8438,84, represented to them on June 27, following, that they had failed, exhibiting what they called a statement of their concerns and declaring that they did not think they should be able to pay more than fifty per cent. of their debts, if so much; and on the 29th day of the same June, the said Williams & Dow, as a firm, further represented to them, that Gilman, the other defendant, declared that he had more debts of his own, than he could possibly pay. And the plaintiffs aver, that confiding in the truth of these statements and others of a like character, which were made to them, from time to time, by said firm, they did, on Sept. 13, 1837, accept of the firm a composition of the said debt in cash and notes, to the amount of $5625,89, which subjected them to the loss of the balance. And the plaintiffs aver further, that on June 9, 1837, the defendants were indebted to them in another sum of $2307,15, for money advanced by them, for the use of the firm of Williams & Dow, together with an interest account against said firm, amounting on April 12, 1838, to the sum of $2670,02; that on the day last named, confiding in the truth of the statements made as before mentioned, they accepted in money and notes, as a composition of the debt last referred to, the sum of $2124,54, whereby they sustained a loss of the balance.

And the plaintiffs aver, that said statements were false and fraudulent, and had the effect to deceive them; that the defendants had, at the times of the compositions, either as a firm or as individuals, ample means, wherewith to have paid the whole amount of their debts to the plaintiffs, each of the defendants being by law, liable for the same. And the plaintiffs

aver, that Gilman alone had then, and now retains, property far beyond, that wanted to pay in full the sums justly due to the plaintiffs; that being deceived, they did not for more than two years, discover the real truth of the case; that Gilman was well aware that the plaintiffs were deceived, and accepted and availed himself, with the other members of the firm, of the compositions. The plaintiffs ask a decree, that the defendants pay the amount of the losses aforesaid, and that they answer upon oath to the matters and things alleged in the bill.

The defendants severally answer under oath. They admit their former indebtedness and the composition of the same, but deny that any composition was made after September, 1837.

The representations alleged to have been made by the firm of Williams & Dow, on June 27th and 29th, 1837, are admitted; they were in letters, under their respective dates, and are made a part of their answers; they allege, that the statements therein were true, and that the statement referred to, in the former of the letters, contained a just and true exhibit of the concerns of the firm, so far as the then unsettled state of their affairs, would enable them to make it. The letter of Gilman under date of September 5, 1837, makes also a part of their several answers; the writer therein states, that it set forth the condition of his business affairs; Dow states, that the same was exhibited to the plaintiffs or one of them, and read before the compositions referred to, in the plaintiff's bill, were finally agreed upon. The defendants each answer, that according to their best knowledge, information and belief, the compositions were obtained fairly and honestly, on a fair and just exposition of the concerns of the company, without any artifice, imposition or concealment, or fraud, of any kind, made or intended, by either of the defendants, and they deny that the representations made, had any effect to deceive or defraud the plaintiffs.

Williams & Dow state, that so far as they could judge of their concerns, as they were correctly stated in their exhibits sent to the plaintiffs, their effects would not avail them more than to pay fifty per cent. in cash, if so much, of the debts

due from them. Gilman states, that from the exhibit, it could not be judged, that the company would pay more than fifty per cent. with costs. Gilman further states, that about the time of the failure of the firm of Williams & Dow, being applied to by them for further assistance, in their pressures, replied to them that he had more to do, to keep the firm of Thomas Small & Co. from failing, than seemed possible; but he denies, that either he or any person for him, with his knowledge or consent, made the representation to the plaintiffs, that he owed more debts of his own, than he could possibly pay. That at the time of the failure of Williams & Dow, before and after, he was concerned with the firm of Small & Co. and between $40 and $50,000 of his own cash capital, was invested therein; that they had become greatly embarrassed, most of their debts being unavailable by the failure of their debtors; they had at the time, as he remembers and believes, more than $50,000 of failed paper; their stock was large, and could not be wholly sold or in part, without great losses. The members of the firm of Thomas Small & Co., consisting of Thomas Small and William Miles, possessed little or no property, had lost by speculations, and without his consent, had drawn from the funds of the firm, more than $10,000; that firm was pressed and hired money at a rate of interest varying from one to three per cent. a month for short periods; he was greatly pressed to keep this firm up, and the endeavor often seemed hopeless. That about the time of the failure of Williams & Dow, he met with heavy losses in navigation, and from bad debts, other than those due to the two firms before mentioned, which losses and those he sustained, in the firm of Thomas Small & Co., amounted, as he believes, to more than $100,000. With these losses, and the large expenses incurred in living in New York, business being prostrated, banks having failed, and confidence gone, and owing more than $100,000 besides the sums due from the firm of Williams & Dow, the prospect of getting out of debt, was extremely small. The large debts due to him were of little avail in raising cash. Vessels and other property, and real estate in

Maine which he owned, would sell only at ruinous losses; and in June, 1837, and afterwards, he feared for a large portion of the time, that it would not be possible for him to pay his own debts, apart from what was due from the firm of Williams & Dow. His entire failure was avoided by obtaining postponements of pay days; and several thousands of dollars of his indebtedness in 1837 remain unpaid.

The defendants in their several answers, submit to the Court, that in the matters in the bill mentioned and complained of, the plaintiffs have a plain and adequate remedy at law, and are not entitled to relief from a court of equity, and ask the same benefit from this defence, to which they would have been entitled, if they had demurred to the bill.

The bill does not ask, that the contract of settlement under the composition should be rescinded, and the contract as originally existing should be restored with the rights secured thereby; neither does it purport to be for discovery and relief; or present a claim upon the ground, that the notes first given were obtained by the fraudulent acts and representations of the defendants, and that therefore, they are entitled to relief as upon securities, which have been lost or destroyed. But they seek to recover damages alone, for the injury accruing to them by the fraudulent concealment and misrepresentation of the defendants, which resulted in the delivering up of the notes. A compensation in money alone, is sought. It is not manifest, that the plaintiffs have not a plain and adequate remedy at law for all the injury which the bill alleges, they have sustained, and for which they ask redress. Such a remedy must be wanting to entitle this Court, sitting as a Court of Chancery, to entertain jurisdiction. Something more must be sought in a bill in equity, than a simple application for a decree in damages, which may be awarded by a jury in a suit at law. *Woodman* v. *Freeman*, 25 Maine R. 531.

But the facts alleged in the bill and relied upon in the proofs, if established, as the plaintiffs contend that they have been, might perhaps have authorized an application in a bill, which would have so presented the case, as to have brought it within

the equity jurisdiction of this Court. It was probably their intention, to ask for all the remedy which a court of equity could afford, and pray for such decree and relief as the facts, supposed by them to exist, would justify and require. It may not be improper, therefore, to consider the grounds, upon which the bill is attempted to be sustained on the one hand, and defended upon the other.

The defendants insist that the claim of the plaintiffs has become stale, and that the relief sought should for that cause be denied.

The application of the statute of limitations is not confined to suits at law, and it is admitted by the counsel for the plaintiffs, that it equally affects those in chancery. But it is insisted that this defence cannot avail; 1st, because the bill alleges, that the fraud of the defendants was not discovered, until two years after it was successfully perpetrated, which it is contended is not denied in the answers; and 2d, that the final settlement under the composition was not completed till a time, which was less than six years preceding the filing of the bill.

If the defendants had denied in terms, that the plaintiffs were not ignorant of the fraud, by which they were subjected to the losses alleged in the bill, for two years after it was committed, it would imply an admission, that they were guilty of the fraud complained of, which they expressly negative throughout their answers. When they deny all fraud and at all times, and all concealment, the admission, that the plaintiffs were ignorant thereof for two years, cannot be inferred, but is repelled. But the plaintiffs rely upon facts, which they contend are established, and which they insist show the fraud alleged. If they would rely upon their own ignorance of those facts, for the space of two years after their existence, such ignorance is not supposed to be within the knowledge of the defendants, if they were guilty of no concealment, but must be shown by proof; we have seen no such proof, excepting the allegation in the bill, which is not evidence upon this point for the plaintiffs.

The answers of the defendants deny that any compositions

alleged in the bill, were made subsequent to September, 1837; these are responsive to the bill, upon this point, and are to be regarded as true, till overthrown by sufficient competent proof. Such proof, it is contended, is found in the two depositions of Lloyd, and the plaintiffs' books. The latter are not in evidence, and it is contended by the defendants, that they would be inadmissible, if they had been filed among the exhibits. Instead of the books, is a copy of a transcript therefrom, verified by the oath of Lloyd. In his first deposition, Lloyd testifies that there was a settlement subsequent to that of September 13, 1837, made between the plaintiffs, and the firm of Williams & Dow, on April 12, 1838, "as I find from the date of the entry in my handwriting." He says afterwards, "I think, the terms of compromise as to the plaintiffs' whole claim, were made at the time of the first settlement, which I find by the books, was Sept. 13, 1837." In the second deposition he says, "the last five lines in the document [paper marked A, annexed to his deposition] under date "1838," I *presume*, were not made in the book, at the same time, that I entered those under previous dates. I *do not know*, but I presume, they were made under the respective dates. Part of the memoranda in the document, A, has, I *presume*, been made since the settlement." The witness is understood not to testify from his own knowledge or remembrance of the facts in reference to dates upon the book, or upon the document A, and there is no evidence that the dates upon either are correct. But if the depositions showed, that the dates upon the document indicated truly, when the business was done, in the absence of the book, even if it were admissible in evidence, we have the depositions of one witness only and nothing more, which cannot control the express denial in the answers, that the compositions were made subsequent to September, 1837.

Were the representations made by the firm of Williams & Dow, on the 27th and 29th of June, 1837, false and fraudulent, and did they have the effect to deceive and defraud the plaintiffs? The exhibit of the liabilities and the assets of the firm, are alleged in the answers to be as matters of fact, true

and just, and it is not attempted to be proved otherwise. There is no evidence in the case, that the failure in April, 1837, was voluntary, but it is manifest, that it arose from necessity, after Gilman withheld farther aid. The statement in the letter of June 27, 1837, that they could not judge, that the firm would be able to pay over fifty per cent. of their debts in cash, purports, to be an opinion, which subsequent events have shown to be somewhat erroneous. The evidence exhibits the receipt of more money from the assets. But the sequel could not be foreseen, at the time the statement was made, and if the belief there expressed was honestly entertained, upon the grounds which were fully made known to the plaintiffs, or so far indicated, that they could with common care and prudence possess themselves thereof, the representations, though since proved to have been magnified, cannot be regarded as a fraud. Fraud cannot be imputed, when no design to deceive is manifest. In the representation which Williams & Dow made of the great deterioration in the value of their assets, they professed to give the facts on which the opinions expressed were based. If these facts were not really as represented, the falsehood could have been ascertained. The means of a more rational opinion were presented, or within their reach, if those given, were erroneous, more than two months having elapsed between the representation complained of, and the composition. It was a time, when the firm might well anticipate greater disasters, than any which had yet overtaken them. The answers and proof show such a derangement of commercial undertakings, arising from a general want of confidence, the prostration by failure of houses before deemed strong, the withdrawal from active business of much of the capital, on which those engaged, had hitherto thought it safe to rely, and the high rates of interest; and the difficulty and expense attending exchanges, between New York and the more distant States, in which many of the debtors of the firm, resided, and the causes, which produced all this revulsion from a state of prosperity, then in full operation, prognosticated to the fears at least of the firm, a breaking up of the deep foundations, on which their hopes of success had been placed. It

is not strange, that the general consternation, which prevailed among merchants and traders, should have reached the defendants as well as others, who had sunk under pressures, less weighty, than those which they might suppose would fall upon them. And if there had not been a change for the better, even worse results than those expressed by the defendants might have been apprehended.

The plaintiffs, however, rely upon the testimony of Daniel Dwight and Francis Hobbs, who had been clerks of Williams & Dow, to show that they early entertained the design to secure to themselves a benefit at the expense of their creditors. The former deposes, that about the time of the failure, Dow said, it was occasioned by the fault of Gilman, as he was able to carry them through, but would not advance. He then requested the deponent to make the thing look as bad as possible, to any of the creditors, who might come in, and to tell them, they had better take what was offered, which was understood to be goods on hand at their cost, and this the deponent did. Dow was very much excited about the failure. The other deponent testifies, that about the day the first note was protested, Dow said it was a shame, that they should fail. Gilman said he could not keep up both firms, he must let one go down. A day or two after the failure, there was an altercation between Gilman and Dow because the former would not furnish money to keep the concern up, when Dow was excited, showed temper, and threatened Gilman with personal violence. Soon after, on being informed, that Gilman had supposed it would become necessary that a receiver should be appointed and take charge of the goods, Dow replied, that he was calmer, and could do better with the concern than any other, that he had put into the firm $9000, and he intended to get it out again. If the designs thus expressed, were deliberately formed under the same knowledge of facts, which Dow possessed, when the representations to the plaintiffs were made on the 27th and 29th of June following, and continued to be entertained till those times, it is certainly indicative of a determination to make an arrangement with their creditors less

favorable to the latter, than they would have a right to claim. But this was said under the excitement, produced by the failure, not premeditated, and which he believed at the time, it was in the power of Gilman to prevent, by affording the aid required. It does not appear that a composition was then thought of. Dow was desirous that the goods should be returned to those who sold them, or other creditors at cost. He had not then had the opportunity to see the true condition of their affairs as he had afterwards; his excitement against Gilman, for the reasons given by the deponent Hobbs, can be accounted for only on the ground that in Dow's opinion they would have been kept up, to their advantage, by timely assistance; and he might then honestly suppose that under his management, enough might eventually be realized to discharge their liabilities, and save his capital. But even if he did at that time cherish the dishonest purpose imputed to him, it does not follow that every thing, which he did, to bring about an arrangement with his creditors, by a composition of these debts afterwards was of the same character. The answers of the defendants are full in the denial of any fraudulent intention, in the representations made months afterwards, under a more perfect knowledge of their true condition, and when they were uninfluenced by excited feelings.

The letter of Williams & Dow of the 29th of June, 1837, represents, that Gilman said he had more debts of his own, than he could possibly pay. The truth of this, is substantially shown by the answers of Williams & Dow. Gilman, in his answer, denies that he authorized such a representation to be made to the plaintiffs. This denial is not inconsistent with the answers of the other defendants; and if it were so it is not evidence against the answers of the latter. But notwithstanding Williams & Dow in this matter represented to the plaintiffs no more than the language of Gilman would justify, still, if they knew, and Gilman knew, that it was false, and the statement was made to deceive, and to induce the plaintiffs to make the composition, the literal truth of the language will not excuse them, provided the plaintiffs were thereby deceived and defrauded.

In the testimony of William Miles, it appears that he was one of the firm of Thomas Small & Co. and they did a joint business with the defendant Gilman, that he and Small, who composed the firm, were worth nothing excepting what might result from their joint business, that in June, 1837, the joint liabilities of their firm and Gilman was about $69,000, exclusive of indorsements on discounted paper, their own liabilities, in which Gilman had no interest, was about, $26,000, the joint assets belonging to the company and Gilman was about $133,000, consisting of stock on hand, notes and book accounts, considered good, doubtful and bad; about $29,000, were against persons who had failed; out of $48,000, classed as good at the time, $20,000, failed or suspended. There were accounts for leather sent out to be tanned amounting to about $30,000, of which $4,000, failed; the tanning was in a suspended state, requiring aid from the firm to complete the operation. The stock in leather, hides and wool amounted to about $26,000, in market value, but sales could not be made thereof in cash for more than $18,000 or $20,000. The concern was embarrassed during the summer of 1837 and several of their heaviest notes were renewed.

William W. Arnold deposes for the plaintiffs, that he was a clerk for Thomas Small & Co. from the spring of 1836 to the first of July, 1837, and thinks upon the whole, the company and Gilman made money over and above all losses and liabilities. But it appears further in his testimony that Small & Miles had no capital of their own, when the deponent became connected with them; that they drew out money invested by Gilman, amounting to a sum not exceeding $10,000, which in the deponent's opinion did not exceed the profits of the concern; they owed large sums of money, but had ample means, which were not then available.

From the answer of Gilman, and the evidence in the case, it is obvious, that his property as represented by Dow in January, 1837, or according to reputation was not overrated. Nor does it appear that on June 29, 1837, the nominal amount of his property had very materially diminished. By testimony of

the plaintiffs, he was represented by Dow in January, 1837, as having an amount of real estate, personal property and debts against various persons, which he valued at $196,000, exclusive of the sum, which he put into the firm of Williams & Dow. Gilman's letter dated Sept. 5, 1837, which makes a part of the answers, and which is responsive to the bill, having been read to the plaintiffs before the terms of the composition were finally agreed upon, represents that his property was in 1836, estimated by him to be worth the sum of $210,000, and it is not to be inferred that any of the various items, which composed it, had ceased to exist, excepting that he had collected something like $20,000 or $25,000 and perhaps some of the debts due to his family had been paid; he speaks of his debts, and says they look bad; his vessels had not been profitable, and could bring but little, if sold; his real estate would sell at low prices; his liabilities, exclusive of family claims, were $70,000, and $60,000 of the paper due to him was suspended. No evidence is introduced controverting in any degree the truth of these statements, or tending to show that his apprehensions at the time were exaggerated; but it is shown that he made great exertions to pay his debts, and prevent losses; he obtained the loan of small sums from his family connections; and portions of his property were under attachment. If the representations of Williams & Dow made on June 29, 1837, would bear the construction, that Gilman was insolvent, when in reality he was otherwise; or if they did create any false belief in the minds of the plaintiffs, the means of correcting those erroneous opinions and impressions were fully furnished to them before the final agreement for the compositions. It is true there might be something obtained from the investment in the firm of Small & Miles, at a future day; but it is quite manifest, if any general hope of immediate payment to the plaintiffs had been excited in their minds from that source, it would have proved delusive under the state of things then existing; and if he had given a particular detail of the affairs of that firm, it would have shown, that his connection with it would tend rather to increase his embarrassments than to have afforded the means of relief in other quarters.

It is worthy of notice, that the claim of the plaintiffs, according to the account annexed to the deposition of Lloyd, which was for merchandize, had not become payable at the time of the composition, in Sept. 1837, and that the letters of Williams & Dow, and of Gilman, show, that they regarded the result of their affairs as uncertain; that their insolvency, or ability to pay, must depend much upon information, which they did not then possess, but which they hoped would be obtained in some degree from Williams, who was then in the Western States, and the letter of June 29, expresses a wish that things should remain as they were till his return, when they hoped to settle with each, and all of their creditors in some way. A composition for a settlement, and the payment of the sum to be agreed upon, was evidently the object of the plaintiffs, and probably of the defendants, also, when it was made. It cannot be thought strange, that at a time, when there were such embarrassments to success in commercial pursuits, which threatened to continue and bring consequences worse than those, which had been realized, that the plaintiffs should have preferred to a delay with the risk, which must attend it, the certainty of the receipt of a larger portion of their claims in cash at an early day.

Unless the plaintiffs received more favorable terms in the composition, than other creditors, which does not appear, they could not have supposed, that the means of the defendants, which might be expected to be finally available, would be entirely exhausted. In the composition, they received cash, and paper payable in a short time of the same parties, who had been previously liable, with no additional security. This was, it appears, satisfactory, and no suggestion is made, that the payments were not prompt. It could not be apprehended by the plaintiffs, that all the assets of the defendants could have so soon been converted into money. The plaintiffs had the benefit of the payments made, at a time of commercial distress; they acted at the time of the composition under the guidance of the lights, which they had, without the aid of those, which subsequent events have shed around them. Both parties

were probably influenced by their fears, which were doubtless greater, than they would have been, if they could have foreseen the change, which subsequently took place. It may appear now, perhaps, that the bargain of settlement was one favorable to the defendants, and otherwise to the plaintiffs; but it is not shown to us that it was caused by a fraud practised by the former upon the latter.

*Bill dismissed with costs.*

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THOMAS LONGLEY & *al. versus* EDWARD LITTLE.

By the provisions of the Statute, 1836, c. 200, § 3, the stockholders of corporations were made individually liable to the extent of their stock, upon failure to obtain satisfaction from the corporate property, for all debts against the corporation existing at the time of the judgments, although the debts were contracted before the persons called upon became stockholders.

The Statute, 1836, c. 200, was repealed when the Revised Statutes went into operation; and the statute then in force on the same subject (Rev. St. c. 76, § 18) makes a stockholder liable in the same manner only for "debts of the corporation contracted during his ownership of such stock."

The cause of action against individual corporators under the St. 1836, c. 200, did not accrue until a failure to obtain the amount of the judgment against the corporation from the corporate property by a due course of proceedings for that purpose. And where the cause of action was not established by such proceedings before the Revised Statutes went into effect, it was not saved by the exceptions in the repealing act; and could be enforced only according to the provisions of Rev. St. c. 76.

THE case came before the Court upon the following report of the trial before WHITMAN C. J.

This was an action on the case brought by the plaintiff against the defendant as one of the stockholders of the Longley Stage line Company, to recover of him in his individual capacity the amount of the judgment in favor of the plaintiffs against the Longley Stage line Company.

The act of incorporation of said company, judgment, execution, and several returns and proceedings, alleged in the plaintiffs' writ were admitted as facts in the case, and may be referred to, but need not be copied. The foundation of

the judgment recovered consisted of two items as follows: — Five hundred dollars paid to the Granite Bank, May 29, A. D. 1838, and two horses purchased in April, 1838. The act of incorporation of the Longley Stage line Company bears date February 28, A. D. 1838. The company organized under their charter, March 29, 1838. The defendant first became a stockholder June 25, 1838, by the purchase of one share, and subsequently during the same year to the amount of forty shares, which he still holds. About June 25, 1838, or soon after, the plaintiffs ceased to be members of said company. Upon these facts the Court are authorized to direct a nonsuit or default to be entered, as they shall adjudge the law to be.

*Wells* and *S. May*, for the plaintiffs, contended that the defendant was liable to the action under the provisions of the statute 1836, c. 200, § 3. The statute makes the stockholders personally liable for all debts of the corporation contracted prior to the transfer of the shares, without any reference to whether the debts were contracted before or after becoming a stockholder. Such was the decision in Massachusetts under a similar statute. *Marcy* v. *Clark*, 17 Mass. R. 330. Nor is the law inequitable, for the stockholder has the benefit of all the property of the corporation purchased before he came in as a member.

Although it was admitted to be a question of more difficulty, still it was believed, that this right of the creditor to obtain payment of his debt from the private property of a stockholder was not taken away by the Revised Statutes. The provision in the Rev. St. c. 76, § 18, it is true, makes stockholders liable only for the debts of the corporation contracted while they were stockholders. But here the liability of the defendant was fixed before the Revised Statutes took effect as laws, and the right of the plaintiffs was saved by the exception in the repealing act. The right of the plaintiffs had become a vested one, and the legislature could never have intended to take it away, nor does a fair construction of the language used require it. *Treat* v. *Strickland*, 23 Maine R. 234; 21 Pick. 417; 3 Metc. 44. It was a vested right, and the legislature

had no power to take it away. *Ken. Purchase* v. *Laboree*, 2 Greenl. 275.

*Vose* and *Lancaster*, for the defendant, contended that by a fair construction of the statute 1836, c. 200, stockholders were liable only for the debts of a corporation contracted while they were stockholders. Partners are liable only to that extent, and it could not have been intended, that stockholders should be under greater liabilities than partners. 3 Stark. Ev. 1072, 8 Mass. R. 442.

But if the right claimed by the plaintiffs ever existed, it ceased, when the Revised Statutes went into operation. The general act defining the powers and duties of corporations, (st. 1831, c. 137, § 6) was in force when the incorporation of this company took place, and expressly provides, that the legislature shall have power to modify and repeal all such charters. The right in the legislature to destroy this liability of stockholders entirely, or to modify it to any extent, clearly existed. The statute imposing the liability of the defendant, whatever it was in this case, (st. 1836, c. 200) was repealed, when the Revised Statutes went into effect. Nor does this case come within any saving or exception in the repealing act.

The opinion of the Court was drawn up by

WHITMAN C. J. — By the statute of 1836, c. 200, § 3, it was provided, that any judgment creditor of any corporation, thereafter established, other than those of Banks, and those in regard to which it should not be otherwise provided, who should not, upon due proceedings, have been able to obtain satisfaction against the same, might have a remedy therefor, by an action of the case, against any stockholder therein, to the amount of his stock ; and, by § 4, it was provided, that forty-eight hours previous notice should be given to any stockholder, intended to be charged, to produce corporate property, prior to the commencement of any such action against him. It appears that all the preliminary steps required by the statute cited, to entitle the plaintiff to recover had been taken.

But it is contended, in the first place, that the case stated

is not within the purview of that act, because the defendant was not a stockholder in the corporation at the time the debt, for which judgment was rendered, was contracted. But it appears that he was so at the time the judgment was rendered, and so continued till due proceedings, to collect the amount for which it was rendered, had been had against the corporation, to obtain the amount due, without success; and nothing in that statute seems to confine the remedy to such as were stockholders at the time the debt was contracted. Its provisions were, in reference to stockholders, in general terms, as to judgments against corporations; and seems manifestly to have been intended to render all stockholders liable, without exception, for one year, after they should have sold out their stock, provided they were called upon within that time, and within six months after judgment rendered. *Marcy* v. *Clark*, 17 Mass. R. 330.

It is, however, further insisted, that the act "repealing all the acts, which are consolidated in the Revised Statutes," repealed the act of 1836; and the Revised Statutes, c. 76, having provided, that the right of action against stockholders should be confined to those who were such, at the time the debt was originally contracted, that the defendant is not liable; and it is agreed that he was not then a stockholder. To this it is replied, nevertheless, that the repealing act above cited, saves "to all persons, all rights of action in virtue of any act repealed;" and "all actions and causes of action, which shall have accrued in virtue of, or founded on any of said repealed acts."

We are, therefore, called upon to decide whether this was a right of action, "in virtue of any act repealed;" or an action or cause of action, which had accrued "in virtue of, or was founded on any of said repealed acts." These saving clauses must have had reference to rights and causes of action, which then, to wit, in 1841, when the repealing act was passed, had accrued. Rights and causes of action could not accrue subsequently, by virtue of, or be founded on a repealed statute. Before the repealing act took effect the plaintiffs

had cause of action against the corporation, which they prosecuted against it to final judgment. But until a failure to obtain the amount from corporate property, by due proceedings for the purpose, no cause of action arose against the individual corporators. The right against them depended upon a default on the part of the corporation; and furthermore, upon default, after notice to the stockholder sought to be charged, forty-eight hours previously, and a failure on his part to exhibit within that space of time corporate property for the purpose of satisfying the demand. This right and cause of action did not accrue until after the statute of 1836, c. 200, had been repealed. The maintenance of the action, therefore, must depend upon the provisions to be found in the Revised Statutes, c. 76. As that gives no right of action, in such cases, except against those who were stockholders at the time the debt accrued, and the defendant not having been then a stockholder in the corporation, the plaintiffs must become nonsuit

THE INHABITANTS OF CLINTON *versus* THE INHABITANTS OF YORK.

If a person, who afterwards becomes a pauper, removes from the town wherein he usually resides, by order of the selectmen of the town, to prevent his gaining a settlement therein, and his removal is for that purpose only, to remain in the town to which he removes for a few weeks only, with an intention not to abandon his former residence, but to return there as his home; such removal and return will not prevent his gaining a settlement by a residence in the former town, "for the term of five years together."

If it be proved, that a minor daughter "had lived about in a good many places, since she was a child;" that during her minority, her father said, "that he would not have her at his house; that his wife was quarreling with her; and that he was not able to take care of her, under the circumstances she was then in;" and that her brother took her to his house, and she was there delivered of a child, while she was a minor; this does not show that she was emancipated.

If supplies are furnished to a minor daughter, living in the same town as her father, by the overseers of the town, and such supplies are necessary, it is not material, at whose request they were furnished. Her father must thereby be considered as having received supplies indirectly.

ASSUMPSIT to recover the amount of expenses incurred by the plaintiffs in the relief and support of John Beal, his wife and two children, who were alleged to have fallen into distress, in Clinton, and whose legal settlement was averred to have been in York.

At the trial before WHITMAN C. J. certain facts were admitted, and fifteen witnesses were examined, introduced by the one party, and by the other, whose testimony is given in the report of the case. After the witnesses had been examined, the case was taken from the jury; and the parties agreed, that it should be submitted to the Court upon the evidence, the Court to draw such inferences as a jury could properly draw, and to enter such judgment, as should be deemed legal, upon nonsuit or default.

The facts admitted, and what the Court considered to have been proved by the testimony, appear in the opinion of the Court.

*Evans* argued for the plaintiffs, citing, *Garland* v. *Dover*,

19 Maine R. 441; *Corinna* v. *Exeter*, 13 Maine R. 321; *Poland* v. *Wilton*, 15 Maine R. 363.

*Moody* argued for the defendants, citing, 10 Pick. 77; 21 Maine R. 357; 3 Greenl. 455; 4 Greenl. 47; 5 Pick. 37; 17 Pick. 126; 1 Metc. 42; 3 Greenl. 136 and 205; 5 Greenl. 143; 16 Maine R. 427; 18 Maine R. 376; 19 Maine R. 441; 13 Maine R. 321; 14 Mass. R. 396; 23 Maine R. 410; 1 Fairf. 85.

The opinion of the Court was drawn up by

SHEPLEY J. — It is admitted, that John Beal and wife, and two children, were supplied as paupers, during the year 1843, by order of an acting overseer of the poor, of the town of Clinton; that due notice thereof, was given to the town of York; that an answer was seasonably returned by that town, denying their liability; that Beal was married to his last wife, on June 30, 1839; that their oldest child was born in August, 1840; and that Beal once had a legal settlement in the town of York.

As the statute provides, that all settlements acquired shall remain, until lost by gaining others, the burden of proof is on the defendants to show, that Beal has gained another.

They contend, that he gained one, in the town of Canaan, by a residence there, on March 21, 1821. The only testimony introduced to prove it, is, that he was in that town, and left there in the year 1813, during the war, and returned there after the peace, was there in the years 1815 and 1816, and removed from there in the year 1839. The Court cannot from such testimony conclude, that he had a residence there, in the month of March, 1821.

They further contend, that he gained a settlement in the town of Clinton, by a residence in that town "for the term of five years together," without receiving supplies as a pauper. The testimony proves, that he removed from the town of Canaan to the town of Clinton, in the month of September, or early in the month of October, 1834; and that he continued to reside in Clinton, until the month of August or September,

1839, when he removed to the town of Harmony, and remained there, about three weeks, and then returned to the town of Clinton, and continued to reside there, until he removed to the town of Unity, some time during the year 1840.

There is a conflict of testimony respecting the exact time of his removal from Canaan to Clinton, and of his removal from Clinton to Harmony. It becomes unimportant to decide according to the weight of testimony, when those removals were made, for his removal from Clinton to Harmony was not of such a character as to prove, that his legal residence did not continue to be in Clinton during that time. The testimony shows that removal to have been made, by order of the selectmen of the town of Clinton, to prevent his gaining a settlement in that town and that he removed for that purpose only, to remain in the town of Harmony for about three weeks with an intention not to abandon his residence in Clinton, but to return there as to his home. Such a removal and return, could have no more effect to change his established residence, than a removal would have, for the same length of time occasioned by business, illness, or pleasure, and accompanied by an intention to return, when the time expired. His residence must therefore be considered as established in the town of Clinton, from September or October, 1834, to the time, when he removed to Unity in the year 1840. Unless he received directly or indirectly, supplies, as a pauper, in such a manner as to prevent there being any five successive years, during that period, when he was not thus supplied, he would gain a settlement in that town.

The plaintiffs contend, that there was no such period of five years, and the defendants, that there was. The testimony proves, that his daughter, Mary Beal, was supplied in the town of Clinton from some time in the month of January until the tenth day of June, 1835, when she was removed by the town of York. The counsel for the defendants insists, that those supplies should not be considered as indirectly furnished to her father; because she was then of age; and that if she was not, she was emancipated; and if not emancipated, that the sup-

plies were not furnished at the request of her father, but at the request of her brother. Elisha Buzzell testifies, that this daughter was born about a year after her father's return, after the peace following the war of 1812, and that she was twenty-eight years old in May, 1844. The testimony of Samuel Beal, her brother, is to the same effect. There is nothing in the case, as reported, to destroy the effect of this testimony, which proves her to have been under age, when thus supplied as a pauper.

Her brother Samuel also testifies, that she had "lived about in a good many places, since she was a child;" that in December, 1834, her father said, he would not have her at his house; that his wife was quarreling with her; that he was not able to take care of her, under the circumstances, she was then in; that he took her to his house, and she was delivered of a child the last of December. There is no other testimony tending to prove that she had been emancipated; and this does not prove it.

Her brother further testifies, that she received supplies, while she was at his house, and that neither he, nor his father could furnish them. As they appear to have been necessary, and to have been supplied by the overseers of the poor, of the town, it is not material at whose request, they were furnished. Her father must thereby be considered as having received supplies indirectly until June 10, 1835.

To prove that there could not have been five successive years, after that time and before Beal removed to Unity, during which no supplies were furnished, the testimony of Dr. Garcelon, is referred to, by the plaintiffs' counsel. He states, that he was called upon to visit the wife of Beal, in the year 1837, when sick; that when going or returning, he notified the overseers, and they directed him to charge the amount to the town, which he did; and that he had no doubt, he had been paid for it by the town, but did not recollect as to that. When a question of such importance as the settlement of a pauper is to be decided by it, such testimony is too loose and unsatisfactory to prove, that supplies were then actually furnished by affording medical advice and assistance.

He further testifies, "that in April, 1840, he was called to attend Beal's present wife, made two visits, notified the overseers, either before the first visit or after the first and before the second, was authorized to attend on behalf of the town, and did so, and was paid by the town; that he could not say, that Beal knew he charged his visits to the town; that Beal sent for him."

The counsel for the defendants insists, that this testimony only proves another attempt to prevent Beal from gaining a settlement in Clinton, made in a spirit, similar to that, which caused his removal to Harmony; and that supplies, furnished for such a purpose, can have no such effect.

All the testimony shows, that Beal was extremely poor. The overseers of Clinton, appear to have supposed, that they had accomplished their object of preventing his gaining a settlement by causing him to remove to Harmony, and the motive for a fictitious supply is not apparent. He considered the assistance of a physician necessary, and sent for him. The physician was unwilling to afford it upon his credit. The overseers being satisfied by the information obtained from the physician, that it was necessary, might properly furnish it without an application from Beal. The Court would not be authorized by the testimony to conclude, that it was provided unnecessarily, or from any improper motive; and that supply is sufficient to prevent Beal from gaining a settlement in Clinton.

*Defendants defaulted.*

WARDENS OF CHRIST'S CHURCH *versus* WHEELER WOODWARD.

The return of the proceedings of the selectmen of a town in laying out a road or way, to be valid, must state whether the way laid out is a town way or a private way.

And this should be distinctly stated in the return, and is not to be inferred from other facts.

Since the Revised Statutes were in force (c. 5, § 6 and 7) the return of the person warning a town meeting must state "the manner of notice, and the time it was given," and must state that an attested copy of the warrant was posted up "in some public and conspicuous place in said town, seven days before the meeting," unless the town has appointed a different mode, or the meeting will be illegal.

A *conditional* acceptance of a town or private way by the town is void. And there is no provision, as in the case of a public highway laid out by the county commissioners, that a town or private way may be considered as not laid out or established, if the damages assessed should be greater in amount, than the public convenience would require to be paid.

THIS case came before the Court upon the following statement of facts by the parties.

"The parties agree to submit this case to the Court on the following facts: —

"The suit is trespass *qua. clau.* The writ is dated May 19th, 1846, describing the *locus in quo*, as part of a tract commonly called and known as the Parsonage lot in Gardiner. The title is admitted to be in the plaintiffs, and the act of breaking and entering by defendant is admitted, as alleged in the writ, under direction of the selectmen of Gardiner.

"Also the following return made by the selectmen of Gardiner, viz: — "On the petition of E. F. Deane and nine others, citizens of Gardiner, and in pursuance of notice publicly given according to law, the undersigned selectmen of the town of Gardiner, have proceeded to view the locations of streets, as requested by said petitioners, and have laid out the same as follows, to wit: — commencing on the westerly line of the Parsonage lot at the southwesterly corner of A. T. Perkins' lot and running on the line of said Parsonage lot about twelve rods to land owned by E. F. Deane, Esq. the line above described is the easterly line of said street and the street to be

three rods wide. Also a street leading from Lincoln street to Dresden street as follows: — commencing at the aforesaid southwesterly corner of A. T. Perkins' lot, thence running on the southerly line of said Perkins' lot and the lot owned by Ivory Nudd to Dresden street about twenty rods; the above described line to be the northerly line of the street, and the street to be three rods wide. — All which is submitted for the action of said town.

"Gardiner, Aug. 29, 1844. "A. Clark, "Mason Damon, "Arthur Plummer, } Selectmen of Gardiner."

"The undersigned, in estimating the damages for land passed over by the above streets, award to Simon Bradstreet eighty-five dollars and to the trustees of the Episcopal Church the sum of thirty dollars.

"Ansyl Clark, "Mason Damon, "Arthur Plummer, } Selectmen of Gardiner."

"The trespass complained of, is on the land last described in said return; the defendant acting under the orders of the selectmen to open said street as a highway.

"On the 17th of October, 1844, said selectmen issued their warrant directed to a constable of Gardiner requiring him to warn a meeting of the inhabitants for the purpose of a town meeting to be held on the 24th of October of said month. On the back of the warrant is a return in the following words and figures, "Kennebec ss. Oct. 18, 1844. I have notified and warned the inhabitants of Gardiner as within directed, by posting up six notices, stating the time, place and purposes of said meeting. "J. D. Gardiner, Constable of Gardiner."

"The fourth article in said warrant, was as follows. "To see if the town will accept a street leading from Lincoln Street to Dresden Street as laid out by the selectmen." On the back of said return is indorsed as follows: Return of Streets, Lincoln and Dresden, Aug. 29th, 1844. — Received Sept. 25th, 1844. — Recorded page 27th. — Accepted Oct. 24th, 1844."

"A meeting of the town was held on the 24th of October, 1844. Among others the following vote was passed. Art. 4th. "Voted to accept a street leading from Lincoln Street to Dresden Street, as laid out by the selectmen, provided the damages shall not exceed thirty-five dollars." The legal title to the land thus located as a street, was then, and is now in the wardens of said church, as wardens, no persons ever having been known or denominated trustees of the Episcopal Church as connected with said Parsonage lot; said street has never been opened, nor has any labor been bestowed upon it for that purpose. No amount of damages has ever been agreed on, to be paid or received by any party to the above transaction or by said plaintiffs; nor has any method been adopted by said selectmen or town, or others, for ascertaining the amount of said damage, except as herein before stated. The damages claimed by said plaintiffs is much greater, exceeding by ten fold the amount named in said return of said selectmen "to be paid the trustees of the Episcopal Church," or in said vote accepting the same as a street, provided the damages should not exceed $35, being not less than $400, which is denied by defendant. The said town have never passed any vote providing that less than seven days should be sufficient notice for warning a town meeting.

"A motion is submitted by defendant's counsel to the Court to grant leave to said constable who served said warrant (he being still in office by virtue of a re-election) to amend his said return by stating the time when, and the manner of posting up the notices, warning said meeting of the 24th of October. This motion is resisted by counsel for plaintiffs: — 1st on the ground that the Court *cannot* in this case legally grant such power; and 2d, that if said Court *can* legally grant it, they, in the exercise of a sound legal discretion, *will not* so do. But if said Court should decide both questions in the affirmative, it is then agreed that said constable would amend the same according to the following statement made by said constable, viz: — "A statement of facts in regard to my re-

turn on the warrant for town meeting, October 17th, 1844, that on the day of the date of said warrant, I posted up in three public places in the town of Gardiner, three copies, and on the following day posted up three more, which is the day on which I returned said warrant or the day I made the return.

"J. D. Gardiner."

"It is agreed, that the road in dispute is the only one ever located, by the selectmen from Lincoln to Dresden Street since 1840, although there was one so located prior to 1840. It is also agreed, that neither said wardens, nor any other person legally authorized, ever applied to the county commissioners for an increase of damages within a year from said 24th of October, 1844, nor at any other time, they not supposing that there was any highway or road legally laid out, it being supposed otherwise by defendant. It is further admitted that the warrant calling the town meeting and return thereon, also the proceedings of said meeting, were duly recorded, and that the report of the selectmen was made to the town clerk's office, and recorded in due season.

"It is agreed by said parties, that if said Court should decide in favor of granting said amendment, the case is submitted to their decision in the same manner as though said amendment was actually made; but if they should decide against granting said motion, on either ground, they are in that case to decide the case as though no such motion was made. It being agreed that if said Court should be of opinion that said plaintiffs are entitled to recover without said amendment being made, or notwithstanding said amendment (if allowed) then said defendant is to be defaulted, with nominal damages; but if otherwise, plaintiffs are to become nonsuit. Costs to be allowed to the party prevailing."

*F. Allen*, for the plaintiffs, contended that there was no legal town or private way laid out over the premises; and that therefore the justification set up by the defendant wholly failed. Twelve objections were made, among which were the following.

1. The return of the selectmen is defective in not stating

whether the way laid out by them is a town way or a private way. This is clearly required by the statute. And with reason, for the damages are to be paid by the town, if a town way, and by the persons benefited, if a private way. Rev. St. c. 25, § 31. There is nothing in the return from which it can be implied, for it does not state by whom the damages are to be paid.

2. It is a substantive and independent objection, that the return does not state by whom the damages are to be paid. It was the duty of the selectmen to determine this question, and to state it in their return.

3. There was no valid acceptance by the town, because it was upon a condition; "provided the damages shall not exceed thirty-five dollars." 2 Pick. 547. The town can only accept or reject the return of the selectmen as they have made it.

4. There was no acceptance of the report by the town, because the meeting was illegal, and the acts of the town at that time were void. The return of the constable is fatally defective. There is a new provision in the revised statutes (c. 5, § 7,) that he "shall make his return on the warrant, stating the manner of notice and the time it was given."

5. But if the Court have the power to permit the proposed amendment, and they see fit so to do, in the exercise of their discretionary power, and it can affect this present action, still, when so amended, it would remain fatally defective. It should state at what places, and that those were conspicuous public places. And it does not appear, that the papers posted up were copies of the warrant.

*Danforth & Woods*, for the defendant, contended that it was not necessary, that there should be any direct statement in the return of the selectmen, that this was a town or private way. The statute does not in terms require it to be done. It is said, that it must be inferred, because damages are to be paid by different persons in the one case, than in the other. If the necessity of making the statement can be inferred, it certainly may also be inferred, from the facts in the case, that

this was a town way. It is enough, if it appears for whose benefit the road was laid out, as the persons for whose use the road was laid out must pay the damages. *Goodwin* v. *Hallowell*, 3 Fairf. 271. There is not a word about its being laid out for the benefit of any one or more individuals. It is laid out from one street to another, and it is called a street, showing, that it could not be considered a mere private way, but a public road. Besides, all that the selectmen are required to return is, simply, the boundaries and admeasurements of the way.

There is nothing in the statute, which forbids the acceptance of the report of the selectmen, from being conditional. No reason has been given, and we think none can be, why a conditional acceptance should not be good. Conditions similar to this have been imposed, and still the proceedings have been held valid. *Jewett* v. *Somerset*, 1 Greenl. 125; *Patridge* v. *Ballard*, 2 Greenl. 50.

We do not consider, that the acceptance of the report of the selectmen is conditional. It amounts to this. We will accept the report of the selectmen; but should the damages by an appeal to the county commissioners, exceed the sum of thirty-five dollars, the road is to be discontinued. No appeal has been taken, and there can be no increase of damages, and it is now the same as if no condition had been annexed.

The return of the warning of the meeting, would unquestionably have been good, before the revised statutes, as it stands, without the proposed amendment. And now, when towns have actually met and acted under such returns, the proceedings of the towns will not be held to be void. The presumption of law, is in favor of the correctness of such proceedings, that officers have done their duty; and besides, it is only directory. 12 Maine R. 491; 8 Greenl. 343; 1 Pick. 112.

But this becomes a question of little importance, as the proposed amendment should clearly be permitted. 1 Pick. 112; 11 Mass. R. 477 and 413; 9 Greenl. 16; 4 Greenl. 444; 13

Maine R. 466. By the amended return the meeting was legally called.

But even if it should appear, that there are some technical objections to the proceedings, the Court have, in many cases, upheld the doings, where no injustice has been done. And the counsel strenuously urged, that the present was a case, where the Court ought to uphold the proceedings of the selectmen and of the town.

The opinion of the Court was prepared by

SHEPLEY J.— It appears from the agreed statement of facts, that the defendant entered upon the estate of the wardens under the direction of the selectmen of the town of Gardiner, to open a street or way alleged to have been laid out by the selectmen of that town, and accepted by the town.

The selectmen of towns, are authorized by statute, c. 25, art. 2, § 27, to lay out, alter, or widen town ways, for the use of their respective towns, and private ways, for the use of one or more of the inhabitants. The damages occasioned by the laying out of a town way, are to be paid by the town; those occasioned by the laying out of a private way, are to be paid by the persons, for whose benefit the way is laid out. The thirty-first section provides, that the selectmen shall determine the fact, whether it be a town or a private way. The record of the proceedings of the selectmen, presented in this case, states, that they "have proceeded to view the locations of streets as requested by said petitioners, and have laid out the same as follows." It does not state, whether the streets are laid out as town or as private ways. This was essential to enable the town to act understandingly respecting the acceptance or rejection of the ways. And also to enable those persons who claimed damages, to know against whom those claims could be enforced.

It is insisted in argument, that it may be inferred from the proceedings in this case, that the selectmen intended to lay out a town way; and it is probable, that such was their intention. The statute authorizes an application to the county commis-

sioners by way of appeal in certain cases respecting the laying out, the acceptance by the town, and the damages occasioned by the laying out of such ways. Their jurisdiction, in such cases, must depend upon the fact, that a particular kind of way has been laid out, or has been unreasonably refused to be laid out. Their jurisdiction should not rest upon an inference, more or less urgent and conclusive. The action of debt to recover damages sustained by any person, must also be founded upon an allegation and proof, that a town or a private way has been laid out; and in what mode should that fact be determined, if not decided by the selectmen as required by the statute? It was doubtless intended to prevent these uncertainties and difficulties by requiring the selectmen to determine and state, whether the way was laid out as a town or as a private way.

The damages awarded by the selectmen are for the laying out of two streets. If the streets might be considered as ways, and one as accepted, and the other as rejected, it would be doubtful, whether a party injured could recover damages. It does not appear whether the other street was ever presented to the town for acceptance, or whether accepted or rejected.

It is provided by statute, c. 5, § 6, that town meetings shall be notified by posting an attested copy of the warrant "in some public and conspicuous place in said town seven days before the meeting" unless the town has appointed a different mode, which does not appear to have been done by the town of Gardiner. By the use of the word "conspicuous," it was intended to prevent the possibility of calling a town meeting in a secret manner by posting a notice in a public place, and yet in such a position, that but few, if any, persons would be likely to notice it. The seventh section requires, that the person, who notifies the meeting, should make his return on the warrant, "stating the manner of notice, and the time it was given." It is difficult to perceive how there can be a compliance with this provision, unless the person states what he did and when he did it. It is necessary for the protection of the valuable rights designed to be protected by these

provisions of the statute, that the persons, who post such notices, should be required to state "the manner of notice and the time it was given."

The return of the constable, upon the warrant in this case, and the one proposed to be made, are both too defective to show, that the town meeting was legally notified.

The record states, that the town "voted to accept a street leading from Lincoln street to Dresden street, laid out by the selectmen, provided the damages shall not exceed thirty-five dollars." The statute does not provide for the conditional acceptance of a town or private way. Nor is there any provision, as there is in relation to highways, that a way may be considered as not laid out or established, if the damages assessed should be greater in amount, than the public convenience would require to be paid. The existence of a town or private way must be certainly and finally determined before a party injured can recover his damages, or sustain a process for their increase. If upon an application for their increase, a greater amount should be assessed, than was named in the conditional acceptance, it is contended, that the way must be considered as discontinued. This would not only be a result not authorized by any provision of the statute, but productive of gross injustice. For the party injured would be deprived of all means of recovery for the expenses and costs of the proceedings to obtain an increase by the very judgment awarding it. There is no provision for the recovery of costs in such case, as there is in case of highways.

The cases cited to show, that a conditional acceptance may be good, do not sustain the position. In the case of *Jewett* v. *Somerset*, 1 Greenl. 125, the Court adjudged the county road to be of common convenience and necessity, without any condition annexed; and appointed the plaintiffs to lay it out, "the service to be performed at the expense of the petitioners." The only question decided, was, whether the plaintiffs, performing services under such a commission, could recover pay for them, of the county. The case of *Patridge* v. *Ballard*, 2 Greenl. 50, was a suit of like character to recover compen-

sation for services, performed in laying out a highway, of those persons, who petitioned for it, the county commissioners having ordered it to be laid out at the expense of the petitioners. And their right to recover, was made to depend upon the consent of the petitioners to pay for such services.

The Court has been urged to sustain these proceedings, should they prove to be defective. But it cannot yield to such considerations, when the effect of establishing such a rule might be productive of much inconvenience and uncertainty in public proceedings, and of serious injury to individuals, without any adequate redress. It will occasion much less mischief to require town officers to pay some attention to the plain language of a statute, than would be occasioned by an attempt to uphold proceedings so irregular and defective, as those presented in this case. It will not be necessary to notice the other objections taken by the counsel for the plaintiffs. According to the agreement of the parties, the defendant is to be defaulted.

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SAMUEL S. PARKER *versus* NEHEMIAH FLAGG *& al.*

When exceptions are taken on the trial of an action, every matter of law intended to be insisted on, should, at sometime during the trial, be brought particularly to the notice of the Court. And no question can be raised on the argument, which does not appear from the exceptions to have been made at the trial.

Unless a carrier by water limits his responsibility by the terms of a bill of lading or otherwise, he cannot escape from the obligation to deliver a shipment according to its destination, unless prevented by the public enemy or by the act of God. A loss of the property by an accidental fire furnishes no sufficient excuse; although the carrier might be excused, if the non-delivery was caused by lightning.

THIS case came before the Court upon the following exceptions, taken by the counsel for the defendants to the ruling of TENNEY J. presiding at the trial.

This was an action of assumpsit to recover of the defendants, as owners of the schooner Mary and as common carri-

ers, pay for certain property, shipped on board of said schooner by the plaintiff in the fall of 1841. It was admitted by the defendants, that the owners of the vessel were common carriers. In order to prove that the defendants were owners, the plaintiff called one Sawyer, and while upon the stand, drew out from him declarations of Flagg and Safford, two of the defendants, tending to show that they were owners; in answer to the plaintiff's question, he said he would not say, whether they said they were owners or part owners. The witness, also testified, that in other conversations, which he had with Capt. William Lamson, the master of the vessel, and one of the defendants, that said William Lamson told him, that Edwin Lamson, another of the defendants, Safford and Flagg, owned the vessel. This was on examination in chief. After the witness was turned over to the other party, he stated that he had several conversations with Safford and Flagg, about the schooner, and that he could not distinguish the particular conversation about which he had testified from the others. Hereupon the defendants' counsel contended, that the witness should be allowed to state all Safford and Flagg told him at any of the conversations he had with them; but the Court ruled otherwise, confining him to the time, to which his attention had been called by the plaintiff. The counsel for the defendants then requested the witness to state all that William Lamson told him at the time of the conversation to which he referred to in his testimony. The witness then testified that William Lamson, at that time, told him that Edwin Lamson of Boston, owned one half, Flagg one quarter, and Safford one quarter, and he, William Lamson, run her on shares.

The plaintiff's counsel here objected that the testimony of the witness, as to what William Lamson told him in the examination in chief, was voluntary. The defendants' counsel contended that as that testimony came out on examination in chief without objection, they were entitled to all William Lamson then said, even if it were a voluntary statement, which they denied, but on the contrary, said it was drawn from the witness by the plaintiff's counsel as before stated;

but the Court, understanding it to be a statement not in answer to a question put by the plaintiff, allowed the plaintiff's counsel to elect whether he would have the aforesaid statement of William Lamson in the case or out; and the plaintiff elected not to have it in the case, and the Judge directed the jury to disregard it, and also his statement which came out on cross-examination. On the ground of negligence, the Judge instructed the jury, that if the master wished to have a fire on board his vessel, it was at his own risk or that of the owners; and if the hay on board the vessel, that carried it, was secured against a fire kindled on board in the best way imaginable, still if it took fire either from the fire on board the same vessel, or from the steamboat, or any other vessel, while passing, its owners would be liable. Much evidence was introduced by the plaintiff, tending to prove, that the hay was so stowed around the galley in which a fire was kindled, before the hay and other property was discovered to be on fire, as to expose it to be burnt, and that the fire itself was negligently managed; and much on the other side of a contrary tendency. The judge directed the jury to find from the evidence and return an answer to the special question, in addition to their general verdict, in substance, "whether the master and crew of the vessel used all the diligence and care which prudent and cautious men in like business usually employ for the safety and preservation of like property, under like circumstances, assuming that the master had a right to kindle a fire on board his vessel." The jury returned a verdict for the plaintiff, and answered the special question in the negative. To the above rulings and instruction to the jury the defendants except.

*Vose*, argued for the defendants, citing 1 Chitty on Pl. 31, 32; 18 Maine R. 174; 1 Stark. Ev. 372; 8 Pick. 551; Story on Bailm. 329, 330.

*Evans* argued for the plaintiff.

The opinion of the Court was afterwards drawn up by

WHITMAN C. J. — From the bill of exceptions, it would seem, that no evidence of ownership was offered, except as to

two of the four defendants. This, at first, led the Court to the conclusion, that the ruling of the Judge at the trial, taken in connection with his instruction to the jury, amounted to an intimation to them, that the plaintiff was entitled to recover, without proof of ownership by the others. Upon a re-examination, however, we are induced to doubt as to the correctness of such a conclusion. There does not appear to have been any ruling, explicitly, upon the point; and we do not discover, that any was desired by the counsel for the defendants. Where exceptions are taken it is unquestionably proper, that every matter of law, intended to be insisted on, should, at some time during the trial, be brought particularly to the notice of the Court. As we do not, on the whole, perceive that the attention of the Court was particularly called to the consideration of the law in reference to the point of ownership of the defendants in the vessel, we may well consider any such question, though now raised in argument, as having been then waived.

In reference to the ruling of the Court, as to the liability of common carriers, we see no reason to doubt its correctness. Unless they limit their responsibility, by the terms of a bill of lading or otherwise, they cannot escape from the obligation to deliver a shipment according to its destination, unless prevented by the public enemy or the act of God. The disaster complained of was not attributable to any such cause. If the accident had accrued from lightning, the non-delivery of the hay might be excusable.

The ruling, that the disclosure of William Lamson might, at the option of the plaintiff, be wholly rejected, forms no essential ground of complaint on the part of the defendants. Nothing fell from him, which would have been conclusive upon the plaintiff. He might still have shown that the facts were otherwise, than as stated by him in his discourse with the witness, as testified by him on cross-examination. And besides, the statements proved to have been made by him were in reference to the ownership of the vessel, which, as before stated, we think must be considered as not now a legitimate subject of controversey. *Exceptions overruled.*

JAMES SPROAT *& al. versus* JOTHAM DONNELL *& al.*

A bill of lading of lumber shipped on board a vessel, in the usual form, and what is called a clean bill of lading, would bind the person so undertaking, to carry it under deck, if there was no agreement, express or implied, to the contrary. But when there is a well known usage in reference to a cargo of this description, to carry it as convenience may require, either upon or under deck, and more especially when the shipper saw the cargo stowed on deck, and intimated no objection on that account, the bill of lading may import no more, than that it shall be carried in the usual manner.

Where a vessel is sailed by the master on shares, and he undertakes to carry lumber to a market, he and not the general owner of the vessel, is liable to the owner of the lumber, if any part of it is used as fuel during the voyage.

Goods of every description, including lumber, shipped on deck and lost by jettison, are not entitled to the benefit of general average.

THE action was assumpsit, and was brought to recover the value of six hundred sugar box shooks, alleged to have been shipped on board a schooner called the Nancy, owned by the defendants, and lost from the vessel in a voyage from Gardiner to Boston. In the first count the plaintiffs claimed contribution from the defendants for the losses sustained, upon the principles of a general average. The other counts alleged that the loss was occasioned by the misconduct and negligence of the defendants, or of the master and crew of the vessel.

The report of the trial before WHITMAN C. J. gives all the evidence introduced by the parties, respectively, and concludes thus: — The whole case is to be submitted to the Court, who are at liberty to draw any inferences from the testimony which a jury could properly draw, and who are to enter up such judgment by nonsuit or default, as they may deem proper.

The material facts, considered by the Court to have been proved by the evidence, are stated in the opinion of the Court.

The case was argued by

*Evans* and *Sawyer*, for the plaintiffs: — and by

*Rundlett*, for the defendants.

The counsel for the plaintiffs cited *Thompson* v. *Snow*, 4 Greenl. 264; *Emery* v. *Hersey*, 4 Greenl. 407; 1 Ware, 210 and 324; *Taunton C. Co.* v. *Mer. Ins. Co.* 22 Pick. 108;

4 Pick. 433; 1 Caines, 44; 4 Bingh. N. C. 134; 4 Campb. 142; 2 Cromp. & Jerv. 247; Hunt's Merch. Mag. Vol. 3, 432; 2 Phil. on Ins. 78 and 437; Marsh. on Ins. 466.

In the argument for the defendants these authorities were cited. *Tudor* v. *Macomber*, 14 Pick. 34; *Dodge* v. *Bartol*, 5 Greenl. 236; *Cram* v. *Aiken*, 13 Maine R. 229; Story on Bail. 339; *Wolcott* v. *the Eagle Ins. Co.* 4 Pick. 429; *Reynolds* v. *Toppan*, 15 Mass. R. 370; *Taggard* v. *Loring*, 16 Mass. R. 336; *Thompson* v. *Snow*, 4 Greenl. 264; *Cutler* v. *Winsor*, 6 Pick. 335; the Paragon, Ware's Rep. 322.

The opinion of the Court was drawn up by

WHITMAN C. J. — The plaintiffs claim to be remunerated for six hundred sugar box shooks, shipped on board the schooner Nancy, of which the defendants were the general owners, at Gardiner, to be transported to Boston; which are alleged to have been lost by the negligence of the master and crew of said vessel; or, if not so lost, that they were *jettisoned* for the preservation of the vessel and the residue of the cargo and freight, whereby the plaintiffs have become entitled to a contribution, upon the principle of a general average loss. The cause was opened to the jury, and, after the evidence had been developed, it was agreed that it should be withdrawn from the jury, and be submitted to the decision of the Court, upon a report of the evidence, with liberty to draw inferences from the facts proved, as a jury might.

It appears, that the shooks were laden on deck, and not in the hold. It appears that the vessel was constructed purposely to carry deck loads of lumber; and that it is customary to carry such lumber on deck, as well as in the hold; and the evidence is such as should be satisfactory, that the shooks in question were stowed and secured in the usual and customary manner; and it appears, that the authorized agent of the owners of the shooks, who shipped them, repeatedly saw them as they were stowed on deck, and made no objection to their being so stowed, but merely, in one instance, questioned the strength of one of the stanchions, which was thereupon taken

out, and a better one inserted in its place. The captain signed bills of lading in the usual form, agreeing to transport the lumber, &c. the dangers of the seas excepted.

On the voyage to Boston, the vessel encountered tempestuous weather, which swept from the deck about three hundred of the shooks, together with the fuel, which had been provided for the voyage; and the residue of the six hundred, with the exception of about thirty, which were used for fuel, were thrown overboard, to relieve all concerned from the danger of shipwreck. The evidence adduced leaves no room to doubt, that all was done that was practicable, by the captain and crew, to save the vessel and property on board. We cannot, therefore, come to the conclusion, that there was any reason for accusing them of want of due care or precaution.

It is urged nevertheless, that the bill of lading, being in the usual form, and what is called a clean bill of lading, bound them to carry the shooks under deck; and it may be admitted, that such would be the case, if there were no agreement express or implied to the contrary. But when there is a well known usage, in reference to a cargo of this description, to carry it as convenience may require, either upon or under deck, the bill of lading may import no more than that it shall be carried in the usual manner; as held in the case of the Paragon, Ware's R. 322; and more especially would such be the case, where, as in this case, the shipper repeatedly saw the cargo stowed on deck, and intimated no objection on that account.

But it is insisted, that the defendants must be held answerable as wrongdoers for the thirty shooks used for fuel; and such would be the case, if they were the owners for the voyage. The evidence in the case, shows they were not. It appears, that the master of the Nancy, at the time of the shipment, had taken her in the way usual in regard to coasting vessels in this State; and in effect had chartered her for an indefinite period, agreeing to pay as and for the charter or hire, instead of a fixed price, a certain portion of her earnings. Such an hiring, though by parol, has been held to be an indefeasible

letting for hire, for every voyage, which the hirer shall have entered upon anterior to notice from the general owner of his intention to put an end to the contract. *Cutler* v. *Winsor*, 6 Pick. 335. And the Courts in this State have often ruled, that such a letting of a vessel to hire, renders the hirer owner *pro hac vice*, and answerable personally for his fidelity in the performance of contracts, which he may make, in reference to the employment of the vessel thus taken, and that the general owners are not in such case personally responsible therefor. *Thomson* v. *Snow*, 4 Greenl. 264; *Williams* v. *Williams*, 23 Maine R. 17. The remedy, therefore, for the thirty shooks used for fuel, is against the hirer, and not against the defendants. And the same might have been said in reference to negligence or improper stowage, if any thing of the kind had appeared.

We come now to the consideration of the point, principally relied upon for the support of the plaintiffs' claim against the defendants, viz: a contribution as and for a general average loss. In regard to this, the special ownership of the master, for the voyage, would not interfere with the liability of the general owners. They were bound to keep the vessel in due reparation. In case of any disaster rendering her innavigable they must have refitted her. So, if she became subject to a general average contribution, the claim therefor would be good against them. And if thrown on her beam ends, so that it should become necessary to sacrifice her masts, sails and rigging to save the hull and cargo, the owners, notwithstanding the letting, would be entitled to a general average contribution from the owners of the cargo.

It is, however, objected, that a jettison of articles laden on deck, forms no foundation for a claim of this kind. This is a question of some importance, to the navigating interests of the people of this State, as our great staple, lumber, is in a great measure, necessarily so carried. But the great principles of law, cannot be made to yield and accommodate themselves to every case attended with some little peculiarity. If it be a general principle, and no case like the one before us, has ever

formed an exception to it in our country, or in that from which we have derived our common law, we must be careful not to innovate upon it. And it must be admitted, that many cases have occurred in which it has been held, that no contribution in such cases is admissible. Two decisions of this Court, viz: *Dodge* v. *Bartol,* 5 Greenl. 286, and *Cram* v. *Aiken,* 13 Maine R. 229, explicitly so decide, without qualification or exception. And Mr. Justice Putnam, in *The T. C. Co.* v. *The M. Ins. Co.* 22 Pick. recognizes the same doctrine as settled law, as he had done before in *Wolcott* v. *The E. Ins. Co.* 4 Pick. 429. And in the 3d of Kent's Commentaries, § 240, it is so laid down in conformity to decisions in New York there cited. The law, therefore, in the States of Maine, Massachusetts and New York, would seem to be firmly settled against any such contribution. Under the above citation from Kent, he cites the case of the brig Thaddeus, 4 Martin's Louisiana R. 582, as being to the same effect. And the law is so laid down in Abbot on Shipping, 344, and in Phillips on Insurance, 333. The latter, however, speaks of some exceptions to the general rule, and names them particularly; but those exceptions in the authorities above cited, have not been considered as applicable to a case like the one before us. And moreover, it is understood, that the practice among merchants, underwriters, and average adjusters, has uniformly conformed to the same principle in the states of Maine, Massachusetts and New York, if not elsewhere. Indeed it has escaped our research, if any different principle or practice has obtained in any other part of the United States. Merchants, it is understood, protect their interests in such cases by insurance upon cargoes of lumber, and other articles, usually carried on deck; and underwriters understand that they incur the additional risk of not being entitled to the benefit of a general average contribution in case the deck load be thrown overboard for the benefit of all concerned. To adopt now a different principle, merely in this State, would manifestly be attended with perplexity and embarrassment. The principles of commercial law have a widely extended operation; and when once understood, and

the practice and habits of the mercantile community have been long adapted to and predicated upon them, there should be great hesitation in changing them, even by the whole of that community; and much more so by a small section of it.

*Plaintiffs nonsuit.*

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF FRANKLIN.

ARGUED AT JUNE TERM, 1846.

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## SAMUEL G. STANLEY *versus* JAMES STANLEY.

The legislature had the constitutional power, as by the st. 1839, c. 400, § 3, to make the stockholders of a corporation, created in 1833, personally liable to the amount of their stock for debts of the corporation, contracted while they were stockholders after the last act went into operation.

It is competent for the legislature, by an act passed for that purpose, to cause the private property of stockholders in a corporation to be made liable to be taken on executions against their corporations.

Under the statutes in force in July, 1841, the books of a corporation, so far as creditors were concerned, were to be deemed conclusive evidence as to who were, and who were not to be considered as stockholders. Parol evidence, therefore, was inadmissible, to show that a person had ceased to be a stockholder.

The returns of officers should be explicit, and contain all that is requisite to enable them to justify their doings. They are bound so to express themselves as to be intelligible; and must so express all that is essential. They are not, however, expected to use technical language with technical precision.

Where an officer, under the provisions of the statute, 1836, c. 200, returned that he could find no corporate *property* wherewith to satisfy the execution, instead of using the words of the statute, "*corporate property or estate*," *it was held* to be sufficient.

THIS was an action of trespass, alleging, that the defendant took 3000 pounds of wool, the property of the plaintiff,

and converted the same to his own use on January 5, 1842. The defendant pleaded the general issue, and filed a brief statement setting forth that he was sheriff of the county of Franklin; that Joseph Covill was his deputy; that Covill had an execution for service recovered by the Freeman's Bank against the Readfield Cotton & Woolen Manufacturing Company; that the company having no property or estate, Covill, after due notice to the plaintiff, took the wool named in the declaration to satisfy the same execution in part, and sold the same for that purpose, the plaintiff being a stockholder in that company when the debt was contracted.

At the trial before SHEPLEY J. it was admitted, that the defendant was Sheriff, and that Covill was his deputy. The defendant introduced copies of the writ, judgment and execution in favor of the bank against the company. The execution issued on December 9th, 1841. The debt, upon which the judgment was recovered, was contracted on July 27th, 1841. The return of W. V. Brown, a deputy sheriff, and the return of Covill are to be copied and annexed.

A book, purporting to be the book of records of the company, was produced, and Josiah Perham, Jr. introduced by the plaintiff, testified that he was the last clerk of the company, and that the book was used in the meetings of the corporation as its book of records. The following is his certificate of an extract from the records, read by him.

"The following is contained on the stock book of the Readfield Cotton and Woolen Manufacturing Company.

"Dr. Samuel G. Stanley Cr.

| | | | |
|---|---|---|---|
| 1841 Jan. 4, To forty-eight shares No. 401 to 448 inclusive, transferred by J. Mooaer, | 48 | 1841 July, 31 By 48 shares No. 401 to 448 inclusive, transferred to Sargent & Huse." | |

Perham testified, being objected to, that the plaintiff sold his shares to Sargent & Huse, the latter part of June or fore part of July, 1841, and received an obligation from them to pay for them; and delivered to them the certificates; that he was then agent of the company, and that Huse delivered the

certificate to him a few days, not more than ten days after, and wished him to have the shares transferred, and that he told him he would take them down to Readfield and have them transferred for him; that he thought he did not go down until the 31st day of July, 1841, and on that day handed the certificates to the clerk, and asked him to make the transfer upon the books; that the clerk desired him to make the entry upon the books and he did so at the time; that the par value of a share was $25; that Covell called upon him with the execution to know if there was any property of the company to satisfy the execution, and was informed that there was not and that there were no debts then due to the company which were good and which had not been transferred.

The cause, by consent, was taken from the jury and is submitted to the decision of the Court, upon this testimony or so much thereof as may be legal, and the Court is to enter such judgment as the rights of the parties may require.

The following are the copies of the returns of the officers referred to: —

"Kennebec, ss. December 9, 1841. I have made diligent search to find corporate property of the defendants wherewith to satisfy this execution and can find none, and the same is in no part satisfied. "W. V. Brown, Dep'y Sheriff."

"Franklin, ss. December 20, 1841. I have made diligent search to find corporate property of the defendants wherewith to satisfy this execution, and can find none, and the same is in no part satisfied with corporate property.

"Joseph Covell, Dep'y Sheriff."

Then follows upon the execution a return by Covell, dated December 24, 1841, of the taking and sale of the wool, in part satisfaction of the execution.

*R. Goodenow* and *Randall*, first gave a history of the legislation of this State with respect to corporations, and said that it was certain, that there was no law making stockholders of a corporation liable for its debts when the act incorporating the Readfield Cotton and Woolen Manufacturing Co. was

passed in 1833. If the plaintiff was made liable by any law for the debts of the corporation, it was by the st. 1839, c. 400, § 3. The st. 1831, c. 503, gives no power to alter the liabilities of stockholders in a corporation by a general law. It merely provides, that the act creating the corporation may "be amended, altered or repealed at the pleasure of the legislature." This has never been done, or attempted to be done. It was contended, that the legislature had no power, under the constitution, to impose new and additional liabilities upon the stockholders of this company, and that the statute of 1839, so far as it attempted to do it, was unconstitutional and void, and could furnish no justification for the acts of the deputy of the defendant. 2 Cranch, 338.

It was also contended, that as the plaintiff was not a stockholder in the company when this action was commenced against it by the Freeman's Bank, that he could not be presumed to have any knowledge of the suit, and if he had, he had no power to appear and defend the action. This therefore is an attempt to take the property of the plaintiff to satisfy an execution issued upon a judgment to which he was not a party, and against which he had no opportunity to make defence. It is but the taking of the property of one man to satisfy a judgment against another.

The plaintiff was not a stockholder in the corporation at the time their debt to the Bank was contracted, and stockholders only are liable under any act. Whenever a man sells out his stock, he can no longer be a stockholder in the company, and could hold no office required to be holden only by a stockholder. The entry of the transfer upon the books of the corporation is always made after the sale, and merely for the convenience of the purchaser.

But if the plaintiff was liable to have his property taken to satisfy an execution against the corporation, on the ground of his having been a stockholder, the justification set up fails, because it does not appear, that such preliminary steps were taken by the officer, as the law requires, before the property of the individual can be taken on an execution against the

corporation. The officer must first certify on the execution, that he can find no *corporate property or estate*, before he can touch the individual property of the stockholder. The words, *property or estate*, are used several times in the statute, and must have been understood to have meant different things, and not the same. The officer is bound to make an explicit return of his doings, and nothing can be presumed in his favor.

It was also contended, that the return by the officer of the sale on the execution was defective, because it merely stated, that "he had given forty-eight hours notice of his intention," &c. without stating the amount of the debt or deficiency.

*Wells*, for the defendant, said that the plaintiff was a stockholder in the corporation when the debt to the Bank was contracted. The debt was contracted on July 27, 1841. The statute 1838, c. 325, then in force, provides that the shares may be transferred by endorsement and delivery thereof; but specially provides, that "the title to such stock shall not pass from such proprietor, until such transfer has been so far entered on the corporate records, as to show the names of all the parties thereto, and the date of the transfer." No entry whatever was made of any transfer from the plaintiff until July 31, 1841, and the entry then made is not a compliance with the requisitions of the statute.

The plaintiff was liable for the debts of the corporation to the amount of his stock when the debt to the bank was contracted, and so continued until one year after the record of the transfer of his stock. The statute of 1831, c. 503, gave the legislature the right to amend, alter or repeal any act of incorporation, and the Readfield Company was incorporated under the provisions of that act. The st. of 1836, c. 200, made stockholders in corporations, created after that time, liable for the debts of the corporation to the amount of the stock held. And the stat. 1839, c. 400, § 3, subjected stockholders in corporations created since the passage of the act of 1831, to all the liabilities imposed on stockholders by the statute of 1836, so far as it respected debts, contracted as this

was, after the act of 1839 became a law. The rights of the plaintiff were saved by the exception in the repealing act; and if not, c. 76 of the Rev. Stat. continued the liability of stockholders for debts of the corporation contracted as this was.

The return of the officer, that he had made diligent search for *property* of the corporation was sufficient. The statute says *property or estate.* Either word is enough without the other, as they have precisely the same meaning.

The opinion of the Court was drawn up by

WHITMAN C. J. — The first question to be considered is, whether the plaintiff's situation was such as to subject him to the operation of the statute of 1839, c. 400. As the act creating the corporation, to which the credit was given, was passed in 1833, it is contended, that it was not competent for the legislature, afterwards, to enact that the individual stockholders in it, should be made liable for its debts. But this debt was incurred after the passage of the act of 1839; and that act did not provide for any such liability, except for debts incurred after its passage; and this debt was incurred in 1841; and the plaintiff purchased his stock in the corporation after that time. He may, therefore, be regarded as having purchased with full knowledge of the liability intended to be created, and, therefore, as assenting to it. And besides; if the corporators were not satisfied with their individual liabilities, so created, they had it in their power to cease incurring them. We are satisfied, therefore, that it was competent for the legislature to make such a provision.

It is next insisted, that, if the private property of individuals could be rendered liable to be levied upon, it could not be done by virtue of judgments and executions against their corporations, in which they were not summoned individually to appear, and as such, had no opportunity to make defence. But it has been considered, that corporations of this class were, in reality, but joint stock companies, enabled to manage their concerns under corporate names; and that, therefore, the individual corporators were to be regarded as parties in effect,

in suits against them as corporate bodies; and, therefore, that it is competent for the legislature to cause the private property of the individual corporators to be liable to be taken on execution, against their corporations, the same as if it were against the individuals themselves, who might be doing business under an assumed name of copartnership. *Marcy* v. *Clark*, 17 Mass. R. 330. This objection therefore, is not sustainable.

The next question presented is, was the plaintiff a stockholder at the time the credit was given? If not, by the Rev. Stat. c. 76, he was not liable, and his property could not be levied upon for the debt in question. This presents a matter of fact, which it has been agreed that we may decide from the evidence reported. It appears that the debt was contracted on July 27, 1841; and from the copies of transfers, as entered upon the books of the corporation, it appears, that the plaintiff was a stockholder from January 4, 1841, to July 31, of that year. But he introduced evidence tending to show his transfer, though not entered as of record, till July 31, was in fact made before the 27th of that month, and so before the credit was given. The defendant objected to this evidence; insisting that the transfer, as it respected the creditors of the corporation, was not effectual till entered on the transfer books. It would seem to be reasonable and highly expedient, as the statute has provided that none shall be liable, who were not stockholders at the time of the credit given, that there should be some settled and well defined mode in which creditors should readily be able to ascertain who were stockholders at the time of their giving credit in such cases. They could not be expected to know any thing of the private negotiations between stockholders and other persons, unless some such mode were prescribed. The transfer books would furnish such data as, if they are allowed to be conclusive, would answer the purpose; and it seems scarcely reasonable to doubt, that the legislature must have intended such evidence should be relied upon conclusively. In two other instances in the statute, c. 76, it is rendered certain that such transfer books should be conclusive. The first is in § 18, where it is provided, that the

individual stockholders shall be liable, and it is also provided, that they shall be so liable for the term of one year after the record of the transfer of their stock on the books of the corporation. The second is in § 21, which enacts, that the clerks of corporations, on demand, shall furnish any officer, legally holding any execution against the same, with the names of the stockholders, with their places of residence, so far as known; and the amount of liability of each. The legislature, must of course have considered, that reliance upon information so obtained (and it could only be obtained by the clerk from the transfer books,) was conclusive in favor of creditors, as against the stockholders of the corporation. It would seem to be equally important, that a creditor, being bound to take notice of who were to be deemed stockholders at the time of giving credit, should have the same resource for information; and, moreover, it is important, that any one giving credit to a corporation should, at the time, be able to ascertain who the individuals were, who might become ultimately responsible to him, as well as subsequently, when it might become necessary to call upon them for payment. We think, therefore, that the evidence objected to should have no weight; and that the transfer books, so far as creditors were concerned, were to be deemed conclusive as to who were to be considered as stockholders.

It is objected, also, that the return on the execution, issued against the corporation, by the defendant's deputy, is defective, and does not show such proceedings thereon, as would justify his seizing and making sale of the defendant's private property. In the return, he states that he has not been able to find property belonging to the corporation; but does not say he could find no property or estate in the language of the statute. It is true, that officers' returns should be explicit, and contain all that is requisite to enable them to justify their doings. They are not however, expected to use technical language, with technical precision. They are bound so to express themselves as to be intelligible; and must take care that they so express all that is essential. If the word property

embraces all that is embraced in the words *property or estate*, it must be deemed sufficient. Webster defines property to mean estate, and estate to mean property; and Jacob says, property is the highest right a man can have to any thing real or personal. The word property, therefore, comprehended the meaning of both words; and was therefore sufficient.

Several other objections, of minor importance, have been made to the return of the deputy, which we cannot think of sufficient weight to deserve particular animadversion; and they must be overruled.

*Plaintiff nonsuit.*

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF SOMERSET.

ARGUED AT JUNE TERM, 1846.

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WILLIAM METCALF, *Adm'r. versus* SAMUEL H. HILTON.

A debtor who discloses property in his hands in "any bank bills, notes, accounts, bonds or other choses in action," is not entitled to have the poor debtor's oath administered to him until he has complied with the provisions of the statute of 1839, c. 412, by having appraisers appointed to appraise off property, so disclosed, sufficient to pay the debt.

THE facts in the case appear in the opinion of the Court, so far as it respects the subject matter of the opinion. Nothing is said in the proceedings, in any way, respecting appraising the notes disclosed.

It also appeared, that the justices adjourned their examination from the twenty-third day of one month to the third day of the next month.

*Adams,* for the plaintiff, among other objections, contended that the debtor should have caused the notes disclosed to have been appraised; and should have assigned them to the creditor. He cited *Harding* v. *Butler,* 21 Maine R. 191.

*Bronson,* for the defendant.

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

WHITMAN C. J. — This is an application for a *certiorari* with a view to a reversal of the proceedings before two justices of the quorum, under the statutes of 1835, c. 195, and 1836, c. 245, for the relief of poor debtors, the defendant having given bond, as by those statutes is provided, on being arrested on execution in favor of the petitioner, in which he was admitted to take the oath prescribed in said statutes, in order to save the forfeiture of the penalty of his bond. The petition sets forth that there is manifest error in the record and proceedings of the justices, and particularly specifies sundry instances of such errors. We, however, do not deem it essential to go into a consideration of the errors particularly insisted upon, as we deem the proceedings defective on another ground. In *Harding* v. *Butler*, 21 Maine R. 191, it was held, the debtor disclosing property in his hands in "any bank bills, notes, accounts, bonds or other choses in action," was not entitled to have the oath administered to him till he had complied with the provisions of the act of 1839, c. 412, by having appraisers appointed to appraise off property, so disclosed, sufficient to pay the debt. In the proceedings before the justices it does not appear, that any such appraisers were selected or appointed preliminarily to the admission of the debtor to take the oath. And it appears that the debtor disclosed, as his property, one note signed by John Ruggles, dated April 18, 1835, for $500, payable in one year from its date, with interest, and one note signed by Randall Fish, Abner Knowles and John Ruggles, dated April 29, 1835, for $2755, payable in two years from its date, with interest payable annually. We think, therefore, that a writ of *certiorari* should be issued.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF PISCATAQUIS,

ARGUED AT JUNE TERM, 1846.

## ISAAC FARRAR *& al. versus* RICHMOND LORING *& al.*

The rule, that it must appear by the record, that courts of local and limited jurisdiction have verified every fact necessary to give them jurisdiction, is not applicable to the District Courts of this State. Where, therefore, the process contains the proper averments to give that Court jurisdiction, and the Court acts in the matter, the presumption arises, that it had become satisfied of the existence of all the facts necessary to give it jurisdiction.

Where application is made, under the statute of 1842, c. 33, by the county commissioners to the District Court, to appoint a committee to locate the land reserved for public uses in townships granted by the State, after the statute of 1828, c. 393, went into operation, it is not necessary that notice should be given to the owners of the land prior to the appointment of such committee. If the owners of such townships have any title whatever to the lands thus reserved for public uses, such proceedings to which they are not a party cannot have any effect to destroy or impair it. Notice, however, is to be given by the committee before they proceed to the performance of their duties.

Inhabitants of the county wherein the lands lie may be legally appointed as such committee.

The Court would not readily grant a writ to bring proceedings before it to be quashed for neglect to comply with statute provisions, when compliance was shown to be impossible. But it is a sufficient answer to an objection, that the notices were not posted in the township by the committee, or in public places therein, that the record states that they were.

Where lands were granted by the State subsequent to the act of 1828, c. 393, it is not necessary that the committee should designate, at the time of locating the reservations, the uses for which they were reserved.

It is no sufficient cause for granting a writ of *certiorari* on the petition of the owners of the township, that the lots located for public uses contain a less quantity of land, than there is reserved in the grant.

Whether lands better than an average quality have been run out and located for public uses, may or may not be properly presented and considered in the District Court, when the acceptance of the report is under consideration; it cannot properly arise or be discussed upon a petition for a writ of *certiorari* to quash the proceedings.

THIS was a petition for a *certiorari* to the end, that certain proceedings in locating the lands reserved for public uses in certain townships, in which they were interested, might be quashed.

No copy of the petition came into the hands of the Reporter. The facts sufficiently appear in the opinion of the Court.

The case was fully argued by

*Rowe*, for the petitioners — by

*Blake* and *Robinson*, for the County Commissioners — and by

*Hobbs*, for a purchaser of a portion of the reserved lands.

*Rowe*, in his argument, (the main points made therein appearing in the opinion of the Court,) cited st. 1842, c. 33, § 21; Rev. St. c. 3, § 11, and c. 122; 4 Mass. R. 627; 2 Mass. R. 118; 1 Mass. R. 87; 7 Mass. R. 163; 3 Mass. R. 229; 2 Mass. R. 489; 2 N. H. R. 100; 3 Greenl. 438; 8 Greenl. 137; 1 Fairf. 335; 14 Mass. R. 222; 14 Pick. 276; 6 Greenl. 430; st. 1821, c. 41, § 1; 8 Greenl. 271; 1 Fairf. 24; 11 Mass. R. 468; 8 Greenl. 146; 2 Fairf. 473; Rev. St. c. 122, § 3.

*Robinson* cited st. 1821, c. 41, § 1; 19 Maine R. 338; 11 Mass. R. 419; 6 Pick. 470; 18 Pick. 309; 11 Pick. 322; 8 Greenl. 137; 23 Maine R. 10; 1 Mass. R. 256; 14 Mass. R. 490.

*Blake*, for the County Commissioners, cited Rev. St. c. 97, § 18; 15 Pick. 238; 4 Mass. R. 171; 23 Maine R. 433; st. 1842, c. 33, § 21; Rev. St. c. 122; st. 1821, c. 41 § 1;

7 T. R. 270; 3 Wils. 133; 3 Johns. R. 468; 2 Pick. 592; 21 Pick. 536; 8 Greenl. 137; 14 Mass. R. 224; 14 Pick. 276; 15 Mass. R. 198; 11 Mass. R. 413; 20 Pick. 71; 15 Pick. 1; 9 Pick. 46; 9 Greenl. 414. He also replied to the argument for the petitioners.

*Hobbs*, in his argument, cited st. 1842, c. 33, § 21; Rev St. c. 122; 16 Maine R. 349; 3 Greenl. 433; 2 Mass. R. 170; 4 Mass. R. 627; 3 Mass. R. 229; 7 Mass. R. 158; 8 Greenl. 137; 23 Maine R. 10.

The opinion of the Court was drawn up by

SHEPLEY J. — The owners of township numbered three in the thirteenth range, and others interested in it under them, desire to bring before the Court the record of proceedings of a committee appointed on application of the county commissioners of this county to run out and locate the lands reserved for public uses in that and other townships. Thirteen errors in those proceedings have been assigned; but it will be sufficient to consider those insisted upon in argument.

It is alleged, that the record does not show, that the district court had jurisdiction under the act of March 18, 1842, c. 33, § 21, because the Court did not determine, that the township had not been incorporated; that the reservations for public uses had not been located; and that there was valuable timber or grass on them, liable to be taken off by trespassers. In the petition these averments were made, and the case as presented therein, was one, over which that Court had jurisdiction, and from its proceeding to appoint a committee to perform the duties required by the act, the presumption, similar to that, which exists after the finding of a verdict, arises, that the Court had become satisfied of the existence of all the facts necessary to enable it to exercise that power. The rule, that it must appear by the record, that courts of local and limited jurisdiction have verified every fact necessary to give them jurisdiction, is not applicable to the District Court.

Another objection, esteemed to be most material is, that the proceedings, until after the appointment of the committee,

were *exparte*, and without notice to the owners of the township.

Upon revision of the statutes, the words "no sufficient cause being shown to the contrary," contained in the statute, c. 41, § 1, were omitted in the statute, c. 122, § 1. The act of March 18, 1842, c. 33, § 21, provided for the location of lands reserved for public uses in townships unincorporated, and directed, that the same proceedings should take place as are prescribed by the statute, c. 122, on the application of assessors, to have such lands located in incorporated towns or plantations. There is no statute requiring, that notice should have been given to the owners of the township in this case. It is still insisted, that natural justice required such a notice, and several decided cases are referred to, as sustaining the position. If they might be, and probably were entitled to hold such lands and to enjoy the use of them, until the township should be incorporated; and if such right would be destroyed by these proceedings, as the counsel contends, there might be just reason to insist upon such a notice. This township was granted subsequent to the passage of the act of February 10, 1828, c. 393, § 4, which provides, that there shall be reserved in every township thereafter sold "one thousand acres of land, to average in quality and situation with the other land in such township, to be appropriated to such public uses for the exclusive benefit of such town, as the legislature may hereafter direct."

Whatever may have been the rights of grantees under former reservations made and declared to be appropriated to particular uses, it does not follow, that they would have any to the use of the lands reserved, since the passage of that act. But it is not the design to express any opinion in relation to it. For the proceedings under the act of 1842, are originated and conducted by official persons acting in their official character; and the act does not contemplate or provide for any examination, trial, or decision of adverse rights. If the owners of the township, had any title whatever to the lands thus reserved for public uses, these proceedings, to which they are not a party, cannot have any effect to destroy or impair it. The design of

the act is to cause the proceedings to take place upon an apparent state of facts for the public good, and the especial benefit of the future, if not present, owners of the lands within the township. The legislature for such a purpose and duty might by the act have selected its own permanent agents, and might at its discretion entrust their appointment to a court of justice, and provide the mode, by which its power should be called into exercise. In such cases no person having a private interest is supposed to be present, or to be heard in the selection of the agents, the whole proceedings in the selection, being conducted by official persons. The great distinction between such cases and those found in the decided cases referred to, consists in this. In the latter the private rights or property of the parties were conclusively affected by the proceedings, while such is not the effect of the proceedings in the former. In this case the committee had no power to take private property, or to impose a servitude upon it. So far as it might be just or necessary to secure to the owners of the township an opportunity to be heard upon the question, whether the lots were run out and located equitably according to the provisions of the statute, it was accomplished by the notice to be given by the committee, before they proceeded to the performance of their duties. This notice would enable them to be present to counsel them, to inspect their proceedings, and to present their own claims for consideration. They might thus become informed of the time, when their services were completed, and the law would inform them, that they must be presented to the next District Court in the county, for acceptance, where they might appear and be heard with respect to their acceptance.

Another allegation is, that the committee, being citizens of the county, were interested in the location of the lands reserved for public uses, and therefore incompetent to make it. The alleged interest arises out of a provision of the statute, which authorizes the county commissioners to seize and sell timber, grass, or hay, cut by trespassers on such lands, and requires them, after deducting all reasonable expenses, to pay the pro-

ceeds to the county treasurer; and that officer is required to keep a just account thereof, and to pay the same to the treasurers of the towns rightfully owning it, whenever applied for. The argument is, that the amount thus received will be large, that it may be a long time before this township will be settled, incorporated, and have a treasurer to call for the money, that the county in the mean time will have the use of the money without interest to be paid for it, and that the citizens of the county thereby become interested. The statute requires that citizens of the county should be appointed, and that they should be disinterested. If no citizen could act, the provision of the statute would prove to be abortive. The word disinterested in the statute, doubtless, was used to exclude those persons, who were interested in or owners of the lands, from being appointed on the committee. Without inquiring whether the county could derive any such benefit, as the argument supposes, it will be suficient to remark, that the supposed interest, if there be one, is a corporate interest and not a personal one, and quite small, remote, and contingent. Such a contingent interest will not disqualify the person to act in such a capacity. *Commonwealth* v. *Ryan*, 5 Mass. R. 90.

Another objection is, that the notice required by the statute has not been given. The record states, that they gave notice of their appointment and of the times and places of their meeting to perform their duties, stating particularly each time and place, thirty days at least before those times. The Court designated the Age and the Piscataquis Farmer as the newspapers, in which the publication of notice was to be made. It was published in the latter on July 18, and in the former on July 25, 1845; and the earliest day appointed for the performance of their duties was August 27, 1845. The record further states, that the notice was posted on July 30, 1845, "on said township No. 3, Range 13th, one at the northwest corner of lot No. 6, and one where the monument line strikes the west shore of Chesuncook lake." The day appointed to commence on this township was Sept. 10, 1845. It is insisted, that this was not, and that there could not be, a compliance

with the provisions of the statute. The Court would not readily grant a writ to bring proceedings before it to be quashed for neglect to comply with statute provisions, when compliance was shown to be impossible. The location of lots reserved for public uses was first provided for in towns and plantations, and the statute required the notice to be posted in two public places in the town or plantation. When provision was subsequently made for the location of such lots in unincorporated townships, the statute required the same proceedings; and it must receive a reasonable construction in conformity to the obvious intention of the legislature, that the proceedings should be the same so far as practicable, and as intending, that the notices instead of being posted in a town or plantation should be posted in the township, and in places as public, as there might be found in such township. That there may not be places in such townships so much resorted to as to become known and public, it would not be safe for the Court to conclude, when the record speaks of places so public as to have acquired a distinct name; such as "Norcross' landing," "Wyman's camp," "Chesuncook farm," "Northeast carry," and "Black brook shanty." It is however a sufficient answer to the suggestion, that the notices were not posted in the township, or in public places in it, that the record states, that they were.

A further objection is, that the committee have not in their report designated the uses, for which the lands were reserved, as the statute requires. The statute, c. 122, § 1, having been framed with a view only to such reservations, as were formerly made, when the uses were designated at the time of making the reservation, this provision cannot be applicable to reservations of a different character, made by virtue of the act of 1828, the uses of which were not at the time of the reservation, and do not yet appear to have been declared.

Again it is said, that it does not appear, that the thousand acres, reserved for public uses, have been fully run out and located. The record describes one lot of a mile square containing six hundred and forty acres as located. It states that

another lot designated by lines and distances on three sides and bounded by the Chesuncook lake on the other side, was run out and located, "said lots being set off in full for the one thousand acres reserved in the grant of said township." Whether the last lot would contain the remaining three hundred and sixty acres may perhaps depend upon its extent into the waters of the lake. If the Court may not be judicially informed, that the lake is but an enlargement of a stream of running water, it may not be so informed to the contrary, and it cannot therefore conclude from the record presented, that the lot may not contain the requisite number of acres. If such be not the fact, it would not be a grievance to the petitioners, that too small a quantity of land had been taken from their township for public uses, especially when they at the same time contend, that the lots located were more valuable, than they ought to have been. Whether, as contended, lands better than an average quality have been run out and located for public uses, might be properly presented and considered in the District Court, when the acceptance of the report was under consideration, but it cannot properly arise or be discussed upon this petition. *Writ refused*

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THE STATE *versus* WILLIAM S. FOLSOM *& al.*

An action of debt may be maintained upon a recognizance to the State in a criminal proceeding.

If an action of debt be brought upon a recognizance to the State, and the declaration sets out the facts in manner appropriate to a declaration in *scire facias*, it will be bad on demurrer.

But the declaration may be amended by declaring appropriately in debt, upon terms; such as relinquishing costs for the State.

THE writ commenced in the usual form of a blank writ of attachment, commanding the defendants, William S. Folsom and Hiram Folsom, to appear at the November Term of the Eastern District Court for this county, 1845, to "answer unto

the State of Maine in a plea of debt, for that whereas an indictment, found by the grand inquest of said county against said William S. Folsom for the crime or offence of larceny," at the November term of the Court in this county, 1844, was pending, and setting out particularly, that he was then and there ordered to recognize for his appearance; that he did so recognize as principal, and the other defendant as surety, setting out the recognizance at length; that the principal forfeited the penalty by his neglect to appear at the May Term of said Court, 1845; that thereby the sum became forfeited, and has not been paid; and concludes thus: — "We therefore, willing to have the said sum due to us, with speed paid and satisfied as justice requires, command you that you make known unto the said William S. Folsom and Hiram Folsom, that they be before our Justice of our District Court (at said November Term, 1845) to show cause, if any they have, why we ought not to have judgment, and our writ of execution thereupon, against them, for the sum forfeited by them and costs, and further to do and receive that which the said Court shall then consider. To the damage of said plaintiffs," &c.

The defendants demurred.

*Morrison*, for the defendants, contended that the action of debt would not lie in favor of the State upon a recognizance entered into in a criminal case, and cited Rev. St. c. 171, § 29; st. 1845, c. 161; *Cram* v. *Keating*, 13 Pick. 339; *Pierce* v. *Reed*, 2 N. H. R. 359. The statute of 1845, is imperative that the principal may be surrendered on payment of costs.

But if the action of debt may be maintained in proper form, this declaration is bad.

*Moore*, Att'y Gen'l, for the State, contended that an action of debt would lie in a case like this, and cited 1 Chitty on Pl. Action of debt; *Commonwealth* v. *Green*, 12 Mass. R. 1.

If the declaration is not entirely formal, it may be amended, so as to make it properly *scire facias*, or debt. Rev. St. c. 114, § 51; *Austin* v. *Bell*, 13 Pick. 90.

The opinion of the Court, TENNEY J. not being present at the argument, was drawn up by

WHITMAN C. J. — This purports to be an action of debt, in which the sheriffs were commanded to attach the goods and estate of the defendants; and is grounded upon a recognizance, taken for the appearance of the defendant, Folsom, to answer to a criminal charge against him. In issuing the writ, instead of declaring in the form proper to an action of debt, the recitals proper to a *scire facias*, are relied upon; and the conclusion is with an *ad damnum*. The defendants demur to the writ and declaration.

The first question raised, is as to the maintenance of an action of debt upon a recognizance to the State, in a criminal proceeding. In support of this objection it is urged, if debt, instead of *scire facias*, would lie, that the defendants would be deprived of an important privilege, secured to them by the statute of 1845, c. 161, which is, that the bail may, upon *scire facias*, upon a recognizance, surrender their principal in Court, at any time before final judgment, on payment of the costs of *scire facias*. It is insisted, also, that the cases of *Pierce* v. *Reed & al.* 2 N. H. Rep. 359, and *Cram* v. *Keating & al.* 13 Pick. 339, are against the maintenance of an action of debt upon a recognizance. But those were cases of debt upon bail bonds, taken to the sheriff, and it was holden, that he could not maintain any such action, he having no interest in the bonds taken and debt to be recovered; and that *scire facias* in the name of the creditor, was the only remedy in such cases, the same having been specially provided for the purpose, by statute. The case, therefore, of debt on a recognizance to the State, or to an individual, is not within the principle adopted in those cases; and accordingly it has been held (*Commonwealth* v. *Green*, 12 Mass. R. 1,) that debt lies to the Commonwealth on a recognizance, as well as *scire facias*. In that case, the objection, now raised under the statute cited, was fully considered; there having been at that time a statute in force, in Massachusetts, of which this State was then a part, similar to the one in question. Mr. Justice Jackson, in deliver-

ing the opinion of the Court in that case, says, "even if the relief granted by the legislature in the statute, were confined to actions of *scire facias*, that could not alter the law, which allows an action of debt to be brought on such a recognizance." But he says, "it cannot be supposed that the legislature intended, that their benevolent designs should be frustrated by a change in the mere form of action. This case is clearly within the equity of that statute. And he cites, Sir T. Raymond, 14, and the 2d of Lord Raymond, 720, as showing, that defendants, the bail, in such cases would be allowed the same privileges as to the surrender of their principal, as on *scire facias*. We, therefore, feel no hesitation in coming to the conclusion that an action of debt is sustainable in this case; and when the question shall be presented, whether the bail can surrender their principal in such cases, we may say, with Mr. Justice Jackson, in the above case, that, "perhaps, the Court would find no difficulty in deciding, as in the case before cited from Lord Raymond, that the defendant should not be deprived of any fair advantage to which he would have been entitled on *scire facias*."

The next question is, as to the declaration, which clearly is informal, and as if the process were in *scire facias*. How such an oversight should have occurred, is not understood. The error, however, under our statutes of *jeofail*, may be amendable. By the Rev. Stat. c. 115, no abatement or arrest of judgment is admissible "for any kind of circumstantial errors or mistakes, when the person and case may be rightly understood." And Mr. C. J. Shaw, in *Bell* v. *Austin*, 13 Pick. 90, in view of a similar provision in the statutes of Massachusetts, remarks, that where Courts have jurisdiction of the subject matter, the proceedings "may be shaped and varied so as to reach the justice of such case." Such alterations, however, are not always to be made but upon terms. These are to be imposed at the discretion of the Court; but are never refused when the amendment allowed is in matter of substance. The defendants in this case could not have had any difficulty in understanding the cause of action. That is most

circumstantially disclosed; much more so even than if the declaration were appropriately in debt. But an amendment, making the appropriate declaration, would be of a matter in substance, and therefore terms must be imposed. Between individuals the terms would ordinarily be on the payment of costs by the party amending, but as it is not according to rule for the government to be ordered to pay costs, the declaration must be adjudged bad; and the plaintiffs may, on motion, be allowed to amend by declaring appropriately in debt, on relinquishing their costs.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF PENOBSCOT.

ARGUED AT JULY TERM, 1846.

## EDWARD R. SOUTHARD *versus* OLIVER PARKER.

Where a levy was made on real estate, and the creditor made a lease thereof to another for a year, but to become void whenever the land should be redeemed, the rent to be paid quarterly; and the lessor assigned the lease to a third person, who was to be accountable to the lessor for the rent received under the lease; and at the end of the second quarter the land was redeemed from the levy; but, nevertheless, the lessee paid rent for three quarters to the assignee, *it was held*, that the lessor could not recover of the assignee the rent for the third quarter.

THE facts in this case are stated at the commencement of the opinion of the Court. In the assignment of the Goddard lease by the plaintiff to the defendant, there was a special provision, that the defendant should account to the plaintiff for the rent received under it.

At the trial before TENNEY J. the Judge instructed the jury, that the assignment of the lease held the defendant to account with the plaintiff for the moneys which might come into his hands for the rents; that the defendant, being a stranger to the agreement between Gosler & Dakin, and the plaintiff, and having received no notice not to account with the plaintiff for the rents so received, he was to be regarded, as to every other person than the plaintiff, an agent or depository

of the money for the plaintiff, and would be held to account with the plaintiff for the rents, notwithstanding it might turn out, that the plaintiff was not entitled to hold to his own use all the money so paid him for rents.

The verdict was for the plaintiff, and the defendant filed exceptions to the instructions of the presiding Judge.

*Hathaway*, for the defendant, said that by the terms of the lease, Goddard had no right to hold under it a moment beyond the time of redemption, and the assignment to the defendant was merely of the right of the plaintiff under it. The plaintiff was not entitled to receive any rent of Goddard, after the redemption. Goddard was then accountable for the rent to third persons, and the defendant was liable to Goddard or the owners for the rent received after the redemption. The plaintiff has no more right to recover in this action for the last quarter's rent, than any other stranger.

*Cutting*, for the plaintiff, said that there was no privity between the defendant and Gosler & Dakin. They never gave notice of the redemption and have never claimed the rent. If the defendant pays the money to his principal, the plaintiff, Gosler & Dakin would have a right of action against the plaintiff perhaps, but none against the defendant. If the defendant succeeds in this suit, the plaintiff will still be accountable to Gosler & Dakin, and although the defendant received the money as the agent of the plaintiff, he will hold it against every one. Parker should, therefore, pay the money to the plaintiff according to his agreement.

The opinion of the Court was drawn up by

WHITMAN C. J. — The plaintiff by a levy, by virtue of an execution, on the 22d of November, 1841, acquired an estate in Orono, subject to the right of Messrs. Gosler & Dakin to redeem the same, within one year from the time of the levy; and, on the 29th of April, 1842, leased the same to John Goddard for the term of one year, commencing on the 10th of May, 1842, if not redeemed before the expiration of that term; and, if redeemed, then, to the time of redemption, at an annual

rent, payable quarter yearly. The plaintiff, on May 18th, 1842, assigned his counterpart of the lease in trust, for certain purposes, to the defendant, who, on the 12th day of November, 1842, received of Goddard, according to the terms named in the lease, the rent for three quarters of the year. On the 10th day of November, 1842, Gosler & Dakin redeemed the premises; so that the defendant received a quarter's rent more than was due under the lease to the plaintiff, whose title had become extinct at the end of the second quarter; and whose lease, by its express terms, had, also at the same time, become null and void.

The action against the defendant is for money had and received; and the plaintiff claims of him the amount he received, as well for the third, as for the other two quarters. The charge of the Judge to the jury, excepted to on the part of the defendant, was, that the defendant should be held to account with the plaintiff for the amount received, notwithstanding it might turn out that the plaintiff was not entitled to hold to his own use all the money so paid for rents. We think this position was somewhat too broad. The plaintiff was not accountable to Gosler & Dakin for more of the rents than had been received by him or his agent for the use of the estate, during the continuance of the title in him. After that he had no right to the rents and profits, in whose ever hands they might happen to be found. If Goddard were sued in trespass for mesne profits by Gosler & Dakin, it would be no defence for him, to say that he had paid rent for the third quarter to the defendant, the same having accrued after the redemption; nor would the fact, that he had paid it without being notified by Southard, that his tenancy under him had expired, be of any avail in his defence. Gosler & Dakin were not bound to give him any such notice; and they have no legal claim against the defendant for rent received by him; for there is no privity of contract between them in reference thereto. Goddard, if compelled to account to Gosler & Dakin for the mesne profits for the quarter, next after the redemption, may have a remedy against the defendant for

money paid by mistake. We think therefore, that the exceptions must be sustained, and that a new trial should be granted.

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NATHANIEL TREAT *versus* THE INHABITANTS OF ORONO.

The law presumes, that official persons conduct legally and perform their duties, until proof is made to the contrary. And this principle applies to the acts of highway surveyors.

Where a surveyor of highways has made a return to the assessors of a deficiency in working out, or otherwise paying highway taxes, and they have assessed the amount in the next town tax, such assessment cannot be shown to be illegal and void, by proof of payment to the surveyor. The remedy of the aggrieved party is in a different manner.

Where a person claims to recover back money paid as the consideration for a deed of land sold to pay the taxes thereon, the burden of proof is on him to show a failure of consideration, and he must prove every fact necessary to make out his position, that the sale was void; although when a person attempts to establish a title by proof of an assessment and sale, the burden of proof is on him who would set up such title.

Ordinarily a collector of taxes, on making sale of land to obtain payment of the taxes thereon, inserts covenants in his deed respecting the regularity of his proceedings, but none respecting the title. The purchaser pays his money for such conveyance; the only security he expects to obtain is by his deed; and he cannot, without proof of some fraudulent representation or concealment, recover back the consideration. And in such case, it can only be recovered of a party to the fraud.

If a collector's sale of land to obtain payment of taxes is made under such circumstances, that no valid title passes to the purchaser, and this purchaser conveys the premises to another by quitclaim deed, there can be no recovery back of the purchase money by the last purchaser of his grantor on the ground of a failure of consideration, without proof of a total failure.

And if the last purchaser has entered into possession of the premises by virtue of his deed, and has received rents and profits therefrom, or has never been dispossessed or evicted, or has otherwise received benefit, by obtaining payment of those taxes, or by obtaining the title at a very reduced valuation, on account of the existence of his apparent title, he cannot recover back the consideration paid.

AT the trial before TENNEY J. nearly twenty witnesses were examined, and several depositions, deeds, agreements, receipts,

notices and records were read; and after all the evidence had been introduced, on each side, the parties agreed, that the whole Court should upon that evidence, so far as the same is legally admissible or not objected to, render such judgment as the law applicable thereto should require; and that the Court might infer any facts, that a jury would be authorized to infer.

The case was argued, both as to the facts and the law, by

*Kent* and *Washburn*, for the plaintiff — and by

*J. Appleton* and *Wilson*, for the defendants.

One position taken by Washburn in his opening was this: —

In the common case of a deed of release, and no title, we admit, the consideration money cannot be recovered back. It has been so decided in *Soper* v. *Stevens*, 14 Maine R. 133; and in *Joyce* v. *Ryan*, 4 Greenl. 101. But where the parties acted under a mistake as to the facts, or where the title failed through want of form, or want of authority in the grantor to pass what he intended and designed to pass, so that what title there was remained as before, then the money paid as the consideration may be recovered back. *Joy* v. *Oxford*, 3 Greenl. 134; *Shearer* v. *Fowler*, 7 Mass. R. 31; *Williams* v. *Reed*, 5 Pick. 480; *Claflin* v. *Godfrey*, 21 Pick. 1; *Lazell* v. *Miller*, 15 Mass. R. 207; 3 Mass. R. 74; 17 Mass. R. 380; 3 Pick. 261; 4 Pick. 228; *Norton* v. *Marden*, 3 Shepl. 45; *Haven* v. *Foster*, 9 Pick. 112.

*For the defendants* were cited *Hill* v. *Hobart*, 16 Maine R. 164; *Emerson* v. *Washington*, 9 Greenl. 94; 2 Kent, 379; *Gerrish* v. *Gardiner*, 23 Maine R. 46; 22 Pick. 18; 21 Maine R. 124; 16 Maine R. 281; 4 Greenl. 101; 14 Maine R. 133; 9 Greenl. 128; 9 Cowen, 674; 5 East, 449; 2 Shepl. 364; Chitty on Cont. 653.

The view of the facts taken by the Court appears in the opinion drawn up, as follows, by

Shepley J. — The claims of the plaintiff arise from different sources and transactions, and they must be separately considered.

He first claims to recover the amount of a promissory note, made on July 20, 1837, payable to the town for $110,67. It was paid by the plaintiff to the town treasurer, on June 27, 1838.

It appears, that certain real estate was assessed in that town, in the year 1835, to Samuel Veazie. That an item of $98,87, for a deficiency of a highway tax, made in the year 1834, composed a part of that assessment. That Samuel Page, a collector of taxes in that town for the year 1835, advertised and sold to the plaintiff, on April 21, 1837, the estate so assessed to collect a balance of taxes then remaining unpaid, and received therefor by order of the selectmen, on July 20, 1837, the above named note; and on that day made a conveyance of the estate to the plaintiff. Veazie testifies, that he had caused the highway taxes, assessed on his estate for the year, 1834, to be paid in labor upon the highways during that year.

The plaintiff alleges, that he obtained no title by that conveyance; and that he is entitled to recover back the amount of the consideration paid for it. It was provided by statute, 1821, c. 118, § 13, that the surveyor of highways shall, at the expiration of his term, render to the assessors a list of such persons, as shall have been deficient in working out or otherwise paying their highway taxes. And that the assessors should put the deficient sums in a distinct column in the next assessment for the town tax to be collected, as other taxes were. There is no proof in this case, that the surveyor of highways, to whom the tax was committed for collection, made such a return to the assessors, upon which their assessment of a deficiency was founded. The law presumes, that official persons conduct legally and perform their duties, until proof is made to the contrary. When a surveyor has made return of a deficiency to the assessors, and they have assessed the amount in the next town tax, such assessment cannot be shown to be illegal and void by proof of payment to the surveyor. The remedy of the aggrieved party would be an application to the assessors for an abatement, where such proof should avail him, or a suit against the surveyor to recover for the injury occasion-

ed by his false return. The burden of proof is upon the plaintiff to show a failure of consideration, and he must prove every fact necessary to make out his position, that the sale was void. When a person claims to recover back money paid, the burden of proof is not upon the same party, as it is, when a person attempts to establish a title by proof of an assessment and sale. Ordinarily the collector of taxes receives the money and the town is not a party to the transaction, and his deed conveying property sold usually contains covenants respecting the regularity of his proceedings, but no covenants respecting the title. The purchaser pays his money for such a conveyance, which is the only security, which he expects to obtain; and he cannot, without proof of some fraudulent representation or concealment, recover back the consideration paid. *Emerson* v. *The County of Washington*, 9 Greenl. 88; *Sawyer* v. *Vaughan*, 25 Maine R. 337. And in such case it could only be recovered from a party to the fraud. In this case the town became so far connected with the sale as to receive the plaintiff's note to itself instead of cash from the collector. But it could not have been the expectation of either party, that it was thereby to assume a responsibility, which otherwise would not have existed. To allow a person to purchase at such a sale, as he often may, a valuable estate for a trifling sum, and to take a deed from the collector without covenants of title, and to become the absolute owner of the estate, if the title thus acquired, should prove to be good, and if not good, to recover back the consideration paid, with interest, and thus to derive all possible advantage from the contingency, without being subjected in any event to a loss, would present a case anomalous as a business transaction, showing that it could not have been the intention of the parties. In this case there is no evidence, that the title has been decided to be invalid, or that he has been evicted; and he is not entitled to recover for this item of his claim.

His next claim is to recover a part of the sum of $669,73, paid to the town as the consideration of a conveyance made by the selectmen to him, on August 24, 1838. It appears,

that twenty-two saw mills and privileges, eight lath machines under them, and one hundred and sixty acres of land, formerly owned by William and Jeremiah Coburn, Elihu Baxter and others, with the buildings thereon, were assessed, in the year 1837, to the Bangor Lower Stillwater Mill Company. That the plaintiff was the acting agent of that company, from July, 1836, to the year 1839, that John B. Smith, a collector of taxes for the year 1837, advertised and sold these estates, to collect the taxes assessed upon them, on May 7, 1838, to John Hutchins, Jr. for the sum of $629,54, being the amount of the taxes and charges of sale. That Hutchins, as first selectman, was authorized by a vote of the town "to bid off for the benefit of the town, non-resident lands advertised to be sold for taxes, provided no other person or persons shall appear at the time and place of sale, to bid off the same." The town at its meeting on April 30, 1838, having authorized the selectmen to hire a large sum of money on the credit of the town to pay outstanding orders, they made an arrangement with the plaintiff, by which they obtained a discharge of certain claims against the town and money to pay other debts and expenses, as the consideration of a conveyance made by them to him, of the estates purchased by Hutchins as agent, and conveyed by the collector to the town, the deed of conveyance was signed by them as selectmen. It was a deed of release, and contained no covenants but the following; "we do covenant with the said Treat, his heirs and assigns, that we will warrant and forever defend the premises to him the said Treat, his heirs and assigns, forever, against the lawful claims and demands of all persons claiming by, through or under us."

The town received the benefit of that conveyance, and has never repudiated the transaction; or claimed any title in the premises since that conveyance. If the collector's sale and conveyance did not affect the title, the plaintiff being then agent of the company, might perhaps have been considered as extinguishing any pretence of title by a payment of the taxes for the benefit of the company, had the company claimed to consider him as acting for its benefit. The sale and convey-

ance of the collector may be considered as inoperative by reason of its having been made in such a manner and without, so far as it appears, receiving any thing in payment. If the plaintiff however has entered into possession of the premises by virtue of his conveyance from the selectmen and has received rents and profits from them, or has never been dispossessed or evicted, or has otherwise received benefit by obtaining payment of those taxes, or by obtaining the title at a very reduced valuation on account of the existence of his apparent title, he cannot recover back the consideration. For it is obvious, that money paid for a conveyance of lands containing such covenants, cannot be considered as paid without consideration; and there can be no recovery on the ground of a failure of consideration without proof of a total failure. It becomes necessary to inquire, whether the plaintiff has derived benefits from the conveyance made by the selectmen to him. There appears to have been two blocks of saw mills, one containing sixteen, and the other six saws. Gershom B. Weston and others, trustees of the company, conveyed to the plaintiff, on October 14, 1837, saw No. 7 and half of the lath machine under Nos. 7 and 8; and that property may be considered as freed from the supposed incumbrance of a tax title. William G. Bent states, that the plaintiff since his purchase has occupied all but four in the block of sixteen saws. Myrick Emerson states, that the plaintiff since that time has occupied all those saws, that have been in operation except the first four, which belonged to Cooper; and that he sold two of the mills to Strickland and others, which were taken down. Edmund Kimball states, that the plaintiff claimed saw No. 5, in that block, by tax titles, which he considered to be worthless, and that he sold it to the plaintiff, in the year 1841, for $500, and cheaper than he would have done, had it not been for the tax, because he did not want trouble. It appears from the testimony of John B. Hill and Jabez True, that the Newbury Bank owned four in the block, of six saws; and offered to allow the plaintiff to retain two of them to extinguish his tax titles, or to take $1000, for its whole title,

and that the plaintiff paid the $1000 and received a conveyance from the Bank, of the four saws, on April 17, 1841.

The trustees of the company, appear to have made a conveyance of the property, on October 16, 1837, to John Daggett, Alden Weston, and Ebenezer Harlow. And Daggett, G. B. Weston and Harlow, made a contract in writing with the plaintiff, under date of October 1, 1840, which after reciting, that the plaintiff had claims upon the company to the amount of $1900,85, "as also certain other claims for taxes, which ought to have been paid by said company and amounting to the sum of $973,58;" and that he had been paid towards the first named sum, $1006,34, contains this clause. "He, said Treat, hereby fully releases and discharges said Daggett, Weston, Harlow and John M. Mayo, who was formerly a trustee in said Bangor Lower Stillwater Mill Company, from any and every liability of every description on account of said taxes." And it appears from the testimony of Bent and Emerson, that the plaintiff admitted, that it was part of an arrangement between himself and Daggett, Weston and Harlow, by which he became the purchaser of their rights in that property by being allowed his claims, including the taxes, in part payment therefor. They conveyed to him on the same day their interest in that property computed to be ten hundred and ninety-five twelve hundredth parts. It appears therefore, that the plaintiff has claimed and received, by virtue of the conveyance made by the selectmen to him, benefits to a large amount by rents and profits derived from the property, and by the purchase of a large portion of it by having those taxes allowed in part payment, or by purchasing at a reduced price on account of that supposed incumbrance upon the title. And it does not appear, that he has surrendered, or been evicted of any portion of the property included in that conveyance, without having received payment of the taxes, excepting the four saws relinquished to Cooper. There is not only no pretence for the claim on the ground of a total failure of the consideration, but there is reason to believe, that the purchase has proved to have been an advantageous one.

He also claims to recover back a small part of the sum of $620, being the consideration paid for a conveyance of certain other estates made by the selectmen of the town, on Nov. 17, 1838. The same collector had sold these estates for the collection of taxes assessed upon them, and conveyed them in like manner to the town. The claim is to recover the amount of the taxes on the lot and store built by Bakeman, being $8,82, and on the Longfellow boom, being $6,00 and one half of the amount on the Averill boom, being $8,68. It is not therefore contended, that there has been a failure of consideration but to a small extent. Most of the remarks respecting the last item apply with equal or greater force to the present.

The remaining item claimed is for taxes assessed upon the property since the conveyance of it to the plaintiff and paid by him; and this item falls of course on failure to recover for the others.

*Plaintiff nonsuit.*

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BENJAMIN G. CAMPBELL & *al. versus* DANIEL L. KNIGHTS.

A sale of real estate by an administrator for the payment of debts, under a license from the Probate Court, is invalid, and no title passes to the purchaser by a deed thereof from the administrator, and no estoppel is created thereby, if the administrator neglects to take the oath required by law prior to the sale.

WRIT of entry. This is the same action in which the case arose reported in vol. 24, p. 332.

At the new trial before TENNEY J. it was admitted, that on April 10, 1833, the demandants conveyed the premises in controversy to Samuel Moore; that he, on the same day, reconveyed the same in mortgage; that the wife of the tenant was then the wife of Moore, and did not join in the conveyance or relinquish her right of dower; and that Moore afterwards died intestate. The tenant produced the record of the proceedings in the probate court, assigning dower in the premises to the

widow on Oct. 20, 1834; and shew that Kendrick was appointed administrator of the estate of Moore, December 31, 1833; that Kendrick was duly licensed as administrator to make sale of the real estate of Moore, and did make sale of the premises demanded on Dec. 1, 1834, to the demandants; that as administrator, he gave them a deed of "all the right, title and interest which the said Moore had at the time of his decease to redeem the demanded premises from the mortgage aforesaid, reserving the widow's dower which had been assigned and set out to her before;" that the demandants accepted that deed, and caused it to be recorded; that on the last Monday in March, 1840, the administrator rendered into the probate court, his account, wherein he charged himself with the proceeds of the sale of the real estate to the demandants; and that on obtaining the license he gave the proper bond required before the sale of real estate.

The register of probate, called by the tenant, testified, that he had been register about four years in the county of Penobscot, has made search and finds the petition, the license and the bond, but finds no return of sale, of oath before sale, or advertisement, and nothing subsequent to the granting the license and filing the bond, excepting the said account of Kendrick, as administrator, on the files in the probate office.

Joseph Kendrick, the administrator, called by tenant, testified that he had the license to sell, and he had before him the form of oath, but does not recollect distinctly having taken it; that he knew he was bound to do so, before the sale, and that if he did not, he should make himself personally responsible; that it was his intention to do his duty according to law; that he has no distinct recollection, that he did not take the oath; that he does not distinctly recollect, that he made out a return of his doings, but kept all the probate papers separate from others, carried them to the probate office, and shew them to the Judge, and took away such as the Judge thought proper that he should take, and left the remainder; knew that it was his duty to make a return, and intended to do his duty, and has no recollection that he did not do it. Notice of sale was

admitted to have been legally given. The demandant's counsel objected to the competency of Joseph Kendrick, and his testimony in the case was received subject to objection.

After all the evidence had been introduced, it was agreed by the parties, that it should be reported, and that the Court should enter such judgment upon the facts, so far as they were legally admissible, upon nonsuit or default, as the law requires; and that they have the power to make such inferences as a jury would do.

*Kent*, for the plaintiffs, contended that the assignment of dower was illegal, and that he had a right to make this point notwithstanding the former decision.

We did not introduce the administrator's deed, but objected to its introduction, until proof had been made, that the administrator had done all that the law requires to make the sale legal. That was not done. There was no evidence, that the oath had been taken. The deed, therefore, passed nothing to the demandants; was entirely void; and the plaintiffs cannot thereby be estopped from recovering upon their perfect title under the deed of mortgage. Stat. 1821, c. 51, § 69; *Parker* v. *Nichols*, 7 Pick. 111.

*Hathaway*, for the defendants, said the only question here was, whether the oath was taken by the administrator, or rather whether the sale was invalid in consequence of an omission by him to take the oath. Every thing besides was decided in the former case between the parties. 24 Maine R. 332.

He contended, that there was sufficient evidence to show, that the oath was taken by the administrator prior to the sale.

He also contended, that the demandants were equally estopped by their deed, whether the administrator did, or did not take the oath. They cannot impeach their own title; and we did not do it by introducing the deed.

The opinion of the Court was drawn up by

TENNEY J. — It was held by the Court in this case, 24 Maine R. 332, that the assignment of dower to the widow of

Samuel Moore, before her marriage with the tenant, was a valid assignment, and must be effectual against all persons, excepting the mortgagees, and those claiming under them. The evidence upon that point at this time does not vary from that adduced on the former trial, and we see no reason for disturbing the doctrine there advanced.

The tenant, in his defence to the action, relies upon a deed given by the administrator of the estate of Samuel Moore to the demandants, of the right in equity of redeeming from the mortgage to them, therein "reserving the widow's dower, which has been assigned and set out heretofore." It is insisted by the demandants, that this deed has no validity, and that they are not estopped thereby, to contest the widow's right under the assignment, to hold against them as mortgagees.

The tenant attempted to show, that the sale of the equity of redeeming was in all respects according to the requirements of the statute; but there was no evidence, that the administrator took the oath required, before the advertisement and sale, or that return of his doings touching the same was ever made to the probate office; and that no record or document can be found, from which it appears, that any thing was done by the administrator in reference thereto, subsequent to the granting of the license, and the bond given upon receiving such license, excepting the account of administration, in which he charges himself with the sum of $220, received of Campbell & Mills for real estate sold them. These omissions were important, and are such as to render the sale and the deed inoperative and void. Stat. 1821, chap. 51, sect. 69; *Parker* v. *Nichols*, 7 Pick. 111.

The demandants have not admitted, that the husband of the tenant died seized, but claim by a paramount title under their mortgage. The administrator by virtue of his office had no right of possession of the deceased's lands, and his deed gave no seizin. *Marr* v. *Hobson & al.* 22 Maine R. 321.

It is not pretended, that there has not been a breach of the condition of the mortgage, and the demandants are entitled to the conditional judgment, and the tenant has the right of redemption in him.

## William Shimmin *versus* John N. Inman.

The statutes of this State have regarded the sale of the estate assessed, to be one mode of collecting taxes. And the provisions of the second section of the statute of 1831, c. 591, were continued in force by the tenth section of the act of amendment to the Revised Statutes, so far as it respected sales of land for the payment of taxes, assessed before the Revised Statutes took effect.

When the law provides, that the assessors shall set forth in their lists "the number of acres of unimproved land, which they may have taxed on each non-resident proprietor of lands, and the value at which they have estimated the same," if several such lots are taxed, the number of acres in each lot, and the valuation thereof should be stated separately.

Where a tax is assessed on unimproved lands of non-resident proprietors whose names are known and stated, the collector must give the name of the owner in his advertisement.

If taxes are assessed upon several lots of unimproved land, as the property of non-resident owners whose names are unknown, it is essential to the validity of the tax, that each lot should be valued and assessed separately.

When the statute requires, that the collector shall record and return to the town treasurer "his particular doings in the sale of unimproved lands of non-resident proprietors" within thirty days after the sale, he must comply with the provision, or the sale will be invalid.

A mere statement by the collector, that on a certain day "C. D. bought of D. W. collector, lots of land as follows, (describing three lots by their numbers,) containing 230 acres, $5,82. Recd. payment, D. W. Collector of H. for the year 1835," is not a sufficient return.

Trover for a quantity of mill logs, cut by the defendant and taken from lots numbered 16, 17 and 18 on Penobscot river, in the town of Howland.

The plaintiff proved title in himself to these lots, by deed from the then proprietor thereof in 1824.

The defendant claimed the right to cut the timber as the owner of the lots, and claimed to have title, through a mesne conveyance, under a deed from Daniel Wood, collector of taxes for the town of Howland for 1835, to one Charles Davis. This deed was dated Feb. 6, 1836. If a title to the land, which was at that time unimproved, passed by this deed, the defence was made out, and if it did not, the plaintiff was entitled to recover.

At the trial before Tenney J. the defendant introduced the

deed of the collector, proceedings of the town in raising the money, and in the choice of the assessors and collector of taxes, their qualification to act, and their assessment of the taxes. Their admission was objected to at the trial. The case then states that the defendant also introduced the records of assessment for 1835, signed by the assessors, in which is the following: —

| | No. lots. | Range or Division. | No. of acres. | value. | St. & Co. tax. | Town tax. | Deficiency. 1834. | Sum Total. |
|---|---|---|---|---|---|---|---|---|
| Wm. Shimmin | 16 | | | $ c. | $ c. | $ c. | | $ c. |
| or | 17 | on Penob. | | | | | | |
| unknown. | 18 | River. | 240 | 240,00 | ,61 | 3,22 | | 3, 83. |

Also warrant to the collector signed by the assessors, dated May 28th, 1835. Also assessments by the assessors, and by them committed to the collector in which is the following: —

| | No. lots. | No. acres. | value. | St. & Co. tax. | Town tax. | Def. Highway, 1834. | Sum Total. |
|---|---|---|---|---|---|---|---|
| Wm. Shimmin | 16 | 82 | $ c. | $ c. | $ c. | | $ c. |
| of Boston, or | 17 | 78 | | | | | |
| unknown. | 18 | 80 | 230,00 | ,61 | 3,22 | | 3, 83 |

Also the Eastern Argus was admitted to be the State paper, and the Eastern Republican a paper printed in the county, and it was admitted that notice of the sale was duly given unless "Sherman or unknown," instead of "Wm. Shimmin or unknown," may be considered erroneous.

It was admitted that a paper, called a return, of which the following is a copy, was filed with the treasurer within thirty days after the sale.

"Howland, February 6, 1836.

"Charles Davis

"Bought of Daniel Wood, Collector, lots of land as follows, viz. —

| *"On Penobscot river, No. of lots.* | *Range.* | *No. of acres.* | *Taxes & charges,* |
|---|---|---|---|
| 16 | 00 | | |
| 17 | 00 | | |
| 18 | 00 | | |
| | | 230 | $5,82 |

"Howland February 10th, 1836,

"Received payment.

"Daniel Wood. Collector of Howland for the year 1835."

The presiding Judge instructed the jury, that the defendant had not shown a title in himself to the lots of land in contro-

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

*Cutting*, for the defendant, said that in consequence of the difficulty in sustaining a tax title, the Stat. of 1831, c. 501, was passed, whereby it only became necessary, to sustain such title, to produce the collector's deed, the assessment and warrant to the collector, and to show that the collector advertised according to law. Although this statute was repealed when the revised statutes went into effect, its provisions were retained by the act of amendment. And if it were otherwise, the same statute, was enacted before this trial took place, and applied to all cases, before as well as after its passage.

He contended, however, that if necessary to prove the legality of the previous proceedings, it had been done ; and also, that the proceedings of the collector in advertising and selling the property, and in making his return to the treasurer had been legal. The error in the notice, in substituting *Sherman* for *Shimmin*, was wholly immaterial, as the land was taxed as if the owner was unknown, and the name might have been wholly omitted. If the return to the treasurer is not in exact form, the omission to perform a subsequent act cannot affect the validity of the sale.

*Rowe*, for the plaintiff, contended, that the statute of 1831, affecting the remedy only, or mode of proof, was not in force at the time of this trial. This act related merely to the evidence in actions after the sales, and not to the collection of taxes; and therefore was not saved by the tenth section of the act of amendment. And he made various objections to the proceedings in raising the money, choosing and qualifying the assessors and collector, and in the assessment of the taxes.

If the tax was assessed, as where the owner of the land is known, then the advertisement was wholly defective, as the name of the owner is not given. And if it is to be considered to be taxed, as where the owners are unknown, then the collector wholly failed to comply with the requirements of the law in advertising. He also insisted, that a return, " of his partic-

ular doings in the sale," was indispensable; and that the paper produced as such was no compliance with the provisions of the statute. *Porter* v. *Whitney*, 1 Greenl. 306.

The opinion of the Court was drawn up by

SHEPLEY J. — The property of the plaintiff in the mill logs must depend upon his title to the lots of land, on which they were cut. Those lots were conveyed to him by William Hammatt on November 3, 1824. The defendant shows that they were sold and a conveyance of them made to Charles Davis by a collector of taxes of the town of Howland, on February 6, 1836, to collect taxes assessed upon them in the year 1835.

The act of March 12, 1831, provided that it should be sufficient for a party claiming under such a sale to produce in evidence the collector's deed, the assessments signed by the assessors, and their warrant to the collector, and to prove, that the collector complied with the requisitions of law in advertising and selling the estate. That act was repealed by the general repealing act of the Revised Statutes. The tenth section of the act of amendment of those statutes provided, that all laws now in force relating to the collection of taxes shall remain in force for all the purposes of collecting any taxes, which may have been assessed prior to the time, when the Revised Statutes shall take effect. It is said, that this provision does not declare, that the kind of proof to establish the validity of such a conveyance should continue to be the same; that the former acts are continued in force only for the purpose of collecting taxes. Our statutes have regarded the sale of the estates, assessed, to be one mode of collecting taxes; and the proof that such sale has been legally made, as an essential provision to induce persons to become purchasers and to pay the taxes. Hence it is found, that the provisions respecting the kind of proof were contained in "an additional act concerning the assessment and collection of taxes." When a similar provision was made respecting the proof of sales made under the act of March 22, 1844, it was incorporated into an act "regulating the collection of taxes on real estate

in incorporated places." It appears to have been the intention to continue all the provisions contained in the acts then in force, providing for the collection of taxes, so far as it respected taxes assessed before the Revised Statutes took effect. The inquiry in this case must therefore be limited to a consideration of the questions, whether the assessment appears to have been legally made; and whether the collector in making the sale complied with the requisitions of the law.

The fourth section of the tax act of the year 1835 provided, that the assessors should set forth in their lists "the number of acres of unimproved land, which they may have taxed on each non-resident proprietor of lands, and the value at which they have estimated the same." This may be done, when the owner is known, if all his lands are valued together, and assessed together. But when the owner is unknown, if several lots were valued and assessed together, which might prove to be owned by different persons, there would be no compliance with that provision requiring the number of acres assessed to each non-resident proprietor to be stated. The eighth section of the same act provided, that the assessors should make their lists in substance, as should be prescribed by the treasurer of the State. The assessors in this instance probably supposed, that they had done so. The numbers of each lot were stated in one column; in another the whole number of acres, but the number of acres contained in each lot was not stated; in another the valuation was made upon the whole and not upon each lot; and the assessment was made upon the whole and not upon each lot separately. The lands were advertised by the collector as assessed to "Sherman or unknown." They had been assessed to "Wm. Shimmin or unknown." This does not show a compliance with the provision of statute c. 116, § 30, which required, that he should state the names of the proprietors when known, if the assessment be considered as made on lands, the owner of which was known. If the assessment can only be considered (as it probably must be) as made on lands of unknown proprietors, then the collector was required by that section to "publish the sum of the taxes on

the several rights, numbers of lots, or divisions." When the assessment has been made on "rights" or "divisions," it can only be required, that such right, division, or tract of land, should be described, valued, and taxed alone and not with other lands. But when it is made upon lots, if they are not valued and taxed separately, the collector cannot advertise the sum of the taxes on the several numbers of lots as required.

There may be a great difference in the value of the lots, and when taxed, the owners being unknown, the lots may be owned by different persons; and if a joint valuation and taxation were allowed, one owner could not ascertain the amount of tax on his own land, or pay it, or redeem the land, when sold, without paying the tax on all the other lands assessed with it, and with which he had no connection. A fair construction of the statutes seem to require, that each lot should be valued and assessed separately, when assessed as lands the owners of which are unknown. Although in this case the several lots appear to have been owned by one person, that fact cannot dispense with the law, or excuse a deviation from it when the assessment was made as upon lands of unknown persons.

There is another defect. The collector does not appear to have complied with the requisitions of law by recording and returning to the town treasurer "his particular doings in the sale of unimproved lands of non-resident proprietors," within thirty days after the sale, as required by the act of March 6, 1826. The paper returned by him to the treasurer is in no respect a proper compliance with that provision of the statute. The soundness of the argument cannot be admitted, that the neglect of the collector to do a subsequent act should not prejudice the title of the purchaser. For his title is made to depend upon proof of a compliance by the collector with the requisitions of the law.

*Exceptions overruled.*

ALBERT MERRILL *versus* THE INHABITANTS OF HAMPDEN.

It is the duty of the Judge to instruct the jury upon every point of law raised by the case, if thereto requested by either of the parties; but he is not bound to give the instruction in the language of the request, even if the principle therein contained be correct. In determining whether the instructions requested were properly withheld or given, they must be examined in connection with the cause of action, the proof adduced, and the other instructions given. But it is never required, that the jury should be instructed upon abstract principles of law, or upon hypothetical points and cases.

In an action against a town to recover damages for an injury alleged to have been caused by a defect in a highway, the defendants are not bound to prove that the plaintiff's carelessness was the cause of the injury, to be relieved from liability; but the plaintiff is bound to prove, that he was in the use of ordinary care at the time of the accident, or he is not entitled to a verdict.

If there be a defect in the road, however small, which occasions an injury, the party injured using common and ordinary care, the town is liable.

If a road be safe and convenient, it is all that is required of the town. Such a state of repair in a road as would free a town from exposure to an indictment and conviction, would protect it also against a claim for damages for an injury sustained by an individual, while traveling thereon.

The law has not prescribed what imperfections in a road will constitute the defect referred to in the statute; it is a fact for the jury to settle, what condition of the road would render it safe and convenient or otherwise.

TRESPASS on the case to recover damages, alleged to have been occasioned by a defect in the road in the town of Hampden, over which the plaintiff was passing, and at which defect his horse was frightened, his wagon overturned, and he thrown out with violence and severely injured.

At the trial before TENNEY J. certain instructions were requested by the plaintiff, which the presiding Judge declined to give, and gave such as he deemed right in the case. The verdict was for the defendants, and the plaintiff filed exceptions to the refusal to instruct, and to the instructions given.

The material parts of the declaration, the requests for instruction, and the instructions given, are all found in the opinion of the Court.

*J. Appleton*, for the plaintiff, said that the first requested

instruction was believed to have been correct, and should have been given.

The second instruction requested, is in accordance with the provisions of the statute, is plain and specific in its language, and should have been granted. Rev. St. c. 25, § 89, provides, that "if any person shall receive *any* bodily injury or shall suffer any damage in his property through *any* defect or *want* of repair, in *any* highway, town way, &c." It is immaterial where the road is, or *what* or *how slight* the defect or want of repair. For any and every defect the inhabitants of towns are liable. The statute treats all roads alike, and recognizes none in which it allows the existence of *any* defects. The statute rule was refused to be given.

The instruction corresponding to this request was objectionable in divers respects. It is objectionable, because it says there is no rule of law on the subject; because it implies, that there is a rule varying, fluctuating, and indeterminate, which rule the Court say, that it cannot state, but leave entirely to the good sense of the jury; thus allowing them to be judges both of the law and the fact. If no precise and distinct rule "as to the kind and magnitude of the defect" can be laid down, can a vague and indistinct one be laid down? If so, why not state it? The fair implication from the language of the Court is, that there are, or may be, defects of some kind, and of some magnitude, for which towns are not liable. But what they are, is left in a state of uncertainty.

But who is to determine the question of law arising? According to the instruction given, the rule is not found in the statute; is not to be derived from the Court; but "is to be left to the good sense, experience and discretion of the jury." The juries are to be judges of the law as well as of the fact. The next clause in the instructions, that if there "was any defect, however small, which occasioned the injury, &c." "the town would not be liable," must be taken in connection with what precedes and follows, and is at variance with both. The precise and distinct rule of the statute is disregarded.

The instruction to the jury is, to consider what would be

defects "in highways like the one in question." Such is the rule or want of rule laid down for the jury. One rule for one road, and another rule for another road. It is directly adverse to the statute. *Any* defect in *any* highway renders the town liable for damages occasioned by it.

The third requested instruction should have been given. It was alleged in the writ, that the injury was occasioned by the fright of the horse — and the broad question submitted by the request was — whether a road is defective or out of repair when unusual appearances are to be allowed to remain within its limits, or upon the traveled path, which would be likely to frighten horses — and whether a town would be liable for an injury occasioned by such defect. It was contended in argument, that the town was liable for defects which might frighten a horse, and thereby occasion an injury — and that the principle had been recognized by the courts. *Howard* v. *North Bridgewater*, 16 Pick. 190; *Bigelow* v. *Weston*, 3 Pick. 267; *Cobb* v. *Standish*, 14 Maine R. 198. The instruction given entirely excluded the case of any injury caused by a fright.

It was also contended, that the instruction to the jury, that the affirmative was on the plaintiff to show ordinary care on his part, was erroneous. The law presumes ordinary care, until the want of it is shown. *Foster* v. *Dixfield*, 18 Maine R. 380.

*H. Hamlin* argued for the defendants, wherein he contended, that the two first instructions requested by the plaintiff had no relevancy to the facts proved in the case, and therefore were merely requested instructions upon abstract principles of law. The Court is not obliged to give such instructions. *Cummings* v. *McKinney*, 4 Scammon, 57.

The instructions given, or requests for instructions, must be taken as applied to the allegations in the plaintiff's writ and to the evidence in the case.

The sections 57 and 89 of the statute should be taken together, as defining the duties and liabilities of towns. The first describes the duties of towns to make their roads safe and

convenient for travelers. If that be done, towns are discharged from all liability. And the law is, that it is sufficient, if travelers can pass upon the road with safety and convenience, *using common and ordinary care.* To be defective, the road must present such obstruction, as will cause an injury to the traveler, who uses ordinary care; and if passing with a horse and wagon, as the plaintiff alleges he was, they should be suitable ones for such business. When the facts are found, what constitutes a defect is matter of law, but the jury must decide the facts. They must necessarily say, whether any defects proved did in truth cause the injury. They must determine, whether the injury was caused by the badness of the road, the viciousness of the horse, or the carelessness of the driver. The ruling of the Court submitted nothing more to the jury, than it was their appropriate province to decide.

The presiding Judge is not bound to give a requested instruction, even if correct, in the very language of the request, but only in such form and manner as comports with the real merits and justice of the case. 2 Story's Rep. 609.

The objections made by the counsel to the ruling of the Court, exist only in the imagination of the counsel. The law, as favorable to the plaintiff as his request, was very clearly laid down by the Judge. The town was liable for any injury caused by any defect, however small. What would amount to a defect, would scarcely admit of any definite rule, and must necessarily be left in some degree to the good sense of the jury. Every case must depend upon its own circumstances. No two cases can be expected to be exactly alike. It is for the jury, and not the Judge, to decide, whether any thing proved to have been in the road at the time caused the "fright" of the plaintiff's horse, and whether any fright of the horse occasioned the injury to the plaintiff.

The plaintiff was bound to prove, that he was in the use of ordinary care at the time of the alleged accident. 2 Pick. 621; 7 Pick. 188; 10 Maine R. 187.

*Kelley*, for the plaintiff, replied.

The opinion of the Court was drawn up by

TENNEY J. — The plaintiff alleges in his writ, that the road described therein "was not amended and in good repair, but," at the time described, "was and long had been defective and unsafe for travelers passing and repassing with their horses and carriages;" "by reason of a large hole being broken through into a water course or causeway," &c. "and by reason of said hole, the horse with which the said plaintiff was riding took fright at said hole, and suddenly sprang or jumped with great violence to one side of the road," &c., "by which means the plaintiff was thrown headforemost from the wagon, in which he was riding, upon the ground,&c. whereby the plaintiff's head and face, &c. were badly bruised," &c. The plaintiff introduced evidence tending to show, that there was a hole in the road broken partially through a culvert, which hole caused the horse to be frightened, and to turn suddenly from the traveled part of the road, &c. Most of the plaintiff's witnesses represented the hole as partially filled with stones. The defendants introduced evidence tending to show, that before the accident, on the same day, the hole had been entirely filled with small stones, and the defect which had existed was perfectly repaired. Some of the defendants' witnesses testified, that there might be some depression where the hole had been. The plaintiff relied upon proof of the existence of the hole, and there was no proof that there was any unusual appearance, other than the existence of the hole; or the mode of filling it with stones.

The plaintiff's counsel requested, that the jury might be instructed: — 1. That if the plaintiff received a bodily injury through any defect or want of repair, however slight, in the highway, over which he was traveling, he is entitled to recover for such damages as he has sustained, if the town had reasonable notice of the defect; unless the defendants show, that the plaintiff was guilty of carelessness, and the injury was occasioned by such carelessness. 2. That the law does not regard the magnitude of the defect, but requires, that there should not be any defect. 3. That if the hole

was filled up with stones, and not covered, so that it would be likely to frighten horses, and if the plaintiff's horse was thereby frightened, it would be a defect for which the town would be liable. These instructions were not given, but the jury were instructed, that to recover, the plaintiff must show, that there was a defect in the road, that the injury was occasioned thereby, and that the plaintiff was using care, such as men commonly and ordinarily use in like circumstances. As to the kind and magnitude of the defect, which would render the town liable, no precise and distinct rule could be laid down for all cases, but upon this point much must be left to the good sense, experience and discretion of the jury; if there was any defect however small, which occasioned the injury, the plaintiff using common and ordinary care, the town would be liable.

At the request of the defendants, the jury were instructed "that if the hole in the road was so filled with stones before the accident, as to be safe for the horse to travel over, or carriage wheels to pass over in traveling; without any danger, the fact, that the horse was frightened at its appearance, would not render the defendants liable for any injury accruing on that account."

It is the duty of the Judge to instruct the jury upon every point of law raised by the case before him, if thereto requested by either of the parties; but he is not bound to give the instruction in the language of the request, even if the principle therein contained, be correct. In determining whether the instructions requested were properly withheld or given, they must be examined in connection with the cause of action, the proof adduced, and other instructions which were given. It is never required, that the jury should be instructed upon abstract principles of law, or upon hypothetical points and cases.

All roads within the bounds of any town are to be duly opened and kept in repair, and amended from time to time, that the same may be "safe and convenient" for travelers and their horses, teams, carts and carriages; and in default thereof, such town on presentment by the grand jury, and conviction,

shall pay such fine as the Court may order. Chap. 25, sect. 57, Rev. Stat. If any person shall receive any bodily injury, or shall suffer any damage in his property, through any defect or want of repair, or sufficient railing, &c., he may recover of the county, town or persons, who are by law obliged to repair the same, the amount of the damage sustained, if such county, town or persons had reasonable notice of the defect, &c. Chap. 25, sect. 89, Rev. Stat.

The instruction first requested by the plaintiff was properly withheld. The plaintiff was bound to prove that he was in the use of ordinary care, at the time of the accident, or he was not entitled to a verdict; and the defendants were not bound to prove that his carelessness was the cause of the injury, to be relieved from liability. *Butterfield* v. *Forrester*, 11 East, 60. In *Adams* v. *Carlisle*, 21 Pick. 146, which was an action for damages sustained by an alleged defect in the highway, the Court say, "the burden of proof is on the plaintiff, not only to show defects in the highway, but that he was free from negligence, or in other words, using due care and skill." The authorities upon this point are numerous, and the uniform current of them is in accordance with the instructions given. The case of *Foster* v. *Dixfield*, 18 Maine R. 380, relied upon by the plaintiff, is not inconsistent with other decisions; the Court only express a doubt, whether direct and positive proof is essential.

The Judge instructed the jury, that if there was any defect, however small, which occasioned the injury, the plaintiff using common and ordinary care, the town would be liable; this was substantially a compliance with the second request of the plaintiff so far as it had application to the case.

The third request of the plaintiff, and the instruction given at the request of the defendants may be examined in connection. Such a state of repair in a road, as would free a town from exposure to an indictment and conviction, would protect them also against a claim of damages for an injury sustained by an individual, while traveling on the same. That the road be "safe and convenient" is all that is required. *Howard &*

*al.* v. *North Bridgewater*, 16 Pick. 189. If a road is safe, it would seem to follow, that the town, which was bound to keep it in repair, would be relieved from liability to an individual for an injury received thereon; if he were entitled to recover for such injury, it must be, because the road was unsafe, and not for want of convenience. If the defect described in a writ, for the recovery of damages for an alleged injury by reason of such supposed defect, and attempted to be shown by evidence, is one, which to a human mind is purely imaginary, but from its character, is calculated to terrify horses, trained so as to be suitable for ordinary use, and without any want of common care and skill in the driver, he is injured in consequence of such defect, the town might be liable, if they were seasonably notified. The case put by the plaintiff's counsel, of an injury arising from the fright of a horse, occasioned by his seeing beneath him the water, through wide spaces between the planks of a bridge over a rapid and agitated river, is one, which would probably create a liability in the party bound to keep the bridge in repair, to one injured by reason of its condition. If, however, the cause alleged is a *real* defect, and the evidence relied upon is confined wholly to sustain the cause alleged; and no attempt is made to prove, and no evidence is offered in the case tending to prove, that, if the defect had been repaired, at the time of the injury, there was any thing unusual in the appearance of the place, or calculated to produce an injury by the fright of a horse, it would be otherwise.

The plaintiff complains, that he was injured because the road was *defective and dangerous*, on account of a large hole, which frightened his horse. Witnesses for the plaintiff represented the hole as entirely open or partially filled with stones; witnesses for the defendants represented, that the hole which had been there, at the time of the accident was entirely filled with small stones, and perfectly repaired. No suggestion is made, that the materials, used for the repair, were not entirely proper for the purpose, if the repair was made; the case finds, that the appearance was not unusual, if the defect was repaired in the mode in which it was contended by the town, that it

was done; no attempt is shown to have been made, to prove, that even the appearance was calculated to frighten a horse, if no hole existed at the time of the accident; but the plaintiff relied upon the proof of the existence of the hole. If the town had the proper notice of the defect, and there was no want of care and skill in the driver, and the horse was suitable, the verdict shows under the instructions, that the jury found that the horse or carriage wheels in traveling, could safely pass over the place alleged to be defective and dangerous, without any danger. It is not to be expected that the aspect of the road would not undergo a change by filling a hole, and rendering the place where it was, safe as a carriage road, so as to occasion no danger. It would probably be impossible to find materials, and so place them, that the spot should appear precisely as it did before the defect existed, but if repaired in the usual manner, so that the appearance was not unlike roads, when similar injuries were repaired, the town could not be liable therefor on an indictment, and consequently not to an individual for an injury received. It does not appear from the case, that there was evidence, which called for the instruction last requested by the plaintiff and withheld; and it does appear, that the instruction given at the defendants' request was authorized.

It is insisted, that the statement made by the Judge to the jury, "that as to the kind and magnitude of the defect, which would render a town liable, no precise and distinct rule could be laid down for all cases; much must be left to the good sense, experience and discretion of the jury," was an abrogation of the requirement of the statute, that the road be safe and convenient. No such intention can fairly be deduced from the language used, and it is not perceived, that the jury could have so understood it. They were distinctly informed, that the town would be liable for any defect, however slight, which occasioned the injury, other necessary facts being established. It is manifest, that it was designed, that the jury should be informed, that the law had not prescribed what imperfections in a road would constitute the defect referred to in

the statute; it was a fact for the jury to settle, what condition of the road would render it safe and convenient, or otherwise; herein there was no error. Of the width of the traveled part of the road, whether it should fall off on each side from the centre, or be level, from one side to the other; whether there may be with propriety a depression in one place and an elevation in another, to what angle the hills shall be reduced, whether the way shall be made of one material or another, and many other things, connected with the requirement, that the road may be "safe and convenient," the law is silent, and might be determined somewhat by the circumstances attending each road. The evidence of the condition of a road, for a defect in which an indictment or civil action is tried, must be submitted to a jury, who find, whether there is or is not a defect.

*Exceptions overruled.*

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## WARREN GEORGE *versus* JAMES STUBBS.

Where chattels are sold on condition of receiving a certain sum in payment within a stipulated time, the title to the chattels does not pass until the money is paid.

But if one man sells chattels to another, and the title thereto passes, that title, so far as it respects creditors, cannot be transferred again to the seller merely by an acknowledgement in writing, that the property is his, without the payment of a valuable consideration therefor.

It is the duty of the Court, on request, to instruct the jury what the law is, applicable to the testimony in the case; but it is not its duty to express an opinion, on request, as to the effect of that testimony, when it is contradictory, or as to its tendency to produce a particular result.

The declarations of a witness, made to others, that he is interested in the event of a suit, do not prove him to be so, or that he is an incompetent witness.

TROVER for a yoke of oxen. The defendant justified the taking, as a constable, on a writ in favor of Lowell against Joseph Smith, alleging the property of the oxen, at the time, to have been in Smith. The only question made at the trial

before ALLEN, District Judge, was, whether the oxen were the property of the plaintiff or of Smith, on August 18, 1843, the time of the attachment.

The whole of the evidence is given in the exceptions, and enough of it is stated in the opinion of this Court to understand the application of the law to the facts.

The defendant, at the trial, contended that upon the evidence, the action could not be maintained; that the papers of July 14, 1841, were conclusive against the plaintiff; that the payment of the sixty-five dollars rendered the sale absolute; that by the terms of the contract, as proved, it was a sale, and the property passed absolutely, leaving it optional with Smith either to return the oxen or to pay the money; and that the acknowledgment of July 8, 1842, could not pass the property from Smith to the plaintiff.

The defendant also contended that the transactions relative to the oxen, between the plaintiff and Smith, was fraudulent as to Smith's creditors.

ALLEN, District Judge, instructed the jury, that the plaintiff had shown property in the oxen, unless the defendant proved, that Smith had paid the sixty-five dollars in pursuance of the terms of the contract of July 14, 1841; that the receipt signed by the plaintiff, and dated July 14, 1841, was evidence of such payment, and, if unexplained, would show such performance on the part of Smith as would vest the property of the oxen in him.

The presiding Judge further instructed the jury, that if from the testimony of Wood, and the other evidence in the case, they believed, that the payment by Wood to the plaintiff, referred to in said receipt, was prior in point of time to the contract dated July 14th, for the sale of the oxen, that then such payment could not be in discharge of the proviso in said contract of sale; and submitted it as a question of fact for them to determine upon the whole evidence in the case; that if they should find that said payment was made in the performance of the proviso in said contract, that they should render a verdict for the defendant, but if they should find that pay-

ment was not so made, they would return a verdict for the plaintiff.

The defendant also requested the Court to instruct the jury, that there was evidence tending to show, that the transactions relative to the oxen between plaintiff and Smith were fraudulent as against Smith's creditors, which instruction the Court declined to give, and gave the jury no instructions on the subject.

To all which rulings and instructions of the Judge the defendant excepted.

Copy of paper dated July 14, 1841: —

"Borrowed and received of Warren George one pair of oxen nine years old, more or less, always subject to him or his order, life and limb of said oxen always at my risque during the whole time he may permit them to remain with me. And I do further agree to pay him a reasonable sum of money for the use of said oxen during the whole time he may permit them to remain in my hands.

"Provided nevertheless, if I pay him sixty-five dollars and interest from date hereof, which sixty-five dollars is also to be applied to certain notes, he, the said George, now holds against me, then the said oxen are to become my property, if said sixty-five dollars shall be paid on or before May 8, 1842.

"Bucksport, July 14, 1841.

"Joseph Smith."

Copy of indorsement thereon: —

"Know all men by these presents, that the within named George, permitted me, the said Joseph Smith, to change the within named oxen for him, the said George, to get another yoke of oxen, which oxen I do by this my signature acknowledge to be the property of the said Warren George.

"Joseph Smith.

"Bucksport, July 8, 1842.

"Attest — Jonathan Wood."

Copy of the receipt: —

"Received of Joseph Smith, by Jonathan Wood, sixty-five

dollars, to be applied to his notes, which notes said Smith gave him for land, when called for.

"Warren George.

"Bucksport, July 14, 1841."

*Hathaway*, for the defendant, contended, that Smith was an incompetent witness by reason of interest.

But if Smith was a competent witness, his testimony was inadmissible. It was not competent for the plaintiff to explain, control or vary the effect of the writings by parol evidence.

The writing of July 14, 1841, signed by Smith, was offered by the plaintiff as evidence of his title, and he should not have been permitted, as he was, to vary the effect of it by the testimony of Smith.

The oxen attached were never the property of the plaintiff. The case shows, they were purchased and paid for by Smith long after his contract with the plaintiff.

It was Smith's election to return the oxen or pay the sixty-five dollars. They therefore became his property as soon as he received them. The instruction on this subject was erroneous.

The Judge erred in refusing to give an instruction to the jury on the subject of fraud, as requested by the defendant. *Lapish* v. *Wells*, 6 Greenl. 191.

*D. T. Jewett*, for the plaintiff, said that the objections made to the admissibility of the testimony of Smith went only to his credibility, not his competency. He was not permitted to vary or contradict any writing by his testimony.

The question of fraud was submitted to the jury, and rightly, as it was exclusively for their determination. But there was no evidence before the jury tending to prove fraud.

The question whether the payment of the money was for the oxen, or towards the land, was properly submitted to the determination of the jury, as a matter of fact. The receipt is merely evidence of payment, and it was competent to show, when and for what purpose the payment was made.

This was not a bill of sale, where it was left optional with

the party, whether to pay the money or return the property. The writing expressly provided, that the oxen should remain the property of the plaintiff until payment was made.

The opinion of the Court was prepared by

SHEPLEY J. — The oxen claimed by the plaintiff were taken by the defendant, a constable, as the property of Joseph Smith, on August 18, 1843, by virtue of a precept against him in favor of Lowell, a creditor. The plaintiff presented as evidence of his title a contract, bearing date on July 14, 1841, and an indorsement made on it bearing date on July 8, 1842, both signed by Smith. The counsel for the defendant contends, that the property passed by that contract to Smith without any proof of payment of the money, named in it. It is distinguishable from the class of cases alluded to in the argument. It is an agreement to sell the oxen on condition of receiving payment within a stipulated time; and differs from that, upon which the case of *Dearborn* v. *Turner*, 16 Maine R. 17, was founded. The person, from whom the defendant in that case purchased, had an option to return the property, or pay for it within a stipulated time, secured to him by the contract.

Smith was introduced as a witness for the plaintiff. Counsel insists, that his testimony should have been excluded, because it appeared by other testimony in the case, that he was interested, and refers to the testimony of other witnesses proving his declarations, that if the case was lost it would ruin him. The declarations of a witness made to others, that he is interested in the event of a suit, do not prove him to be so, or that he is an incompetent witness. Another complaint is, that he was allowed to contradict or vary the contract in writing by his testimony. This does not appear to be correct. His testimony as stated in the bill of exceptions, only narrates, so far as it relates to that contract, the circumstances under which it was made, and the time, when it was executed and the money paid.

To determine whether the instructions and other proceedings were correct, it will be necessary to examine the testimony

exhibiting the dealings between the plaintiff and Smith. It shows, that the plaintiff bargained with Smith on May 8, 1841, to sell him a farm or tract of land for $600, to be paid in six annual payments of $100, with interest; and gave him a bond to convey it upon payment thereof according to the agreement. That in the month of June following, Smith received a yoke of oxen of the plaintiff, and it would seem upon the terms contained in the contract afterward signed and dated on July 14, following. For the father of the plaintiff testified, that he wrote that paper at the request of his son, and according to his instructions, about the time, when Smith first took the oxen.

Jonathan Wood testified, that he bargained with Smith and paid him $95, for a lot of land on July 2, 1841. That this sum was paid by paying Smith $30, and by paying the plaintiff $25 cash, and $40 by a note payable in one year with interest. Were the oxen thus paid for on July 2, 1841? Smith states, that he never paid a cent to the plaintiff for the oxen. Whether he meant more than to say, he never paid any thing from his own hand in money without denying, that he received pay in part, for a lot of land, by Wood's paying $65 for them to the plaintiff, may not be quite clear. Wood says, that he told him, that he sold the land to buy the oxen, and would not have sold it so low, but for the sake of getting them. The first payment to the plaintiff for land would not become due for about ten months. Noah Doane testified, that Smith told him, that he bought the oxen of the plaintiff. Other witnesses testified, that he said he bought them of the plaintiff and gave $65 for them. That was the sum agreed to be paid for them, and the sum which Wood paid to the plaintiff on July 2, for Smith. Solomon Hervey testified, that the plaintiff told him the latter part of June, 1842, that Smith had not paid the interest on his notes for the land, and Wood had not paid for the oxen within ten or twelve dollars. Wood states, that he paid on the note of $40, given by him to the plaintiff as part of the $65, on April 27, 1842, $30; and the remainder, three or four days after the note became due

on July 2, 1842. Both of the plaintiff's statements to Hervey would be substantially correct, if the $65 were paid for the oxen; and both incorrect, if they were paid towards the land notes; Smith states, that he killed one of the oxen in December, 1841, and obtained another ox of his brother, for $33, paying partly by the proceeds of the ox killed and the residue out of his own property. That soon after he exchanged those two oxen, with Daniel Atwood, by the plaintiff's advice, and paid $25, of his own money, for the exchange. Such dealing with the oxen, and such payments made from his own funds are inconsistent with the position, that the oxen were the property of the plaintiff; and consistent with the position, that the sum paid by Wood was received in payment for them.

Is this aspect of the case materially changed by the written documents made between Smith and the plaintiff? The conveyance of the lot of land sold by Smith to Wood, was not made and executed until July 14, although payment had been made on July 2. On the day, when that conveyance was executed, the plaintiff gave Smith a receipt for the $65 received of Wood, "to be applied to his notes, which notes said Smith had given him for land, when called for." This is not inconsistent with the idea, that it also paid for the oxen, for it was part of the agreement as exhibited in the written contract, that the sum paid for the oxen should also be applied in part payment towards the land. The contract, which had been prepared about the time, when the oxen were delivered to Smith, was executed on the same July 14; and provided, that the oxen should become the property of Smith upon payment of $65, on or before May 8, 1842; and Smith therein acknowledged, that he had borrowed them of the plaintiff. If the oxen had in fact been paid for, according to the terms of that contract, before it was signed and while the contract existed only in parol, the title to the oxen passed to Smith, and the execution of that paper, whatever might be its effect between the parties to it, could have no effect upon the title to the oxen, so far as it respects Smith's creditors. That title, as it

respects them, could not be transferred again to the plaintiff without the payment of a valuable consideration for it. And for a like reason, that there was no consideration paid for it, the writing indorsed on the back of the contract and signed by Smith on July 8, 1842, could not in such case transfer the title to the oxen, then in possession of Smith and obtained as before stated, to the plaintiff, so as to deprive Smith's creditors of their rights. There was some testimony introduced by the defendant to show, that these arrangements between the plaintiff and Smith, so far as they had reference to the oxen, were designed to prevent their being taken by Smith's creditors; and the District Judge was requested to instruct the jury, "that there was evidence tending to show, that the transactions relative to the oxen, between the plaintiff and Smith, were fraudulent as against Smith's creditors." This request was properly refused. It is the duty of the Court, on request, to instruct the jury, what the law applicable to the testimony is. It is not its duty to express an opinion on request as to the effect of that testimony, when it is contradictory, or as to its tendency to produce any particular result. The instructions, which were given, appear to have been founded upon the supposition that Smith could become the owner of the oxen only by proof "that he had paid the sixty-five dollars in pursuance of the terms of the contract of July 14, 1841." This the jury must have understood to mean in pursuance of or in performance of the written contract after its execution on July 14, 1841. It has already been stated, that the oxen might, according to the testimony, have become the property of Smith before that time, and these instructions therefore on being applied to the testimony in the case would be suited to mislead the jury.

*Exceptions sustained and*
*new trial granted.*

## Charles P. Brown *versus* George B. Leavitt.

When a demand, not negotiable, has been assigned for value, with notice, such demand is embraced within the terms of a submission of "all matters claims and demands, either at law or equity" by the assignee and alleged promisee; and the arbitrator, or referee, has authority to allow to the promisee all payments made upon the claim, and every thing in the way of set-off, as if between the original parties, which existed previous to the assignment and notice thereof. 26 251 94 32

Where a demand has been submitted by bonds, under the hands and seals of the parties, to an arbitrator, it is not competent for the party against whom the award is made, in an action upon the bond, to show by testimony what the evidence before the arbitrator was, touching the merits of the respective claims, or how he regarded it.

It is a general rule, that any party may revoke his submission to an arbitrator before award made, giving notice thereof to the arbitrator. But if the submission be by deed, the revocation can be by deed only. And if such revocation be made, the party thereby forfeits his bond, given to abide the award.

If the arbitrator be a relative of one of the parties, and that fact is unknown at the time to the other, and objection is made on that account, when known, and the objection is disregarded, his award is not binding; but if the party, with knowledge of the fact, proceeds to a hearing, and interposes no objection for that cause, such objection cannot avail him afterwards.

When the parties agree to submit their mutual claims to the arbitration of a person named, "whose decision, made within one month after he has notified the parties, and heard them, to be final and binding upon the parties," without any mention of an *ex parte* hearing, and the parties are notified and meet, and a partial hearing takes place when both parties are present, and the hearing is adjourned until another day, when one of them does not attend, and a further hearing takes place; it is not a valid objection to the award, that the final hearing was *ex parte*.

Debt on a bond from the defendant to the plaintiff, dated April 8, 1843. Mutual bonds were given. The condition of that declared upon was as follows: —

"The condition of this obligation is such, that whereas the said Leavitt and Brown had this day agreed to submit and refer all matters, claims and demands either at law or equity, which the one has upon the other up to the date hereof, to the arbitration of F. A. Butman, Esq. of Dixmont, whose decision, made within one month after he has notified the parties and heard them, to be final and binding upon the parties.

"Now if the said Leavitt shall do and perform all and singular the things, pay all sum and sums of money that said Butman as referee in said case shall order to be paid by said Leavitt, and in all things stand to and abide by said Butman's decision, then this obligation shall be void, otherwise to be and remain in full force and virtue."

The award of the referee set out particularly his notices to the parties and their proceedings before him, the substance of which is given in the opinion of the Court, and concluded by awarding, that a sum of money should be paid by the defendant to the plaintiff, with costs of reference.

No claim was presented by the plaintiff against the defendant but that assigned to him by Miles, and the defendant set up none against the plaintiff, unless as originally against Miles.

The defendant pleaded the general issue—and by brief statement, that before the supposed award was made, "the defendant revoked all authority in the referee, of which said plaintiff had due notice," and also, that "no award has been made in the premises."

The case was argued in writing, with much fullness, by —

*C. P. Brown, pro se,* and by —

*J. Appleton,* for the defendant.

Among the positions taken by the plaintiff, and authorities cited under them, were the following: —

The submission in this case was by deed, and it can be revoked only by deed. Caldwell on Arb. 31; 8 Johns. R. 125; 1 Cowen, 335; Phill. Ev. 498.

A party to a reference may revoke, but it must be by equally high authority; and if he do so revoke, the penalty of the bond is forfeited. 16 Johns. R. 205; 1 Conn. R. 498; 2 Tyler, 328; 3 Day, 118; Cald. 205.

Upon the issue of "no award," the plaintiff has only to prove the making of the award within the time, and give the award in evidence. The defendant cannot, on the trial of such issue, go into any legal objections to the award. Cald. 209.

Where the submission and award are in writing, parol evidence is inadmissible to explain them. 18 Maine R. 251; Kyd on Awards, 143; Phillips' Evi. 496; 3 Johns. R. 367; 9 Johns. R. 98; 2 Wend. 567; 3 Johns. 368; 10 Johns. R. 147; 9 Johns. R. 38; 13 Maine R. 41; 23 Maine R. 435.

Where an award is within the submission, even a Court of Chancery will not set it aside, except for partiality or corruption in the arbitrator, or fraud or misbehavior of the party. 13 Maine R. 41; 1 Con. R. 569; 7 Con. R. 542; 10 Johns. R. 143; Cald. 64 and 65.

All presumptions of law are to be taken favorably for the support of an award. 10 Pick. 348; 3 Johns. R. 369; 17 Maine R. 52; 1 Peters, 222; 13 Maine R. 41; 13 Johns. R. 27.

The referee was fully authorized to proceed on the third day of meeting in the absence of the defendant. Cald. 45 & 86; 11 Johns. R. 402; 1 Chitty's Dig. 77.

Under a submission in which costs are not mentioned, the arbitrator may award costs. 14 Johns. R. 161; 2 Cowen, 639; 2 Conn. R. 691; 22 Wend. 128.

But should the costs be rejected, the rest of the award stands good. 23 Maine R. 259; 13 Johns. R. 264; 2 Cowen, 649; 6 Greenl. 427.

The award of a certain sum is sufficiently final. 7 Metc. 316.

*J. Appleton,* for the defendant, made these points and argued in support of them.

1. The claim, *Miles* v. *Leavitt,* is embraced in the submission and covered by the bonds between Miles and Leavitt, and the hearing and award should have been on that submission. The award, then, is of a matter not submitted in the submission between Brown and Leavitt, and not being within the terms of the submission, is void. 3 Hill, 88.

2. The referee had no authority to proceed, because the submission was revoked. 14 Maine R. 185; Kyd on Awards, 29; Caldwell on Arbitration, 31; 4 Peters, 83; 6 Peters,

598; 1 Greenl. Ev. § 27; 3 N. & M. 603; 1 Ado. & Ellis, 792.

3. The referee, being related to the plaintiff, was disqualified to act. 10 Pick. 275; Rev. St. c. 1, § 22.

4. The hearing was *ex parte*, and an award upon an *ex parte* hearing is not within the terms of the bond, given to the plaintiff, and therefore void. 11 Johns. R. 133; 6 Johns. R. 14; 6 Greenl. 247.

The opinion of the Court was prepared by

TENNEY J. — Previous to April 8, 1843, Dudley R. Miles having a demand against the defendant, assigned the same to the plaintiff; and the defendant was informed of the transfer. He had a counter claim against Miles, which he contends he was entitled to treat as a discharge of his own indebtedness, or to file in set-off thereto. On that day, the parties to this suit, by mutual bonds under their respective hands and seals, submitted all matters, claims and demands in law and equity, which one had against the other, to the decision of Frederick A. Butman, who was the uncle of the plaintiff's wife; and by the same bonds bound themselves to abide the award, which should be made by the referee in one month after notice and a hearing. At the same time, Miles and the defendant submitted to the same referee, the claims which one had against the other, and which had accrued since Dec. 5, 1837, the decision to be made upon legal principles. This submission was made by mutual bonds between the parties thereto. Miles was then in bankruptcy, but there was evidence in the case, that he agreed to waive any rights, which he might have thereby.

The referee having notified the parties met them; an adjournment took place at the request of the defendant, to enable him to procure counsel. At the next meeting, the defendant appeared with counsel, and offered to proceed, if the defendant could be allowed to testify as a witness in his own behalf, but made no other objection to the hearing. The trial proceeded, though the defendant introduced no witnesses. A farther adjournment took place, that Miles, who was then ab-

sent, might be present; and a final hearing, after due notice to the parties, was had on Dec. 27, 1843. And on the same day the referee made his award in favor of the plaintiff, which was duly published, and after demand of the sum awarded, and a refusal by the defendant, this action was brought upon the bond given by the defendant to the plaintiff. On the evening before the final hearing, the defendant informed the referee verbally, that he should not be present, and requested him to have nothing farther to do with the case. The bonds between Miles and the defendant were put into the referee's hands at the same time that he received the bonds between the parties to this suit, and he gave notice of a hearing upon both submissions. No objection was ever made to the referee on account of his relationship with the plaintiff. At the final hearing, the defendant was not present, but attended the previous meetings. On Dec. 21, 1843, the defendant addressed to the plaintiff a writing in the following terms: "This is to give notice, that I decline going into a hearing before Frederick A. Butman, Esq. to whom, as you allege, I have agreed to submit matters in controversy between you and me subsisting. And I object to said Butman's sitting as a referee, in or about the same, and notify you, that I shall resist and object to any award, that he shall make in and about the premises." Signed "George B. Leavitt."

One ground of defence to the action is, that the hearing and award should have been made under the submission between Miles and the defendant; inasmuch as the plaintiff's whole claim was that assigned to him by Miles. We understand the claim, which was transferred to the plaintiff by Miles, was not negotiable; consequently in a suit at law for its recovery the action must have been in the name of the promisee. But the submission being of all claims in equity as well as at law, it was competent for the referee, on being satisfied that the assignment was *bona fide*, to award to the plaintiff such sum as should be due to him, on a fair adjustment, including the amount of the demand transferred.

The plaintiff was not a party to the submission between

Miles and the defendant, and could have no control over it, or be in any manner bound by it. But when Miles made the assignment to the plaintiff, the latter succeeded only to the rights of the former, and the subsisting equities both of Miles and the defendant remained unaffected by the transfer; and the claims of the defendant, which could have been allowed in set-off or as payments, if the assignment had not been made, would not legally or equitably be excluded under the submission. All the matters, claims and demands were submitted to the referee, and he was authorized to allow to the defendant all payments made upon the plaintiff's claim, and every thing in the way of set-off, which existed previous to the assignment and notice thereof to the defendant. What the evidence before the referee was, or how he regarded it, was not competent for the parties to show in this action.

Another objection to the maintenance of this action is, that the submission was revoked before the final hearing and making of the award. It is a general rule, that any party or any one of a party may revoke his submission before award made, giving notice thereof to the arbitrators. But then he forfeits his obligation, he has given to abide the award. 1 Dane's Abr. 277, c. 13, art. 14, § 15; Vynior's case, 8 Co. 162, 3d Resolution; *Milne & al.* v. *Gratrix*, 7 East, 608; *Warburton* v. *Storr*, 4 B. & C. 103; *King* v. *Joseph*, 5 Taunt. 452. But if the submission be by deed, the revocation can be by deed only. Caldwell on Arbitration, 35. The mutual bonds between the parties were put into the hands of the referee, and were the only evidence of a submission. A revocation could not be made, excepting by a writing under seal. The verbal request made by the defendant of the referee to have nothing further to do with the case is not indicative of a design to revoke the submission, and was entirely ineffectual. The writing of the 21st of Dec. 1843, was equally inoperative, as it was not under seal, and it does not appear that the referee ever had knowledge of it.

Another objection is, the family connection between the referee and the plaintiff. If the submission was made, the

defendant being ignorant of this fact, and when known objection was interposed for that reason, and disregarded, it ought to prevail in this suit. But in the absence of all proof that he had no knowledge of this connection, and with the evidence, that all objections to proceedings were upon other grounds, this defence cannot avail.

Again, it is insisted, that the hearing was *exparte* and an award upon such a hearing is not within the terms of the bond. The case shows that the referee met the parties several times, at one time by their agreement, and at others by his appointment. A partial hearing at least took place before the final meeting, at which the defendant was not present, but he was duly notified, and had the fullest opportunity of attending and being heard. It is a well established rule of law, that if a party covenants to do a certain thing, and afterwards by his own act, disables himself from doing it, or declines doing it, when he was able, it is a breach of the covenant. *Warburton* v. *Storr*, 4 B. & C. 103. To give effect to this objection, would be tantamount to a revocation of a submission, which the law has not contemplated could be so done.

There is nothing in the case, tending to show that the defendant did not enter into the submission with a full knowledge of his rights; or that the plaintiff practiced any imposition upon him; neither is there evidence impeaching in any degree the conduct of the referee.

*Judgment to be entered for the penalty of the bond, and execution to issue for the award of the referee, and interest thereon.*

THE STATE *versus* EPHRAIM R. LAMOS.

The jurisdiction of the licensing board, under Rev. St. c. 36, like that of all inferior magistrates, must appear affirmatively, and cannot be presumed or inferred.

Unless the proceedings of the licensing board in revoking the license of an innholder, by virtue of the provisions of Rev. St. c. 36, § 15, show that they were founded upon a *complaint* to them, their acts in that respect will have no validity.

But it is not necessary, that the complaint should be in writing, signed and sworn to, as the law requires in complaints in criminal proceedings before a magistrate, to authorize him to issue a warrant.

THE following is a copy of the exceptions: —

"Indictment found by the grand jury at the last Oct. term against the defendant for presuming to be and being a common innholder, on the first day of June last, and between that day and the finding of said bill, without being licensed therefor according to law, and without being duly authorized therefor.

"*Plea not guilty.* On the trial, it was admitted by the defendant, that he carried on the business of a common innholder as alleged.

"In defence, the defendant introduced the records of the licensing board, and by the government, it was admitted, that he was duly licensed as a common innholder during the period in which the offence was alleged to have been committed, with restrictions not to sell spirituous liquors.

"The government then introduced the records of the same board, of which the following is a copy: —

"Saturday, August 5, 1843.

"The undersigned, being a major part of the licensing board of Oldtown, after notifying him of their intention so to do, met at the house kept by E. R. Lamos, gave him a hearing on the charges preferred against him, and being fully satisfied beyond a reasonable doubt, that said Lamos had failed to keep the Wadleigh House according to the conditions and restrictions of his bond and license, did, on said fifth day of August, in accordance with the provisions of the statute, revoke said

license, rendering it of no effect, informing him at the same time of this fact.

"Samuel D. Hasty, } Selectmen of
"Joseph H. Reed, } Oldtown.
"John Rigby, Town Treasurer."

"Upon the foregoing evidence, the Judge instructed the jury, that they would be authorized to return a verdict of guilty against the defendant, which they accordingly did. To which instructions and ruling of Court, the defendant excepts and prays that his exceptions may be allowed and signed by the Judge presiding.

"By Cony & Sewall and Cutting, his att'ys.

"The foregoing exceptions being here presented to the Court before the adjournment thereof and being found conformable to the truth of the case are hereby allowed and certified.

"*Fred. H. Allen, J. D. C.* &c. Presiding at the trial."

*Cutting*, argued for Lamos, objecting, that the jury might have found entirely upon what was done before the attempt to revoke the license, the indictment covering a time before that attempt was made.

That Lamos having given bond to the acceptance of the town, the only remedy was on that bond, and not by indictment.

That the licensing board had no jurisdiction of the matter, and the alleged revocation was a nullity, because no complaint was made, and notice given, before they proceeded to act, as the statute requires.

That it does not appear, that the persons undertaking to act as a licensing board were properly organized to act as a board. It is not pretended, that one of the selectmen, or the town clerk, was ever notified of the meeting.

And that the board had no right to put such restriction in their license. 1 Fairf. 438; 16 Maine R. 121. The statute of 1844, c. 84, authorizing this restriction, was not passed until after this indictment was found.

*Moor*, Att'y Gen'l, for the State, said that the statute of

1844, was merely explanatory of the prior statute, and did not, nor was it intended, to change the law.

The law presumes, that all town officers do their duty, until the contrary is made to appear. *Jackson* v. *Hampden*, 20 Maine R. 37. The town officers in this case, then, are to be presumed to have given all necessary notices, both to the other members of the board and to Lamos.

The town clerk has not a negative upon the acts of the other members of the board. The selectmen, town clerk and treasurer, together, constitute one board, and act as such by a majority of the board, and not as three distinct boards, each having a negative upon the other.

No objection was made to the introduction of the record of the board, revoking the license, and it is now too late to say for the first time, that they had not jurisdiction. Had the objection been made at the trial, it would have been obviated by the introduction of a complaint.

But there is no necessity for any written, technical complaint to authorize the board to revoke a license. It is their duty by the statute, c. 36, § 15, to revoke it, "whenever any instance of a breach of the condition of the bond, shall have come to their knowledge;" and the additional words, "after complaint, notice to the party complained of, and a hearing thereon," do not release them from the performance of the duty, if the complaint be merely verbal, or by way of information of the facts. He had notice, and attended at the hearing.

The time stated in the indictment was immaterial. The jury must have found the offence to have been committed, after the revocation of the license, or he would not have been found guilty.

The opinion of the Court was drawn up by

TENNEY J. — The defendant is charged in the indictment with the offence of presuming to be, and of being a common innholder between the first day of June, and the time of finding the bill at the term of the Court holden in October, 1843, without being licensed therefor according to law, and without

being duly authorized therefor. It was admitted by the defendant, that he carried on the business of a common innholder as alleged in the indictment, and by the prosecuting officer that he was duly licensed as such for the period during which the offence was alleged to have been committed, with the restriction not to sell spirituous liquors. But it was insisted by the latter, that the defendant's license was legally revoked on August 5, 1843.

The defendant not being charged with any other offence than that of being a common innholder *without license*, the correctness of the instructions to the jury, that the evidence authorized a conviction, must depend upon the legal revocation of that license. The town officers, who are authorized to grant a license, are empowered also to revoke it, whenever any instance of a breach of the bond required by Rev. Stat. chap. 36, sect. 2, shall have come to their knowledge, and after complaint, notice to the party complained of, and a hearing thereon. Chap. 36, sect. 15.

The power given by the section referred to, to the board, is important, and its exercise may materially affect the interests of those against whom complaints may be made. Their jurisdiction, like that of all inferior magistrates, must appear affirmatively, and cannot be presumed, or inferred. The authority to give a hearing, and to revoke a license, is not conferred without a complaint, and a notice to the party complained of.

It is not necessary, that the complaint should be in writing, signed and sworn to as the law requires in complaints in criminal proceedings before a magistrate, to authorize him to issue a warrant; neither is it indispensable, that it should be signed by any one; but the language used in the statute implies, that the word complaint is to be understood in its legal sense.

A breach of the bond of a person licensed, may come to the knowledge of the board; this alone is not sufficient to give a hearing after notice; but a complaint is necessary. The legislature could not have intended to have made a distinction between simple information of the breach, and that information given verbally to the board, by way of complaint; such would

be senseless; but it was evidently their purpose, that after the fact of a breach should become known to them, before they could give the notice to the person accused of having committed it, and proceed to a hearing, the complaint should be in writing and contain an allegation of the charges, with specifications, and the time when, the breach took place. Of all these the party complained of was entitled to reasonable notice, that he might know particularly, what he was called upon to answer, and have opportunity to produce proof, that the charges were unfounded. Without this, there would be a looseness, which would be perfectly anomalous in all proceedings of the same general character. There would be an uncertainty, whether the evidence adduced at the hearing had relation to the charges of which he had notice, or others, which were distinct therefrom; if the license should be revoked, it could not appear whether it was upon satisfactory proof of the charges alleged, when no record or document existed to show what they were.

The order revoking the defendant's license is in writing, and it is therein stated, that the undersigned, being a major part of the licensing board, after notifying him of their intention so to do, gave him a hearing on the charges preferred against him, and being satisfied beyond a reasonable doubt, that he has failed to keep the Wadleigh House, according to the restrictions and conditions of his bond and license, did revoke said license, rendering it of no effect, informing him at the same time of the fact. No written complaint or copy thereof was introduced at the trial as the basis of the proceedings of the board, nor was there evidence that any was before them at the hearing. The order of revocation was introduced without objection, but if it contained no statement showing a jurisdiction in the board, it certainly was insufficient for that purpose; and it contains nothing which indicates, that they proceeded under a written complaint. It does not state what charges were preferred against the defendant; and they could have jurisdiction only on complaint of a charge that the condition in the bond, which the law anthorized them to insert, had been broken. *Crosby* v. *Snow & al.* 16 Maine R. 121.

The board found the defendant guilty of not keeping the Wadleigh House according to the conditions and restrictions of his bond and license, and for that cause his license was revoked. Whether this was the charge preferred against him or not; or whether the conditions and restrictions in the bond and license, which they found he failed to observe were those, which could be legally required, even if written complaint was not necessary, no proof was adduced to show.

*Exceptions sustained.*

THE STATE *versus* FREDERICK A. ROBERTS *& al.*

The District Courts of this State are Courts of the State, and when holden, are District Courts for the counties, and not for the districts. The allegation, therefore, "for the eastern district," in an indictment found in a county within that district, is unnecessary.

A description of the Court, in an indictment, as "the District Court of the State of Maine, holden at Bangor in the county of Penobscot, for the county aforesaid," is a sufficient description.

And in an indictment wherein the Court is so described, it is enough to allege, that a warrant, issued by order of the Court, was "under the seal of said Court."

In this country, usually, in an indictment, the place where an offence is alleged to have been committed, is a town named, which is within a county also named, where the Court have jurisdiction; but it is not necessary, that the town should be stated, if the place mentioned is equally specific. If the particular place named is shown to be within the county, over which the Court have jurisdiction, it is sufficient.

If an indictment alleged, that an offence was committed either within the town of E. or the town of H. in the county of Penobscot, without indicating more specifically the particular spot, there would be an uncertainty, which, in cases on this subject, has been held to be fatal. But if it allege that the acts, constituting the offence, were done on the Penobscot river, on a particular part of it, within the county, it is sufficiently certain.

THIS case was said in the argument to have come before the Court on a motion in arrest of judgment. But no copy of any motion came into the hands of the Reporter.

The following is a copy of the indictment: —

"STATE OF MAINE.

"PENOBSCOT, ss. At the District Court for the Eastern Dis-

trict of the State of Maine, begun and holden at Bangor within and for the county of Penobscot, on the first Tuesday of January in the year of our Lord one thousand eight hundred and forty-four.

The jurors for the State aforesaid upon their oath present, that Frederick H. Allen, Esq. then and now one of the Justices of the District Court for the State of Maine, duly qualified and empowered to perform the duties of that office, at Bangor aforesaid, in the county aforesaid, on the 10th day of October now last past, while holding a District Court at Bangor aforesaid, in the county aforesaid, for the county aforesaid, did make or cause to be made a certain warrant in writing, under the seal of said Court, and signed by one Wm. T. Hilliard, Clerk thereof, and witnessed by said Frederick H. Allen, directed to the sheriff of said county of Penobscot or either of his deputies, by which warrant the said sheriff and his deputies were commanded to take the body of one Wm. Wallace (if he could be found within their precinct) and him safely keep, so that he could be had forthwith before the Justices of the District Court for the Eastern District, then sitting at Bangor, within and for the county of Penobscot, then and there to answer to such matters and things as should be objected against him, for contempt of process of law, and of that Court, for that the said Wm. Wallace being a material witness in behalf of the State in an indictment against one Harriet Stinson, then and there to be tried, in said Court, and having been duly summoned to give evidence touching the matter of said indictment, neglected and refused to appear, which said warrant was afterwards, to wit, on the same day, at Bangor aforesaid, delivered to one Henry Morgan, then and now one of the deputy sheriffs for said county under Jabez True, Esq. then and now sheriff thereof, to be by him executed in due form of law, and that the said Henry Morgan, so being a deputy sheriff as aforesaid, afterwards, to wit, on the eleventh day of said October, on the Penobscot river, between the two towns of Enfield and Howland or within the limits of one or the other of them, and within said county of Penobscot, did

take and arrest the said William Wallace for the cause aforesaid, and him, the said William Wallace, the said Henry Morgan, deputy sheriff aforesaid, in his custody then and there had, and that John S. Hunt of Oldtown, in said County of Penobscot, laborer, and Fred. A. Roberts of said Oldtown, laborer, well knowing the said Wm. Wallace so to be arrested as aforesaid, afterwards, to wit, on the said eleventh day of Oct. now last past, on the said Penobscot river between the two towns of Enfield and Howland aforesaid, or within the limits aforesaid, or either of them, and within said county of Penobscot, with force and arms in and upon the said Henry Morgan, deputy sheriff as aforesaid, then and there being in the peace of said State, and in the due and lawful execution of his said office, did make an assault, and him the said Henry Morgan did then and there ill treat and abuse, and that the said John S. Hunt and Frederick A. Roberts him the said Wm. Wallace out of the custody of him the said Henry Morgan, and against the will of the said Henry Morgan then and there unlawfully did rescue and escape at large to go where he would, to the great damage of the said Henry Morgan, and against the peace and dignity of the said State of Maine.

"A true bill. Moses Rowe, Foreman.

"Gorham Parks, Attorney for the State for the County of Penobscot."

*J. Appleton* argued for the defendants. In the course of his remarks he cited Rev. Stat. c. 97, § 5 and 12; Stat. 1839, c. 398, § 2; 19 Maine R. 207; 3 M. & S. 167; 11 East, 508; 1 C. & P. 472; 2 B. & A. 756; 7 T. R. 447; 2 Esp. R. 98; 1 Chitty's Crim. Law, 196, 197, and note; 2 Mis. 226; 3 Mis. 61; 1 Mis. 547; 1 Bailey, 144.

*Moor*, Att'y Gen'l, argued for the State.

The opinion of the Court was drawn up by

Tenney J. — It is contended on the part of the defendants, that the warrant issued to arrest the witness named therein does not sustain the indictment.

The warrant is a command to the sheriff of the county of Penobscot or his deputy to take the body of William Wallace, and "him safely keep, so that you have him forthwith before our Justices of our District Court for the eastern district now holden at Bangor, within and for the county of Penobscot." The allegation in the indictment is, "that Frederick H. Allen, Esq. then and now one of the Justices of the District Court for the State of Maine, duly qualified and empowered to perform the duties of that office, at Bangor aforesaid, in the county aforesaid, on the 10th day of October now last past, while holding a District Court at Bangor aforesaid, in the county aforesaid, for the county aforesaid, did make or cause to be made a certain warrant in writing under the seal of said Court, and signed by one William T. Hilliard, Clerk thereof, and witnessed by said Frederick H. Allen," &c.

By statute of 1839, c. 373, sect. 1, there is established a District Court, which shall be holden by one Justice, and by sect. 3, all writs and processes issuing from the District Court shall be in the name of the State, and shall bear test of one of the Justices of said Court, and such writs and processes shall be under the seal of said Court, and signed by the clerk, &c.; and by c. 398, sect. 2, the District Judge or Judges are authorized to adopt seals of the Court for the respective Districts.

By the Rev. Statutes, chap. 97, sect. 1, the District Court heretofore established is hereby continued, and the State is divided into three Districts, which shall be denominated the Western, the Middle and the Eastern Districts. All writs and processes issuing from such Court shall be in the form now in use, and shall be so authenticated, signed, sealed, &c. Sect. 12. The District Court shall be held annually in the several counties in the State at the places and times hereinafter mentioned, that is to say, "at Bangor for the county of Penobscot on the first Tuesday of January, the first Tuesday of October and the fourth Tuesday of May." Sect. 27. There shall continue to be one Justice of the District Court in and for the said Western District, and one other Justice for the Middle District and two

other Justices in and for the Eastern District. Sect. 5. In 1844, an act was passed by which the District Court, heretofore established, is continued, and it is provided, that there shall be one Justice only in and for the Eastern District. Chap. 125, sections 1 to 5 inclusive. By chap. 97, sect. 11, Rev. Stat. the Court may be held by the Judge of some other District, if thereunto requested by the Judge, whose duty it was to hold such Court.

It is seen from the provisions in the statutes referred to, that the District Court is a Court of the State, which is to be holden for the several counties. In the appointment of the Judges, it is required, that they shall be selected from those residing in the District, in which they are to act in the discharge of their official duties, but the Courts when holden are District Courts, and for the counties, and not for the Districts. The words in the warrant, "for the Eastern District," were not required to give authority to the officer to whom it was directed; and it was alike unnecessary that the indictment should contain an allegation, that the Court was for the Eastern District.

The allegation in the indictment, that the Justice named, being one of the Justices of the District Court of the State of Maine, while holding a District Court at Bangor, in the county of Penobscot, for the county aforesaid, is so certain, that it could not be confounded with a warrant from the District Court of the United States, as has been suggested by the defendant's counsel. The latter is a Court of the United States, and is holden in this State for the District of Maine, and not for any State or county. The warrant is alleged to have been under the seal of the Court, and whether it was the seal of the District Court of the State or the District Court for the Eastern District, does not appear; but if it was either it was a compliance with the statute; and the allegation is, that it was the seal of said Court, which must refer to the District Court generally, or to the District Court held in and for the county of Penobscot.

Another ground of the motion in arrest of judgment is, that there is uncertainty as to the place, where the offence is alleged to have been committed.

The crime consists, in an alleged assault and battery upon the person of the officer, who had arrested the person against whom the warrant issued, and the rescue of the person so under arrest, from the custody of the officer. It is stated in the indictment, that the officer named, "on the Penobscot river, between the two towns of Enfield and Howland, or within the limits of one or the other of them, and within said county of Penobscot, did take and arrest the said William Wallace," &c. and it is further stated, that the officer then and there had the said Wallace in his custody, and then follows the further allegation that the defendants, named, "well knowing the said Wallace to be arrested as aforesaid, afterwards," &c. "on the said Penobscot river between the two towns of Enfield and Howland aforesaid, or within the limits aforesaid, or either of them, and within said county of Penobscot, with force," &c. "in and upon the said Henry Morgan, deputy sheriff as aforesaid, then and there being in the peace of said State, and in the due and lawful execution of his said office, did make an assault, and him the said Henry Morgan did then and there ill treat," &c. and that the defendants "him the said Wallace out of the custody of him the said Henry Morgan and against the will of the said Henry Morgan, then and there unlawfully did rescue," &c.

By the English common law, "in general it is essential to lay every issuable and triable fact to have happened in some particular parish, ville, hamlet or place within the county to which a venire may be awarded, and it will not suffice merely to state the county." Chitty's Cr. Law, 196. And "in general when any particular fact is averred, it should be stated to be done then and there, after the county and ville have been clearly expressed in the body of the indictment, and the allegation of time and place, "then and there" should be repeated to every material fact, which is issuable or triable." *Ibid*, 198. If two places be previously named, and afterwards a material fact only laid "then and there," the indictment is defective, because it is uncertain to which place reference is made, and the indictment would be bad on motion in arrest of judgment. *Ib.*

200. "But it is in no case, not even in instances of treason or murder, necessary to prove that the offence was committed at the precise ville, parish or place laid in the indictment, excepting when the place is of the essence of the crime." *Ib.* 199.

In this country, the place where an offence is usually alleged in an indictment to have been committed, is a town named, which is within the county also named, where the Court have jurisdiction; but it is not necessary that the town should be stated, if the place mentioned is equally specific. We have seen, that in England, the "ville, hamlet or place" is all that is required. And no valid objection can be taken, if the place is a state house, court house, or college, instead of the town. Neither is it necessary, that the particular place should be one, the existence of which the Court can without proof take judicial notice. In England, courts cannot presume as in this country, that a certain parish or town is in the county named in the indictment, because the boundaries of such are not defined by public laws. *Commonwealth* v. *Springfield*, 7 Mass. R. 9. But if the particular place named is shown to be in the county over which the Court have jurisdiction, it is sufficient. An indictment found in this county, containing the allegation, that the offence set out was committed on the Pushaw Pond, in the county of Penobscot, it cannot be doubted, that this is all which the law would require, provided it was made to appear, that Pushaw Pond was in this county.

If the whole description of the place where the offence is alleged in this indictment to have been committed, when taken together, legitimately conveys the idea to the mind, that it was either in the town of Enfield or the town of Howland, in the county of Penobscot, without indicating more specifically the particular spot, there would be an uncertainty, which has been held in analogous cases to be fatal. There are the words, "or within the limits of one or the other of them," referring to the two towns mentioned in the preceding clause of the sentence. Did the grand jury find only, that the rescue was made either in the town of Enfield or the town of Howland, in the county of Penobscot, or on the

Penobscot river, in the same county? If so, nothing more was necessary, then to have used this plain and simple language in its shortest terms, which could have left no doubt, that there was an uncertainty as to the place. But it is clear, that the grand jury did not find the place of the alleged crime thus uncertain. They found that the acts constituting the offence, to have been done on *the Penobscot river* in the county of Penobscot; they found further upon what portion of that river, within the county, was the scene of the rescue, and that spot is described in the indictment. But no traces of the acts would exist upon the waters after they were done, and it must be uncertain where they took place in reference to the line dividing the two towns of Enfield and Howland. Hence the indictment states, that the *place on the Penobscot river was between the towns of Enfield and Howland, "or within the limits of one or the other of them."* The grand jury were manifestly in doubt, whether the spot was upon the thread of the river, which was the exact line between the two towns, and therefore not wholly in one or the other, or whether it was entirely on one side or the other of that line; and if not upon the line they did not find on which side thereof was the place of the rescue. But it is clear from the language that the use of the alternative terms, is not expressive of a doubt, that the spot was upon the Penobscot river, where it passes and is the line between the two towns named. This construction gives force and effect to every word used, and is consistent with the strictest rules of grammatical construction. The place of the acts complained of being as particular as the rules of criminal pleading require, and there being no question, that it was within the jurisdiction of the Court it is sufficient; when the terms "then and there" are used subsequently in the indictment, they refer to the time and place previously described therein, and are as free from uncertainty as the language to which the reference is made.

*Motion overruled.*

ADAM HUNT *versus* IRA WADLEIGH.

The transfer by the indorser of a previously indorsed and protested draft by delivery, is equivalent to the drawing of a new draft on the acceptor, payable on demand or at sight; and it becomes the duty of the holder to present it to the acceptor for payment within a reasonable time, and to give notice thereof, if not paid, to the indorser.

The insolvency of the acceptor of a bill or draft does not excuse the holder for neglecting to make presentment thereof.

If the drawer or indorser, after full knowledge of the fact of an omission to make due presentment, promises to pay the bill, it will amount to a waiver of such presentment, and bind the promisor to pay the bill. But such a promise, made in ignorance of the facts, will not be binding, or a waiver of the laches.

And the plaintiff must show affirmatively, that the defendant knew he had not been regularly charged.

ASSUMPSIT against Wadleigh, as indorser of a bill dated August 23, 1837, for $312,16, drawn in his favor, and by him indorsed, by E. S. Goodnow on Porter & Harlow, and by them accepted, payable in four months. The bill was duly presented to the acceptors, and protested for non-payment. The protest was introduced in evidence, as were also the depositions of Claflin, Cheney and Lane, subject to objection, at the trial before TENNEY J.

The case was then taken from the jury, by consent of parties, and submitted to the decision of the whole Court, they having the same power as a jury to ascertain facts and draw inferences from the evidence which should be deemed admissible, and to enter judgment by nonsuit or default.

The material facts, considered by the Court to have been proved, appear in the opinion of the Court.

*Wakefield* argued for the plaintiff, citing Story on Bills, § 373; Bayl. 498; 7 East, 231 and 236; *Fuller* v. *McDonald*, 8 Greenl. 213; 6 Wheat. 572; 12 Peters, 497; 5 Pick. 446; 4 Pick. 525; 20 Maine R. 98; 3 C. & P. 338.

*Ingersoll* and *Cony* argued for the defendant, citing 21 Maine R. 455; 2 Conn. R. 419; 17 Maine R. 387; 19 Maine R. 447; 1 Cowen, 398; 14 Mass. R. 116.

The opinion of the Court, WHITMAN C. J. dissenting, was prepared by

SHEPLEY J. The only testimony presented on the part of the plaintiff is contained in two depositions. It appears from the testimony of Lea Claflin, that the plaintiff held a note against the defendant, who was called upon for payment of it during the summer of the year 1840. That an arrangement was then made between the parties to make payment of it by the transfer and delivery of a draft, which had been drawn on August 23, 1837, by E. S. Goodnow of Nashua N. H. on Porter & Harlow at Bangor, payable to the defendant or his order in four months after date, for the sum of three hundred and twelve dollars and sixteen cents. This draft had been indorsed by the defendant, accepted, presented at maturity for payment at Bangor, where the acceptors were not found; the notary being informed, that they were in Boston, protested the draft and gave due notice to the other parties. The defendant having received it from the bank, in which it had been left for collection, delivered it to the plaintiff, who then delivered to the defendant his note.

The transfer of the protested draft to the plaintiff, by delivery, was equivalent to the drawing of a new draft on the acceptors payable on demand or at sight. It became the duty of the holder to present it to the acceptors for payment, within a reasonable time, and to give notice thereof, if not paid, to the defendant. Story on Notes, § 267; *Jones* v. *Swan*, 17 Wend. 94; *Greely* v. *Hunt*, 21 Maine R. 455. There is no proof, that such a presentment was ever made. Nor any proof, that the defendant, when the draft was delivered to the plaintiff, made any remarks, from which an intention to waive it can be inferred.

The next information respecting the draft is derived from the deposition of Ira Cheney, who states, that during the spring and summer of 1842, George O. Brastow, whom the defendant subsequently admitted to be his agent, called upon him several times respecting it, offered to pay ten cents on a dollar for it, and requested him to communicate this offer to the plaintiff;

that he did do so, and the plaintiff refused to accept it. The witness further states, that he received the draft of the plaintiff, and by his request called upon the defendant for payment of it in July, 1843. That "he said he was able to pay that debt, and if Mr. Hunt would say, that he, Wadleigh, was to be holden on the draft, he would pay it. It was agreed, that he, Wadleigh, was to write to Hunt about it, before I saw Hunt, and that if Hunt would say to him, that he understood him, Wadleigh, to be liable at the time he passed it, he would pay it." That the defendant called upon him in September following and offered to pay ten cents on a dollar for it, and that during the conversation he said "he did not doubt, but that he was liable by law, and that he expected Hunt would get an execution against him." That he admitted, that he had written to Hunt and obtained an answer from him; and that the drawer and acceptors of the draft had been unable to pay it, since it was protested.

The insolvency of the acceptors does not excuse the holder for neglecting to make a presentment. *Gower* v. *Moore*, 25 Maine R. 16. The remark of the defendant, that he did not doubt, but that he was liable by law, does not authorize one to conclude, that he had any knowledge, that the draft had not been presented for payment. It was evidently made under a misapprehension of the law, that he was liable without it. There is no evidence therefore, that the defendant had any knowledge, that it had not been presented, or that he had been discharged by the laches of the holder. And without such proof his subsequent promise to pay, if the condition were fulfilled, is not binding. "If he drawer or an indorser, after full knowledge of the fact of an omission to make due presentment, promises to pay the bill, it will amount to a waiver of such presentment, and bind the promisor to pay the bill." But such a promise, made in ignorance of the facts, will not be binding or a waiver of the laches." Story on Bills, § 373, 320; Story on Notes, § 361; Chitty on Bills, 536 to 539, (8th Ed.;) Bayley on Bills, 294, (Ed. of P. & S.) And "the plaintiff must show affirmatively, that the defendant knew, he

had not been regularly charged." *Leonard* v. *Gary*, 10 Wend. 504; *Davis* v. *Gowen*, 17 Maine R. 387.

The plaintiff fails to show by the testimony presented, that he is entitled to recover.

*Plaintiff nonsuit.*

The following dissenting opinion was delivered by

WHITMAN C. J. — This case was, by consent of parties, withdrawn from the jury, and referred to the Court, to determine, as a jury might, as to matters of fact, and to ascertain the legal rights of the parties.

Certain depositions, taken in behalf of the plaintiff, are to be examined, if necessary; provided they can be considered as legally admissible; and, if admissible, such parts of them, only, are to be allowed to have weight as may be found to be legal testimony. To their admissibility it is objected, that notice to the adverse party, of the intention to take them was not such as is prescribed by law, inasmuch as it does not name the justice before whom they were intended to be taken. The Revised Statutes, c. 133, § 14, provides, that "when any deposition shall be taken out of the State, and not under a commission, the adverse party or his attorney shall be duly notified." The form of notice to be given, (§ 11,) when depositions are to be taken within the State, does not seem to require any thing more than the time and place to be named; unless the deposition be to be taken before a justice of the peace, other than the one issuing the notice. Notice of the time and place of caption would seem to be of use to the adverse party to enable him to be present. Whether then and there to be taken by one magistrate or another it would be unimportant for him to be informed; and that information was given.

It is true that the caption is, in many respects, quite informal; but there can be no doubt, that the deponents were sworn to tell the whole truth, touching the matter pending between the parties; and, as by § 22, of said chapter, we are authorized, at discretion, to admit or reject depositions taken out of the State, and as the adverse party appears to have had rea-

sonable notice of the time and place of caption, and the deponents appear to have been sworn to tell the whole truth, and in so doing could not tell any thing but the truth, we think the depositions were admissible; and this decision is sustained by the authority of the cases of *Blake* v. *Blossom*, 15 Maine R. 394, and *Haley & al.* v. *Godfrey & al.* 16 *Ib.* 305.

We may then look into those depositions, and allow such parts of them as are admissible as testimony to have influence in settling the matters of fact in the case. And from the admissible portions of the evidence therein contained we gather, that the claim of the plaintiff originates from a negotiation between him and the defendant, which took place in the summer of the year 1840, in reference to an accepted bill of exchange, of which the defendant was then the holder, and on which he had before placed his name as indorser, which became due in 1837, and was, at maturity, protested for non-payment. The plaintiff having a demand against the defendant to about the same amount, was, at the time first named, induced to accept of that bill in payment of his claim; but it is not in evidence, that he has ever called upon the acceptor or drawer for payment of the amount due on it; and, if he had, it is manifest, that it would have been but a useless ceremony, as they have been, since the protest of the bill, utterly worthless; of which the defendant was well knowing.

But the defendant insists, that the case is within the principle of that of *Greely* v. *Hunt*, 21 Maine R. 455; and, if nothing further appeared in this than in that case, it might be admitted to be so. In that case there was no evidence, that the maker of the note had been called upon for payment, though it had been due over a year; and it was not proved that the defendant, at the time he passed it to the plaintiff, knew it to be worthless. Reliance in that case was placed upon the ground of a waiver of demand and notice, evidenced, as it was contended, by the insolvency, at the time of transfer, of the maker, and the presumed knowledge of that fact on the part of the defendant. But the Court considered the indorsement of the note as the drawing of a new bill, and that

the evidence, relied upon by the plaintiff, as proving a waiver, was not sufficient for the purpose. In the case at bar the bill had been protested for non-payment; and had remained unpaid in the hands of the defendant for about three years, with knowledge of its worthlessness. Putting it off under such circumstances, he could but know, that a further demand upon the acceptor and drawer would be fruitless, and nothing but an idle ceremony. Notice that it had been done could not have been of the slightest utility to him.

The law that demand should be made, and notice of non-payment be given, is bottomed upon a principle of justice. When the reason of the rule ceases, the rule itself should should cease to have force. Accordingly we find the cases to be numerous in which the Courts have considered the rule in question as inapplicable, and have dispensed with it. One is, where the drawer of a bill has no reason to expect an acceptance or payment by reason of his having no funds in the hands of the drawee; another, where the drawer or indorser has taken the precaution to secure himself, by availing himself for the purpose, of all funds and means of payment in the hands of the acceptor or maker. The reason for these exceptions is that the drawer in the one case, and payee in the other, could not be injured by the non-performance of a ceremony, which it must have been known, would be of no use. The case here seems every way within the exception. The defendant passed off to the plaintiff a bill, which had already been protested and dishonored by all the prior parties to it, he at the same time well knowing their utter worthlessness, and that it had lain dormant, and as a dead letter, in his hands for three years. To apply the general rule to such a state of facts would seem to be nothing more nor less than a gross perversion of it.

And, moreover, the conduct and express admissions of the defendant render it evident, that nothing could have been further from his expectation at the time of passing the draft to the plaintiff, than that the plaintiff should proceed with it as if then originally drawn. He was repeatedly called upon

for payment, in the course of the several years intervening between the passing it to the plaintiff, and the commencement of this suit; and though well knowing he had never been notified of any demand on the acceptor or drawer by the plaintiff, or any one in his behalf, yet it is manifest, that it never occurred to him, that he had any such ground of defence as is now set up. Some two years after the plaintiff took the bill he expressly admitted his liability; and stated, that he expected the plaintiff would get an execution against him for the debt. And often personally, and by his acknowledged agent, Brastow, urged the plaintiff to adopt a composition of ten per centum of the debt in full discharge of it, alleging that he could pay no more; and that a similar proposition had been made to his other creditors. The case differs essentially in this particular from that of *Greely* v. *Hunt*, in which there was not the slightest recognition of indebtedness on the part of the defendant, upon any occasion, or in any manner. Under the circumstances of this case it appears to me that, to allow the defence set up to prevail, would not be in accordance with the principles of justice, or with the spirit and sensible construction of the rules of law.

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ANDREW PIERCE *versus* HASTINGS STRICKLAND.

The statute authorizing the levy of an execution upon land requires, that the appraisers should be disinterested; and the law requires, that it should appear by the return of the officer making the levy, that they were so. If, therefore, the officer merely states, that the appraisers were freeholders and discreet men, wholly omitting to certify that they were disinterested, the levy is void.

The court will not permit an amendment of the officer's return to be made, by inserting that the appraisers were disinterested, where the motion was filed more than six years after the levy, and when the officer had gone out of office, and where there was nothing appearing on the proceedings authorizing the amendment, and when the officer making the levy had become the party interested to have the amendment made.

If an administrator has caused an execution to be levied on land, to satisfy a judgment recovered by him as such on a debt due to the deceased, and is

afterwards disseized, he may recover the land, declaring either on his own seizin, or on his seizin in his capacity of administrator.

The proper evidence to prove, that real estate, acquired by levy at the suit of an administrator, will not be necessary for the payment of debts, is his final account settled in the probate office. Parol evidence of the declarations of the administrator is inadmissible for that purpose.

A return by the officer making a levy, that he "appointed an appraiser for the within named debtor, S. S., he having neglected to choose an appraiser although I gave him a notice in writing to appear and choose an appraiser, at least twenty-four hours before the time of the levy," was held to be sufficient evidence of legal notice.

Where there are several separate levies, made on several tracts of land, in satisfaction of one execution, and the total amount of the levies exceeds the sum for which the officer was authorized to make the extent, the amount of the appraisement of the last tract levied upon exceeding the excess, none of these levies, unless the last, are void for that cause.

Where separate levies, at different times, are made on several tracts of land, the interest upon the judgment should be calculated upon the principle, that each levy should be considered a payment to the amount of each appraisement at the time it was made, until the final satisfaction is accomplished.

The presumption of law is, that all judgments rendered by Courts of competent jurisdiction are properly rendered, and upon due proceedings had preparatory thereto; and between the parties thereto and privies, such judgments are conclusive, unless fraudulently obtained. Between a party thereto and a stranger, they are evidence only that such judgments were rendered upon due proceedings had therefor, and in support of proceedings had thereupon, as in case of levies upon real estate to satisfy them, in which case they become muniments of title.

But when a judgment is introduced collaterally as a muniment of title which was rendered *inter alios*, it is not conclusive upon one not a party to it. It will be competent for him to show, that it was unduly or irregularly obtained.

Where a suit is brought in this State by a person residing in another State, as administrator of the estate of one residing there at the time of his decease, and judgment is rendered therein in his favor, and a levy on land is made by virtue of an execution issued upon such judgment, in an action to recover the land by the administrator against one claiming under the debtor, the judgment is *prima facie* evidence, that he had been duly appointed in this State. But such fact may be put in issue by the defendant, and such presumption may be rebutted by proof.

THIS action was opened for trial, and after the evidence was all before the jury, they agreed upon the following case, for the opinion of the Court.

"This is a writ of entry, dated October 11th, 1841, brought to recover a certain lot of land lying in Hermon in this county.

"To maintain the issue on his part the demandant introduced a writ in favor of James Bartlett, of Dover, in the State of New Hampshire, against Samuel Smith and others, and the officer's return thereon, showing that the real estate of said Smith and others, was attached on said Bartlett's writ, January 20, 1836. Also the records of this Court showing that said action was duly entered and continued from term to term until June, 1838, when the death of said Bartlett was suggested, and the demandant, as his administrator, came in; after which the action was defaulted, and continued from term to term and judgment duly rendered therein July 3, 1841. Execution issued July 5, 1841, in the name of said Pierce, as administrator, and levied upon the land, described in this writ, on the 30th day of July, 1841, and seizin of the land was delivered to an agent, verbally appointed by said Pierce, attorney for that purpose. Upon this evidence the counsel for the tenant requested the Court to rule, that this action could not be maintained, and particularly requested the Court to rule, that it was necessary for the demandant in this case, (who resided in New Hampshire, where said Bartlett died, ever since the death of said Bartlett,) to prove that he had been appointed administrator of said Bartletts' estate, but the Court ruled, that the evidence was sufficient to make out a case for the demandant, unless rebutted, and that proof of such appointment was not necessary.

"The tenant then introduced Hezekiah Winslow, as a witness, who testified, that he saw the demandant at Dover, N. H. within the past month, that demandant then told him, that all said Bartlett's estate was settled, and the debts paid, excepting one debt of 60 or 70 dollars, which was in the hands of an attorney, who had funds in his possession, belonging to said estate, more than sufficient to pay said debt, but that he, said Pierce, had never settled his final account as administrator in the probate office in New Hampshire. The tenant also introduced a deed of the demanded premises from said Samuel Smith to himself and William Arnold, dated May 20, 1836,

and acknowledged and recorded on the same day. And a deed of the same premises from John McDonald to said Strickland and Arnold, dated Oct. 19, 1837, and acknowledged and recorded on the day after its date; also an execution issued from this Court in favor of said McDonald against said Smith and others, dated Sept. 21, 1837, and a copy of a levy of said McDonald's execution on the demanded premises, made Sept. 27, 1837; also all the records and papers relative to said McDonald's execution, including the original writ in that case, and the officer's return thereon, by which return, records and papers it appeared, that the demanded premises were attached on said McDonald's original writ on the eighth day of December, A. D. 1835, and that all the proceedings in that case were such as to preserve his said attachment until his said levy was made. To said McDonald's levy the demandant objected, that it did not appear thereby, that the appraisers were disinterested men, the word *disinterested*, being omitted in the officer's return, and requested the Court, to rule that this levy was for that cause void, with which request the Court complied. The tenant's counsel then moved for leave to the officer, who is the defendant in this case, to amend this return by supplying said omission, but that motion was overruled by the Court. Said motion is to be made a part of this case. The levies and other papers above mentioned are to be referred to and such parts copied, and make part of this case, as either party may desire; both of said levies remaining open to all legal objections which may at the argument be urged against them.

"It is agreed by the parties, that a default should be entered upon the following terms, viz: If the whole Court shall adjudge the evidence offered by the demandant insufficient to maintain this action, or shall allow the amendment, or shall determine that the tenant has offered sufficient evidence to rebut the demandant's claim, then the default is to be stricken off, and the action to stand for trial; otherwise the default is to stand

"*James S. Rowe* for demandant.

"*Thornton McGaw*, for tenant."

The nature of the objections, made on the one side and on the other, will be understood without copying the papers referred to.

*T. M'Gaw*, for the tenant.

1. The action should have been brought in the name of Bartlett's heirs. It appears by the original suit, execution and levy and by the agreed statement, that Pierce's claim is grounded on his being administrator of Bartlett. The case finds, that the estate levied upon, was not necessary for payment of Bartlett's debts, for which purpose only, it could be holden in trust under Stat. 1821, c. 52, § 16. The trust estate had ceased, and the whole estate by operation of the statute vested in the heirs. *Webber* v. *Webber*, 6 Greenl. 134.

2. If Pierce could sue at all to recover this land, he must declare on his seizin as administrator; i. e. in the capacity in which he obtained judgment. *Willard* v. *Nason*, 5 Mass. R. 240. Whereas he declares, as his writ shows, that he was "seized in his demesne as of fee."

3. He was bound to prove that he was duly appointed administrator in this State.

The whole case shows from the beginning, that he acts in that capacity, and he is bound to show his authority. We were not parties or privies to the suit on the note, and are not concluded by the default in the case. We hold by deed, and one claiming against us must show his right; and to constitute that right, his appointment as administrator in this State is most essential. Unless so appointed his whole proceedings, including the levy, are void. *Pond, adm'r* v. *Makepeace*, 2 Metc. 114; Starkie on Evidence, vol. 2, p. 548 and 549.

4. If the action is rightly brought, our title is good by our levy.

The levy shows substantially, that the appraisers were disinterested; and besides it has never been decided, that a levy would be rendered void by the accidental omission of that single word. If held to be material, the officer would be allowed to amend under our motion which makes part of this

case. The Courts of Massachusetts and this State, have recently inclined to allow such amendments, and have allowed them in cases materially affecting the rights of third parties, when such amendments are conformable to the facts in the case. *Ward & al.* v. *Clapp*, 4 Metc. 458, and cases there cited.

5. If our levy is void the demandant's is void also, and then we have a good title under our deeds.

Demandant's levy is void, because the officer does not make a sufficient certificate of notice to the debtors before choosing an appraiser for them in the levy on this lot. He merely states that he gave notice in writing to one of the debtors (there being four debtors in all) "to appear and choose an appraiser, at least twenty-four hours before the time of the levy." A notice in those words would give no information when to appear, where to appear, or what was to be appraised. The officer should state the precise notice he gave, or the substance of it, in order that the Court may judge of its sufficiency. He should also state how he gave the notice, whether to the debtor in hand, or whether he left it at his last and usual place of abode, or elsewhere, or sent it by a third person.

The statute requires the debtors, all of them, to be notified, if living in the county; and it is only in case that one debtor chooses an appraiser, that the officer can dispense with notice to the others. Stat. 1821, c. 60, § 27.

The demandant's levy is void, because the officer chose several different appraisers for the debtor, S. Smith, giving him only one notice. The officer is only authorized to appoint for the debtor after notice. When the appointment is once made, the notice is *functus officio*, and no new appointment can be made except upon new notice. The debtor may well be presumed to know of the first appointment and to acquiesce in it, but in no other. The officer states only one notice and that on the 27th of July, and all that is said subsequently respecting notice, by all fair rules of construction, refers to the first and special statement of notice. He does not any where state that he *again* notified the debtor or debtors, as he ought if new notice had been given.

6. The demandant's levy is also void because it is for an amount greater than the sum due on the execution.

"It seems to be a well settled rule that the levy shall be considered as taking effect by relation from the time when the legal proceedings for making the levy commenced." *Hall* v. *Crocker*, 3 Metc. 247, and cases there cited. In the present case the proceedings were commenced July 27, 1841, and Thatcher, one of these appraisers, and also two others were then sworn. It appears by the copy of execution, that judgment was rendered July 3, 1841, and that by the execution the sheriff was ordered to collect legal interest on the "*rendition of judgment.*" These words do not authorize him to collect any interest. If he could collect any interest it would be only on the debt (as the law then was) from the rendition of judgment, July 3, 1841, to time of levy, July 27, 1841, being twenty-four days interest on amount of debt, $1405,43, which amounts to $5,62, instead of which the creditor has received by said levy, interest amounting to $6,29, being 67 cents too much. For this cause the levy is void. *Pickett* v. *Breckenridge*, 22 Pick. 297. It makes no difference that it is interest, which has always been holden to be a component part of the debt. It goes to the execution creditor and not to the officer, and it is the business of the creditor to see that he does not receive too much. He has received too much, and the Court are not at liberty to disregard the fact, even if it is the result of mistake, or of small amount. If it is so, then those reasons apply as strongly to the alleged defect in our levy as to his, and if this may be disregarded, certainly the other may. As honest purchasers by deed, as first attaching and levying creditors, and as tenants in possession, the equity of the case, if any, is with us.

*Rowe*, for the demandant.

1. The action was rightly brought in the name of Pierce. The claim, in satisfaction of which the land was taken, was assets in his hands; and the land is to be holden as assets till settlement of final account, and administration discharged. Stat. 1821, c. 52 § 16; *Boylston* v. *Carver*, 4 Mass. R. 609;

*Webber* v. *Webber*, 6 Greenl. 132–5; *Hancock* v. *Minot*, 8 Pick. 29.

The case does not find, that the estate is not wanted for payment of Bartlett's debts. Such a fact can be proved only by the record. Pierce's admissions would not be competent evidence of it. His statements to Winslow are not admissions of the fact, that all the debts of Bartlett were paid, but mere expression of an opinion. For such fact can be within no one's knowledge until final settlement, for then it is first legally and certainly ascertained. The land is held for expenses of administration as well as debts. By tenant's own showing, one debt is unpaid, and the expenses remain to be adjusted and paid. To sustain his first position, tenant must show a final settlement. Pierce's statement proves that there has been none. Besides, Pierce's statements refer to the situation of affairs in October, 1843, while his right to maintain this action depends on their situation in October, 1841, when it was commenced. The objection is founded on the stat. of 1821, which was repealed before action brought. By Rev. St. c. 108, § 26, 27 and 28, no title can vest in heirs till distribution. For until that time, the land remains personal assets, liable, not only for debts, &c., but to be sold by order of the Judge of Probate, to raise money for distribution. § 28.

2. It is not necessary to declare as administrator. Rev. St. c. 145, § 4, 5, 11. Demandant must declare on his own seizin, set forth his estate, and if he show that he is entitled to such estate, shall recover. The demandant claims the fee, and shows by the levy that the land was set off to "him, his heirs," &c. By that levy the fee was divested from the former owner and vested in him. In what capacity he holds that fee, whether to his own use, or as trustee, is no concern of the tenants, nor a question to be raised in this case. The case of *Willard* v. *Nason*, cited by the counsel, does not support his position. The decision was upon another point; and the dictum on which he relies, merely goes to show that the demandant could have safely declared as administrator,

not that he ought to have so declared. 4 D. & E. 477; 2 D. & E. 128; *Crawford* v. *Whittal*, Doug. 4, n.; *Talmage* v. *Chapel*, 16 Mass. R. 73; *Mowry* v. *Adams*, 14 Mass. R. 327; *Carlisle* v. *Burley*, 3 Greenl. 254.

3. The demandant has proved his appointment as administrator. A judgment by this Court in his favor as administrator, is evidence that plaintiff sustained that character, in all questions arising under that judgment against all persons; conclusive, on parties to that suit; *prima facie*, against strangers. The tenant, not being a party or privy, may impeach that judgment by plea or proof. No question having been raised by plea or proof, the *prima facie* evidence becomes conclusive. *Downs* v. *Fuller*, 2 Metc. 135.

4. The title set up by tenant is fatally defective. He relies upon Smith's deed, which is subsequent to our attachment; and McDonald's levy, which passed no title, because the return does not show that the appraisers were *disinterested*. *Williams* v. *Amory*, 14 Mass. R. 20. The amendment proposed cannot be allowed against persons not parties to the original suit; and, if made, would be of no use to the tenant, as the Registry of Deeds would still show his title to be defective. *Means* v. *Osgood*, 7 Greenl. 146; *Williams* v. *Amory*, 14 Mass. R. 29, 30.

McDonald, in whose name the motion is made, has not, and never has had, any interest in the matter. Before the return was completed and recorded, before he had any color of title, he released to the tenant. The tenant was the officer who made the return. A month before his return was completed and recorded, he became the ostensible owner of the execution and all titles under it, by putting on record McDonald's release to himself; and was probably the real owner at the commencement of the levy. At that time he claimed and held the land as Smith's grantee. His brother, S. P. Strickland, was one of the appraisers.

Under these circumstances, it certainly cannot be deemed unjust to infer, that the omission of the word "disinterested" was not by mistake, but by design, and to make the return in accordance with the fact.

5. The tenant's fifth objection, an objection to *our levy*, seems to be founded on a misapprehension of the statute, and the officer's return.

The statute did not require notice to all the debtors, but to those whose "land is to be taken." Some of the "land taken" belonged to Edward and Samuel Smith, and some, including the demanded premises, to Samuel alone. The return shows, that the officer, before commencing the service of the execution, notified both, and before making the levy in question, gave another notice to Samuel. It shows how he notified him, "by *giving* him a written notice;" and for what? "to appear and choose an appraiser." The statute prescribed no form, but merely said that the debtor should be "duly notified." This return meets the requirements of the statute, and is as full and particular in this respect, as any that have been met with.

6. The tenant's last objection is, that our levy is for too much, covering excessive interest, to the amount of 67 cents. Such a fact is not stated in the case, nor admitted, nor does it appear on the face of the papers. It appears from the counsel's argument, that he and the officer differ in the results of their computations. Which is correct, is not a question of law for the Court, but of fact for the jury. But the tenant's counsel must be wrong in his result, for he is wrong in his mode of arriving at it. He stops the interest on the whole amount of the judgment, at the date of the first levy, July 27; when, in fact, interest ceases to run then, only on such part as is satisfied by that levy, and continues to run on each of the sums satisfied by levies on subsequent days, till such sum is satisfied. The last levy was made Aug. 2d, and interest on the sum covered by that levy run till that day. And if in the case, and proved, it could not affect this levy; for the return shows this to have been made July 30th, and another, for $96, on the second of August.

*T. Mc Gaw* in reply.

1. The case finds that all the said Bartlett's estate was settled, and settled without making sale of this land, and that

there were funds on hand sufficient to pay the only remaining debt. Of course this land was not wanted for that purpose. The statute of 1821, was substantially re-enacted in 1841. Revised Statutes, c. 108.

2. The case of *Downes* v. *Fuller*, cited for the demandant, is not in point. My position is, that if the demandant declare on a cause of action arising in his own time, he must, under the general issue, if it be essential to his claim, prove his title as executor or administrator, and the defendant may controvert it, as the doctrine is laid down in 2d Starkie on Evidence, 548–9.

3. The demandant's counsel is mistaken respecting the deed from McDonald. The levy of McDonald and his deed to Strickland show, that the levy was fully completed before the deed was made. It is true the levy was recorded after the deed was given, but that is immaterial.

4. I do not find it stated in the officer's return, that he gave "*another* notice to Samuel," or any thing equivalent thereto as the counsel suggests.

5. As to excessive interest, it is in the agreed statement, that both of said levies shall remain open to all legal objections, which may at the argument be urged against them. The facts relative to this objection appear from the copies of the demandant's levy. The value of the land, as appraised, exceeds the amount of the execution and all costs and legal interest. The levy is one entire transaction and all parts of it "take effect by relation, from the time when the legal proceedings for making it commenced," agreeably to *Hall* v. *Crocker*. The objection affects the whole levy and every part of it. When all the facts are given, as in this case, the question whether the interest is excessive, is a question for the Court.

The opinion of the Court was prepared by

WHITMAN C. J. — A default was entered in this case, after the action had proceeded to trial, upon an agreement between the parties, if the evidence introduced by the plaintiff would not entitle him to recover, that it should be taken off, and the action stand for further trial.

The questions presented for our consideration are numerous, and predicated upon supposed defects in levies upon the demanded premises, one under which the plaintiff claims, and another under which the defendant deduces title. The latter having been prior in date, and under an attachment on mesne process, will first be noticed. If sustainable it will defeat the plaintiff's claim. The officer who made it was the defendant himself, who, at the time of making it, was sheriff of this county. In making his return of his doings, he omitted to certify, that the appraisers were disinterested, and has returned only that they were freeholders and discrete men. The statute authorising the levy requires, that they should be disinterested; and the law requires that it should appear by the return of the officer making the levy, that they were so. *Fairfield & al.* v. *Paine*, 23 Maine R. 498; *Howard* v. *Turner*, 6 Greenl. 106; *Russ* v. *Gilman*, *Ib.* 209.

The defendant, however, at the trial, filed a motion for leave to amend his return, but the Judge then presiding declined granting it; and it is now insisted, that the Judge erred in so doing; and this is one of the questions saved for the consideration of the Court. Although such questions are addressed in some measure to the discretion of the Judge holding the Court at the time the motion may happen to be made, yet it is now for the whole Court to consider of the matter, and determine whether, under the circumstances here presented, it would be proper to allow the proposed amendment to be made. The return was made in 1837, more than six years before the motion to amend was filed; and nothing appears by which the amendment could be authorized to be made, besides the recollection of the defendant. This Court has decided, however, that such an amendment may be permitted, even at a remote period, when the original parties in interest remain the same. *Howard* v. *Turner*, before cited; *Gilman* v. *Stetson*, 16 Maine R. 124; *Eveleth* v. *Little*, *Ib.* 374.

But in this case the plaintiff was no party to the judgment under which the defendant claims; and of course, is not to be affected by any alteration of the levy consequent upon it, or

the return thereof; unless he should have understood from something apparent in the proceedings in that case, that the defect was the result of accident merely. *Haven* v. *Snow*, 14 Pick. 28; *Johnson* v. *Day*, 17 *Ib.* 106; *Hovey* v. *Wait*, *Ib.* 196; *Baxter* v. *Rice*, 21 *Ib.* 197. There does not appear to be any thing in the proceedings in the case, from which the plaintiff was bound to have inferred, that the omission was not from design, and a consciousness that the appraisers were not disinterested. It may be said that the plaintiff should have been placed upon his guard from the strangeness, that an officer should have proceeded to make a levy, unless the appraisers were known to him to be disinterested; but it would be equally so in the case of any other omission of duty in making a levy. Moreover, many years had elapsed after the return in question had been made, and the defendant had gone out of office, which are considered as adding force to the objection to an amendment like the one proposed. *Hovey* v. *Wait*, before cited. But an objection, paramount to all others, arises from the fact, that the individual to make the amendment proposed, is the defendant himself. Under such circumstances to grant the motion would certainly be unprecedented, and also of a dangerous tendency. The temptation to disregard the truth in such cases would be too strong. He could not be a witness for himself in the case; and cannot be admitted, under the guise of an amendment of his return as an officer, to make that evidence, which would be indispensable to the validity of his claim. The proposed amendment, therefore, must be adjudged inadmissible.

But the defendant has had the precaution to have his title confirmed, by a conveyance directly from the person, as whose the premises had been attempted to be acquired by a levy; and must prevail unless the plaintiff can make out a superior title.

The plaintiff counts upon his own seizin; and to maintain it he offers in evidence a levy upon the premises in question, purporting to have been made in his favor, as administrator of James Bartlett, of Dover, in the state of New Hampshire, who

was a creditor of the individual, as whose the grantor of the defendant had made the before named imperfect levy. The defendant's conveyance, however, was executed before this levy was made, but subsequently to the attachment on mesne process in the suit, which eventuated in a judgment, in satisfaction of which the plaintiff's levy was made. To avoid the effect of this levy the defendant interposes sundry objections.

He insists, in the first place, that the plaintiff has no right to prosecute this action, as upon his own seizin, and a disseizin done to him; but that he should have sued, if at all, in his representative character as administrator; and, to support this position, he relies upon a dictum merely, though of a very learned Judge, in the case of *Williams* v. *Nason*, 5 Mass. R. 240. The dictum is, "If executors or administrators, who have caused an execution to be levied on lands, to satisfy a debt due to the deceased, are after disseized, they may recover the lands, declaring on their seizin, in the capacity in which they had obtained their judgment." It is not said, that they may not recover, declaring on their own seizin. There are numerous cases in which it is admissible for executors and administrators to declare either way; either in their individual or representative capacities. All judgments recovered by executors and administrators may be declared upon either way. So if the personal property coming into their hands, in their representative capacity, be wrested from them, they may bring actions for it as individuals, or in their representative capacity. *Crawford* v. *Whittal*, in a note, Doug. 4; *Talmage* v. *Chapel*, 16 Mass. R. 71. And, by parity of reasoning, the same must be the case where executors and administrators are allowed to sue for and recover seizin of real estate. Upon a setting off to them by levy they become seized. Rev. St. c. 108, § 26. They become seized in trust; but whoever is seized in trust, is seized, so that actions for the injuries done to the trust estate may be brought in his name, without allusion to his representative capacity.

It is secondly contended, that there is evidence in the case, which shows, that the estate so acquired by the plaintiff, was

not necessary for the payment of the debts of his intestate; and, therefore, that he had not a right to bring any action, either personally or as administrator, to recover seizin of the premises. The evidence relied upon is the testimony of a witness, who heard the plaintiff hold language, from which such a fact was inferable; and, therefore, it is contended, that the action should have been brought by the heirs of the deceased, and not by the administrator of his estate. But the proper evidence of such a fact is not the loose declarations of the administrator. It should, at least, appear from his final account settled in the probate office. *Webber & al.* v. *Webber*, 6 Greenl. 128. Till then it cannot be known conclusively, that real estate acquired by levy, at the suit of the administrator, will not be necessary for the payment of debts.

It is thirdly objected, that the plaintiff's levy is void, because the debtor in the execution was not suitably notified to choose one of the appraisers. The return of the officer is, "that he appointed an appraiser for the within named debtor, Samuel Smith, he having neglected to choose an appraiser, although I gave him notice in writing to appear and choose an appraiser, at least twenty-four hours before the time of the levy." This return, in this particular, must be taken to be true; and we think the notice must be holden to be sufficient. The other debtors in the execution do not appear to have been interested in the premises; and the conveyance, which the defendant took, as before noticed, to confirm his title, was not from them, or either of them. The notice, therefore, was sufficient. The defendant, however, insists that the time and place, at which Smith was notified to appear for the purpose of choosing an appraiser, and also to attend to the levy, should appear by the return to have been designated. But the statute has not, in terms, prescribed that any thing of the kind shall expressly appear in the return, and we are not aware that any decision has ever held it to be necessary. Having returned that Smith neglected to choose an appraiser, we must understand, that the notice designated the purpose for which he was required to make the selection. The officer could not otherwise have re-

turned that the debtor neglected to choose one. Notwithstanding the decision in *Means* v. *Osgood*, 7 Greenl. 146, may seem to be the other way, it has since, repeatedly, been held to be sufficient for the officer to return, that the debtor "neglected," or "neglected and refused" to choose an appraiser, without saying, in express terms, that he notified him to do so. *Bugnon* v. *Howes*, 13 Maine R. 154; *Thompson* v. *Oakes & al. Ib.* 407; *Sturdevant* v. *Sweetser & al.* 3 Fairf. 520; *Blanchard* v. *Brooks*, 12 Pick. 47. The courts in these cases have considered, that, when an officer so returned, his return would be false, unless he had duly given the debtor an opportunity to make the selection.

It is fourthly, objected, that the notice to choose an appraiser was given but once, although several different appraisements took place, of several different parcels of land and at several different times. The answer to this is, that we do not so understand the facts to appear. The officer's return, in reference to the premises in question, admits of no such construction. His language is, as before quoted, in reference to this levy. How it may have been as to the others it is unnecessary to inquire; as to this it is single and specific.

The fifth objection is predicated upon the supposition, that the levy was for a greater amount than was due on the execution for debt, costs, interest and charges for the levy. If this objection has any foundation it can only apply to the last of the levies made in satisfaction of the execution. At the time when the levy in question was made it did not satisfy the amount named in the execution, exclusive of interest and charges of levying the same; and, therefore, was unaffected by any miscalculation, if any there was, at the time when the last levy was made. Though the officer dates his concluding return on the second of August, the day on which the last levy was made, yet, referring to his former partial returns, made at the dates of the previous levies, he returns as to those, that they were made at their respective dates, and that the appraisements and delivery of possession, in part satisfaction, then took place. All previous to the last levy, therefore, must

stand unaffected by any miscalculation as to the amount for which a levy was to be made, which took place at the time of the last levy.

But the defendant's calculation is based upon an erroneous principle: it is upon the supposition that the several levies should be considered as taking effect from the date of the first levy, which was on the twenty-seventh of July. The several levies, as the return shows, were distinct and separate; and, until the last, were in satisfaction *pro tanto* only, at their respective dates. The interest on the judgment and every part of it, remaining unsatisfied, should be calculated till the final satisfaction was accomplished. Calculating the interest upon this principle to the time of the first levy, and so on, upon the balances remaining, until final satisfaction, the balance finally satisfied may not have been materially greater than the law would sanction. But however this may be, as the execution was clearly not satisfied by the levy in question, this objection is not sustainable.

We come now to a question, which, but for the course taken by the defendant at the trial, if the fact was as supposed by him, that the plaintiff had never taken administration in this State, might have been availing to avoid the plaintiff's levy. He, on that occasion, insisted that the plaintiff was bound to prove that, before the rendition of the judgment, upon which his levy depends for support, and when he was allowed to take upon himself the prosecution of the suit, which led to the judgment, he had been duly appointed administrator of his intestate's estate in this State. This the Court very properly overruled. The presumption, *prima facie* is, that all judgments, rendered by courts of competent jurisdiction, are properly rendered, and upon due proceedings had preparatory thereto; and between the parties thereto and privies are conclusive, unless fraudulently obtained. Between a party thereto and a stranger it is otherwise. Against the latter they are evidence only that such judgments were rendered upon due proceedings had therefor, and in support of proceedings had thereupon, as in the case of levies upon real estate to satisfy them, in which

case they become a muniment of title. There are exceptions, however, to this general rule as to judgments *inter alios*, but they are not applicable to the case before us. But when a judgment is introduced collaterally, as a muniment of title, which was rendered *inter alios*, it is not conclusive upon the one not a party to it. It will be competent for him to show that it was unduly or irregularly obtained. *Pond* v. *Makepeace & al.* 2 Metc. 114; *Downes* v. *Fuller*, *lb.* 135, and cases there cited. If the defendant, in the case before us, had put the question, as to the qualification of the plaintiff to take upon himself the prosecution of the suit, in which his judgment was rendered, in issue, and had presented proof that the plaintiff's intestate had not resided in this State, and from the probate office in this county, where the premises levied upon were situate, and where the suit was pending, that the plaintiff had not been there appointed administrator, there being no evidence that the intestate had *bona notabilia* in any other county in this State, the burthen of proof would have been shifted, so that if, thereupon, the plaintiff had not shown, that he had duly taken administration in this State, his judgment, as it respected the rights of the defendant, would have been rendered nugatory. As the case presented stands, however, according to the agreement of the parties, judgment should be entered upon the default.

## Diana G. Emery *versus* Levi G. Vinall.

Where the undertaking of a principal to repay to a surety the amount paid by him for the principal, by a levy upon land of the surety, is but one implied by law, it seems that the surety cannot recover of the principal the expenses of the levy.

In case of the avoidance of a levy for informality, the creditor may, in an action of debt, recover judgment against the debtor for the amount of the debt levied for *and interest.*

In the trial of an action, every point of law intended to be made, should be presented to the presiding Judge explicitly, or he cannot be expected to give an opinion upon it; and no exceptions will lie in reference to any point, whereupon no opinion is given, or refused to be given, and no ruling is made by the Judge.

It is not enough for a party to say, that he excepts to the introduction of a witness; he should explain why and wherefore he so objects.

A party cannot prove by a witness the contents of a deed, until he has taken proper measures to have the deed produced, or shown some sufficient reason for not having produced it.

In the absence of evidence or testimony to the contrary, a note is presumed to have been made at the time it bears date.

A conveyance of land as an absolute gift is void as to prior creditors of the grantor. An instruction to the jury, therefore, that if the conveyance was made by the grantor for the purpose of preventing his creditors from availing themselves of it, and he intended and expected to receive a benefit therefrom, and the grantee was aiding him, that the demandant, being a prior creditor, should recover, is erroneous, as it requires of the demandant proof of a fact, which could not legally be required in such case.

As the opinion of the Court on some of the points was based on the particular language of the exceptions, a copy will be given, instead of the concise abstract usually made by the Reporter.

"Writ of entry to recover 67 acres of land in Dixmont in this county, and for the mesne profits. Plea the general issue. Writ dated Sept. 6, 1842.

"The plaintiff read a judgment of the District Court, Penobscot county, May Term, 1841, in favor of the plaintiff versus Waldo P. Vinall and Lot Vinall, for $431, debt, and $23,74, costs of suit. He then read the original writ, dated May 7, 1840, and also the note on which the judgment was founded. The note was dated March 17, 1837, and was for $343,74,

payable to Temple Emery, the plaintiff's intestate, in six months from date with interest, signed by said Waldo as principal and said Lot as surety.

"Another note, similar to the above in every particular, was held by the plaintiff and declared for in the writ, but was withdrawn and judgment rendered for one only. Execution on said judgment, dated June 19, 1841, with the return of an extent, by virtue of said execution, on the demanded premises, as the property of Lot Vinall, July 7, 1841. The execution was duly recorded within three months and returned to the clerk's office.

"The defendant, then read a deed from said Lot Vinall to him, dated March 22, 1837, conveying 25 acres of the demanded premises, consideration $400.

"Deed from Thomas Odell to defendant, March 18, 1837, consideration $200, conveying 50 acres more or less. This and the former deed covered the demanded premises, and something more. The defendant, it was proved, was in March, 1837, a minor, and less than 18 years old. He was son of said Lot, and said Odell was his grandfather. The defendant admitted, that the deeds to him were purely voluntary. Odell died about three years ago, and Lot Vinall about two years ago.

"Rowland Tyler, called by the plaintiff, testified that he formerly lived in Dixmont, and knew Lot Vinall and Thomas Odell; that Odell lived with Vinall; that in June, 1829, Vinall came to him, or sent to him, to go to his house to take the acknowledgment of a deed. In the evening he went down and found Odell very sick; he was not expected to live but a short time. Mr. Vinall brought out a deed from his desk, signed by Mr. Odell; the deed was handed to witness, and he asked Odell, if he acknowledged it, and he said he did. Witness then certified the acknowledgment, and handed it back to Vinall. The witness did not read the deed. The parties told him at the time what it contained. The plaintiff then asked the witness to state, what said Odell and Vinall said the deed contained at the time it was acknowledged. This ques-

tion was objected to by defendant and excluded. The witness then stated, that Lot lived on the farm (of which the demanded premises are a part) and carried it on, and as he always considered, claiming it as his own; that, before he took the acknowledgment of the deed, Vinall told him, he had agreed to support his father-in-law (Mr. Odell) and his wife during life, and Odell had given him a deed of his farm. Odell was present and said nothing.

"Waldo P. Vinall, called by defendant, (objected to by plaintiff, but admitted) testified, that he was the brother of defendant, recollects Tyler's coming to his father's and transacting business as a magistrate, about 15 years ago; remembers an instrument was placed in Mr. Tyler's hands, and that he asked his grandfather Odell, if he acknowledged it to be his free act, and that his grandfather assented to it; that his grandfather told his step-grandmother to put it in the till of his chest in which he kept his papers; that he did not see his father (Lot Vinall) have it in his hands, but it may have been that he did have it. Mr. Tyler's remembrance may be better than that of witness; the grandmother then put it in the chest. Saw nothing more. He then testified, subject to objection, that in the spring of 1837, he entered into a copartnership with Hosea B. Emery, brother of Temple Emery, for the purpose of trading at Monroe; that said H. B. Emery and one Scribner had been in trade there and failed. Mr. Kendrick, one of the Boston creditors, came down, and after an examination agreed to discharge the debts against Emery & Scribner on their giving security for one half of the amount due; that H. B. Emery proposed to witness to go in with him, take the stock of Emery & Scribner, and give security for the one half; that he examined into the business and concluded to go into trade with said Emery, and give security as the Boston creditors proposed; that he and said H. B. Emery went together to said Temple, to see if he would be surety for them to the Boston creditors. Temple Emery came to Monroe and went with Emery and Vinall to Belfast, where the security was

given to the creditors by said Temple. Notes were given by Emery and Vinall, signed by Temple Emery, as surety, dated March 21, 1837. S. Heath, Esq. was attorney for said creditors. A bill of sale of the goods at Monroe was made to said Temple. We returned to Monroe. The goods were delivered to Temple Emery, and he put them in our possession; every thing was left in the store; he told us to sell the goods and collect the demands and apply the proceeds, where he was owing for us in Boston. We proceeded to make payments as fast as we could; we paid one note to Kendrick & Lamb, in 1837, for $461,95; we paid to the Boston creditors together. After the transaction at Belfast, Temple Emery said to me that he wanted security. I proposed to get my father to sign. He said he was secured for half by Hosea by a sawmill, built by Hosea on Temple's land; he agreed to take my father; had two notes written; Hiram Emery wrote them; I signed them in Hiram's presence; they were both of the same amount; I took the notes and went to my father's, in Dixmont, and he signed the notes. This was some weeks after the transaction at Belfast. My father had two horses, five or six cows, a good wagon, and a chaise. The said Waldo then stated as follows, (the plaintiff objecting.) The summer that Temple died, (1838), he came to Monroe, and stated that he wanted further security. I had at Emery's mills 32,575 hard wood staves, a few hoop poles and barrels; Emery said, if I would deliver them to him, and have them applied on the notes he had signed as surety for me and Hosea, he would give up the notes he held against me and my father. I agreed to it and made the delivery, and sold the lumber in Boston and applied the proceeds on said notes which Temple signed for us.

"Temple died before I got returns; Temple never received any thing from the goods and demands. A. L. Kelley had a lien on the lumber I turned out to Temple. I settled with Kelley and paid him about $50; my father furnished the means to pay him; he turned out a note against my half-brother, L. Vinall, jr., which Mr. Kelley accepted in payment.

"The aforesaid deeds, notes, judgments, executions and returns may be referred to by either party.

"TENNEY J. presiding at the trial, instructed the jury, that to entitle the demandant to a verdict for the land, which the defendant claimed by virtue of the deed from Odell to him, the demandant must satisfy them, that a deed of the whole or a part of this land was made, executed, and delivered by Odell to Lot Vinall; that the possession of a deed by the grantee, unexplained, is sufficient evidence of a delivery, and often the only evidence of a delivery; but if it appeared that the grantee had possession of the deed for another purpose, than to receive conveyance of the land, the possession would not constitute a delivery; and, if they found a deed was made, executed and delivered by Odell to said Lot Vinall, they must also be satisfied that it described the whole or a part of the land; and they would look at all the evidence in the case touching this question.

"As it was admitted that the other portion of the land, claimed by the demandant, was conveyed by Lot Vinall to the defendant without consideration, and as the deed was dated subsequent to the date of the note which is the baisis of the demandant's claim, the demandant would be entitled to recover for this portion, unless the defendant should satisfy them, that the said Lot Vinall did not sign said note before the execution of the deed from him to the defendant; and if they were satisfied from the evidence, that although Lot Vinall did not sign said note till after the execution of the deed, yet if he contemplated signing said note when he so executed it, or if he conveyed the land to the defendant for the purpose of preventing his creditors from availing themselves thereof, and he intended and expected to receive a benefit from the same, and the defendant was aiding him in this intention, the demandant would be entitled to their verdict."

The jury returned a verdict for the defendant, and the counsel for the demandant filed exceptions to the rulings and instructions of the presiding Judge, and they were allowed and signed.

*Washburn*, in his opening argument for the demandant, made these points: —

1. W. P. Vinall was interested, and therefore incompetent as a witness. Rev. St. c. 94, § 23; 14 Mass. R. 143; 8 Pick. 547; 10 Pick. 204; 3 Metc. 81; 8 Shepl. 494.

2. The witness, Tyler, should have been permitted to answer the question proposed, and to have stated the contents of the deed. 1 Stark. Ev. 436; 1 Greenl. Ev. 94, (note 2) and 616; 1 Stark. Ev. 36, 57, 440; 1 Greenl. Ev. 107, 109, 223.

3. The testimony of W. P. Vinall, concerning the notes, was improperly admitted.

4. It was contended by the plaintiff, at the trial, that the deed from Lot Vinall to the defendant was fraudulent and void. The instructions of the Judge on this subject were erroneous.

5. If this was a gift, if the intention of the grantor was fraudulent, and he designed to contract debts and not to pay them, the knowledge of this intention by the voluntary grantee is not necessary to avoid the deed. *Howe* v. *Ward*, 4 Greenl. 195.

6. The intestate was a creditor of the grantor of the defendant, prior to the voluntary deed under which he claims. The grantor admitted in writing, that the notes were prior to the deed, and he and the defendant claiming under him are bound by it. The instructions respecting this were erroneous.

7. A voluntary conveyance is not good against a subsequent creditor without notice. Until the deed is recorded, or notice given in some other way, it cannot be set up against a creditor of the grantor. 9 Mass. R. 390; 11 Mass. R. 421; *Howe* v. *Ward*, 4 Greenl. 206; 1 Dane, 668.

*Kelley* argued for the tenant.

1. The admission of W. P. Vinall is but the common case of a witness whose interest is balanced.

2. The testimony of Tyler was rightly rejected. It was an attempt to prove by parol the existence and contents of a deed,

without any proof of its loss or diligence to discover it; and that too, not by one who had read the deed, but by what others had said the deed contained.

3. The testimony respecting the time when the notes were actually signed, was admissible to repel any presumption of fraud.

4. If either party has a right to complain of the instructions of the Judge on this subject, it is the tenant. If the whole is read, and not a single sentence alone, it is clearly right.

5. This objection is included in the fourth. The demandant has no ground of complaint as to the whole charge on this point.

6. The facts in the case are such, that this objection is merely fanciful.

7. Voluntary conveyances may not be good against subsequent creditors, when the grantor did it with the view to contract debts afterwards and not pay them, and the grantee at the time knew of such intention, and took the deed to aid him in it. The jury, in this case, have found, that the *whole transaction was in good faith.* But to make the deed void in such case the grantee as well as the grantor must be a party to the *designed fraud.*

*Kent*, for the demandant, replied.

The opinion of the Court was drawn up by

WHITMAN C. J. — The first exception taken to the ruling of the Court, is to the admission of Waldo P. Vinall as a witness. It is urged, that he was incompetent, by reason of interest in the event of the suit. It appears that he was a joint debtor with Lot Vinall in the judgment recovered by the plaintiff, to satisfy which a levy was made upon the demanded premises, as the property of said Lot Vinall; and on which the plaintiff's claim of title rests; and that Lot was but a surety for the witness, on the note on which that judgment was rendered. It is contended, that, coming as the witness does, under such circumstances, to disturb the levy, he has an interest in so doing, greater than he will have by avoiding the levy, (and thereby rendering himself liable for the original debt,)

equal to the amount of the costs of levy, for which it is contended, if the levy should be upheld, he will be responsible to Lot as his surety. But we are not satisfied that the witness would be so responsible. The express undertaking, on the part of Lot, was, that he would pay the debt, if the witness did not; and there does not appear to have been any thing more than an implied undertaking, on the part of the witness, to repay him the amount, in case he should have paid it. Lot does not appear to have had any express stipulation from the witness to indemnify him from all harm, in case he should be compelled to pay the note by a levy upon his real estate, without which, it is far from being clear that the witness would be answerable for expenses so incurred.

But it is further contended, that, by the Rev. Stat. ch. 94, § 23, a creditor, whose levy has been defeated, can have execution renewed, only, for the original judgment, without interest; and, in argument, it is supposed, that the levy was for the amount of the original judgment, and interest thereon to the time of the levy, for which the witness would be answerable, if the levy should be sustained; thus showing, that the balance of interest on his part would be in defeating it. But it is not stated in the bill of exceptions, that the levy was for the amount of the original judgment, with interest thereon to the time of the levy. The statement is, that the execution was levied on the demanded premises. Whether fully satisfied or not does not appear. It is said, in the bill of exceptions, that the execution and levy may *be referred to by either party;* by which it might perhaps have been made to appear, that it was fully satisfied, including interest to the time of the levy; but no such reference of either party has been made in our presence; and from a bill of exceptions we are not authorized to infer any fact not embraced in it; and besides, in case of the avoidance of the levy, the creditor in an action of debt may recover of the debtor, judgment for the whole amount of the debt levied for, and interest. This exception, therefore, cannot be considered as well taken.

It is next contended, that the witness was incompetent, be-

cause he may be answerable to Lot's estate for what may be recovered by the plaintiff for mesne profits, it being supposed by the defendant, that the amount so recovered will be recoverable of that estate by the defendant, and afterwards of the witness by the administrator of that estate. But it is not stated in the bill of exceptions, that the defendant holds under Lot Vinall, by deed of warranty, and we have not been referred to the deed itself to see whether it was so, by either of the parties, as provided for in the bill of exceptions; and of course cannot consider this exception as properly presented for our consideration. Indeed, we might well consider the three grounds of exception to the admissibility of the witness as improperly presented in argument, because it does not appear that they were ever brought distinctly to the notice of the Judge at the trial. Every point intended to be made should be presented to the Judge at the trial explicitly. If that be not done, he cannot be expected to give any opinion upon it; and, if he should not, no exceptions should lie in reference to any such point. It is not enough for a party to say he excepts to the introduction of a witness; he should explain why and wherefore he so objects.

It is next insisted that Tyler, a witness introduced by the plaintiff, should have been permitted to state what Lot and Odell, another grantor of the defendant, stated to be the contents of a deed from the latter to the former, of which he, Tyler, took the acknowledgment, in June, 1839. But it does not appear that the plaintiff had ever taken any measures to have that deed produced, or shown any reason for not having produced it; till which no evidence *aliunde* of its contents could be admissible. The ruling of the Court, therefore, was, in this particular, unexceptionable.

As to the testimony of W. P. Vinall, relative to what took place between him and Temple Emery, in the summer of 1838, concerning the giving of certain notes, we are unable to gather from the exceptions, as drawn up, any ground upon which it was properly admissible. It does not appear, that the note, on which judgment was recovered, was either of those

notes; but the contrary seems inferable, as that note bore date anterior to that transaction; and there would seem to have been no reason why any notes, growing out of it, should have been antedated, so as to correspond with the note sued. And, moreover, the witness, who was one of the signers of those notes, and who must have been conusant of any such identity, if any existed, does not appear to have testified to it. Besides, this witness and Lot had both voluntarily suffered the judgment in question to be rendered against them. If there was any ground upon which it could have been pretended, that the note, upon which it was founded, had been paid, it would seem that they could not have failed to have interposed that defence. With an ill grace, therefore, could this witness have stated, that the judgment was recovered upon a note not due. But his testimony does not seem to have had any such tendency; and was, therefore, so far as can be gathered from the bill of exceptions, wholly irrelevant; and if the Court had finally so informed the jury, or if it could be seen that it could have had no effect upon the minds of the jury, it might not have formed any legitimate ground of exception, as the plaintiff, in the language of our statute, in reference to the allowing of exceptions, might not have been *aggrieved* by it. But it may not be important that we should form or express any definite opinion upon this matter, there being other grounds upon which we are satisfied that a new trial must be granted.

There would seem to be no question, but that Lot Vinall owned twenty-five acres of the demanded premises, at the time of the date of the note, on which judgment was recovered; and the note bears date before Lot conveyed the same twenty-five acres to the defendant; and it was admitted at the trial, that that conveyance was purely voluntary, and without any valuable consideration therefor; and there does not seem to be any thing stated in the bill of exceptions, that should have been considered as having a tendency to show, that the note on which the judgment was rendered had been antedated; especially as W. T. Vinall, the principal in the note, states nothing of the kind in his testimony. The jury, nevertheless, were

given to understand, that they might find it to have been made after the conveyance of the twenty-five acres to the defendant. This we are inclined to consider as incorrect. In the absence of testimony, or evidence to the contrary, the note should have been presumed to have been made at the time it bears date.

Again, the jury were instructed, in reference to the twenty-five acre piece, that, if Lot conveyed it to the defendant for the purpose of preventing his creditors from availing themselves of it, *and intended and expected to receive a benefit therefrom, and the defendant was aiding him*, the demandant should recover. It seems to be unquestionable that the conveyance, referred to in this branch of the instructions, was an absolute gift to the defendant, then a minor son of the grantor, and there is no evidence tending to show that there was any prospect or hope of benefit remaining to him therefrom. It was like numerous other gratuitous gifts, mentioned in the books of reports, in which no benefit was expected to accrue, or intended thereafter to be derived therefrom, by the grantor or donor, which have been adjudged void, when found to be interfering with the rights of creditors. This instruction, therefore, went too far and required of the plaintiff proof of a fact, which could not legally be required in such a case.

*Exceptions sustained.*

*New trial granted.*

JAMES CUSHING *& al. versus* NATHAN LONGFELLOW.

Where the question to be decided is the validity of a sale of non-resident, unimproved lands in an unincorporated place, to pay the taxes assessed thereon by the County Commissioners, to be expended in making a road, whether the doings of the County Commissioners having jurisdiction of the subject matter, can be impeached collaterally, or must be considered as correct until reversed by *certiorari*, respecting which no opinion is given, the doings of the county treasurer in making the sale may be examined. And parol testimony is admissible to affect them.

The county treasurer, in making such sale, is bound to a strict performance of his duties.

The giving credit for the purchase money by the county treasurer, at such sale, renders it invalid against the original proprietor.

In an action of trespass for mill logs, cut upon land of the plaintiff and removed to a distance therefrom, the true rule in the assessment of damages is, that the plaintiff should recover the value of the logs, as it was the moment after they were severed from the freehold.

THE action was trespass for taking, carrying away and converting the plaintiff's mill logs.

It appears from the report of the trial before TENNEY J. that the parties introduced deeds, powers of attorney, assignments, depositions, agreements, admissions and witnesses. The papers were, with a single exception, to be referred to, and not copied. Copies of them, or an abstract of the facts proved, cannot be given by the Reporter. There is, however, no difficulty in obtaining all the facts, necessary to understand the points decided, from the opinion of the Court, and also the ruling of the Judge presiding at the trial.

*Kent* and *Washburn* argued for the plaintiffs — and

*Hobbs*, for the defendant.

One of the objections made, in behalf of the plaintiffs, to the validity of the tax title, was, that the giving of credit by the county treasurer rendered the sale illegal. In their argument on this point they cited st. 1821, c. 118, § 24; Story's Ag. 96; 13 Mass. R. 260; 5 Mason, 425; 9 Johns. R. 263; 1 Cowen, 46; 4 Cowen, 553; 14 Sergt. & R. 434; 2 Pick. 258.

On the point, that the instructions as to the measure of

damages were correct, they cited *Higginson* v. *York*, 5 Mass. R. 341; *Bucknam* v. *Nash*, 3 Fairf. 474; *Hill* v. *Penny*, 17 Maine R. 409.

For the defendant, it was said, on these points, that when the sale was made, the treasurer became immediately liable for the amount. The tax is paid by the sale of the land; and in what manner payment is made, or when, the treasurer and his sureties become immediately liable to pay the money upon the sale. Whether the payment is made in gold or silver, bank bills, notes payable on demand or on time, is a matter between the treasurer and the purchaser. Will a sale be void, if the treasurer receives payment in bank bills? And yet a good note, payable on time, may be better than many bank bills.

He contended, however, that this question was not properly before the Court, as parol evidence could not be admitted to contradict the admission of payment in the deed.

It was also insisted, that the Judge erred in declining to give the requested instruction. *Morgan* v. *Powell*, 3 Ad. & Ellis, N. S. 278; *Wood* v. *Morehouse*, Ib. 440.

The opinion of the Court was prepared by

WHITMAN C. J. — From the report of the Judge, who presided at the trial, we learn that the action is trespass *de bonis asportatis;* that the articles alleged to have been taken and carried away were certain logs, cut on a certain tract of land, containing four thousand acres, situate in the southwest corner of township No. nine, in the county of Aroostook; that the plaintiffs made out a *prima facie* case by showing themselves to be the mortgagees of the tract; and that the logs were cut thereon by the defendant; that thereupon they insisted on recovering, as damages, the estimated value of the logs, at a certain landing place, to which they had been hauled by the defendant; and the Court so ruled, and instructed the jury accordingly. But the defendant insisted that the damages should be estimated according to the value of the timber when standing; and the jury were allowed to ascertain what such value actually was, with a view to the correction of the verdict in

case the whole Court should be of opinion, that such was the true rule for estimating damages. The jury, however, returned their verdict in accordance with the instruction of the presiding Judge. And judgment is to be entered upon this verdict unless the whole Court should be of opinion that the damages were incorrectly assessed. And, in such case, if the rule for the purpose should be found to be as contended for by the defendant, the verdict is to be corrected, as before intimated. If, however, the title to the whole township, as set up on the part of the defendant, should be found to be in him, the verdict is to be set aside, and a nonsuit entered.

The title thus set up in defence must first be considered. It is supposed to depend upon the validity of the laying out of the Baring and Houlton road; and the assessment upon the said township for the purpose of opening and making the road passable; and upon the sale and conveyance to the defendant of the whole township, consequent upon the non-payment, by the proprietors thereof, of the sum so assessed.

A variety of objections were in the first place urged against the proceedings in laying out the road, which we have not been inclined to regard as of much force, but which we have not deemed it necessary to examine with a view to a definite decision in regard to them, as there might be an impropriety in our revising the doings of the Court of County Commissioners, thus incidentally presented; and as we shall find the defendant's title principally objectionable upon other grounds.

The petition for an assessment to open and make the road, and the notice ordered thereon, sets forth, that a road was laid out in 1832; whereas the Baring and Houlton road was laid out in 1833. The proprietors of the township, therefore, could not have been duly apprised, by the notice given, that it was in contemplation to lay an assessment upon the township for the purpose of opening and making the road in question.

And, moreover, the year allowed for the making of the road by the proprietors, had not expired, when the petition was preferred. The road was laid out at March term, 1833; and the petition for the assessment was entered at September term, of

the same year. The Court, in ordering notice upon it, were probably led into an error by the statement in the petition, that the road was laid out in 1832, and may have made the order for the assessment upon the same supposition. The Court, however, had jurisdiction of the subject matter; and though they may have erroneously adjudged, in consequence of their misapprehension of a fact, the notice having been given as provided by statute, and the plaintiffs thereby having been made constructively privy, and therefore, in a manner, parties to the proceeding, it may be improper for us, upon an incidental examination, to treat the proceeding as a nullity; and, thereupon, to adjudge the sale to the defendant for that reason to be void.

But the county treasurer, who made the sale to the defendant, was a ministerial officer. His acts may be examined. Parol testimony is admissible to affect them. He was bound to a strict performance of his duties. The proprietors of the township, as well as the public, were interested in his doings. His acts should have been no otherwise in reference to the one than to the other. It appears that in making the sale he stipulated to give to the purchaser a credit of something like two, four and six months, for the purchase money. This he was not authorized by law to do. He should have sold for cash down. Public agents, authorized to make sales, in the absence of any express authority to the contrary, can do no otherwise. Those who deal with them are bound to take notice, that such is the case, and become privy to the erroneous proceeding. If one deals with a private agent, even, who has not an express or implied authority to sell on credit, the title, to any article purchased of such agent, will not vest in the vendee, against the principal of the agent. Public agents can seldom, if ever, derive authority from implication. The plaintiffs were interested, in this instance, in having the sale made for cash. They had a right of redemption. The sale on credit might well be believed to enhance the price; so that they might, if the sale could be upheld, be compelled to pay a much greater sum for redemption than would otherwise be requisite for the purpose.

They might, besides, be under the necessity, in order to a redemption, to pay the amount to one, who had in fact paid nothing for the land; and who might subsequently fail to make payment for it; and so the land be subject to a re-sale, in order to obtain funds to open and construct the road. We think a sale made, as the one in question was, could not be valid against the original proprietors. The plaintiffs therefore were entitled to damages.

But we are not satisfied, that the principle for assessing them, on the one side or on the other, as contended for by each, was correct. The true rule, we apprehend to be, that the plaintiffs should recover the value of the logs, as it was the moment after they were severed from the freehold. They then became a chattel, so that trespass *de bonis* would lie for them. This value would, perhaps, be somewhat greater than what, among lumbermen, has obtained the name of stumpage, viz. the value of trees standing

The plaintiffs, in their action of trespass, have not a right to select any other place, than that where the injury was originally done, to enhance the value of the articles taken, although they might have been greatly enhanced in value by a removal to such other place. It is true they might have seized them wherever they could find them; and might have demanded them, at another place, of one having them there, and in an action of trover have recovered the value of them there. *Baker* v. *Wheeler*, 8 Wend. 505, and cases there cited. But in trespass the rule is believed to be different. In *Morgan* v. *Powell*, 3 Adol. & Ellis, N. S. 278, it is laid down, that the value of the property severed from the freehold is that, which it has immediately after being severed. That was an action of trespass *de bonis* for coal severed from a mass in the pit, and raised to the pit's mouth, in readiness for sale. The plaintiff in that case insisted on being allowed to recover the value, as it was when raised to the pit's mouth, and the judge at *nisi prius* so ruled; but the whole Court reversed the decision, and ruled as above. And the rule was said to be the same in the Exchequer. *Martin* v. *Porter*, 5 M. & W. 351. In *Wood*

v. *Morewood*, it was said to have been held by Park, Baron, in an action of trover for coals so taken, if the defendant took them without being conscious that he was doing wrong, they might be estimated as if they were to be sold by the plaintiff unsevered; if otherwise, then at the price they would be worth when first severed. 3 Adol. & Ellis, N. S. 440, in a note. The jury returned the former and the decision was acquiesced in. This seems in conflict with the decisions in N. York; but shows the leaning of the mind, of a very distinguished jurist, towards the equity of not allowing exemplary damages to be recovered against one, not conscious of doing wrong, when he took the goods of another. And the defendant, in the case at bar, may well be believed to have been in this predicament.

Our opinion, not being exactly in conformity to either of the estimates of the jury, a new trial must be granted.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF HANCOCK.

ARGUED AT JULY TERM, 1846.

## THE STATE *versus* HIRAM FLYE.

Where there are several counts in an indictment, the Court may, in the exercise of its discretion, compel the prosecuting officer to select on which charge he will proceed; but when different counts are inserted in good faith for the purpose of meeting a single charge, the Court will not compel the prosecuting officer to make a selection.

Where an indictment for forging an order, set it out as it was when altered, and the proof was, that it was originally drawn for nine dollars, and had been altered to nineteen dollars, *it was held*, that the indictment was sufficient.

If the indictment alleges, that the accused "forged and counterfeited a certain order for the payment of money, purporting to be made and drawn by Eaton Clark and Isaac Somes, selectmen of the town of M.", it is not necessary, to sustain the indictment, to prove, that those men were in fact selectmen of the town.

It is not necessary, that the characters and figures in the margin of an order for the payment of money should be set out in an indictment for counterfeiting and forging the same.

On the trial of an indictment, if a *prima facie* case be made out against the accused, the burden of proof is not upon him to show his innocence of the charge, but remains upon the State, on the whole evidence in the case, to satisfy the jury of his guilt. An instruction, therefore, "that if it was proved, that the order came into the hands of the defendant unaltered, and came out of his hands altered, the burthen of proof was on the defendant to prove that he did not alter it," *was held* to be erroneous.

THIS case came before the Court upon the following exceptions to the ruling and directions of the Judge at the trial, WHITMAN C. J. presiding.

"This is an indictment against defendant of four counts, the first of which charges him with forging an order, as set forth in said first count, which is to be copied as part of the case. The defendant moved that the government should be called on to elect one count, and which one, to proceed upon, but Court refused the motion. It being proved or admitted that the order declared on was drawn and signed by the persons whose names were signed to it, and was originally a genuine instrument; and the evidence offered being to show, that the same had been altered in a material point, particularly by adding "teen" to the word "nine," the defendant contended, that he could not be convicted under the count, it not setting forth the alleged alteration, but declaring generally as is therein set forth. But the Court ruled otherwise, and instructed the jury, that if the instrument was originally genuine, and any alteration had been falsely and knowingly made by the defendant, he might be convicted under this count.

"The defendant also contended that it was necessary for the government to prove, that the persons whose names were on said order, purporting to be selectmen, were in fact such officers, before the instrument could be regarded as one of those named in the statute, which might be forged, and that in the absence of such proof the defendant could not be convicted. But the Court ruled otherwise.

"The Court also instructed the jury, that if it was proved that the order came into the hands of the defendant unaltered, and came out of his hands altered, the burthen of proof was on the defendant to prove that he did not alter it.

"The defendant objected, that the order, No. 139, offered, did not correspond with and prove the order named in the indictment, the sign $ being in the order before the figures specifying the amount of order and not in the indictment; but the Court ruled the variance immaterial.

"To which rulings and directions and opinions the defendant excepted," by his counsel; and the exceptions were allowed by the presiding Judge.

The following is a copy of the first count in the indictment: —

"State of Maine. Hancock ss. — At the Supreme Judicial Court of said State of Maine, begun and holden at Ellsworth within and for said county of Hancock, on the seventh Tuesday next after the fourth Tuesday of May, in the year of our Lord one thousand eight hundred and forty-five.

"The jurors for said State of Maine upon their oaths present that Hiram Flye, of Mount Desert, in said county of Hancock, yeoman, on the twenty-fifth day of February, in the year of our Lord one thousand eight hundred and forty-five, at Mount Desert aforesaid, in the county of Hancock aforesaid, did falsely make, alter, forge and counterfeit, and did cause and procure to be falsely made, altered, forged and counterfeited a certain order for the payment of money, purporting to be made and drawn by Eaton Clarke, and Isaac Somes, selectmen for the town of Mount Desert for the year of our Lord one thousand eight hundred and forty-two, upon Daniel Somes the treasurer of said town of Mount Desert, or his successor in said office, for the sum of nineteen dollars and thirty-six cents, and also purporting to be payable to one Moses Hale, or his order, which said false, forged, altered and counterfeit order is of the purport and effect following, to wit: —

"No. 124. Mt. Desert, January 31, 1843.

"To Daniel Somes, town treasurer, or his successor in said office. Pay to Moses Hale, or his order, nineteen dollars and thirty-six cents, being for school books.

"$19,36, "Eaton Clarke, } Selectmen of
"Isaac Somes, } Mt. Desert for 1842,"

with intent to defraud; against the peace of said State of Maine and contrary to the form of the statute in such case made and provided."

*Kent* and *Herbert*, for Flye, contended, that the Judge erred in refusing to direct the counsel for the State to select one count in the indictment, and proceed to trial upon that only.

20 Pick. 362; 1 Stark. Cr. Ev. 239, 245; Archbold's Cr. Pl. 39, 245.

The genuine instrument should have been set out in the indictment, and the alleged alteration, in order that the Court should see that the alteration was material. The instruction that he could be convicted on such indictment was erroneous.

It was necessary to prove, that the persons whose names were upon the order as selectmen, were in fact such. Unless there was authority in the persons drawing the order to draw it, it would be a nullity, and the alteration of it would not be forgery. 2 Russ. on Cr. 470 and note, and subsequent pages; Ryan, & M. Cr. Cas. 231.

The instruction of the presiding Judge on the subject of the burthen of proof was erroneous. Every one is to be presumed to be innocent, until he is proved to be guilty. The presumption of innocence attends the accused throughout the whole trial, and the burthen of proof continues upon the prosecuting officer. The instruction of the Court deprived the accused of the benefit of this presumption. 12 Peters, 460; Rosc. Cr. Ev. 13; 1 Greenl. Ev. § 34, 35; 19 Maine R. 401; 24 Pick. 373; 2 Metc. 329; 13 Pick. 77; 17 Mass. R. 188; 1 Metc. 221; 10 Pick. 378; 1 Mass. R. 53.

They also insisted, that the objection, that there was a variance between the statement of the order in the indictment and the proof, was tenable. *Com.* v. *Stevens*, 1 Mass. R. 203.

*Moor*, Att'y General, for the State, said that several counts in an indictment, for the same offence, were admissible, and the accused may be rightly put on trial upon such indictment. The Court cannot interfere in such case. But if the Court has power to require such selection to be made, it is a mere discretionary power; and the refusal to exercise it, is not the subject of exception. 1 Ch. Cr. L. 253; 8 Wend. 211; 2 East's P. C. 935.

The alteration of the order makes it a different instrument, and it was rightly set forth in the indictment as a forged order. Rev. St. c. 136, § 51; 3 Chitty's Cr. L. 1038; 2 Russ. on Cr. 379.

The indictment does not allege, that the drawers of the order were selectmen, but merely that they purported to be such on the order. If they were not selectmen, and did not bind the town, they were personally liable, and it was a valid instrument.

The instruction was merely, that, on that particular point, if the jury were satisfied, that one fact was proved, they were at liberty to consider it to be so, unless the accused accounted for this conduct satisfactorily. The instruction was, that the general burthen of proof was on the prosecuting officer, to prove that the accused was guilty, and enough appears in the exceptions to show that such was the fact. 1 Greenl. Ev. § 72; Rosc. Cr. Ev. 73, 396.

There was no variance. The omission was wholly immaterial. 1 Mass. R. 62 and 203.

The opinion of the Court, SHEPLEY J. taking no part in the decision, having been employed in holding the Court at Machias at the time of the argument, was drawn up by

TENNEY J. — The Court declined to direct the prosecuting officer to elect upon which of the four counts in the indictment he would proceed. In point of law it is no objection that two or more offences of the same nature, and upon which the same or a similar judgment may be given, are contained in different counts in the same indictment; the Court may, in the exercise of a discretion, compel the prosecutor to elect on which charge he will proceed. It is usual to charge a felony in different ways in several counts, with a view to meet the evidence, as it may turn out on the trial; and if the different counts are inserted in good faith, for the purpose of meeting a single charge, the Court will not ever compel the prosecutor to elect. 8 Wend. 211.

Another ground of exception is, that the indictment being for forgery of an order, and the proof being for an alteration merely, a conviction could not legally take place. The definition of forgery at common law is, "the fraudulent making or alteration of a writing to the prejudice of another man's rights."

4 Bl. Com. 247. By Rev. Stat. chap. 157, entitled "of forgery and counterfeiting," any person is to be punished in the mode provided, who with intent to defraud, shall falsely make, alter, forge or counterfeit any instrument in writing, being or purporting to be the act of another, by which any pecuniary demand or obligation, or any right or interest in or to any property whatever shall be, or purport to be created, increased, transferred, conveyed, discharged or diminished.

The counsel for the defendant, contended, that it was necessary for the government to prove that the persons whose names were signed to said order as selectmen, were in fact such officers; but the Court ruled otherwise. On an indictment for the forgery of an order, it is necessary that the order should import, that the persons in whose names it was made have a disposing power over the subject of the order, or that it should be proved, that the persons in whose name it was made had such power. *Rex* v. *Baker*, Ry. & Mood. C. C. 231. The order in question purports to be drawn by persons acting in the character of selectmen, and is for school books. Selectmen of towns in certain cases have the power to furnish such books at the expense of the town. Rev. St. c. 17, § 11.

It is unnecessary that the characters and figures on the margin of the order should be set out in the indictment, as the defendant's counsel contended. This is settled in *Commonwealth* v. *Bailey*, 1 Mass. R. 62, and in same v. *Stevens*, *Ib.* 203.

The exceptions taken to the *rulings* of the Judge, which have been examined, cannot be sustained. But the *instruction* to the jury, which the counsel for the defence contend with more confidence was erroneous, deserves further consideration. The jury were instructed, "that if it was proved, that the order came into the hands of the defendant, unaltered, and came out of his hands altered, the burthen was on the defendant to prove that he did not alter it." The prosecuting party is bound to make out his case; in civil proceedings to the satisfaction of the jury, and in criminal, beyond a reasonable doubt. The burthen of proof does not shift from the

party upon whom it was originally thrown upon the production of evidence by him, sufficient to make out a *prima facie* case. But when the other party relies upon facts to establish another and a distinct proposition, without attempting to impugn the truth of the evidence against him, it is otherwise. If the result of the case depends upon the establishment of the proposition of the one, on whom the burthen was first cast, the burthen remains with him throughout, though the weight of evidence may have shifted from one side to the other, according as each may have adduced fresh proof. *Powers* v. *Russel*, 13 Pick. 69.

There is a wide distinction between the requirement in a criminal prosecution, that the accused shall prove his innocence, when a presumption is raised, against him, and the necessity of his explaining in some degree the facts on which that presumption rests. In *Commonwealth* v. *Dana*, 2 Metc. 329, which was an indictment against the defendant for having unlawfully in his hands certain lottery tickets, with the intention of offering the same for sale, the jury were instructed, that "if from the whole evidence on the part of the Commonwealth, they were led to the belief, that the defendant did sell and deal in lottery tickets, and had them in his possession for that purpose, as charged in the indictment, they would be authorised to find him guilty; unless he had succeeded on his part, as it had become his duty to do, to explain those facts and circumstances consistently with his innocence of that unlawful intention." The whole Court say, "the remark, that it was the duty of the defendant to explain those facts and circumstances against him consistently with his innocence, meant no more than that he ought to do so; but if he failed, they were not to find a verdict against him, unless on the whole evidence they believed him guilty. If they doubted, they were to acquit him. Not unlike the principle of the case just referred to, is that of the case of *The People* v. *Bodine*, 1 Denio, 281. The instruction to the jury was, "that if the testimony on the part of the prosecution, had shown that the prisoner might have been at the scene of the fire, the *onus*

was cast upon her to get rid of that suspicion, which thus attached to her, or to show where she was at the time." But the Court said, that the mere fact, that the prisoner *might* have been present, was no cause of suspicion, because hundreds of others might have been present living near, and the position was held too narrow. But the Court go on to say, that if there were other facts in the case connected with the crime, that the prisoner was in such a situation at the time of the fire that she might have been actually present, furnished very cogent grounds for suspicion against her; and in such a state of facts, the instruction would not have been wrong. But even under such evidence as was supposed might have been adduced, and not reported in the bill of exceptions, it does not appear, that she would have been required to show herself innocent of the charge against her; but that it might be presumed, that she was able to show that she was at another place, if such was the fact; and by omitting this, the circumstance, which was calculated to awaken suspicion, remained unexplained.

In *Commonwealth* v. *Kimball*, 24 Pick. 373, the Judge instructed the jury, that "when the government had made out a *prima facie* case, it is then incumbent on the defendant to restore himself to that presumption of innocence, in which he was at the commencement of the trial." The Court say, "making out a *prima facie* case, does not necessarily or usually change the burthen of proof." "The presumption of innocence remains in aid of any other proof offered by the defendant to rebut the prosecutor's *prima facie* case." "The Court are of the opinion, that the jury should have been instructed, that the burthen of proof was upon the Commonwealth to prove the guilt of the defendant, that he was to be presumed innocent unless the whole evidence in the case satisfied them that he was guilty."

On an indictment for larceny, proof that the stolen goods were found upon the prisoner, is presumptive evidence against him, so as to call upon him for his defence, and may be sufficient to convict him, if no facts appear in evidence to repel

that presumption. When a horse is stolen and is found in the possession of a man, so soon after the theft, that he must have come directly from the place, where he was missed, this raises a violent presumption, that he was the taker, and a jury would be authorized to infer his guilt, from these facts. But any circumstances inducing a probability, that the prisoner may have gotten the horse honestly, will render it improper, for a jury to convict. 1 Phil. Ev. 129, 130, and note (a). In accordance with the same principle is the doctrine of the case of *State* v. *Merrick*, 19 Maine R. 398, which was, that the guilt of larceny being presumed from the possession of the stolen property by the accused, soon after the theft, the evidence adduced by him may fall far short of showing that he did not steal the property, and yet create a reasonable doubt of his guilt in the minds of the jury, which will require his acquittal.

In the case at bar, the forgery attempted to be proved, was the alteration of a town order, from "*Nine*" to "*Nineteen*" dollars, drawn in favor of Hale, and delivered to the defendant. The defendant denied that he had committed the crime alleged. The prosecuting officer was bound to prove the alteration; and that the defendant falsely made it; these were the propositions both of which it was necessary to make out, beyond a reasonable doubt, or the defendant was entitled to a verdict of acquittal. To prove, is to establish, or ascertain, as truth, reality or fact by testimony or other evidence. Proof that the order came to the hands of the defendant unaltered and came out of his hands altered, unexplained, might raise the presumption, that he made the alteration and make out a *prima facie* case for the State; and it might be very difficult to rebut or control such presumption. But this evidence was only presumptive, and not conclusive; the burthen was still upon the government as before, which the prosecuting officer does not controvert; the jury are bound to acquit, unless from all the evidence, every reasonable doubt was removed. By the instruction, the fact of the alteration between the time, when the order came into the defendant's hands, and when it

came out, threw a burthen on to the defendant. What was that burthen? It was not merely to give such an explanation as would raise a reasonable doubt of his guilt, or even to render it probable, that he did not alter it; but to establish as a fact, a truth, a reality by evidence, that he did not do it. Proof that another had the means, and the inducement to make the alteration, would not prove, though it might in the opinion of the jury render it probable, that the defendant did not do it; but this would not meet the requirement, as the jury probably understood it.

*Exceptions sustained.*

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE COUNTIES OF

# WASHINGTON AND AROOSTOOK.

ARGUED AT JULY TERM, 1846.

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## SOLOMON M. FOSTER *versus* REUBEN ORDWAY.

By the provisions of Rev. St. c. 96, § 16, as amended by st. 1842, c. 31, § 8, where the plaintiff brings his action, not coming within the excepted cases, originally in this Court, and does not "recover more than two hundred dollars damage," he cannot recover costs, although the amount was reduced below that sum in consequence of the allowance to the defendant by the jury of an account filed by him in set-off.

ASSUMPSIT. The action was originally commenced in this Court. The defendant filed an account in set-off. At the trial before TENNEY J. the jury returned a verdict for the plaintiff for one hundred and ninety-one dollars and ninety-one cents. It was admitted that the verdict would have exceeded two hundred dollars, had not the jury allowed a sum to the defendant on his account filed in set-off, as a sum due from the plaintiff to the defendant, and not received in part payment of the plaintiff's claim.

Thereupon the defendant moved, that the plaintiff should not be allowed costs. The presiding Judge decided that the plaintiff was entitled to costs, and allowed the same, in the same manner as if the verdict had exceeded two hundred dollars.

To this decision the defendant excepted.

*Hobbs*, for the defendant, said that the Rev. St. c. 96, § 16, as amended by st. of 1842, c. 31, § 8, — Rev. St. c. 97, § 15, — and Rev. St. c. 115, § 99, — contained all the provisions of the law which could have any bearing on this subject. The first statute, as amended, is positive that the plaintiff shall not recover costs in such case as this, unless he recovers more than two hundred dollars. St. c. 97, § 15, applies only to actions commenced in the District Court and carried by appeal to this Court. The st. c. 115, § 99, applies only to cases in the District Court, where the damages are reduced below twenty dollars by the filing of a set-off, and there the jury must find, that it was so reduced, or the plaintiff will not be entitled to costs. The statute, c. 96, as amended, is imperative that no costs shall be allowed to the plaintiff, where he brings his action originally in this Court, save in the excepted cases, unless he recovers more than two hundred dollars.

*Hayden*, for the plaintiff, said that the language of the statute of 1821, c. 59, § 30, and Rev. St. c. 96, § 16, as amended by the act of 1842, was precisely the same. And no more provision, in case of a reduction by filing a set-off, is made in the one statute than in the other. It has been decided by this Court, that under the st. of 1821, where the damages are reduced by a set-off, that the plaintiff is entitled to recover his costs. *Hathorn* v. *Cate*, 5 Greenl. 74.

The opinion of the Court was drawn up by

Shepley J. — The question presented in this case is one of costs, arising under the provisions of the statute c. 96, § 16, as amended by the act of 1842, c. 31, § 8. That amendment declares, that "if in any civil action originally commenced before the Supreme Judicial Court, except actions of replevin, trespass on lands, actions by or against towns, writs of dower, and real actions, the plaintiff shall not recover more than two hundred dollars damage, he shall not recover costs." This action not being embraced by the exception, the plaintiff is prohibited from the recovery of costs, unles an exception not

found in the language, can be admitted by a construction of it. It was provided by a former statute, c. 59, § 30, if the plaintiff should not recover more than twenty dollars debt or damage in an action originally commenced before the Court of Common Pleas, that he should recover only one quarter part of the damage as costs. If the instruction had been such as to make it applicable to all cases included by the language, the result would have been, that a person who had an account or claim against another to much greater amount than twenty dollars, and which was liable to be reduced below that sum by one filed in set-off, if he commenced a suit upon it before a justice of the peace, must lose the amount over twenty dollars, if the opposing claim was not filed in set-off; and if he commenced his suit before the Court, and such claim was filed in set-off, thereby reducing the damages to twenty dollars, he would lose his costs. It was therefore decided, that the act of Massachusetts, passed in the year 1807, containing a similar provision, was not designed to apply to such cases. And this Court, in the case of *Hathorn* v. *Cate*, 5 Greenl. 74, decided, that the legislature of this State, by "adopting the statute, undoubtedly intended to adopt its well known and received construction." But when, upon the reenactment of a statute, the legislature makes a special provision respecting the class of cases exempted by such construction from the operation of the statute, the intention to adopt, by the use of the same or similar language, the former construction, is distinctly negatived by the enactment of such special provision. The legislature made a special provision for the class of cases referred to by c. 115, § 99, of the Revised Statutes. This case, however, does not arise under that provision, but under the eighth section of the act of 1842. The reasons for making an exception by a construction of the language of the statute c. 59, § 30, as before stated, do not exist, or require a similar construction to be made of the section now under consideration. There is no such mischief to be provided against by it. A party may in all cases, when it is possible, that a claim may be filed in set-off, commence his action in the District Court, without being sub-

jected to inconvenience or loss, and have the benefit of the special provision contained in c. 115, § 99. There was no judicial construction adopted by its enactment. And no continued practice under it calling for such a construction to sustain it. When the general language of a statute may operate without occasioning inconvenience or injury to any one, unless he unnecessarily and voluntarily places himself in a position to receive it, it should not be limited or varied by a judicial construction. There can in such case be no sufficient reason for it, or for a conclusion, that the legislature did not intend, that the language should operate upon all cases embraced by it without any exception. There is another reason, why no such exception should be made by construction. It is provided by c. 97, § 15, that when an appeal is made to this Court of certain actions from a judgment on demurrer, with an agreement to waive the pleadings, and the plaintiff shall not recover more than two hundred dollars damage, he shall not recover but pay costs after the appeal. It is well known, that a partial or more full trial often takes place by which the parties become fully informed of each other's claims, before the demurrer is made and joined. If the case be one, in which an account has been filed in set-off, and the plaintiff should by reason of its allowance fail to recover two hundred dollars damages in this Court, he could not recover but must pay the costs after the appeal. And such must have been the intention, for that provision was designed to prevent appeals without subjecting the plaintiff to that risk in costs in all cases, where it could be perceived, that there might not be a recovery of damages exceeding two hundred dollars. And if such a construction should be made of the eighth section of the act of 1842, as the plaintiff desires, it would operate as an encouragement to bring all such actions originally into this Court without regard to the amount of damages expected to be recovered, contrary to the intention of the legislature to discourage it in all cases, where the plaintiff was not clearly entitled to recover more than two hundred dollars. Under such a construction in connexion with the provisions of c. 115,

§ 99, a person might commence a suit in this Court on a large account with a knowledge that he had no just reason to expect to recover more than ten or fifteen dollars, because the defendant had an account in offset and every inducement to file it, thus occupying the time of this Court in a protracted investigation of large and long continued accounts to ascertain a trifling balance, contrary to the clearly exhibited intention of the legislature.

There were found to be serious inconveniences in the administration of the law respecting costs in such cases, after the exception was admitted by a construction of the former act. There was no mode provided for ascertaining satisfactorily, whether the damages were reduced to a sum less than twenty dollars, by an allowance of part of the claim filed in set-off, or by a disallowance of some item claimed by the plaintiff. The legislature provided a remedy by the special provision before named. If it had intended, that such an exception should exist in the eighth section of the act of 1842, it can scarcely be believed, that it would not have made it by a special provision, instead of reviving the former practical inconveniences by neglecting to do it.

*Exceptions sustained, and costs refused.*

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MIDDLE BRIDGE CORPORATION *versus* JOHN MARKS.

The legislature of this State cannot create a corporation, and so authorize it to build a bridge, extending out of the limits of this State, as to empower such corporation to collect toll of one who passes only upon that part of the bridge without the limits of this State.

And where no express promise is made, the law will not enable such corporation to recover toll or compensation, as on an implied one, against a person for merely passing over without their permission, and under a claim of right, such portion of the bridge, as was erected by such corporation upon the territory of a foreign government.

THIS was an action of assumpsit on an account annexed to the writ, charging the defendant with the use of their bridge.

The plaintiffs were incorporated by an act of this State in 1831, by the name of the "Middle Bridge Proprietors," and empowered to erect a bridge "in Calais, across the St. Croix river," and to take toll from such as should pass over the same. The bridge was erected in the year 1832, and extended across the river, into the Province of New Brunswick. It did not appear, that the plaintiffs had any act of incorporation by the authorities of that Province, or even that they had any right from the owners of the soil to place the bridge there. There were mills on the English side of the river extending nearly as far as the English line. One of these mills, nearest the middle of the river, was owned by the defendant, and he passed over the bridge frequently, on the Province side, to and from his mill.

At the trial before TENNEY J. several witnesses and many depositions were introduced by the parties respectively, and many objections were made to the admissibility of testimony. The view taken by the Court renders it unnecessary to give the evidence, or any abstract thereof, especially as it was somewhat inconsistent on some points, and much was objected to.

The parties agreed to submit the case for the decision of the Court upon so much of the evidence as was admissible or not objected to, and that the Court should render such judgment, as the law requires, and that they should have power to draw such inferences from the evidence in the case, as a jury might do.

The whole case, both fact and law, was fully argued by

*F. A. Pike*, for the plaintiffs — and by

*J. Granger*, for the defendant.

The opinion of the Court was drawn up by

WHITMAN C. J. — The plaintiffs were incorporated by an act passed March 26, 1831, by the name of the "Middle Bridge Proprietors," to erect a bridge "in Calais across the St. Croix river." The suit is in the name of the "Middle Bridge Corporation." No question appears to have been made

as to the identity indicated by the two descriptions. The suit is said to be on an account annexed to the writ. From the case as made up, and the arguments, we gather, that the object of the plaintiffs is to recover a reasonable compensation of the defendant for the use he has made of the plaintiffs' bridge. It cannot be pretended, that they have a right, by the terms of the act of incorporation, to recover of him the toll provided for in it. It does not appear that he ever passed their toll house and gate, when the plaintiffs' toll gatherer was at it, and ready to exact and receive toll. At all other times their gate was to be thrown open for people to pass, as is evident from the terms of the act, without paying toll.

Indeed the complaint does not seem to be that the defendant passed over the plaintiffs' bridge, erected in Calais. The bridge, instead of being erected in Calais, extends across the St. Croix river, to St. Stephens; and the complaint is only, that the defendant used that part of it on the New Brunswick side of the river, he being the owner of a mill on that side, so situated as not to be accessible otherwise than by passing over that end of the bridge.

The legislature of this State had no power to authorize or create a corporation to build that end of the bridge, it being out of the limits of this State. As an incorporated body, therefore, the plaintiffs, by virtue of their act of incorporation, can have no claim to any use of a privilege, or exercise of authority there.

And it is difficult to perceive how an implied assumpsit, as upon an account, can be maintained against the defendant for the use he may have made of that portion of the bridge on territory under a foreign government.

No express promise is relied upon. No work and labor have been performed for his particular use and benefit; and no goods, wares or merchandize have been sold and delivered to him; nor has he received money of the plaintiffs; nor have they lent or laid out money for his particular use; and it is presumed, no attempt is made to charge him under either of these heads.

Is this claim for use and occupation? It must, then, appear that he occupied and used the bridge by their permission, acknowledging their right. But does he appear to have done so? On the contrary he occupies and uses the bridge under a claim of right to do so. He has used the passage way from his mill to St. Stephens for nine or ten years, without paying any thing. He once furnished some plank to repair the bridge. But this would not be an unequivocal recognition of liability to the proprietors to pay for the use of the bridge. It might be done for his own accommodation, on finding that part of the bridge not conveniently passable.

Nor can we regard what passed between him and the toll gatherer, as to a reference, as recognizing his liability. The same witness says the defendant never agreed to pay anything. Besides, as we have before seen, such use would not constitute an item of account; such act would not authorize a declaration upon an implied assumpsit, or on an account annexed.

*Plaintiffs nonsuit.*

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF WALDO.

ARGUED AT JULY TERM, 1846.

## ELIZABETH JOY, *Adm'x. versus* ISAAC ADAMS *& al.*

Witnessed notes, after the lapse of twenty years since they became payable, are barred by the statute of limitations. Rev. St. c. 146, § 11.

A mortgage security has not been deemed to be within any branch of the statute of limitations. He, who would avoid such security, must show payment; otherwise the mortgagee will not be precluded from entering upon and holding possession of the mortgaged premises.

The mortgagor has not been allowed to defeat the right of the mortgagee to enter upon the land, or obtain possession thereof, by showing merely, that the personal security, to which the mortgage security is collateral, has become barred by the statute. But he has been allowed to allege payment, and for proof thereof, to rely upon the lapse of time, when it amounted to twenty years from the accruing of the indebtment.

The lapse of twenty years after the debt secured by the mortgage became payable, has been deemed to be sufficient evidence of payment, in the absence of any countervailing considerations. In such case the fact of payment is admitted as a presumption of law, which may be removed by circumstances tending to produce a contrary presumption.

Whether such presumption has, or has not, been removed by proof, or by circumstances, is a question for the determination of the jury.

WRIT of entry demanding a tract of land in Troy in the county of Waldo.

The parties agreed upon a statement of facts, and that

the Court thereupon might draw such conclusions and inferences as a jury could legally draw, and render judgment in favor of the demandant, or tenant, as they should find the law to require.

The facts appear in the opinion of the Court.

*W. Kelley* argued for the demandant, saying that he supposed the only question to be, whether the mortgage is discharged by the lapse of more than twenty years after the notes secured by it became payable. The notes are witnessed, and therefore are not barred by the statute. A presumption of payment may be raised by the lapse of twenty years. But that, like all other presumptions of law, may be rebutted. He contended that any presumption of payment was rebutted by facts in the case. He cited statute 1821, c. 62, § 12; Rev. St. c. 146, § 13; 19 Pick. 535; 1845 July No. of Kinne's Comp. page 175.

*W. G. Crosby*, for the tenants, said that the tenants claimed that judgment should be rendered in their favor, and that they should hold the land discharged of the mortgage, because there is nothing due upon the same. Rev. St. c. 125, § 10; *Wade* v. *Howard*, 11 Pick. 297.

The demandant, by permitting Millet, the mortgagor, to remain in the undisturbed possession of the premises for more than twenty years, without making any entry, or claim, or demand of payment, standing by while the mortgagor made two conveyances of the premises, without interposing any objection, virtually signified to the world, that he had ceased to have any right, title, or interest in and to the same. *Durham* v. *Alden*, 20 Maine R. 228.

It was contended, as matter of fact, that the mortgage was discharged. There certainly is not in this case any evidence to repel the legal presumption of payment, and the tenants are entitled to the full benefit of it. 2 Metc. 26; 12 Mass. R. 379; 1 T. R. 270; 1 Burr. 433; 5 Dane, 400; 3 Wash. C. C. R. 323; 1 Greenl. Ev. 46 and note; 10 Johns. R. 381; 12 Johns. R. 242.

The opinion of the Court was drawn up by

WHITMAN C. J. — This is a writ of entry upon disseizin, the demandant being administratrix *de bonis non*, of the estate of Benjamin Joy, deceased. It appears, that the premises demanded, were mortgaged to him on the 16th of May, 1814, by Thomas and David Millet, to secure the payment of three notes of hand, given by them to the deceased, payable in one, two and three years from the said 16th day of May, 1814, with annual interest. His decease took place in 1829, at his place of residence in Massachusetts, he never having been an inhabitant of Maine. He left a will, of which Hannah Joy was executrix. No authority to administer upon his estate in this State was taken till 1839. In that year the executrix became qualified for that purpose, and commenced this suit, and soon after died; when the plaintiff took administration here, and took upon herself the prosecution of this suit. It does not appear, that the mortgagee ever made any demand of the sums, so secured, in his lifetime; or that his executrix did so afterwards, until the institution of this suit.

Thomas and David Millet remained in the undisturbed possession of the premises till 1832, when Thomas Millet died, leaving two children; no administration was ever taken of his estate, and David, subsequently, in the same year, mortgaged the estate to Alfred Johnson, jr., who assigned the same to the defendant, Adams; to whom David, in 1837, made his deed of quitclaim of the premises. Nickerson, the other defendant, claims, under Adams, one fourth part thereof.

The defence rests upon the presumption of payment by the mortgagors, arising from the lapse of time since the debt, secured by the mortgage, became payable. The notes given therefor, although witnessed, are unquestionably barred by our statute of limitations, ch. 146, § 11. The mortgage, nevertheless, may not be considered as discharged. The reason is, that the statute does not, in terms, purport to be to the effect, that actual payment shall be presumed to have been made; but from motives of policy, providing, that no suit shall be commenced on the personal security after a certain period has

elapsed, after the sum secured shall have become due, unless the promise shall have been renewed within the period prescribed; and, moreover, it has always been considered, that, after such period has elapsed, no new consideration was necessary to render a new promise available.

A mortgage security has not been deemed to be within any branch of the statute of limitations. He who would avoid such security must show payment; otherwise the mortgagee will not be precluded from entering upon, and holding possession of the mortgaged premises. The mortgagor has not been allowed to defeat such right by showing merely that the personal security, to which the mortgage security is collateral, has become barred by the statute. *Thayer* v. *Mann*, 19 Pick. 535. But he has been allowed to allege payment, and for proof to rely upon the lapse of time, when it amounted to twenty years from the accruing of the indebtment. Such a lapse of time has been deemed to be sufficient for the purpose, in the absence of any countervailing considerations. This is admitted as a presumption of law, which may be removed by circumstances tending to produce a contrary presumption. *Oswald* v. *Leigh*, 1 D. & E. 270. Such circumstances being adduced, they would ordinarily be referred to a jury to determine whether, on the whole, it was reasonable to believe, that the debt, notwithstanding the lapse of time, had never been paid. The parties, in this case, have chosen to refer the question to the Court. We are, therefore, to exercise the province of a jury; and determine, as they might, whether, under the circumstances disclosed, it can be believed, that the debt has not in fact, been paid.

The first ground relied upon by the plaintiff to affect the presumption of payment, is, that the notes, given for the amount, payable at three different times, are yet in the hands of the administratrix, entire and uncancelled. It is undoubtedly in accordance with general usage for those, who give notes, to take them up when paid; or, if but partially paid, to have the payments indorsed thereon. These notes being payable at different periods of time, if all were actually paid, it

may be regarded as still more singular, that no one of them should have been delivered up. Another consideration of some weight, is, that the title of the promisors, to the real estate mortgaged, was dependant upon their having these notes cancelled. Every consideration of a provident character would have urged to a very close attention to the cancelling of securities so situated, if actually paid. The promisee lived twelve years after the notes became due, affording an ample opportunity, if paid, for the makers to insist on their cancellation.

Thomas Millet died in 1832, leaving two children, and no administration was ever taken on his estate; the debt, therefore, could not have been paid from his estate; and David, afterwards, in the same year, conveyed the estate, as if wholly his own, in mortgage to Alfred Johnson, Jr., who assigned the same to the defendant, Adams. If Thomas had ever paid any portion of the debt in question, it is not easy to be understood how it should have happened, that the rights of his children should have been disregarded by David, in his conveyance to Johnson. Thomas seems, originally, to have been equally interested in the estate with David, yet David's conveyance to Johnson would seem to have been acquiesced in to the present time by the heirs of Thomas.

Moreover, David appears to be still living. It cannot be doubted, that, if the debt in question was ever paid, he must have been conusant of it. He was, or might have been made, a competent witness for the defendants; and would have been able to give direct evidence of payment, if any had been made, to redeem the estate. When such evidence is within the power of the party to prove a fact, if it actually existed, and when there would seem to be no good reason, why it should not be resorted to, an attempt to rely upon secondary evidence, which the presumption of payment, arising from lapse of time, clearly is, should be viewed, at least, with some degree of distrust.

Again; it may be noted, that the mortgagee lived in Massachusetts, over two hundred miles from the mortgagors, until his death, as did also his executrix, and the present plaintiff,

rendering it less probable, than otherwise might be the case, that any voluntary payments would be made, or that the promisee or his representatives, would be calling for payment; especially as they knew the debt was secured by mortgage, with a stipulation to pay annual interest; and such a distance renders it less probable, that payment would be made without being accompanied with documentary evidence of the fact: but it is not pretended, that any thing of the kind exists, or ever has existed. On the whole, it can scarcely be doubted that the debt in question still subsists.

The conveyance of the estate by David Millett to Johnson in 1832, cannot affect the rights of the plaintiff. The latter, if it were necessary to do so, must be deemed to have purchased with constructive notice of the state of the title in the former. But fifteen years had then elapsed, since the debt in question had become payable. No presumption could then have run against its existence. The present defendants, coming in under him, must be content with such title as he had to convey.

The conditional judgment therefore, as on mortgage, must be entered for the plaintiff.

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CUSHING WHITMAN *versus* ISRAEL COX.

The acts repealing the charter of the Frankfort Bank, and providing for the distribution of its funds by receivers, incapacitated it any longer to sue or be sued in a Court of law, otherwise than to promote the objects confided to the receivers.

A stockholder of the bank, against which a suit is brought, whose property was attached and who had a copy of the writ left with him, is no party to such suit individually, and has no right to appear and defend it; and may impeach the judgment rendered therein, when introduced against him.

TRESPASS for taking a quantity of wood. The defendant, being sheriff of the county, admits the taking of the wood by his deputy, by virtue of an execution against the Frankfort Bank, the plaintiff being a stockholder of the bank at the time the cause of action accrued.

The Frankfort Bank was incorporated and went into operation in 1836, and its charter was repealed on April 16, 1841. The plaintiff was the owner of one share in that bank from the time it went into operation until the repeal of its charter. On March 3, 1841, George Sherwood was the holder of a certain amount of bills of that bank and duly presented the same at the bank for payment, and payment was refused. On March 19, 1841, Sherwood commenced an action against the bank on those bills, entered his action at the September Term of the District Court in 1841, and at the March Term in 1844 recovered judgment against the Bank for the amount of the bills with six per cent. interest from the time of the demand. An execution issued against the Bank on this judgment and the wood was taken thereon by the deputy of the defendant, who was sheriff of the county of Waldo. The execution was against the corporation, merely, but the officer was directed on the back of it, by Sherwood's attorney, to attach and sell property of the plaintiff to the amount of one hundred dollars, that being the nominal value of the stock held by him in the bank. At the time of the service of Sherwood's writ against the bank, the property of the plaintiff was attached, and a copy of the writ was left with him, but he never appeared in the action.

It was agreed, that if in the opinion of the Court the action could be maintained, the defendant was to be defaulted; but if not, the plaintiff was to become nonsuit.

*N. H. Hubbard*, for the plaintiff, contended that as the charter of the Frankfort Bank was repealed in April, 1841, the corporation no longer existed, except for certain purposes, other than this, specified in the repealing act, the judgment was a mere nullity, and had no binding force whatever on any one. The Court had no jurisdiction in the matter, as there was no such corporation, and the consent of an attorney appearing for the bank, could give none. *Williams* v. *Burrill*, 23 Maine R. 153.

The plaintiff being no party to the judgment of Sherwood

against the bank, he is entitled to impeach it. Sherwood did not pursue the course pointed out by the repealing act, and the act in addition thereto, and was not entitled to maintain any suit against the bank.

The proper course to make the plaintiff liable has not been pursued. It should have been by bill in equity or special action.

The case of *Read* v. *The Frankfort Bank*, 23 Maine R. 318, was cited, and relied on as decisive against the justification set up.

*W. Kelley*, made an extended argument for the defendant, wherein he contended, among other grounds, that the course pursued by the creditor was strictly in accordance with the provisions of the statute of 1836, c. 233, "further regulating Banks and Banking." That statute was in force when this liability was incurred and when the action of Sherwood was commenced, and provides, that when payment of bills of a bank shall be delayed beyond fifteen days, "then the private property of the stockholder of said bank, to the amount of their respective shares, shall be and hereby is liable to be taken and attached on any suit which may be commenced on the bills so presented." And the same section of the statute provides, that the directors of any bank, "against which any suit may be commenced as aforesaid," shall exhibit to the person commencing the suit a true list of the stockholders. The suit must be on the bills of the bank, and against the bank, and the property of the stockholder, is to be taken on the process in that suit. The second section of the act provides a remedy for a stockholder "whose property, rights and credits shall be attached and taken as aforesaid" "at law or in equity" against the other stockholders. And section third provides, that if the directors of the bank refuse to give a true list of the stockholders, then the plaintiff in the suit against the bank, on such bills, "may attach the personal property of the directors on his suit so commenced." The course pursued here is not only authorized by statute, but is

the only mode whereby the holder of the bills can have a remedy. The intention of the legislature was, that the holder of bills of a bank should have a remedy, which should be prompt, and attended with little expense, leaving the stockholders to adjust any equities among themselves by bill in equity or special action. Nor is this any strange or unusual provision. It is but putting the stockholders of banks in the same situation as individual inhabitants of towns and other quasi corporations, where the property of the individual may be taken on an execution against the corporation. 6 Greenl. 264; 1 Greenl. 361; 19 Pick. 564. And such is to be presumed was the intention of the legislature, as no other mode is pointed out. 8 Mass. R. 472; 16 Mass. R. 389; 21 Pick. 453.

It is said, that as the charter of the Frankfort Bank was repealed before the judgment of Sherwood was rendered, that judgment is a mere nullity, and can be the foundation of no rights. This cannot be correct. The st. 1839, c. 400, provides that where the charters of banks expired, or are "annulled by forfeiture, or otherwise," as this was, that they "shall be continued bodies corporate for three years from such time, for the purpose of prosecuting or defending suits by or against them." Such suits are very common. 7 Metc. 340; 8 Metc. 217; 18 Pick. 63. And the Rev. St. c. 77, § 62, provides that all banks whose charters have been revoked shall continue subject to all the penalties and liabilities they otherwise would have been under, for the term of three years. The case of *Read* v. *The Frankfort Bank*, cited and relied on by the plaintiff's counsel, was the suit of a general creditor of the bank, and not the suit of a holder of bills, which had been demanded, and payment refused. The Court could never have intended to be understood, that in consequence of the repeal of the charter, the stockholders were exempted from the liability they were under to the holders of the bills, and that the repeal should operate not as a punishment of fraud, but as an inducement for the commission of it. Various other provisions of the bank act and other statutes were cited, and comments made thereon, to show, that by any fair

construction, the repeal of the charter of a bank for the violation of its provisions could never have been intended to exempt the stockholders from the liability they would otherwise have continued under.

The plaintiff in this action was virtually a party to the suit of Sherwood, under the provisions of the bank act, and is bound by the judgment. 1 Greenl. 361; 14 Mass. R. 216; 19 Pick. 564; 21 Maine R. 501. The judgment certainly is to be considered as conclusive until reversed, were it liable to be reversed, on writ of error. But were it otherwise, and if the present plaintiff is entitled to inquire into the propriety of rendering the judgment, there is no ground for its reversal, for the reasons already given. He but asks the Court to release and absolve him from the statute obligations he voluntarily incurred by becoming a stockholder in the bank. Even if there had been objections to the forms and modes of process, which is denied, the objections should have been taken in the original action. 4 Greenl. 124; 12 Mass. R. 268; 18 Pick. 393.

The opinion of the Court was drawn up by

WHITMAN C. J. — This is an action of trespass *de bonis asportatis.* The defendant does not deny the taking of the articles, but sets up a justification of the act. He alleges that his deputy, (he himself being sheriff of Waldo) at the time of taking the property, had in his possession an execution in favor of one Sherwood against the Frankfort Bank; and for the purpose of satisfying the same, not being able to find any corporate property of the bank, he, by virtue thereof, and in pursuance of the provision in § 41 of c. 77, of the Rev. St. took and sold the articles alleged to have been wrongfully taken. The reply of the plaintiff is, that the judgment, on which the said execution purported to have been issued, was, as to him, null and void; and that he being personally no party thereto, has a right to show, that it was improperly and illegally rendered; and it is admitted, that, before the service of the writ of Sherwood against the bank, the charter of that institution had

been repealed; and it appears that all its funds had been ordered to be taken into the hands of receivers, who were required to make an equal distribution thereof among the creditors of the institution; and it has been adjudged in *Read* v. *The Frankfort Bank*, 23 Maine R. 318, that the acts repealing the charter of the bank, and providing for the distribution of its funds by receivers, incapacitated it any longer to sue or be sued in a Court of law, otherwise than to promote the object confided to the receivers.

It is admitted that the plaintiff was not named as a debtor in the execution, which the defendant relies upon in defence. The judgment on which it issued could not have been against the plaintiff by name. He was in fact no party, individually, in the suit in which it was rendered, and had no right to appear or make defence in it; nor can he bring a writ of error to reverse the judgment. He must, therefore, have a right to impeach it when introduced against him. According to the decision before cited it seems to follow, conclusively, that the whole procedure was unauthorized. The bank had ceased to exist as a corporate body, in reference to suits instituted against it by those claiming to be its creditors. It had been deprived of its power to transact business, and its funds were transferred to receivers, against whom alone its creditors could prefer their claims, and they (the creditors) could insist upon nothing more than a *pro rata* dividend of those funds. To such a case the statutes, giving corporations three years to wind up their concerns, are inapplicable. The Frankfort Bank, after the appointment of the receivers, had no concerns to wind up. The receivers had the whole control of its affairs. It had become in effect a nonentity. A suit against it, and a judgment entered therein, after the repeal of its charter and the appointment of receivers to supersede its further action, must be regarded, as it respects those who were not authorized to interpose a defence, as nugatory.

The defendant, therefore, in conformity to the agreement of the parties, must be defaulted.

## William Doyle *versus* James P. White.

Where the plaintiff had contracted to deliver a quantity of rock to a third person at an agreed price; and before the delivery to him, made known to the defendant his determination not to deliver the rock upon the credit of such third person; and the defendant thereupon said to the plaintiff — "*You bring the rock and I will see you paid for it*" — *it was held by the Court*, that such parol promise was within the statute of frauds, and not binding upon the defendant.

And in such case, if the delivery of the rock was upon the credit of the defendant as an original promisor, the plaintiff would be entitled to recover. But if the original contract was made with the third person, and the defendant agreed only, by parol, to pay for the rock as a surety or guarantor, the plaintiff could not sustain his action, unless the promise was made upon some new consideration, other than the delivery of the rock. Any expectation of profit or hope of benefit from the sale of goods by the defendant to such third person, in consequence of his proceeding to build a house on being furnished by the plaintiff with rock for the cellar, would not constitute a sufficient consideration for such promise.

Where "a mortgage was given to secure the gross sum of twenty-five hundred dollars, which might be furnished in goods and materials towards the erection of a house for the mortgagor," a collateral liability, or one assumed as surety or guarantor would not be within its terms, and would not be secured thereby.

This is an action of the case to recover the value of a quantity of square granite rock.

Shepley J. presided at the trial.

The bill of exceptions states, "that the plaintiff introduced testimony to prove that one John Doyle built a house in Belfast, in the spring and summer of 1841; that the firm of White, Faunce & Co. (the defendant being one of the firm,) had agreed to furnish said John Doyle, and did furnish him, ten or fifteen hundred dollars in such goods and materials as he might want, towards the erection of said house; and after they had furnished the amount of about $400, they took a mortgage of said house to secure the payment of the same, and whatever further materials they might furnish; and that said rock were wanted for the cellar of said house, and a part thereof were put into the same.

"The plaintiff then introduced as witnesses, Wm. T. Elwell and Edwin Doyle. Said Doyle testified, that about the mid-

dle of March, 1841, he was in White, Faunce & Co's store, in Belfast, and the defendant asked him if the plaintiff was going to bring the rock, and he replied no, not unless he knew who was going to pay him ; whereupon the defendant said, you tell the plaintiff, if he will bring the rock *I will see that he has his pay.* Said witness further testified that he delivered said message to the plaintiff, and the plaintiff about the first of April, then next, went after a cargo of said rock, carried it to Belfast, and delivered it to the defendant, who was present, selected the wharf and place where it should be landed ; that John Doyle was not present when said message was sent to the plaintiff, nor when the rock was delivered to defendant. Said Elwell testified, that on the last of March, 1841, he was present at a conversation between plaintiff and defendant, in said White, Faunce & Co's store ; that the defendant asked the plaintiff if he intended to bring the rock, and the plaintiff said no, not upon the credit or responsibility of John Doyle. The defendant replied, you bring the rock and *I will see you paid for it ;* and the plaintiff answered, then I will bring it ; and in a few days after, he, the witness, and the plaintiff, went after a cargo of said rock, carried it to Belfast, and delivered it to the defendant, who was present and directed the wharf and place where it should be landed ; that about the first of July following, he and the plaintiff went after another cargo of said rock, which was carried and delivered, the defendant being present part of the time said rock was unloading, in same manner that the first cargo was delivered ; that John Doyle was not present when the said promise was made, nor when the rock were delivered ; that the amount of both cargoes delivered to defendant was rising of eighty-two tons, and worth two dollars per ton. In the last cargo, in addition to the rock delivered to defendant, was about one hundred feet of underpinning rock, brought for John Doyle, and landed on the wharf by itself.

"The defendant introduced testimony, tending to show, that the plaintiff did not claim pay for the rock of the defendant, till just before the date of the writ ; that he had said several

times that John Doyle owed him for the rock; that he was sued by White, Faunce & Co., and paid the demand, without urging his claim for the rock in set-off; that White, Faunce & Co. were not to furnish materials for the cellar of said house but that said John Doyle had employed one Jonas S. Barrett to build the cellar by the job, and had sold said rock to him in part payment for doing said job. The defendant also introduced Daniel Faunce, one of said firm, and Mrs. Doyle, the administratrix of said John Doyle's estate. Said Faunce testified, that in the latter part of the winter previous to the delivery of the rock, he was present and heard the plaintiff contract with John Doyle, and agree to sell him the rock at two dollars per ton, and that said John was to take up, in part payment for the same, a note of about $50 due from the plaintiff to Kimball & White, which he did not do, but which was sued in the before named action, White, Faunce & Co. *v.* the plaintiff, and afterwards paid by the plaintiff; and that nothing was said by either party as to how the balance should be paid; that White, Faunce & Co. and John Doyle made a final settlement of their accounts in October, 1842, when notes were given by said John to said company for the balance found due to them; and that the rock were not charged to said John, nor included in said settlement; that in the spring and summer of 1841, said John Doyle was occasionally absent from home, being a seafaring man, and that in his absence, the defendant was occasionally called upon to attend to his business, and did so attend.

Mrs. Doyle testified, that in the fall of 1843 she heard the plaintiff say that John Doyle owed him for the rock, which went into the house, but could not say whether he referred to underpinning rock or square rock. She further testified on cross-examination, that in the fall of 1843, she called on the defendant to know the amount White, Faunce and Co. claimed under their mortgage, and he then claimed $1203; that in December, 1844, she sold the house at public auction subject to the right of dower, the White, Faunce & Co. mortgage and another mortgage of $170; and at the time of said

sale the defendant represented the amount due under the first named mortgage to be $1900, and then claimed that amount under the same, and that he bid in said house and the land on which it stood for the sum of one dollar, and that said house cost rising of four thousand dollars and had received no injury, except the ordinary wear and tear. It was in evidence, that the value of said property was at the time of trial about $2000. John Doyle died in August, 1843.

The exceptions also state, that the plaintiff 's counsel made the following points to the Court and jury, and verbally in his argument asked the Judge to rule according to them.

1st. That if the jury should find, that the plaintiff had contracted to sell the rock to John Doyle prior to the defendant's said promise to see him paid for it, still, if before its delivery, the plaintiff refused to deliver it on the credit of said John, but delivered it to the defendant, upon the strength and credit of his said promise, then his said promise would be binding although not in writing.

2. That if the jury should find, that the plaintiff had contracted and agreed to sell the rock to John Doyle prior to the defendant's said promise, still, if before its delivery, the plaintiff refused to deliver it on the credit of said John, but delivered it to the defendant on the strength and credit of his said promise, then said promise would be binding, although not in writing, if he made the promise to enable him and his said copartners to reap a profit on the goods and materials they had contracted to furnish for said house, or otherwise to promote his own interest or purposes, although said promise was made as surety or guarantor of John Doyle.

3. That if they should find, that the defendant had claimed and received pay for said rock under said mortgage, he would be liable to pay the plaintiff for the same, if he promised so to do before its delivery, even if he promised as surety or guarantor, and the promise was not in writing.

The Judge declined to rule according to the above points urged to the Court and jury and according to the verbal request made to the Judge in the argument, but instructed the

jury as follows: — That the difference between an original and collateral promise is, that an original promise is understood to refer to the ordinary case of a sale and purchase of personal property, and that by a collateral one is understood to be another distinct and additional promise, made by another person, to pay or be accountable for the same goods for which the person making the original promise was also liable; that if they were satisfied, that the rock were delivered to the defendant upon his credit as an original promisor, the plaintiff would be entitled to recover; that if not satisfied that it was so delivered, but were satisfied, that it was originally contracted to John Doyle, and that the defendant agreed to see the plaintiff paid for it, as surety or guarantor, he could not recover, such promise not being in writing, unless they should find that said promise was made upon some new consideration, other than the delivery of the rock, and that any expectation of profit or hope of benefit, that might be anticipated from goods that might be furnished by defendant to John Doyle, if by reason of the stone being furnished for the cellar he should be enabled to proceed in building his house, would not constitute a sufficient consideration to make such collateral promise binding upon the defendant. That if satisfied that there was a settlement between the defendant and John Doyle, of all demands between them, in the year 1842, and a balance found and that notes were given for such balance, no other sum could be considered as secured or received by that mortgage, unless there was proof of subsequent dealings between them, or of some error committed in that settlement, and under such circumstances the defendant's statement, that $1900 were due on it would be but a misstatement of a fact.

"To which instructions the plaintiff's counsel excepts and prays that said exceptions may be allowed.

"N. & H. B. Abbot, Att'ys to Plaintiff."

"These exceptions having been presented before the adjournment of the Court without day and found conformable to the truth, it being understood that no request was other-

wise refused, than by giving the stated instructions only, are allowed. "Ether Shepley."

*N. & H. B. Abbott*, for the plaintiff, said they should rely, that the instructions given by the Judge to the jury were erroneous.

To determine whether instructions to the jury be, or be not correct, they should be considered in connexion with the evidence in the case, and as applicable to it. *Blake* v. *Irish*, 21 Maine R. 450; *Lyman* v. *Redman*, 23 Maine R. 289.

Although instructions be correct, when applied to certain facts in the case, yet if, when applied to certain other facts in the case, they are calculated to have an improper influence on the jury, the Court will, for that reason, set aside the verdict. *Pierce* v. *Whitney*, 22 Maine R. 113. The Judge, in his instructions, treated the contract to sell the rock to John Doyle as a perfected sale. This when taken in connexion with the testimony, was calculated to mislead.

The Judge erred in his instructions as to what constituted an original promise. He in effect told the jury, that if they should find, that the rock had been contracted to John Doyle as a principal debtor of the plaintiff, then the defendant must be a collateral promisor and not liable, his promise not being in writing. This definition is too narrow. If A agrees to be accountable to B, and the promise be made before, or at the time of the delivery, and the goods be delivered on the strength of A's promise, he is an original promisor. *Copeland* v. *Wadleigh*, 7 Greenl. 141; *Perley* v. *Spring*, 12 Mass. R. 299; *Duval* v. *Trask*, 12 Mass. R. 154.

But even if the defendant was a collateral undertaker, the Judge erred in his instructions. The jury were distinctly given to understand, that if they should find the promise of the defendant to be a collateral undertaking, then there was but one ground on which the plaintiff was entitled to recover; and that was on the ground, that the defendant's promise was made upon some *new* consideration; and that neither the delivery of the rock to the defendant upon his promise, nor any expectation of profit, or hope of benefit, arising from the sale

of goods under his contract with John Doyle, would be a good consideration. If the defendant was a collateral undertaker, from the evidence in the case, the plaintiff was entitled to recover upon several grounds other than the one named by the Judge in his instructions. A promise made upon a new consideration was one ground. A promise made by the defendant, the leading object of which was to subserve his own interest, or promote some purpose of his own, if made upon a good consideration, was another and a distinct ground, upon which the plaintiff was entitled to recover. *Nelson* v. *Boynton*, 3 Metc. 400; Roberts on Frauds, 232; *Edwards* v. *Kelley*, 6 M. & S. 209; *Costling* v. *Aubert*, 2 East, 325. A verbal promise made by a collateral undertaker, the leading object of which is to benefit himself, is not within the statute, if made upon a good consideration. A new consideration is necessary to take the former case out of the statute. This distinction is clearly sustained by the cases cited. Any benefit to the promisor, or any damage, or possibility of loss to the promisee, constitutes a good consideration. *Russell* v. *Babcock*, 14 Maine R. 140; *Cabot* v. *Haskins*, 3 Pick. 93. Where the property is delivered at the time of the promise, or on the strength of the promise, and the promise becomes an essential ground of the credit given to the principal debtor, the parting with the property is a good consideration to support both the promise of the principal debtor, and the collateral undertaker. *Leonard* v. *Vredenburg*, 8 Johns. R. 29; *De-Wolf* v. *Rabaud*, 1 Peters, 476; 3 Kent, 122.

It was also contended, that the instructions relative to the mortgage were erroneous. If the special promise of the defendant was not binding, as within the statute of frauds, still if the defendant claimed and received pay for the rock under his mortgage, he is liable to the plaintiff on the common counts. It is a well settled principle of law, that where a man receives a benefit under a void contract, it being within the statute of frauds, he is liable on the common counts. *Holbrook* v. *Armstrong*, 1 Fairf. 31; *Kidder* v. *Hunt*, 1 Pick. 338; *Lane* v. *Shackford*, 5 N. H. R. 133.

*W. G. Crosby*, for the defendant.

From the bill of exceptions it would seem, that requests for *specific* instructions were made, which the Court *specifically* declined to give. The certificate of the presiding Judge, however, shows that such was not the fact, and "that no request was refused otherwise than by giving the stated instructions only;" so that in fact, the only questions presented to the Court are, were the instructions sufficiently full to cover the case, and were the instructions in themselves correct.

1. The instructions were sufficiently full. The questions presented to the jury, so far as presented by that portion of the testimony embraced in the bill, were, —

1. Was the promise of the defendant original, or collateral?

2. If collateral, was there a sufficient consideration to take it out of the statute?

The presiding Judge stated very distinctly to the jury the difference between an original and collateral promise; that if defendant's promise was *original*, he was bound by it; if *collateral*, he was not bound by it, except it was in writing, or upon a sufficient consideration. Thus meeting the whole case, so far as presented by the testimony reported.

So far as regards what is stated in the bill as the *third* request, it is a sufficient answer, that being hypothetical, unsupported by any testimony, the Court was not bound to notice it or give any instruction touching it; another answer is, that if the plaintiff's counsel is sustained in his position by *law* and *testimony*, he was not entitled to the instruction requested, for the reason that his writ contains no count under which he could avail himself of such a state of law and facts. He could avail himself of it only under a count for money had and received, or a special count setting forth the facts. 12 Pick. 134, *Babcock* v. *Bryant*.

2. The instructions given were correct. 2 Starkie on Ev. 595; 14 Wendell, 246, *Larson* v. *Wyman*; 3 Pick. 94, *Cabot & al.* v. *Haskins & al;* 1 Smith's Leading Cases, 133; 18 Pick. 369, *Cahill* v. *Bigelow;* 1 Dane's Abr. 214, 216;

22 Maine R. 395, *Blake* v. *Parlin;* 3 Metc. 396, *Nelson* v. *Boynton;* 1 Wm's Saunders, 211, note 2, *Forth* v. *Stanton;* 21 Maine R. 410, *Hilton* v. *Dinsmore.*

The opinion of the Court was drawn up by

SHEPLEY J. — The case, as exhibited in the testimony, was one shewing, that the plaintiff had made a contract with John Doyle to deliver to him certain stone at an agreed price, to be used in building a dwellinghouse. That the plaintiff before he had delivered the stone, made known to the defendant his determination not to deliver them upon the credit of John Doyle; and that the defendant thereupon said to him, as the witness Elwell states, "you bring the rock and I will see you paid for it;" and as Edwin Doyle states, sent a message to him at another time, requesting the witness to say to him, "if he will bring the rock, I will see that he has his pay." There is, legally speaking, no essential difference in the promise as proved by these witnesses. It was decided, while this country was but a colony of Great Britain, that such a promise was within the statute of frauds. *Jones* v. *Cooper*, Cowp. 227; *Matson* v. *Wharham*, 2 T. R. 80; *Anderson* v. *Hayman*, 1 H. Black. 120. Those cases have been often cited and approved in the more recent decisions.

The counsel for the plaintiff, however, contend, that "the Judge erred in his instructions, as to what constituted an original promise."

The cases cited to sustain the position are those of *Copeland* v. *Wadleigh*, 7 Greenl. 141; *Duval* v. *Trask*, 12 Mass. R. 154; *Perley* v. *Spring*, idem. 299. The latter case was substantially overruled in the case of *Cahill* v. *Bigelow*, 18 Pick. 369. The contracts in the two former, on which the defendants were decided to be liable, were made in writing. In the case of *Cahill* v. *Bigelow*, it is said, that when the promise is made, as in this case, before the credit is given, the test to decide, whether one promising is an original debtor or a guarantor, is, whether the credit was given to the person receiving the goods. That test was efficiently applied in this

case by the instructions to the jury, not directly by an inquiry whether the credit was given to the one receiving the goods, but by an inquiry, whether the credit was given to the defendant. It is not perceived, that the jury could have misunderstood, or have been misled by the language used in the instructions. The effect was to inform them plainly, if the rock were delivered to the defendant as an original promisor, the plaintiff would be entitled to recover. As there was testimony in the case tending to prove, that the stone were delivered to the defendant and also tending to prove, that he acted as the agent of John Doyle in receiving them, it was necessary to use some language to denote and have the jury consider, in what character they were delivered to him; and the words as an original promisor do not appear to have been unsuitable for that purpose. The instructions proceeded to state, if not satisfied that it was so delivered, but were satisfied that it was originally contracted to John Doyle, and that the defendant agreed to see the plaintiff paid for it as surety or guarantor, he would not be liable without other proof. To enable the jury to find a verdict for the defendant under these instructions they must have found, that the rock was not delivered to the defendant on his credit as an original promisor, and that his promise was made as surety or guarantor on a contract originally made with John Doyle. The point of the objection seems to be, that the jury were not by the instructions required also to find, that the stone were actually delivered to John Doyle in performance of that contract, and upon his credit. But if they found that the stone were not delivered on the original promise or on the credit of the defendant, and that his promise was made in the character of a surety or guarantor, it would seem to follow, that they must have been delivered on the credit of John Doyle, and if not, to be immaterial to ascertain in this suit, on whose credit they were delivered, for the defendant would not be liable, if the other instructions were correct. The instructions further stated, that the defendant would not in such case be liable, unless the jury should find that the promise of the defendant was made "upon some new consideration other

than the delivery of the rock, and that any expectation of profit, or hope of benefit, that might be anticipated from goods, that might be furnished by defendant to John Doyle," could not constitute a sufficient consideration to make such collateral promise binding.

The counsel make a distinction between a new and a good consideration; and refer to Roberts on Frauds, 232, and to the case of *Nelson* v. *Boynton*, 3 Metc. 396, to sustain it. Mr. Roberts says, "If it spring out of any new transaction, or move to the party promising upon some fresh substantive ground of a personal concern to himself, the statute of frauds does not attach upon such a promise." In other words the promise to be binding, and not within the statute, must spring out of some new transaction, or out of some fresh substantive ground of personal concern to himself. Or in the language of Kent C. J. in the case of *Leonard* v. *Vredenburgh*, 8 Johns. R. 39, it must arise "out of some new and original consideration of benefit or harm moving between the newly contracting parties." In the case of *Nelson* v. *Boynton*, Shaw C. J. speaking of a promise of the like kind says, "the latter if made on good consideration is unaffected by the statute." It is obvious, that the word *good* was not used in a technical sense, to denote a consideration of blood, as distinguishing it from a valuable consideration, but was used with reference to a sufficient or valuable one. And it was not his purpose then to allude to, or consider, whether the contract between the original parties could constitute a good or sufficient consideration between the newly contracting parties. The term, new consideration, is used in many of the decided cases, or words equivalent to them, and is suited to inform the jury clearly, that the collateral or secondary promise must be founded upon a consideration arising between the parties thus contracting, and different from that, upon which the original or first contract was founded.

As it respects the latter clause of this branch of the instructions, the delivery of the stone constituted the consideration of the promise according to the finding of the jury, be-

tween the plaintiff and John Doyle; and could not of course be the consideration of any new promise between the parties, upon which the credit was not given. And any expectation or hope of profit, which the defendant might anticipate, was not a matter, with which the plaintiff had any connexion. It was not a matter "of benefit or harm moving between the newly contracting parties." In the first class of cases as stated by Kent C. J. the consideration for the original and for the collateral undertaking may be the same. But not in those cases, to which these instructions had reference, where the contract is collateral, and not in writing, and yet good, because not within the statute. So far as the case of *Russel* v. *Babcock*, 14 Maine R. 138, may be in conflict with these positions, it was stated in the case of *Hilton* v. *Dinsmore*, 21 Maine R. 433, to be unsupported by authority.

The counsel also insists, that the instructions respecting the mortgage upon the estate of John Doyle were erroneous. The last cargo of stone was delivered in July, 1841. A witness states, that a final settlement was made between the parties to the mortgage in the month of October, 1842, and the balance due upon it ascertained. The argument is, that as "the mortgage was given to secure the gross sum of twenty-five hundred dollars, which might be furnished in goods and materials towards the erection of a house for the mortgagor," it might have been the understanding of the parties, "that the mortgage was to remain and be held as security for the defendant's liability for the rock."

Admitting the mortgage to have been made for the purpose stated, any other claim, than such as might arise from goods and materials furnished for the use of the mortgager, would not be secured by it. A collateral liability, or one assumed as surety or guarantor, would not be within its terms. It cannot be presumed, that any such liability was intended to be secured, for it does not appear, that the defendant ever assumed any to the plaintiff at the request, or with the knowledge of John Doyle. *Exceptions overruled.*

ROBERT HARKNESS *& al. versus* WALDO COUNTY COMMISSIONERS.

An application to the County Commissioners for the location, alteration, or discontinuance of a highway is made "at one of their regular sessions," if presented at an adjournment of a regular session.

A petition for a *certiorari* to quash the proceedings of the County Commissioners in laying out a highway, because they have adjudged the way prayed for to be of common convenience and necessity and yet have laid out but a portion of it will not be granted on the application of such persons only, as have no interest to be affected, otherwise than as members of the community, by the omission to lay out the remaining portion of that way.

The County Commissioners by adjudging that the way prayed for is of common convenience and necessity, adjudge each portion of it to be so.

Under the provisions of the Revised Statutes, County Commissioners have power to lay out a highway wholly within the limits of one town.

A PETITION was presented and addressed to this Court, signed by Robert Harkness and others, all of Camden in the county of Waldo, in the following terms: —

"The petitioners respectfully represent, that a petition was presented to the Court of County Commissioners at an adjourned term of said Court, for the county of Waldo, on the second Tuesday of October, 1844, praying said Commissioners to locate and establish a county road from Fish's mills, so called, in the town of Hope, thence by Ingraham's corner, in Camden, thence easterly intersecting the new road leading from Goose river village to Thomaston, near and northerly of the dwellinghouse of Albert Eells in Camden, and that in pursuance of said petition the said Commissioners on the 19th day of November, 1844, proceeded to view the route set forth in said petition and thereupon located and established a portion of the road prayed for and ordered the same to be recorded, which said route passes over and takes the land of your petitioners. And your petitioners further represent that all that portion of the road prayed for in said petition, leading from Ingraham's corner to the road near Albert Eells' dwellinghouse, is wholly within the town of Camden, and does not connect with or intersect any county road at its termination near Albert Eells' dwellinghouse, and is not necessary for

the accommodation of the travel from town to town; and all that portion of the route from Ingraham's corner, in the town of Camden, to Fish's mills, in the town of Hope, has long since been located, and established, and used as a public highway. And your petitioners further represent that the said Commissioners have only located and established that part of the road set forth in said petition which is wholly without the limits of the town of Camden, viz: the part from Ingraham's corner to the road near Albert Eells' dwellinghouse, and have altered and discontinued two several portions of the remaining part of said located and established highway, both of which are entirely within the limits of the town of Camden, and have exercised no jurisdiction whatever over any portion of that part of the route prayed for, which is in the town of Hope, all of which is, and for a long time has been, a public highway.

"And your petitioners further say, that all that portion of the road which has been located and established, is a town way, not needed for the public travel, and if necessary at all, only so for the convenience and accommodation of a small portion of the citizens of Camden, and that the same, or nearly the same route, having been once laid out by the selectmen of Camden, as a town way, the inhabitants of said town, at a legal meeting, refused to accept the same.

"And your petitioners object to the legality and validity of the doings of said Commissioners in locating and establishing said way, for the following reasons: —

"1st. Because the original petition was not presented at a stated session of the County Commissioners.

"2d. Because it appears of record that the said Commissioners have adjudged the entire route prayed for in the original petition to be of common convenience and necessity, which said route so adjudged, they have not located and established.

"3d. Because it does not appear of record that they have adjudged that portion of the route actually located and established, to be a route of common convenience and necessity.

"4th. Because said original petition only prayed for the establishment of a new county road between the termini described therein, and it appears of record that the said Commissioners have located and established a road wholly within the limits of the town of Camden, and not connecting with or leading to another town, or from town to town, of which, by law, they had no jurisdiction.

"Wherefore your petitioners pray that a writ of *certiorari* may be issued to the said County Commissioners, directing them to certify their record to this Court, and that the same may be quashed."

*W. H. Codman*, for the petitioners for a *certiorari*, argued in support of the reasons therefor, given in their petition. In remarking upon the last objection, he cited the statute of Feb. 8, 1839, and commented upon the cases *New Vineyard* v. *Somerset*, 15 Maine R. 21, and *Parsonsfield* v. *Lord*, 23 Maine R. 511.

*Weeks*, County Attorney, argued for the County Commissioners, and among others, took these objections to granting the petition: —

Presenting a petition for a road at an adjournment of a regular session of the Commissioners' Court is sufficient. *Parsonsfield* v. *Lord*, 23 Maine R. 515. An adjudication that the whole of a route prayed for is of common convenience and necessity, adjudges that every part of it is. The doings of the County Commissioners do not affect the petitioners, and therefore the Court will not interfere. The law is settled, that the acts of the Commissioners were legal. 15 Maine R. 21; 23 Maine R. 511.

*N. T. Talbot* argued for the original petitioners, and added to the citations of the County Attorney, 11 Mass. R. 417; 8 Greenl. 292; 5 Mass. R. 420; 3 Fairf. 210; Rev. St. c. 25, § 1 and 3.

The opinion of the Court was drawn up by

SHEPLEY J. — These petitioners desire to bring before the Court the proceedings of the County Commissioners of this

county, on a petition filed in October, 1844, to have a highway laid out leading from Fish's mills in the town of Hope, to a way near the dwellinghouse of Albert Eells in the town of Camden, to have them quashed.

The first error alleged is, that the petition was not presented at a stated session of the County Commissioners. The statute c. 25, § 1, provides that it should be presented "at one of their regular sessions." It was presented, while they were in session in the month of October, by an adjournment of the August term. A petition presented during a regular session, at any period of the session, is presented at a regular session. *Parsonsfield* v. *Lord*, 23 Maine R. 515.

The second is, that the Commissioners have adjudged the whole way prayed for to be of common convenience and necessity, and have laid out a portion of it only. Some of the petitioners are the owners of lands, over which the way laid out passes. Others of them have no private interest. No one of them can be affected otherwise than as members of the community by the omission to lay out the remaining portions of that way; and as they have not suffered any private injury, they cannot insist, that the Court for that cause should quash the proceedings.

On the third error assigned it is sufficient to remark, that by adjudging the way prayed for to be of common convenience and necessity, they adjudged each portion of it to be so.

The fourth error alleged is, that they had by law no jurisdiction to lay out a highway within the limits of a town. The history of the legislation and decisions respecting it is a little singular. The statute passed in the year 1821, c. 118, contained a provision copied from a statute of Massachusetts, which had received a construction authorizing the court of sessions to lay out a highway within the limits of a town for the reason, that one might be required for the public convenience to pass through a part of a town, where there might be no occasion for a town way. That provision authorized the court of sessions to lay out or alter highways "from town to

town or place to place." This Court considered, that the legislature had adopted that construction by the use of the same language.

When the courts of sessions were abolished, and their powers transferred to County Commissioners, by the act of March 10, 1831, c. 500, it was provided, "that all and every petition for the laying out, alteration, or discontinuance of any highway or common road leading from town to town, shall be presented to the County Commissioners." The words from place to place were omitted. This Court came to the conclusion, for the reasons there stated, in the case of *New Vineyard* v. *Somerset*, 15 Maine R. 21, that the like power was conferred upon the County Commissioners to lay out a highway within the limits of a town. At the next session of the legislature, the act of February 8, 1839, was passed, depriving them of that power, without conferring upon them or upon town officers the power to alter or discontinue an inconvenient or useless portion of a highway within the limits of a town. This condition of the law appears to have been noticed by the commissioners for the revision of the statutes, and they, in a note to c. 25, as reported to the legislature, presume that it was not the intention by the act of February 8, 1839, to restrict the powers of the County Commissioners in the alteration or discontinuance of any county road before laid out. And yet such power could exist only by the construction, which had been given to the act of March 10, 1831. For the power to alter or discontinue was no broader by that act, than the power to lay out. They appear therefore to have framed the first section of that chapter to meet, what they supposed might have been the intention of former legislative bodies, by giving the power to lay out new highways from town to town only; and the power to alter or discontinue any highway, whether within the limits of a town or not. But the legislature rejected that provision. And appear to have resorted to the act of 1831, and to have re-enacted that provision, which had received a judicial construction, with some but no important change in the language, so far as its interpretation

may be affected, thereby making the power to locate co-extensive with the power to alter or discontinue. And if the section should not now receive the same construction, which the substance of the provision had before received, the same difficulties then pointed out as the result of a different construction would be still found to exist. Hence the inference is very pressing, that the legislature by adopting the substance of the provision contained in the act of 1831, must have intended to do it with the construction, which it had received. And that the reason for rejecting the provision reported was not to refuse to the County Commissioners the power to alter or discontinue a highway within the limits of a town, but to grant with it the power to lay out highways within such limits. It cannot fairly receive any other construction, unless the Court should come to the conclusion, that it was the deliberate intention of the legislature to refuse to confer the power upon any state or town officers to alter or discontinue an inconvenient or useless highway existing within the limits of a town. The prohibitory act of 1839 was repealed by the general repealing act of the Revised Statutes.

*Writ refused.*

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JOHN A. BLANCHARD *versus* PHINEAS WOOD.

Where the payee of a negotiable note, before it became payable, indorsed it thus — "Phineas Wood holden for the within note," the Court held, that he was liable without demand or notice; and that he was not discharged by delay for a year to collect the note of the maker.

ASSUMPSIT against the defendant as indorser of a note.

The parties agreed, that the defendant, the payee of the note, indorsed it before it fell due, in this manner, "Phineas Wood holden for the within note." The makers of the note resided in the county of Waldo, and at the time the note fell due, and for one year afterwards, were of sufficient ability to pay it. No demand of payment was made upon the makers until six months after the note had become payable, and no notice of non-payment was given to the defendant.

A nonsuit or default was to be entered according to the opinion of the Court as to the rights of the parties.

*Crosby*, for the plaintiff, said that the defendant, by his special indorsement, had made himself unconditionally liable to pay the note; and cited *Bean* v. *Arnold*, 16 Maine R. 251, as directly in point. He also cited *Read* v. *Cutts*, 7 Greenl. 186, and *Bagley* v. *Buzzell*, 19 Maine R. 88.

As the defendant has thus made himself liable without demand or notice, the plaintiff has not lost his rights by delay. *Cobb* v. *Little*, 2 Greenl. 261; *Page* v. *Webster*, 15 Maine R. 249; *Lane* v. *Steward*, 20 Maine R. 98.

*N. Abbott*, for the defendant, contended, that there was a material distinction between the case relied on for the plaintiff, and the present case. In the case cited, the note was due when the indorsement was put upon it, and the indorser made himself immediately liable. Here the indorsement was made before the note became payable, and the plaintiff was holden to make use of due diligence. Here the defendant could derive benefit from a demand and notice, whereas in *Bean* v. *Arnold*, they would have been entirely useless, as they must have been made on the same day.

This may be regarded as a guaranty; and if so, the plaintiff was guilty of negligence, and the defendant is thereby discharged.

The opinion of the Court was drawn up by

WHITMAN C. J. — The case of *Bean* v. *Arnold*, 16 Maine R. 251, must be regarded as decisive of this case. The distinction relied upon in defence is not well founded. The language of the indorsement in this is more explicit than in that case, where the indorser merely added the word "holden" to his signature. In this, his language is, "holden for the within note." In that case, however, the meaning was held to be identical with what is expressed in this. In both cases something more was intended than an agreement to be holden in case of demand and notice. And it must be understood as importing an agreement to be holden unconditionally, so as

to render it the duty of the indorser to pay the note, or to see it paid without trouble to the indorsee. It amounted to an absolute guaranty; and comes within the principle of *Cobb & al.* v. *Little*, 2 Greenl. 261. It could not make any difference, that the note in the case of *Bean* v. *Arnold*, was overdue, and in this case was not due. The import of the terms used must be the same in either case.

*Defendant defaulted.*

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HENRY O. PAGE *versus* FREDERICK LEWIS.

A justice of a Town Court is not, by holding that office, rendered incompetent to serve as a juror at the Supreme Judicial Court or District Court.

ONE of the jurors, who rendered the verdict on the trial of this cause, was a justice of the town court of the town wherein he resided. This fact was unknown to the presiding Judge until the close of the term.

The verdict was for the plaintiff, and the defendant moved to set it aside, because one of the jurors who gave the verdict was a justice of a town court.

*Williamson* and *Palmer*, for the defendant.

*Kelley* and *Heath*, for the plaintiff.

On a subsequent day, at the same term, it *was held by the Court*, TENNEY J. being absent, holding the Court in the county of Washington, that a justice of a town court was not exempted by Rev. St. c. 135, § 3, from serving as a juror. That statute exempts only Judges of the "common law courts." The statute does not define what is to be considered a common law court, and we must therefore go to the common law for the definition. And by the common law, the town court, departing in many respects from the rules of common law, such for instance, as in the number of jurors, is not a court of common law.

*The motion for a new trial is overruled.*

## James P. White *versus* Adeline H. Mann, *Executrix.*

If the conveyance of a vessel, held as security for a loan, and the payment of the money loaned, are by the contract to be simultaneous acts, it is sufficient for the party claiming from the other a performance of the contract, to show a readiness and an offer to perform. A formal and technical tender is not required of him.

But in such case if a tender were necessary, it would be sufficient to show, that he had done all that could be done on his part to accomplish what, by the contract, he was bound to do.

The rule, that if a thing become physically impossible to be done by the act of God, performance is excused, does not prevail, when the essential purpose of the contract may be accomplished. If the intention of the parties can be substantially, though not literally, executed, performance is not excused.

Where the fourth part of a vessel was conveyed to the master thereof, as collateral security for the payment of a sum of money loaned, within one year; "it being well understood, that if said quarter of said vessel is not redeemed within the time above named, then it is to be considered as a *bona fide* sale; it being further understood, that if the vessel meets with any loss not covered by insurance, by not obtaining successful business, or any misfortune or casualty of any name or description, it is to be borne by you, (the mortgagor); and all net earnings and profits, after deducting insurance and charges of every name or kind, shall be paid over to you, when you claim to redeem her;" and insurance is effected on the vessel "for the owners thereof;" the vessel is lost, and the fourth part of the insurance money is paid to the representative of the mortgagee within the year, and the mortgagor within that time claims the right to redeem, and to have the insurance money accounted for to him. *It was held*, that the mortgagor was entitled to redeem, and to have the amount received of the insurers for the loss accounted for to him.

When a person leaves his usual place of residence with an intention of returning to it, and continues to be absent from it for seven years, without being heard of, he is presumed to be dead. But the time when such presumption will arise, may be greatly abridged by proof, that the person has encountered such perils as might be reasonably expected to destroy life, and has been so situated, that according to the ordinary course of human events, he must have been heard of, if he had survived. No general or certain rule can in such cases, be established; but each case must be decided by the competent tribunal upon proof of the facts and probabilities, that life has been destroyed.

Where one, without lawful authority, assumes the administration and disposition of the estate of one deceased, and receives and pays out money belonging to the estate, although professing to act for the deceased on the supposition that he might be alive; he is liable to a creditor of the deceased, as *executor de son tort.*

This suit is upon a contract signed by Joseph Mann bearing date New York, May 30th, 1842, a copy of which is annexed. The general issue was pleaded, and the defendant also filed a brief statement, alleging that she is not the Executrix of Joseph Mann.

Ralph C. Johnson, called by the plaintiff, testified, that on May 18, 1843, he called upon Edward D. Peters, of the firm of Edward D. Peters & Co. at their counting-room in Boston, with the contract and a power of attorney from the plaintiff and Joseph Robertson, and informed him that he was prepared to pay the money on that contract; that Mr. Peters said that was the first knowledge he had of his agency; that Mann was lost; that he did not feel authorized to receive the money on Mann's account, and would not take it; that he absolutely refused to take it for Mann; that he had the money and was prepared to have made a tender in specie, had it been required, but as Mr. Peters refused to receive it, he did not tender or offer any money; that he exhibited the contract and power of attorney to Mr. Peters, and no other papers; and that he might have spoken of Robertson as interested.

Jonathan Durham testified, that he had a son, as second mate on board the Wyandot; that she was reported to have sailed from New York, in June, 1842, for a port in Yucatan, and there loaded in August following; and that his son has not been heard from, or the vessel, since; that there was a hurricane reported soon after in the Gulf, and many vessels were reported to have been there lost; that Otis Skinner sailed in her as first mate, and has not been heard from since that time; that his son owned one eighth of the vessel, and he has received from Nesmith & Co. $927,82, as the insurance on the vessel for that one eighth.

The plaintiff read the depositions of William Hopkins, James Nesmith and Lot Clark showing a recovery of the insurance on the vessel and freight and a payment of one quarter to the order of the defendant.

*In defence* the deposition of Edward D. Peters was read, which may be referred to.

It was admitted, that the vessel was sailed on shares by Joseph Mann, as master.

Nathan Pendleton testified that the port charges and tonnage duties and consul fees and charges for boat hire which might be paid by the master at the port in Yucatan, would be chargeable 1-2 to the vessel and 1-2 to the master: whether any and what were paid there by Capt. Mann, he did not know; that in August, 1842, he was on a voyage from Liverpool to New Orleans, and that there was a gale in the Gulf in September, that vessels were dismasted and others reported to be lost.

It was admitted that no will of Joseph Mann had been proved, and that neither the defendant, nor any other person had taken out letters of administration on his estate. The parties agreed, that the Court, upon the whole testimony, should decide upon the rights of the parties and enter such judgment and for such amount, if any, as he may be legally entitled to.

A copy of the contract referred to follows: —

"New York, May 30th, 1842.

"Mr. James P. White — Sir,

"Having received from James Nesmith and Louis Walsh a bill of sale of one quarter of barque Wyandot to be held by me as collateral security for a loan of sixteen hundred and fifty dollars, I made you on said barque; I hereby agree to transfer the said one quarter of barque Wyandot to you at any time within one year from this date, on your paying me the amount of said loan of sixteen hundred and fifty dollars with interest at the rate of six per cent.: it being well understood that if the said one quarter of said barque Wyandot is not redeemed within the time above named, then it is to be considered a *bona fide* sale. It being further understood that barque meets with any loss not covered by insurance, by not obtaining successful business or any misfortune or casualty of any name or description, it is to be borne by you, and all net earnings or profits after deducting insurance and charges of every name or kind shall be

paid over to you, when you claim to redeem her as aforementioned.

"Should you be prepared to redeem the said quarter of barque Wyandot at any time while I am absent, you may deposit the sum I paid for the quarter, with interest, in the hands of Messrs. Edward D. Peters & Co. of Boston, and take their receipt and on my return, I or my successor will settle with you for what profit or loss there may be up to the time of my arrival in the United States, on the condition aforementioned.

"Joseph Mann."

The only statement by whose procurement, or for whose benefit, the insurance on the vessel was effected by Nesmith & Co., is in these words in the deposition of Nesmith: — "There was a policy of insurance for $8000, effected upon said barque by the firm of which I am a partner, as agents for the owners of said barque, which policy was in full force at the time she last left New York, and our firm did, after the loss of said barque, on August 15, 1843, receive from the insurers the amount of the same. The amount left the owners of said barque, after deducting costs and charges, was $7422,52." He states, that they paid to the attorney of the defendant, on August 16, 1843, $1855,63.

Means & Clark thus state the procurement of the insurance on the freight. "We were agents of the ship in procuring insurance on said freight. We acted for the master and owners."

*W. G. Crosby*, for the plaintiff, in his argument, advanced these legal propositins: —

The unqualified disclaimer and refusal of Peters to receive the money, obviated the necessity of a formal, technical tender. 3 T. R. 683; 6 Pick. 356; 5 N. H. R. 440; 2 Greenl. Ev. 497 and note; Stark. Ev. 1391.

There was, however, no necessity for a formal tender; there was no one to whom a tender could be made. The agency of Peters was revoked by the death of Mann; there was no legal representative to whom the tender could be made; and it was not the plaintiff's fault, that there was no

one authorized to receive the money, which he was ready to pay. 5 East, 202; 4 Peters, 332; Paley on Ag. c. 3, part 1, § 3. There was no necessity for bringing the money into Court, as the defendant had already received more money, which she was bound to account for to the plaintiff, than the amount due on the mortgage.

As there is no pretence of performance on the part of the defendant, the action would seem to be maintainable, if the defendant was executrix.

Where there are circumstances in the case showing a probability of death, no particular time is fixed by law, when the presumption of death will attach. A short time only is sometimes sufficient. 1 Greenl. Ev. 48, 49; 2 Eng. Com. L. R. 322; 11 N. H. R. 197; Parke on Ins. 434. The testimony, however, is sufficient to prove the death of Mann.

The defendant had rendered herself liable as executrix *de son tort* by her acts. 4 Mass. R. 658; 2 T. R. 97; 1 Dane, 570; Starkie on Ev. part 4, 553; 2 Greenl. Ev. 274; 1 Shep. Touch. 488.

Mann bound himself to reconvey the vessel upon the payment of the money unconditionally, and without any exception or reservation. He voluntarily assumed the duty; the law did not impose it upon him. It was one which his legal representative, his agent or attorney, might perform for him. The case does not come within the principle, that performance is excused by the act of God. 22 Maine R. 536; 2 Wms. Saund. 422; 16 Mass. R. 238.

The insurance was effected for the owners of the barque, and the plaintiff was to bear "all losses not covered by the insurance." The plaintiff had the same interest that Mann had. Whether the insurance money belonged to the plaintiff or to Mann, depended upon whether redemption was made within the year.

*Hathaway* and *Hinckley*, argued for the defendant; contending for these, among other points: —

The tender was insufficient. It should have always been ready, and should have been brought into Court.

The plaintiff had an insurable interest; and having neglected to insure himself, if he sustained loss, he is without remedy. Phil. on Ins. 41; 2 Pick. 249. The insurance effected by Mann was for his own benefit, and the plaintiff had no claim upon it. Mann could not have insured for the plaintiff's benefit. 2 Metc. 16 and 165.

The arrival in the United States of Mann, was the time, the condition precedent of his liability. The contingency has never happened, which might render him liable by virtue of the contract.

The sale became absolute immediately on the loss of the barque, which was before the offer to pay by Johnson. She could not be redeemed after the loss; and the moment the redemption became impossible, the sale became absolute.

Immediately upon the loss of the barque by the act of God, it became impossible to execute the contract. The case comes within the principle, "that if a contract, when made, be legal and possible, and then becomes impossible by the act of God, it is discharged." 1 Rol. Abr. 451; 3 Com. Dig. 109; 4 Dane, c. 117, § 10; 5 Dane, c. 157, § 19; Powell on Con. 446, 447.

The defendant exercised no ownership over this property, other than was necessary for the preservation of it, and she is not liable on that account as *executrix de son tort*. 2 Greenl. Ev. § 343, 344, 345, and cases there cited.

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

SHEPLEY J. — This suit is upon a contract contained in a letter written by Joseph Mann to the plaintiff from New York, on May 30, 1842. From that letter it appears, that Mann held one quarter part of the barque Wyandot, as security for a loan of money. He therein engaged to convey that fourth part to the plaintiff upon payment of the amount loaned, with interest, within one year; and to account to him for one fourth of her net earnings. He sailed in the vessel, as master, from New York, in June following, and

arrived, at the port of Champeton in Yucatan, and in a letter bearing date on August 12, 1842, he stated, that he was about to sail from that place with a cargo for Bremen. This is the last information received of the vessel or of any one on board of her. There was information received of a hurricane in the Gulf soon after, in which several vessels were said to have been lost.

The plaintiff was authorized by the letter of May 30, 1842, to pay the amount due to Mann to Edward D. Peters and company of Boston, if he should wish to redeem that quarter of the vessel during the absence of Mann. An agent of the plaintiff, duly authorized, called upon a member of that firm at their place of business in Boston, before the expiration of the year, exhibited to him the contract, and informed him, that he was prepared to pay the money. And he testifies, that he was in fact prepared and ready to have paid, and in specie, if called for. Mr. Peters, in answer, stated, that Mann was lost, that he did not feel authorized to receive the money on his account, and that he would not take it. The vessel had been insured before she sailed from New York for $8000 by the procurement of Messrs. Nesmith & Walsh as agents for the owners. This sum, deducting the premium and other charges, was received by them for the owners on August 15, 1843. The master was to sail the vessel on shares, as it is called; that is, he was to victual and man her at his own expense, and to pay one half of all port charges, and was to receive to his own use one half of her earnings. It appears from the account of Peters & Co. that an insurance of $1500 had been procured on his half of the freight, which was paid on August 18, 1843. And that a like sum for the insurance of the owners' half of the freight was received by Messrs. Means & Clark on August 17, 1843.

To be entitled to maintain this suit the plaintiff must shew either a performance, or a readiness and an offer to perform, on his own part. The conveyance of a quarter part of the vessel, and the payment of the money loaned with interest, were by the contract to be simultaneous acts. In such case it

is sufficient for the party claiming from the other a performance of the contract to show a readiness and an offer to perform. A formal and technical tender is not required of him. *Rawson* v. *Johnson*, 1 East, 202; *Low* v. *Marshall*, 17 Maine R. 232. If a tender were necessary, it would be sufficient to show, that he had done all, that could be done on his part to accomplish, what by the agreement he was bound to do. *Lancashire* v. *Killingworth*, Salk. 623; *Philips* v. *Hugre*, Cro. Jac. 13; 2 Saund. 350, note 3. This is proved by the testimony of R. C. Johnson.

If this be so, it is contended in defence that performance became impossible before that time by the loss of the vessel, and is therefore excused. The rule relied upon, that if a thing become physically impossible to be done by the act of God, performance is excused, does not prevail, when the essential purpose of the contract may be accomplished.

If the intention of the parties can be substantially, though not literally, executed, performance is not excused. *Chapman* v. *Dalton*, Plowd. 284; *Holtham* v. *Ryland*, 1 Eq. Ca. Abr. 18. In this case the parties must have known, that the vessel might be lost within the year. Did they intend in such an event, that each should protect himself or suffer his own loss; or that one insurance for the benefit of all should protect the interests of all? This clause is contained in the letter of Mann to the plaintiff; "it being further understood, that barque meets with any loss not covered by insurance by not obtaining successful business, or any misfortune or casualty of any name or description, it is to be borne by you." The intention is here clearly exhibited, that such losses were not to be borne by him, if covered by insurance. The contract shews that the parties to it contemplated, that insurance had been or would be obtained, which might be beneficial to the plaintiff, although not effected for him only. How early, or by whose direction the insurance upon the vessel had been effected, does not appear; but the testimony of Nesmith shews, that it had been effected before she sailed from New York. In no other way can the intention of the parties to the contract be carried into

effect, than to hold Mann to be accountable to the plaintiff for any such losses covered by insurance, which has been collected. Although the clause before noticed is followed by one having reference only to the earnings of the vessel, yet it is not so connected with it, as to be limited by it; and the language providing for a loss happening to the barque by "any misfortune or casualty of any name or description" is sufficiently broad to embrace a loss of the vessel. To refuse to make him thus accountable would require not only, that the intention of the parties should fail to be accomplished, but that the clause in the contract providing, that the plaintiff should not bear the losses covered by insurance, should be disregarded.

The contract also states that "all net earnings or profits, after deducting insurance and charges of every name or kind, shall be paid over to you, when you claim to redeem her." Will this admit of a construction, that a sum of money obtained by an insurance of freight was not to be accounted for? The premium and expenses were to be a charge upon the plaintiff by their being deducted from the earnings of the vessel; and if the money thus obtained was not to be accounted for, the effect would be to make the plaintiff pay the premium and expenses without allowing him to derive any benefit from it, when the contract in another clause provides by a necessary implication, that the plaintiff was not to bear losses covered by insurance. Lot Clark testifies, that the firm of Means & Clark owned three-eighths of the vessel and obtained insurance on the owner's half of the freight, and that they "were agents of the ship in procuring insurance on the freight;" and that Mann "owning one fourth of the barque" they paid one fourth of the amount, deducting expenses, to William Hopkins as the attorney of the defendant. The estate of Mann must therefore be held accountable to the plaintiff for an equitable adjustment of the amount received from the insurance made upon the vessel as well as from that made upon the freight.

There are two objections presented to the maintenance of

the action against the defendant. The first is, that there is no satisfactory proof of the death of Joseph Mann. The second, that no will has been proved or letters of administration taken out on his estate; and that the defendant has not so conducted as to be liable as executrix *de son tort.*

With respect to the first objection, the proof is, as before stated, that no information has been received of the vessel or of any person on board of her since she was about to sail for Bremen in August, 1842. The insurance made upon the vessel and upon her freight has been paid as for a total loss. When a person leaves his usual place of residence with an intention of returning to it, and continues to be absent for seven years, without being heard of, he is presumed to be dead. The time, when such presumption will arise, may be greatly abridged by proof, that the person has encountered such perils as might be reasonably expected to destroy life, and has been so situated, that according to the ordinary course of human events he must have been heard of, if he had survived. In such cases insurance companies are accustomed to pay, as in this case, after the lapse of one year, when the vessel sailed for an European port and has not been heard of since. And administration has been granted on the estates of those on board and not heard of after a lapse of two years. No general or certain rule can in such cases be established. Each case must be decided by the competent tribunal upon proof of the facts and probabilities, that life has been destroyed.

One who has sailed in a vessel, which has never been heard of for such length of time, as would be sufficient to allow information to be received from any part of the world, to which the vessel or persons on board might have been expected to be carried, and who has never been heard of, since the vessel sailed, may be presumed to be dead. The facts in this case being submitted to the Court, it should come to such a conclusion, as a jury might justly do; and there does not appear to be any reasonable doubt, that the vessel, master and crew have all perished. The facts in relation to the second objection appear to be, that the defendant, by a power of attorney

by her signed, authorized William Hopkins to receive, and that he accordingly did receive of Means & Clark one fourth of the insurance on the vessel's half of the freight; and of Nesmith & Walsh one fourth of the insurance on the vessel. He also settled with Peters & Co. and received of them a part of the balance due. All these acts were performed by the defendant, through her agent, on the 16th, 17th and 18th days of August, 1843. Hopkins states, that the defendant requested him to act as the agent of Joseph Mann, but as his only power to act was derived from the defendant, such direction cannot alter the legal effect of those acts. The defendant subsequently drew drafts on Peters & Co. for more than two thousand dollars in favor of other persons, which were paid to them; and she thereby appropriated that amount out of the estate of her husband to the use of others. This she could do only by assuming the administration and disposition of the estate. These proceedings are quite sufficient to render her liable as executrix *de son tort*.

The manner in which the account should be stated, and the amount, which the plaintiff will be entitled to recover, ascertained, will be presented on a paper in possession of the clerk.

*Defendant defaulted, and judgment for plaintiff.*

A dissenting opinion was drawn up as follows by

WHITMAN C. J. — Not having been able to agree in the opinion just delivered, I will proceed to explain the reasons for dissenting therefrom. The action is founded upon a contract, entered into on the 30th day of May, 1842, between the plaintiff and the defendant's intestate. The intestate, after reciting that he had received a bill of sale of the barque Wyandot, as collateral security for a loan of sixteen hundred and fifty dollars, made by him to the plaintiff, stipulates to transfer the same to the plaintiff at any time within one year from the said thirtieth day of May, upon being repaid the sum loaned with interest; but if not paid within the year, that the vessel should be considered as sold *bona fide*, meaning manifestly

that the sale should become absolute. It was further stipulated that, if the vessel should meet with any misfortune or casualty, or by not being profitably employed, whereby a loss might accrue, not covered by insurance, it should fall upon the plaintiff; and that all net earnings, or profits, after deducting charges, should be paid to the plaintiff upon his claiming to redeem as aforesaid. The intestate further agreed, that the plaintiff might redeem, by paying the amount loaned and interest, *on the condition* before named, to E. D. Peters & Co. The plaintiff, by his agent, called on Peters & Co. on the 18th day of May, 1843, and offered to pay the amount of the loan and interest, but was informed by them that they knew nothing of any agency or authority to receive the money, and refused to receive it. It appears, by evidence entirely satisfactory, that the intestate, with the vessel, had been lost at sea early in the fall previous.

It appears that Messrs. Nesmith & Co. had effected insurance for $8000,00 on the vessel for the benefit of the owners, one fourth of which, Nesmith says, after deducting charges, was paid to the agent of the defendant, being said intestate's "proportion of said insurance money." And it appears that Messrs. Means & Clark effected insurance on the freight of said vessel to the amount of $1500,00, which, with a deduction for charges, they received; and paid one fourth of it to the defendant's agent, being, as one of them testifies, the proportion belonging to the intestate, "he owning one fourth of the barque as we had no doubt."

The claim of the plaintiff is now to recover so much of the insurance on the one fourth of the vessel, as the amount received therefor exceeded the amount of said loan and interest; and also for the one half of the amount received for insurance on the freight. To the former the plaintiff lays claim because it was stipulated in case of loss, that he should be the sufferer to the amount of all beyond what the insurance would pay, and to the latter, because the intestate agreed to be answerable for the net earnings of said quarter part of said vessel, falling to the owner's share, she having been let to the intes-

tate upon shares, and he contends further, that, the insurance having been effected for the benefit of the owners, it was for his benefit, he claiming to have been owner in equity of one quarter of the vessel. And a majority of the Court are of opinion that his claim in both particulars is sustainable. To me however it appears otherwise.

There is not a scintilla in the case tending to show, that the plaintiff ever authorized either Nesmith & Co. or Means & Clark to insure, or to procure insurance for him. On the other hand both firms, by their testimony, show that they acted as agents for the intestate; that they were employed to procure insurance upon his interest; and that they received and paid over the amount of the losses to the defendant upon that supposition. There was then most clearly no insurance directly upon any interest remaining in the plaintiff, either legally or equitably. Upon what ground then can the plaintiff sustain his claim? It is urged that the intestate contracted to re-convey the vessel, and to account for a proportion of her net earnings upon certain terms and conditions, which, by the offer to pay the loan to Peters & Co., are supposed to have been complied with. But the intestate did not stipulate to transfer any insurance he might effectuate for his own security, upon either freight or vessel, in any event, to the plaintiff. Suppose the debt had been actually paid, after insurance had been effected by the intestate upon his interest in the vessel and freight, his interest thereupon would have ceased and he could not have recovered for his insurance; and nothing can be more obvious than that the plaintiff could not have recovered on any policy so effected; and the intestate could not, upon receiving such payment, have transferred any policy, so by him effected, to the plaintiff, so as to have been available to him. And as the vessel and freight were both extinct neither of those could be transferable. The loss of the vessel and freight, by inevitable accident, in the course of her authorized employment, put an end to the contract, the intestate having been fully indemnified by his insurance, and the plaintiff being exonerated from liability for his debt. The intestate was

careful to make his interest secure by his policies, while the plaintiff was content to be his own insurer upon whatever interest in equity or otherwise he may have had in the vessel or freight. And so, in my estimation, is without cause of action.

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

It is essential that it should appear in an indictment, that it was found upon the oath of the jurors. And each count in the indictment must appear to have been found by the jurors upon oath.

One count in an indictment may refer to another, and thereby that, which if alone considered would appear to be defective, may be sufficient. But a defective count can be thus aided, only when there is a reference therein to another count for the allegation or fact required to make the defective count perfect.

McAllister was indicted for larceny. After a description of the Court, the indictment, in the first count, commenced with — "The jurors for the State aforesaid upon their oaths present, that Isaac C. McAllister of," &c. took a quantity of sole leather, the property of William R. Hunt, setting out the facts and form of an indictment for simple larceny. There was a *nol. pros.* of the second count entered in the District Court. The third count commenced thus. — "And the jurors aforesaid for the State aforesaid do further present, that Isaac McAllister of," &c., on &c., at &c. "the tannery of one William R. Hunt, there situate, in the night time, did break and enter, and" a quantity of sole leather, particularly described by marks, of the value, &c. "the goods and chattels of the said William R. Hunt, then and there in the tannery aforesaid found and being, did steal, take and carry away in the tannery aforesaid, against the peace," &c.

On the trial in the District Court the jurors found McAllister not guilty on the first count, and guilty on the third.

The counsel for McAllister moved an arrest of judgment on account of two distinct alleged fatal defects in the indictment. As the opinion of the Court is based on one only, the arguments upon the other will be omitted.

*W. G. Crosby*, for McAllister, said that the count, upon which the defendant was found guilty, is fatally defective, as it was not found by the grand jury *upon oath*. Every bill of indictment must be found on the oath of the grand jury, and every count in the indictment should be perfect in and of itself. If it should be said, that the third count is aided by the averment in the first, from which it appears, that the jury found the first count upon oath, the Court are referred for an answer to the case, *State* v. *Soule*, 20 Maine R. 19. There is no reference in this matter of the oath, to the first count. Where there is a second or a third count in an indictment, to each count should be prefixed a statement, that the jurors *upon their oaths* found the bill. 1 Chitty Cr. Law, 249. And so are all the forms in the books.

*Moor*, Att'y Genl., for the State. Although every count should appear upon the face of it to charge the defendant with a distinct offence, yet one count may refer to a matter in any other count, so as to avoid unnecessary repetition; and thereby what might otherwise be defective, when alone considered, would be sufficient. 1 Chitty's Cr. Law, 250.

The practice of stating in the bill the finding to be upon oath grew up, when the grand jurors were sworn upon the investigation of each distinct charge brought before them. Now they are sworn but once, and that is before they enter upon the discharge of any part of their duty. The finding of all bills by the jury must necessarily be upon oath, and therefore it has become unnecessary to make the allegation in the indictment. But all that the strictest rule could require, would be that the indictment should set forth, that the jurors were acting upon their oath. This is set out in the first count, and it follows necessarily, that they must have acted under oath in finding the second count.

The opinion of the Court was prepared by

Shepley J. — The case is presented on a motion in arrest of judgment. The indictment contained three counts. A *nolle prosequi* of the second count has been entered. The accused was put upon trial; and was acquitted of the charge alleged in the first count, and convicted of that alleged in the third count. There is an allegation in the first count, that it was presented upon the oath of the jurors. There is no such allegation in the third count.

It is essential, that it should appear in an indictment, that it was found, upon the oath of the jurors. Francis Dily's case, Cro. Jac. 635. Chitty's Cr. Law, 202.

It was once considered, that the names of the jurors finding it should also be inserted; but that is not necessary. 1 Saund. 248, notes.

Several counts are allowed because a person may be indicted for different offences of the same nature in the same bill. If an indictment thus framed charge two or more persons, who are put on trial together, for different offences, and the testimony does not implicate all of them in each offence, the inconvenience may be obviated, and the rights of the accused be protected by requiring the prosecuting officer to elect, for which offence he will proceed. *Young* v. *The King*, in error, 3 T. R. 106; *The People* v. *Costello*, 1 Denio, 83. Different counts are supposed to describe different offences, although but one offence may have been committed, which is differently described to meet any unexpected aspect of the testimony. Hence it is, that each count must appear to have been found upon the oath of the jurors. Holt, 687; 1 Chitty's Cr. Law, 250.

It is true, as stated in the argument for the State, that one count may refer to another, and thereby that, which if alone considered would appear to be defective, may be sufficient. But a defective count can be thus aided only, when there is a reference to another count for the allegation or fact required to make the defective count perfect. In this case there is no reference in the third count to another count for

the allegation, that it was presented upon the oath of the jurors. It alleges, that "the jurors aforesaid for the State aforesaid do further present," without saying as aforesaid, or in manner aforesaid. In other words, there is nothing in the third count either of allegation or of reference, from which it can be made to appear to have been presented *per sacramentum suum.*

It is further insisted that such an allegation cannot be essential in this State, because the grand jurors are sworn, before they enter upon the performance of their duties, to make true presentments. This however is not a new course of proceeding. The accused has a right to insist, that he is not legally called upon to plead and to incur the expense and odium of a trial, unless he finds an allegation in the indictment, that he was accused upon the oath of the grand inquest.

As the judgment must be arrested for this defective finding, it is not necessary to consider the other point presented.

*Judgment arrested.*

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF CUMBERLAND.

ARGUED AT APRIL TERM, 1847.

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## URSULA F. ROBINSON *versus* WILLIAM H. SWETT *& al.*

After the passage of the act establishing a municipal court in Portland and the acts in addition thereto (st. 1821, c. 72; st. 1825, c. 294; st. 1826, c. 324) and before the revised statutes were in force, a justice of the peace had no jurisdiction over complaints under the bastardy act, where both parties lived in Portland, and had no authority to require a bond. A bond, therefore, taken by direction of a justice of the peace, in that place, during that time, under that act, is void, if the parties lived there.

A judgment of affiliation under the process, in which a bond was so taken, does not, in a suit upon the bond, preclude the defendant from questioning the validity of such bond.

DEBT on a bond, of which the following is a copy: —

"Know all men by these presents, that we, William H. Swett of Portland, in the county of Cumberland and State of Maine, Truckman, as principal, and Wm. Swett of Portland aforesaid, as surety, are held and stand firmly bound and obliged unto Ursula F. Robinson of Portland aforesaid, Widow, in the full and just sum of two hundred dollars, to the payment of which sum well and truly to be made to the said Ursula F. Robinson, her certain attorney, heirs, executors, administrators or assigns, we bind ourselves, jointly and severally, our heirs, executors

and administrators, firmly by these presents. Witness our hands and seals this fourth day of September, in the year of our Lord one thousand eight hundred and forty. The condition of this obligation is, however, such, that whereas the said Ursula F. Robinson hath, upon her examination upon oath, taken before Charles Harding, Esq. one of the justices of the peace, in and for the county of Cumberland, on the twenty-sixth day of August, in the year of our Lord eighteen hundred and forty, accused the said William H. Swett of being the father of a bastard child, of which she has been delivered, and the said justice hath ordered him, the said William H. Swett to give sureties for his appearance at the District Court for the Western District, next to be holden at Portland, in and for the county of Cumberland, on the first Tuesday of October next, then and there to answer to the said accusation: Now if the said William H. Swett shall appear at said Court, and answer to the said accusation, and abide the order of Court thereon, this *bond* shall be void; otherwise shall remain in full force and virtue.

"Signed, sealed and delivered, in presence of Asa Bailey." } "William H. Swett, [L. s.] "William Swett. [L. s.]"

The defendants, with the general issue, filed a brief statement, wherein it was alleged, that the plaintiff, at the time the bond was taken and at the time of the commencement of the suit, was a married woman, having a lawful husband alive; and that the judgment of affiliation, upon the default of W. H. Swett, was illegally and fraudulently obtained; and that the said bond was procured by duress and was void.

At the trial before WHITMAN C. J. the signatures of the defendants to the instrument declared on, were admitted to be genuine. The plaintiff introduced in evidence a copy of a judgment of affiliation against William H. Swett, rendered upon default in a bastardy process instituted by her against him. There was testimony introduced by each party with respect to the questions, whether the alleged husband of the plaintiff was or was not alive at the times mentioned, and in what manner the process was entered and the default made.

A report was made of the whole evidence, and thereupon it was agreed, that if, upon the evidence, the plaintiff could maintain her action, the defendants were to be defaulted, and the Court were to assess the damages; and if not, the plaintiff was to become nonsuit.

*A. Haines*, for the defendants, upon the point on which the decision rested, said that it appeared in the case, that all the parties were inhabitants of and resident in Portland during the whole time; and contended, that the municipal court had, at that time, exclusive jurisdiction of the subject matter of the complaint, and alone had authority to issue the warrant and direct the bond to be taken; and therefore, that Mr. Harding had no jurisdiction or authority in the matter, and the bond, taken as this was, was entirely void; not voidable merely, but wholly void. He cited st. 1821, c. 72; st. 1825, c. 294; st. 1826, c. 324; Paine's C. C. R. 55.

*Fessenden, Deblois & Fessenden*, for the plaintiff, contended, that, as the judgment of affiliation is still in full force, and the condition of the bond was to perform that judgment in all its requirements, the judgment cannot be incidentally reversed in this suit. So long, therefore, as the judgment remains unreversed, it binds the parties to it. The bond was an incident to the prosecution, and a part of the process; and the judgment rendered in that process is conclusive upon this point in the present case. They also contended, that the justice had concurrent jurisdiction with the municipal court on this subject.

The opinion of the Court was drawn up by

Whitman C. J. — This is an action of debt on a bond, which was executed in due form by the defendants, and purports to have been taken in pursuance of the requirements of the statute, c. 72, of 1821, in a bastardy process. The defence is, that the bond is null and void, it having been given to procure the liberation of the principal obligor from arrest in pursuance of a warrant, issued and returnable before a justice of the peace, in the city of Portland, who, it is insisted, had

no authority to issue, or to take cognizance of it, and require the bond to be given. And this depends upon the question, whether the several acts, constituting a municipal court in Portland, gave it exclusive jurisdiction in such matters, between parties in such a process, who were dwellers in Portland.

By an act, c. 294, of 1825, the municipal court was established, with authority to "take cognizance of and exercise jurisdiction over all such matters and things, within" this county, "as justices of the peace may by law take cognizance of, and exercise jurisdiction over, and under like restrictions and limitations, and in like manner as they may exercise the same." And by an act, c. 324, of 1826, it was enacted, that such municipal court should have exclusive and original jurisdiction of all cases of forcible entry and detainer arising in said city; "and in all cases in which said court has now jurisdiction; and in which both parties interested, or in which the party interested as plaintiff, and the persons summoned as trustees, shall be inhabitants of or residents in said town of Portland, it shall have exclusive original jurisdiction." If this act had stopped at the conclusion of these words, viz: — "and in all cases in which said court has now jurisdiction," the meaning would have been much more comprehensive than can be believed to have been intended by the Legislature. It would have ousted, not only justices of the peace, dwelling in Portland, but all those living in the county of Cumberland, of every species of jurisdiction, both civil and criminal, which never could have been designed. And therefore the words, which immediately follow, which, after a comma, beginning with the copulative 'and', must be regarded as qualifying and limiting their meaning, and as providing, that such exclusive jurisdiction must be confined to the cases specified, viz: — "in which both parties interested, or in which the party interested as plaintiff, and the persons summoned as trustees shall be inhabitants of, or residents in said town of Portland."

Hence it follows, that the defence must depend upon the question, whether the complainant and the accused, in a bas-

tardy process, are to be denominated parties; and can be considered as interested as such in the subject matter of the controversy, within the meaning of the act. The plaintiff contends, that they are not, and that the exclusive jurisdiction provided for has reference only to cases of forcible entry and detainer, arising in Portland, and to actions at common law. But if such had been the meaning of the Legislature it would have been easy for them so to have expressed it. They have used language much more comprehensive. It is, that all cases where both parties, &c. A bastardy prosecution is a case, and it is not a criminal proceeding; if it were, it might not, under the statutes referred to, be within the exclusion, although it might have been otherwise, if the prosecution had originated since the enactment of the Rev. St. Such a proceeding has been held, though partaking of the nature of a criminal proceeding, to be a civil suit. *Wilbur* v. *Crane*, 13 Pick. 284; *Williams* v. *Campbell*, 3 Metc. 209. The complainant and the accused, then, must be denominated parties: and are they not both interested in the proceeding? The object of the prosecutrix is to compel the accused to contribute to the support of a child, without which its support must devolve entirely upon her. She, then, is a party interested. That the accused is also a party interested is without question. It follows, that this is a case in which there are parties interested adversarily to each other. And it is not questioned that they were both inhabitants of Portland. According to the literal import of the statute, therefore, the case must be deemed to be embraced in the exclusion; and although the reason on the part of the plaintiff is specious, and at first seemed to have great force, yet we, upon consideration, do not find it to be such as will warrant a departure from the natural import of the language used. The bond therefore must be held to be void.

But it has been argued, that, there having been a judgment of affiliation under the process in which the bond originated, it is not now competent for the defendants to question its validity; and that the bond was an incident to the pros-

ecution, and a part of the process. The bond, however, though it may be an incident to the prosecution, cannot be deemed to be a part of the process, any more than a bail bond in an action at common law. The purposes of this bond are nearly if not quite identical with those. In both cases they are to compel appearance, and intended to render the obligors responsible in case of avoidance. The process in either case might go forward to final judgment, though no bond were given for appearance. The bond, therefore, at most, is but a casual incident; and, if unduly obtained, the first opportunity the obligors would have to show it, would be when sued thereon. No question could arise directly in reference to its validity, during the pendency of the suit. Suppose a sheriff should have a writ, in which he was a party, against an individual, and should arrest him, and cause him to give bail, and judgment should thereupon be entered against him, it is believed that suffering judgment to go by default would be no bar to a defence upon *scire facias*, that the bond had been exacted and taken by one, who had no authority to require it. Such a question could not arise during the pendency of the suit, nor until *scire facias* was issued upon the bond. That would afford him his first opportunity to question its validity. So, in the case before us, a bond was exacted by one having no authority to require it. No question could be made concerning its validity till put in suit. We may suppose another case still more apposite, perhaps. A person, pretending to be a justice of the peace, when in fact he was not, might have a person arrested, and brought before him, charged with the commission of some crime, and require him to recognize to appear at some court, having cognizance of the offence, and he should there be convicted, but should avoid sentence, and a default should be entered upon his recognizance, might he not show, upon *scire facias*, that it had been exacted and taken by one, who had no authority to take it, and so avoid his liability upon it? In all such cases the stipulations would have been obtained by duress. They would

have been given to obtain liberation from unlawful imprisonment, and, in such case, are never held to be obligatory.

*Plaintiff nonsuit.*

## Joseph M. Gerrish *& al. versus* Proprietors of Union Wharf.

The right to use the waters covering flats between high and low water marks for the purposes of navigation, was not abridged by the ordinance of 1641, in reference to that subject; and owners of vessels exercised only their legal right of navigation by passing over such flats, when covered by water, and remaining upon them for commercial purposes from the ebb to the flow of the tide.

The rightful use of one's own estate, whether covered by water or not, may, not unfrequently, have some effect to diminish the value of an adjoining estate, or to prevent its being used with the comfort which might have been otherwise anticipated. This, however, is *damnum absque injuria* for which the law does not make compensation.

If individuals have acted unlawfully or injuriously in extending their wharf into the water beyond low water mark, they may be amenable to the sovereign power, but they cannot be called upon by those who have no interest in the land covered by such wharf, to make compensation to them for its use.

An agreement entered into concerning real estate, wherein certain recitals and admissions are made in reference thereto, does not estop the party to deny the truth of such recitals and admissions, saving for the accomplishment of the purpose for which they were made, unless they become a part of or work upon the title.

An executory agreement, never executed, does not estop a party to it from acting in such manner as to violate its stipulations.

A person cannot be barred by an unsealed instrument by way of an estoppel, of his right to real estate, but only by deed or record.

By the colonial ordinance of 1641, (Ancient Charters, c. 63,) the title of the proprietors of flats extended only to the ordinary low water mark, and not to the place to which the tide ebbed, when from natural causes it ebbed the lowest.

This was an action for use and occupation of a parcel of flats and part of a wharf, from August 31st, 1842, to Dec. 31st, 1844. The general issue was pleaded and joined; and the action was tried at the Nov. Term, 1846, Tenney J. presiding.

The plaintiffs, to show the extent of their claim, offered and introduced an agreement, for reference, made between the plaintiffs and the committee of the defendants, authorized by vote thereto, dated Dec. 3d, 1842; which agreement, it was conceded, had been executed, unless, so far as by the record and proceedings in a suit, a copy of which was introduced by the plaintiffs, appeared.

They also introduced in evidence the copy of a record of a former suit, reference, report, and judgment thereon in favour of the plaintiffs, against the defendants, at the November Term of this Court, 1843. This suit was to recover rent for the use of the same flats and part of a wharf, for the use of which the present suit is instituted. It was entered at Nov. Term, 1842.

The above evidence was objected to by the defendants, but was admitted.

It was also shown by the plaintiffs, that the question of rent for the use of the flats, which were in dispute between the parties, from the time of the final decision of the title thereto, had formerly been submitted to referees, who made their award, dated Dec. 23, 1831, that the proprietors of the wharf should pay $100, per annum therefor.

The plan referred to was introduced and exhibited to the jury but is not in the case. Also the writ of possession, &c. on a former recovery of the flats, in an action wherein the grantors of the plaintiffs and the defendants were parties. Also the deposition of Eleazer Wyer, taken in perpetuam. These were merely to be referred to, but made no part of the case.

The plaintiffs also introduced Samuel Chase, who testified, that from August, 1842, to December, 1844, vessels lay at Union Wharf as usual, and that the part claimed by the plaintiffs was as much used during that period as in former years. He also testified that vessels lying at the wharf above the notch in the capsill where the plaintiffs' line intersects it, must for some distance lie partly upon the plaintiffs' flats, and that vessels came and laid there as usual, during the time above mentioned. He also testified that in his opinion, the fair annual value of the

plaintiffs' flats and appurtenances was from seventy-five to one hundred and twenty-five dollars per year, including the piece of wharf upon them, and that the annual value of the piece of wharf was fifty dollars.

The defendants called William Merrill, who testified that he was wharfinger of Union Wharf, from 1837 to 1841, and kept a counting room upon the wharf until 1844 or 1845; that he often observed the tides during that time, took particular notice of them, and never knew the water at any time to be out below the stone pier; and that the average tides did not ebb below the notch in the capsill.

They also called Alpheus Shaw, who testified that he had been the wharfinger since January, 1842; that he had taken particular notice of the tides, with a view to ascertain the time of low water mark, and had never known the water to be out so low down as the point where the plaintiffs' line strikes the wharf. That he had not taken dockage for vessels lying in whole or in part upon the plaintiffs' flats, but that he had taken wharfage as usual for vessels so lying at the wharf, including that part between the notch in the capsill and the end of the stone pier. He also testified on cross examination, that when goods are landed and put into the stores, and go away by land no wharfage is charged by the rules of the wharf; and if they go away by water, that wharfage is charged but no dockage; and that dockage is a charge against the vessel, and wharfage is a charge upon goods landed.

The defendant's counsel contended, that they were not liable for the use of the plaintiffs' flats above the notch, as the plaintiffs had no wharf there; and that the plaintiffs could recover nothing for the use of the wharf, as the portion within the lines of their flats, was below low water mark.

The plaintiffs' counsel claimed, that they had a right to recover for the occupation of their flats, which were made use of by the defendants as appurtenant to their wharf, whether they collected dockage therefor, specifically or not. That the plaintiffs are entitled to recover for the use of such parts of the wharf as are within the line of their flats, whether below or

above low water mark. And that the true line of low water mark was that to which the tide ebbed when the lowest from natural causes.

But TENNEY J. presiding at the trial, instructed the jury, that the plaintiffs could recover nothing for the use of their dock by vessels lying and discharging at Union Wharf, whether they lay afloat, or upon the flats; and that if the jury should find the part of the wharf where the plaintiff's western line struck it, to be below the ordinary line of low water, they should find their verdict for the defendants. The Judge also put several questions, reduced to writing, to be answered by the jury, according as they should return their verdict. And he further instructed the jury not to regard the instrument of agreement dated December 5, 1842, as having any bearing upon the rights of the plaintiffs to recover in the case, on the ground of any admission or acknowledgment thereof, purporting to be contained therein; and upon which the plaintiffs insisted.

The defendants' counsel contended also, that nothing could be recovered for use of the flats above the notch in the wharf, in this action, and the Judge instructed the jury, that as there was no evidence tending to show, that there was anything received by the defendants for dockage as such, but as the evidence in the case upon that point was, that the defendants did not so receive it, the plaintiffs could recover nothing on that account.

The verdict was rendered for the defendants.

If the rulings and instructions of the Court, injurious to the plaintiffs, were materially erroneous, the verdict was to be set aside and a new trial granted.

The following is a copy of the paper, contended on the part of the plaintiffs to be an estoppel: —

"Whereas Joseph Noble of Boston and Joseph M. Gerrish of Portland, being owners in common of a strip of flats lying on the easterly side of, adjoining to and partly under Union Wharf in said Portland, as appears by a plan drawn by Edward Russell, Esq. taken by order of Court and used in an

action brought by Richard and Frederick A. Cobb against the Proprietors of said Union Wharf, to test the title to said property, being the same which is now owned by the said Noble and Gerrish. And whereas by the judgment of the Supreme Judicial Court, obtained on said suit, possession was given of said flats to the grantees of said Richard and Frederick A. Cobb, together with that part of said wharf which was then built, and now standing on the same, and now owned by said Noble and Gerrish as aforesaid. And whereas the proprietors of said wharf, after paying the rent of said property upon the report of referees to whom the question was submitted, up to January 1, 1832, have since neglected to pay the same and a suit has been brought by said Noble and Gerrish, to recover the rent of said property so owned by them as aforesaid, and improved by said proprietors. And whereas the said proprietors by their committee whose names are hereunto subscribed, have proposed to said Noble and Gerrish to have so much of their property as is hereinafter mentioned, united with the said Union Wharf property and to be made a joint stock; and to create as many new shares in said corporation, and convey them to said Noble and Gerrish as shall be an equivalent for the advantages to be derived to said wharf property by the addition of said Noble and Gerrish property aforesaid: —

Now with a view of adjusting amicably said claim for rent and settling the whole matter upon just and fair principles, the parties have agreed, and do hereby agree to submit the whole matter to the judgment and determination of three disinterested and discreet men, which may be agreed upon for that purpose. The said referees to determine how many new shares shall be created and conveyed to the said Noble and Gerrish by said Corporation, as a fair equivalent for the said Noble and Gerrish's claim for back rent, and for their flats; commencing opposite of, and on a parallel line with, the lower end of the block of stores numbered eleven, standing on said wharf and running southeasterly to the channel of Fore River, with that part of the wharf and stone pier standing thereon, with all rights and privileges thereto appertaining; taking into

consideration the location and relative value of said property, and the advantages to be derived by the union thus to be made of the two parcels; each party to give the other a good and sufficient title in fee simple of the property to be conveyed. Dec. 5, 1842."

This paper was signed by the plaintiffs and by a committee of the defendants, authorized for that purpose, but not sealed.

It did not appear, that any referees were agreed on by the parties, in pursuance of that agreement.

*Questions proposed to the Jury by the presiding Judge.*

*Question.* — "Did the defendants use and occupy the flats described in the plaintiffs' writ, and which are *above* the point where the western line of the said flats strikes the wharf, from Aug. 31, 1842 to Dec. 31, 1844, or any part thereof?"

*Answer by the jury.* — "They did not."

*Question.* — "Does Union Wharf cover any portion of the plaintiffs' flats described in their writ, which is *above ordinary low water mark*?"

*Answer.* — "It does not."

*Question.* — "Does Union Wharf cover any portion of the plaintiffs' flats described in their writ, which is *above low water mark, when the tide ebbs the lowest, by natural causes*?"

*Answer.* — "It does not."

*Question.* — "Did the defendants use and occupy the flats described in the plaintiffs' writ, and which are *below* the point, where the western line of said flats strike the wharf, and which are not covered by the wharf, and which are *above ordinary low water mark*?"

*Answer.* — "They did not."

*Question.* — "Did the defendants use and occupy the flats described in the plaintiffs' writ, and which are *below* the point where the western line of said flats strike the wharf and which are *above ordinary* low water mark?"

*Answer.* — "They did not."

*Question.* — "Did the defendants use and occupy the flats described in the plaintiffs' writ, and which are *above* low water

mark *when the tide ebbs the lowest by natural causes*, instead of above ordinary low water mark?"

*Answer.* — "They did not."

The Jury found no flats or erections thereon, belonging to the plaintiffs, were used by defendants.

*C. S. & E. H. Daveis* argued for the plaintiffs.

They contended, that if it were true, that the plaintiffs had not shown a title beyond low water mark to the flats, as it might regard others than the defendants, yet as it respected them, the title to flats, and a part of the wharf below that mark, is made out. As between these parties, the agreement fixes the low water mark; and the defendants are estopped by that agreement to deny, that the plaintiffs had title to the part of the flats and wharf claimed by them. In that paper the respective rights of the parties are admitted; and the admission of facts, although made for a compromise, create an estoppel on the defendants to deny such facts. *Dickinson* v. *Dickinson*, 9 Metc. 471; 1 Greenl. Ev. § 192.

The instructions of the Judge in relation to the low water mark were erroneous. They limited the extent "to the ordinary line of low water." By the ordinance of 1641, flats extend to where the tide ebbs the lowest from natural causes. This point was so decided in the case of *Sparhawk* v. *Bullard*, 1 Metc. 95.

We are entitled to recover our proportion of the dockage of the vessels, whether it was taken by the defendants by that name or not. They had the benefit of it; and if they have received money's worth, they are liable.

*W. P. Fessenden*, for the defendants, said that the premises recovered in the action referred to, and writ of possession, extended only to low water mark. The plaintiffs, therefore, must show some principle upon which they can sustain their action without title.

The agreement to refer does not aid them. The recitals were of no force, unless as to the reference, if it had taken place. It blew up, because the corporation had no power by

its charter to purchase the property and make shares to pay for it. There was no question raised as to title in that agreement. Merely saying, in a paper not under seal, that property belonged to the plaintiff, did not make it theirs. There can be no estoppel, as to title, by such agreement.

The plaintiffs are mere strangers as to the property below low water mark. They have neither title nor possession. The defendants may do as they please, unless the right owners complain. *Deering* v. *Proprietors of Long Wharf*, 25 Maine R. 51.

The instructions respecting low water mark are correct. Low water mark is the line of the margin of the water at ordinary low tides, and not at the lowest possible state of the water at some particular times from natural causes. The case, *Sparhawk* v. *Bullard*, cited and relied on by the counsel for the plaintiffs, stands alone, and opposed to all other authorities and to common sense. The remarks at the close of the opinion were not necessary for the decision of the case, and are erroneous. The only case cited to sustain it, *Storer* v. *Freeman*, 6 Mass. R. 435, is directly against the position; and so are 6 Cowen, 540, and note citing Hale's *De jure Maris*; 7 Conn. R. 186; 5 Day, 22.

But were it otherwise, the instruction would be wholly immaterial, and could not prejudice the plaintiffs, as the jury have found, that the defendants did not occupy any flats of the plaintiffs above low water mark.

The opinion of the Court, WHITMAN C. J. taking no part in the decision, having formerly had some agency with respect to the wharf, was drawn up by

SHEPLEY J. — The action is assumpsit, brought to recover compensation for the use and occupation of a strip of flats ground near Union Wharf, and also for the use and occupation of a part of that wharf, from August 31, 1842, to December 31, 1844.

The plaintiffs are admitted to be the owners of a strip of flats ground, extending from high water mark to low water

mark, near to which place the westerly line of the flats, being extended toward the channel of Fore river, would include a part of the wharf. For some distance from low toward high water mark the same line runs so near to the wharf, that vessels lying on the easterly side of the wharf must cover a portion of the flats. The testimony shews, that vessels approached the wharf on that side, and there remained to lade and unlade as usual during the time, for which the compensation is claimed. That the proprietors of the wharf claimed and received wharfage for goods landed from them, but did not claim or receive dockage for the vessels.

The right to use the waters covering flats between high and low water marks, for the purposes of navigation, was not intended to be abridged by the ordinance of 1641. The owners of vessels, which at certain times covered a part of the plaintiffs' flats, exercised only their legal right of navigation, by causing them to pass over those flats when covered by water, and to remain upon them for commercial purposes, from the ebb to the flow of the tide. With the exercise of this right the proprietors of the wharf do not appear to have interfered; or to have claimed any compensation from the owners of the vessels for such use of the flats. There is no proof, that the proprietors of the wharf have ever occupied those flats. Nor that they have authorized or induced others to do so, unless they may be considered to have done it by preparing the facilities for navigation and commerce, afforded by their wharf. The conveniences for these purposes, obtained by the erection of a wharf on their own land, although they may induce more vessels to pass over or to lie upon flats in the vicinity, than would otherwise be found there, afford no legal cause of complaint to the owners of the flats. The rightful use of one's own estate, whether covered by water or not, may not unfrequently have some effect to diminish the value of an adjoining estate, or to prevent its being used with the comfort, which might have been otherwise anticipated. This, however, is *damnum absque injuria*, for which the law does not, and cannot make compensation.

The testimony shows, that the defendants had been required, formerly by an award of referees, and subsequently by a judgment recovered at law, to make compensation to the plaintiffs for the use of these flats; but it does not prove, that any contract or arrangement existed between the parties during the time, for which compensation is now sought; and it does not exhibit such a state of facts, that a promise to continue to make such compensation can be implied by law.

As the title to their flats, does not extend further toward the channel than to low water mark, the plaintiffs fail to show, that they have become the owners of any portion of the wharf which has been extended toward the channel, beyond that line. If the defendants by so doing have acted unlawfully or injuriously, they may be amenable to the sovereign power; but they cannot be called upon by those, who have no interest in the land covered by this part of their wharf, to make compensation to them for its use.

Without controverting this position, the counsel for the plaintiffs contend, that the defendants are estopped by their agreement with the plaintiffs, made on December 5, 1842, to deny, that the plaintiffs by certain former proceedings have become the owners of a part of that wharf. That agreement was made with the plaintiffs by a committee of the proprietors for an adjustment of all differences between them by the union of their respective estates, upon certain terms contained in the agreement and to be ascertained by referees. The proprietors at a legal meeting, holden in the month of January following, authorized their committee to carry that agreement into effect; but this was not done, and no further proceedings by virtue of it, ever took place. By that agreement the plaintiffs' flats are described as commencing "opposite of and on a parallel line with the lower end of the block of stores numbered eleven, standing on said wharf, and running southeasterly to the channel of Fore River with that part of the wharf and stone pier, standing thereon." This recital and admission of the plaintiffs' title would have operated to estop the defendants from denying it for the execution of the purpose contemplated

by that agreement. But it can not thus operate beyond its design, and for all other purposes. It did not become a part of, or work upon the title. The doctrine, that one is bound by an estoppel, when it does not become a part of, or work upon the title, only for the accomplishment of the purpose, for which the fact was admitted, will be found in many decided cases.

If an executor permit judgment to be entered against him, it is an admission of assets, and on *devastavil* returned, he is estopped to deny it. But he is estopped for the purposes of that suit only. *Rock* v. *Leighton*, Salk. 310. *Ruggles* v. *Sherman*, 14 Johns. R. 446.

If a judgment be obtained against persons as partners, they will thereby be estopped to deny the partnership, but only to accomplish the purposes of that suit. *Lord* v. *Baldwin*, 6 Pick. 348.

If one by deed indented, accepts a lease of his own land as the land of another, he is thereby estopped to deny it to be the land of the other, only to accomplish the purposes of that lease. 4 Co. 54; Co. Lit. 47, *b*.

When an estoppel does and does not become a part of the title, or work upon the interest in land, may be illustrated by a couple of cases. If a tenant in a writ of entry plead the general issue, he thereby admits himself to be tenant of the freehold, and is estopped in that action, and for that purpose only, to deny it. *Kelleran* v. *Brown*, 4 Mass. R. 443. While if he plead a disclaimer, he will thereby admit, that he has no title, and will forever afterward, and under all circumstances, be thereby estopped to deny it, because the disclaimer becomes a part of the title, and works upon the interest in the land.

There are other grounds also, upon which the defendants will not be estopped by that agreement to deny, that the plaintiffs do not own any part of the wharf extending beyond low water mark. That was but an executory agreement never executed. Such an agreement does not estop a party to it, from acting in such a manner as to violate its stipulations. *Gibson* v. *Gibson*, 15 Mass. R. 106. That was not a sealed agree-

ment; and one cannot be barred by an estoppel of his right to an estate, but by deed or record. *Whitney* v. *Holmes*, 15 Mass. R. 152.

The counsel for the plaintiffs further contend, that the jury were erroneously instructed, if they "should find the part of the wharf, where the plaintiffs' western line struck it, to be below the ordinary line of low water, they should find their verdict for the defendants." These instructions in effect declared, that the plaintiffs' title to the flats extended by the ordinance only to the ordinary low water mark, and not to the place, to which the tide ebbed, when from natural causes it ebbed the lowest. The ordinance declares, that the proprietors of lands "shall have propriety to the low water mark." It evidently contemplates and refers to a mark which could be readily ascertained and established; and that, to which the tide on its ebb usually flows out, would be of that description. That place, to which the tide might ebb under an extraordinary combination of influences and of favoring winds, a few times during one generation, could not form such a known boundary, as would enable the owner of flats to ascertain satisfactorily the extent, to which he could build upon them. Much less would other persons, employed in the business of commerce and navigation, be able to ascertain with ease and accuracy, whether they were encroaching upon private rights or not, by sinking a pier or placing a monument. It would seem to be reasonable, that high and low water marks should be ascertained by the same rule. The place, to which tides ordinarily flow at high water, becomes thereby a well defined line or mark, which at all times can be ascertained without difficulty. If the title of the owner of the adjoining land were to be regarded as extending, without the aid of the ordinance, to the place to which the lowest neap tides flowed, there would be found no certain mark or boundary, by which its extent could be determined. The result would be the same, if his title were to be limited to the place, to which the highest spring tides might be found to flow. It is still necessary to ascertain his boundary at high water mark in all those places,

where the tide ebbs and flows more than one hundred rods for the purpose of ascertaining the extent of his title toward low water mark. It is only by considering the ordinance as having reference to the ordinary high and low water marks, that a line of boundary at low water mark becomes known, which can be satisfactorily proved, and which having been once ascertained will remain permanently established.

Sir Matthew Hale, in his treatise *de Jure Maris*, c. 4, says, "the shore is that ground, that is between the ordinary high and low water mark." He remarks also, "it is certain that, that which the sea overflows, either at high spring tides or at extraordinary low tides, comes not as to this purpose under the denomination of *littus Maris*, and consequently the King's title is not of that large extent, but only to land, that is usually overflowed at ordinary tides." This treatise has been received by judicial tribunals and by distinguished jurists, both during the earlier and later days of the law, with unqualified approbation and commendation. Vide the note to the case of Exparte Jennings, 6 Cow. 536. The rule, as therein stated, appears to have been received with approbation in the cases of *Storer* v. *Freeman*, 6 Mass. R. 435, and *Commonwealth* v. *Charlestown*, 1 Pick. 180. In the case of *Sparhawk* v. *Bullard*, 1 Metc. 95, low water mark was considered to be at that place, to which the tide ebbed, when from natural causes it ebbed the lowest. No authority is there cited, or reason stated for this difference of opinion. The former conclusions appear to be more in accordance with reason and authority.

The instructions on this point must be regarded as correct; but if they could be otherwise regarded, the plaintiffs do not appear to have been aggrieved by them; for the jury found, that the defendants did not occupy the flats "which were above low water mark, when the tide ebbs the lowest by natural causes."

*Judgment on the verdict.*

DAVID CUMMINGS *versus* OLIVER DENNETT.

It is not essential, at common law, that the consideration for a promise in writing should appear in the writing itself. Parol evidence of it is admissible; and to ascertain whether there was a good consideration, not only the writing, but all the circumstances connected with it, must be taken into view.

If application is made to a mechanic or manufacturer for articles in his line of business, and he undertakes to prepare and furnish them in a given time, such a contract is not affected by the statute of fraud.

THIS was an action of assumpsit on an agreement given by the defendant to the plaintiff, a copy of which, follows:—

"Portland, 9th mo. 6th, 1845.

"I the subscriber, hereby agree to furnish David Cummings with one hundred and forty backs and strips for belting, to be delivered in Portland, at eighteen cents per pound, by the first day of December next. "Oliver Dennett."

After reading the contract to the jury, the plaintiff produced Wm. Huse, as a witness, who testified, that he went with the plaintiff to defendant's tan yard, on December 1st, 1845. Cummings tendered to Dennett $1154,84. Dennett declined taking it, saying he had not the leather. The plaintiff said it was for leather; that he came there to tender him the money for the leather that he agreed to have done for him at that time; witness counted the money, paper and gold, all current bills; the gold a sovereign; all the paper was Portland money. Dennett made no objection, but simply said he had not the leather. On cross examination, he said, he counted the money in Sumner Cummings' house and down at the yard. Dennett declined taking it. Cummings offered the money in the first place; and then I took it, counted it and tendered it.

Stephen Wescott, for the plaintiff, testified that he resided in Boston, was a leather dealer, had been since he was 14 years old, and dealt in belting; a middling lot of backs and strips would average, the backs 34 to 35lbs. each, the strips about 12lbs, he should think; that as delivered by a tanner the average weight of a back and two strips would be about

42 pounds, after they were tanned and before curried, 30 pounds to the backs and twelve pounds to the two strips.

Upon the foregoing evidence, TENNEY J. presiding at the trial, directed a nonsuit. If that direction was right, the defendant was to recover his costs; if otherwise, a new trial was to be granted.

*Adams* and *W. P. Fessenden*, for the plaintiff, contended that the nonsuit was erroneously ordered. The contract is not within the statute of frauds. There was an engagement on the face of the paper, to take the leather and pay for it at the time and place, and at the price stated. This is a question for the jury, and not for the Court, to decide. Besides, when the money was offered to him, the defendant could not object, that the plaintiff was not bound to receive and pay for the leather. 2 Caines, 120; 1 Metc. 84; 5 Pick. 380; 17 Pick. 407; 6 East, 307; 4 Greenl. 350; 9 East, 348; 13 Mass. R. 87; 8 Pick. 252; 5 Cranch, 150. If the leather had been prepared and offered at the time and place, the defendant could have recovered the price of the plaintiff.

It is not necessary, that the consideration of an agreement should be stated in it, to make it binding. The consideration may be proved by parol. The plaintiff was at expense in preparing to obtain the money to make payment at Portland, and he sustained damage immediately, by relying on receiving the leather for which he had contracted, instead of making a new bargain. *Bean* v. *Burbank*, 16 Maine R. 458, was a case respecting the sale of lands, but is in point, to show that it is not necessary, that the consideration should be stated in the contract. Whether there was a consideration, or not, was also a question for the decision of the jury.

*Deblois*, for the defendant, contended that no recovery could be had upon the paper, because it is without consideration on its face, and merely void. No extraneous proof was offered to show a consideration, and for want of it the contract is entirely void in law. It is void, also, for want of mutuality. To make the agreement binding, both parties must be bound. Chitty on Cont. 4; 3 T. R. 653; 12 Johns. R. 190; 1 Caines,

584; 5 East, 16; *Bean* v. *Burbank*, 16 Maine R. 458; 3 Pick. 211; 14 Pick. 201; 7 T. R. 350; 4 East, 463; 19 Maine R. 77; 22 Maine R. 475; 18 Johns. R. 149; 7 Mass. R. 22; 5 Bingh. 34.

The opinion of the Court was drawn up by

WHITMAN C. J. — The plaintiff relies upon a special contract, entered into between him and the defendant, in which the defendant in writing, agreed to furnish the plaintiff with one hundred backs and strips for belting, to be delivered in Portland by the first day of December then next, the date of the writing being September 6, 1845, at eighteen cents per pound. The plaintiff, on the first of December following the date of the writing, tendered to the defendant, at his tannery in Portland, the amount the articles would come to at the price agreed upon, and demanded them of him; to which he replied that "he had not the leather." He did not deny that he had made such an agreement; or then pretend that it was not mutually obligatory; or that the plaintiff had not agreed to take and pay for the articles upon their being furnished according to promise. He now sets up, however, in defence, that the written agreement does not show, that the plaintiff did so agree; and, therefore, that there was no consideration for the promise he had made; and, moreover, that there being no written promise on the part of the plaintiff to accept and pay for the articles, at the time specified, and therefore no mutuality of obligation, the statute of frauds will prevent his being liable in this action.

If the defendant's promise can be regarded as having been made without consideration, it will be immaterial to inquire whether it is within the statute of frauds or not. It is not essential, at common law, that the consideration for a promise in writing should appear in the writing itself. Parol evidence of it will be admissible. *Bean* v. *Burbank*, 16 Maine R. 460. To ascertain whether there was a good consideration, not only the writing, but all the circumstances connected with it must be taken into view. Written contracts are often drawn in

haste, by parties not well skilled in such matters; and it not unfrequently becomes difficult to ascertain their meaning. One part of the contract may be reduced to writing, and another be left to inference; and there are sometimes inconsistencies, apparently, between the different parts of the same writing. Resort must be had in such cases to the obvious scope and design of the parties, and to the subject matter to which it has reference, and even to the situation of the parties contracting. The object in every case must be to ascertain the real intention of the parties. When that is ascertained it must govern: as where one says in a memorandum of an agreement to sell land, "I have bargained and sold the same," &c. the meaning is, that he will do that, which shall perfect a sale thereof. *Atwood* v. *Cobb*, 16 Pick. 227.

In the case before us, the writing contains the promise of one party in very explicit terms; and the question is whether a corresponding promise is or is not ascertainable, as having been made by the other party, and thereby constituting a good consideration for the other. The agreement by the defendant was absolute to furnish, at a certain time, place and price, certain articles. The agreement was in writing, which was taken and carried away and held by the plaintiff. The defendant, it would seem, was a manufacturer of such articles, as the tender was made at his tannery, and he is called in the writ, and without objection by him, "a tanner." They were to be *furnished* at a future day; (implying that they were not then on hand;) and, therefore, may be believed not to have been on hand at the time of the contract. It did not occur to the defendant at the time the tender was made to pretend, that there had not been a mutual and obligatory contract, by one party to furnish, and by the other to pay for the articles. The tender was made for articles the defendant "agreed to have done" for the plaintiff; and the defendant did not deny that he had so agreed. Here then there was at least matter for the consideration of the jury, from which to find a mutual and obligatory contract between the parties.

The question then arises, whether the contract was void under the statute of frauds; and this depends on whether

the statute applies to a case like the present; and if it does, then, whether the writing relied upon is in conformity to the requirements of that statute.

As to the first branch of the inquiry, it does not appear, explicitly, whether the application of the plaintiff to the defendant was to him as a manufacturer of the articles in question: although there is reason to apprehend that such may have been the case, and a jury might so find. It is very clear, that, if application is made to a mechanic or manufacturer for articles in his line of business and he undertakes to prepare and furnish them in a given time, such a contract, though not in writing, is not affected by the statute. *Mixer* v. *Howarth*, 21 Pick. 205; *Spencer & al.* v. *Cone & al.* 1 Metc. 283. On a new trial the evidence upon this point may, if necessary, be more explicit.

If the application was to the defendant for goods on hand, then it will, perhaps, become important to ascertain whether the writing in question was in conformity to the requirements of the statute. The promise, on the part of the defendant, was quite intelligible, and the consideration expected for the promise is stated. And we have before seen, that a jury might well find, from the circumstances, that the plaintiff promised to take and pay for the articles to be furnished; and we have before seen that the law does not require that the party seeking the fulfilment of a promise in writing should show that the engagement on his part, forming the consideration, was in writing. And to this point, see *Lunt & al.* v. *Padelford*, 10 Mass. R. 230; *Train* v. *Gold*, 5 Pick. 380. It may not, however, be necessary now to decide that question. On a new trial it may not arise.

*Nonsuit taken off, and a new trial granted.*

JAMES B. THORNTON *versus* LORING FOSS.

If a person can acquire any title to flats, covered by water at ordinary flood tides, but rising above the water at low tides, by cutting "thatch grass," growing thereon, each year for forty successive years, such title will not extend beyond the line of the actual occupation by cutting the grass.

But if the party had title to such "thatch islands," or elevations of the flats, and in consequence of the colonial ordinance of 1641, c. 63, that title was extended to low water mark, it would extend only to flats lying between the thatch islands and low water mark, and not to flats lying to the right or to the left of the land not covered by water at ordinary low tides.

TRESPASS *quare clausum* for taking and carrying away five loads of "marsh mud," from the close of the plaintiff in Scarborough, described as "called and known as the Thatch Islands, in Scarborough or Blackpoint River, and near the mouth of Jonas' creek, and the same purchased by said plaintiff of one Hunking Leavitt."

One of the witnesses called by the plaintiff was his grantor, Hunking Leavitt, who testified, that he had no other title to the premises, than by possession, but that he had, for twenty-eight years prior to his conveyance to the plaintiff, cut the "*Thatch Islands*, every year, as his own, without any interruption."

The first witness called by the plaintiff testified, that "at the highest of the tides, when the tides run very low, about a quarter of an acre of the thatch beds are not covered with water. At high tides and at middling tides they are covered at high water."

At the trial before TENNEY J. the parties respectively introduced their testimony, and deeds; and then, by consent of parties, the case was taken from the jury and submitted to the decision of the Court, who were to be at liberty to make such inferences as a jury might make from the evidence, and enter such judgment, upon nonsuit or default, as might be necessary to carry their decision into effect.

The material facts appear in the opinion of the Court.

*A. Haines*, for the plaintiff, said that the plaintiff had a perfect title to the premises, where the manure was taken, by

a recorded deed and possession under it, for more than twenty years; and his grantor had occupied for twenty-eight years. He argued in support these legal positions.

1. The effect of the colonial ordinance of 1641, c. 63, § 3, was to extend the grant to low water mark. 14 Johns. R. 255; 1 Wend. 237; 6 Cowan, 518; 22 Maine R. 356; 20 Maine R. 357; 22 Pick. 85; 1 Metc. R. 95.

2. The pleadings, being the general issue only and joinder, do not permit the defendant to deny our rights to the Thatch Islands. 22 Maine R. 85.

3. If the owner of the marsh owned the premises in controversy, originally, as riparian proprietor, the plaintiff has acquired a title thereto by disseizin. 4 Mason, 326.

4. The owner of Thatch Islands is entitled to riparian rights equally with the proprietor of the main land.

*Howard & Shepley* argued for the defendant in support of these propositions.

1. The plaintiff had no title to the *locus in quo*, and therefore cannot maintain this action. His deed does not cover it.

The *locus in quo* was a part of the shore, between high and low water mark. The colonial ordinance of 1641, (Ancient charters, 148) is a part of the common law of this State. 8 Greenl. 85; 9 Greenl. 42; 6 Mass. R. 435; Just. Inst. L. 2, T. 1, § 3, 5, 20; Hale, *Jure Maris*, c. 4; Hargrave & Butler's notes to Coke Lit. note 205; 2 Black. Com. 262; 3 Kent, 428; 6 Cowen, 518, note 536. No right could be acquired by possession.

2. But if a possessory title was acquired by the plaintiff to the flats, it was only to the *thatch beds*, where the thatch grass grew and was cut. The mud was taken more than four rods from where the grass was cut. The title, if any, was limited by the possession, and no riparian rights were acquired. 10 Peters, 662; 16 Peters, 55.

3. If riparian rights did attach to these thatch beds, they would extend only in front, to low water mark; and not up or down stream, and so would not include the place where the mud was taken

The opinion of the Court was delivered orally at a subsequent day in the same term and afterwards reduced to writing by

SHEPLEY J. — The close, on which the trespass is alleged to have been committed, is described in the writ as "the Thatch Islands in Scarborough or Black Point River and near the mouth of Jonas' creek, and the same purchased by the said plaintiff of Hunking Leavitt." In the conveyance from Leavitt to the plaintiff it is described as "the Thatch Islands situate on the western side of Black Point river in Scarborough aforesaid, opposite Patterson's marsh at the mouth of Jonas' creek, containing about six acres." Whatever title Leavitt had, was acquired by possession. That possession consisted only in cutting annually for many years the coarse grass commonly called thatch, and found upon the islands as they are called. The plaintiff has continued to occupy them in the same manner. These islands are situated between the marsh land and low water mark on the southwesterly side of the river. They are covered by the water at every ordinary flood tide. The testimony shows, that the defendant dug and carried away several loads of mud manure composed of marsh mud, muscles and raskweed, from the flats or shore on the southwesterly side of the river, and from four to ten rods northerly, and distant from these Thatch Islands. This was the trespass alleged. The testimony shows, that the distance from the marsh land across the flats to low water mark, was less than one hundred rods.

If the title of the owner of the marsh land extended by virtue of the colonial ordinance of 1641, to low water mark, the Thatch Islands were a part of the estate owned by the person who had a legal title to the Patterson marsh, unless he had been deprived of his title to the islands by an exclusive and adverse possession. Admitting the title of the plaintiff to them to have become perfect by such a possession for more than twenty years, that title would not thereby be extended beyond the line of the actual occupation by cutting the grass; and that line would not include the place, from which the mud

manure was taken by the defendant. It is contended, that the plaintiff's title to the islands was extended over the adjoining flats by virtue of the ordinance. The effect of that is to declare, that the proprietors of the lands adjoining tide waters shall become the owners of the flats or shore to low water mark, where the tide does not ebb and flow above one hundred rods. The land adjoining must be regarded as the land, to which the tide flows, and from which it ebbs; and not land, if such it may be called, elevated so far above the common level of the flats, that it is not entirely covered by the neap tides. If the ordinance should be considered as applicable to a small island elevated above the common level of the shore and as extending the title of the owner to low water mark, it might happen, that flats would be owned by virtue of it by the owner of the main land and of the island to a greater distance than one hundred rods from high water mark; and yet the ordinance declares, that it shall not be extended more than one hundred rods, where the tide ebbs and flows further than that distance.

If the plaintiff's title to the Thatch Islands could be extended by the ordinance to low water mark, he would not thereby acquire any title to the flats, from which the mud manure was taken by the defendant. For the ordinance would extend his title only over the flats lying between them and low water mark. It would not extend the title to the islands up or down the river at all over the adjoining flats. To allow the ordinance to have the effect to do this would be to deprive the owners of lands adjoining the river above and below the islands of all benefit to be derived from it. In whatever aspect the plaintiff's title may be viewed, he does not appear to have become the owner, or to have been in possession of the flats, where the acts complained of as a trespass were done.

*Plaintiff nonsuit.*

## Inhabitants of Windham *versus* Cumberland County Commissioners.

No particular words or form of words are required by the statute in applications to the County Commissioners for the location of roads; and the greatest technical accuracy and precision are not to be expected. Nor is it necessary, that those who are authorized to judge of the necessity and convenience of ways should use technical terms in their adjudication and location, provided their intention is manifest, and they have jurisdiction of the subject.

The jurisdiction of that court does not fail, merely because the word, "road," instead of highway, is used in the petition or in the record, if an examination of the whole will show what description of road was intended.

It is not necessary that the road located should be described in the same language used in the petition therefor. It is sufficient, if there be a substantial compliance therewith.

County Commissioners, under the Revised Statutes, have power to lay out a highway wholly within the limits of one town.

This case came before the Court upon the petition of the inhabitants of Windham for a *certiorari*, to the end that certain proceedings of the County Commissioners locating a highway within the limits of that town might be quashed.

The following reasons why the prayer of their petition should be granted were assigned.

"*First.* That in the petition of said Frederic Nutting and others, it does not appear that the petitioners pray for the location of a county road, nor does it appear whether the same is a county road, a town road, or a private way.

"*Second.* The road or way prayed for in said petition does not lead from town to town, but from one place to another in the same town, and the termini and the whole course of the same road, as prayed for and as located, are wholly within the limits of the town of Windham aforesaid.

"*Third.* It does appear by the same petition, that the road as prayed for and as located is a town road or private way; and it does not appear that the selectmen of said Windham, refused to locate the same; nor does it appear that the selectmen of said Windham located the said road or way, and that the town of Windham refused to allow or approve of the same.

"*Fourth.* That said road was not located in compliance with the prayer of the petition aforesaid.

"*Fifth.* The said petition for the road aforesaid, was drawn up and circulated and the petitioners' names were procured by certain inhabitants of said town of Windham and many of the petitioners when they signed the petition supposed they were praying for a road in another place.

"*Sixth.* It appears by the record of the said commissioners' doings, that the inhabitants of said town of Windham, by their agent, appeared at the time and place said commissioners met to view and locate the road aforesaid, appeared and objected and filed their objections in writing to the jurisdiction of said commissioners, to view and locate the same, because the termini and the whole course of the same road were within the limits of the town of Windham aforesaid.

"And the said inhabitants, by their agent, appeared at the December term of said County Commissioners and objected to the jurisdiction of the County Commissioners, over the subject matter of said petition, and filed their objections in writing as before named.

"*Seventh.* Your Petitioners further object to the proceedings of said pretended Court of County Commissioners, because they say that said Charles Hannaford, Richard Greenleaf and Lemuel Rich, 3d, are not duly and constitutionally appointed as a Court of County Commissioners, and therefore have not, nor ever had any authority or legal right to act in that capacity."

The following is a copy of the petition for the location of the road under which the Commissioners acted.

"To the Honorable Court of County Commissioners for the County of Cumberland.

"The undersigned, inhabitants of said County, represent that the public highway, as now traveled from Raymond, Otisfield, Harrison, Bridgeton, and from Oxford county and the North-eastern part of New Hampshire, through those towns towards Portland, is, and has long been a subject of complaint on account of the hills in Windham, especially Windham hill, so called, which presents a very serious obstacle to the public

travel, especially to loaded teams. These objections and complaints would be obviated by the location of a piece of new road, commencing at some point on the present travelled road, near Abram Anderson's in Windham, and passing on the most convenient and practicable route easterly of Windham hill, and intersecting the present traveled road at some point in the vicinity of the lower corner in said Windham. We therefore pray that after due proceedings had, a road may be located and opened on the route above mentioned.

"Frederick Nutting and eighty-eight others.

"May 12, 1844."

Arguments in writing were furnished to the Court by

*Eveleth*, for the inhabitants of Windham — and by

*Augustine Haines*, for the original petitioners.

The opinion of the Court was drawn up by

TENNEY J. — The petition, under which the respondents undertook to locate and establish the way in question, represented that the public highway, as traveled from Raymond and other towns mentioned, and the Northern parts of New Hampshire, through those towns to the city of Portland, was subject to great complaint on account of certain hills in Windham, especially Windham hill, so called; and the petitioners pray that a new road, commencing at some point on the present traveled road, near Abraham Anderson's in Windham, and passing on in the most convenient and practicable route, easterly of Windham hill, and intersecting the present traveled road at some point in the vicinity of the lower corner of said Windham (being wholly in said town of Windham) may be located and opened. After the usual proceedings, the County Commissioners adjudged the road to be of common convenience and necessity; and the record particularly describes the courses and distances of the same, which was located accordingly.

The application now before us is for a writ of *certiorari* to bring the records of the proceedings of the County Commissioners, touching the road in question, before this Court, and

that the same may be quashed. Several objections to the correctness of the course pursued by the respondents, as disclosed by the record, are relied upon. One is, that in the petition praying for the location of the road, it does not appear that the object of the prayer was a county road.

In common parlance the term "road" is a generic term, comprehending "county roads," "town roads," "turnpikes," "private ways" and perhaps others; and to determine what kind of a way is sought to be located, it is proper to look at the whole petition together. No particular words or form of words are required by the statute in such application, and the greatest technical accuracy and precision is not to be expected. Neither is it necessary that those who are authorized to judge of the necessity and convenience of ways should use technical terms in their adjudication and location, provided their intention is manifest, and they have jurisdiction of the subject; this jurisdiction does not fail because the word "road" instead of "highway" is used in the petition or the record.

If the way prayed for, was one which the County Commissioners were authorized on a proper petition to lay out and establish, the language used in this petition was sufficient to empower them to act.

Another ground relied upon, to entitle the present petitioners to the writ prayed for, is, that the way was not located according to the prayer of the petition to the County Commissioners. It is not necessary that the Commissioners should describe the way located in the same language used in the petition, provided there is a substantial compliance therewith. Where the road in the petition is indicated by general terms, and when it is not undertaken therein to point out the exact route, the description in the petition alone would show no location, which could be afterwards found. The petition under which the Commissioners acted in this case does not point out precisely either *terminus* or the courses and distances in the route. The record shows that the road prayed for, was adjudged to be of common necessity and convenience, and the Commissioners proceeded to locate "the road." There is

nothing showing that the way was not laid out as prayed for, and by the record it is to be understood, that there was not a departure from the way as prayed for.

It is denied, that the County Commissioners have jurisdiction in a case where the way prayed for is wholly within the limits of one town. This question was before the Court in the case of *Harkness* v. *Co. Commissioners of the county of Waldo*, 26 *Maine R.* 355; and it was held that the statutes, construed according to well settled rules, conferred upon County Commissioners the jurisdiction exercised by the respondents in this case.

Other objections were presented, which are involved in the points, herein discussed, or not relied upon in the argument.

*Writ denied and petition dismissed.*

JOHN B. SMITH *versus* HANOVER KEEN.

An attachment of real estate upon a writ containing but one general count for money had and received, without any bill of particulars, was valid, if made prior to the St. 1838, c. 344. And that statute does not apply to attachments made before it was in force.

If judgment be rendered for an amount larger than the sum named in the *ad damnum* clause in the writ, it may be liable to be reversed in whole or in part for that cause, upon error brought by the party against whom it was rendered. It is, however, a valid judgment until reversed; and a stranger to it can neither sustain a writ of error, nor take advantage of the irregularity.

A levy on land is not invalid, merely because there was a clerical error in the recital of the amount of the judgment, where the true sum was apparent on an inspection of the whole execution. Such an error is amendable.

Where in making a levy upon land, before the Revised Statutes were in force, the officer returned that "the debtor within named, having been duly notified to choose an appraiser, but having neglected and refused to choose," he appointed one for the debtor; *it was held* by the Court, that the levy was not void for that cause.

And where there was a certificate upon the execution, signed by a justice of the peace, stating that he had administered the proper oath, which was set out in full, to the appraisers; and the appraisers referred to it in their return as "having been sworn as above;" and where the officer in his return, named the appraisers, and stated that he had caused them "to be chosen and sworn faithfully and impartially to appraise the estate above described;" *it was held* by the Court, that there was sufficient evidence that the appraisers had been legally sworn.

If an objection be first taken, at the trial, after the arguments had been concluded, and when the presiding Judge had finished his charge to the jury, it may for that cause be rightly overruled.

A judgment of a court, having by law jurisdiction of a cause, cannot be impeached collaterally, unless obtained fraudulently; but remains in force until reversed.

Where the demandant claims under a judgment and levy, and the tenant under a subsequent deed from the debtor, it is not competent for the tenant to show, that the judgment was recovered upon demands which were not justly due; that being a matter to be finally settled between the creditor and debtor.

WRIT OF ENTRY. The case came before the Court on exceptions to the rulings and instructions and refusals to instruct of TENNEY J. who presided at the trial.

The testimony at the trial was given in the exceptions, and copies of the writ, judgment, execution and levy in favor of John B. Smith against Benjamin Dillingham, were referred to as part of the case. The material facts are stated in the opinion of the Court; and the precise language of the material parts of the levy, to which objection was made, are given, unless it be the certificate of the justice, who administered the oath to the appraisers. This was made upon the back of the execution and immediately preceded the return of their doings by the appraisers. It was as follows: —

"Cumberland, ss. Nov. 14, 1840. Then personally appeared William Martin, John Smith and Edward T. Little, and made solemn oath, that they would faithfully and impartially appraise such real estate as should be shown to them to satisfy the within execution and all fees and charges.

"Thomas B. Little, Justice of the Peace."

The tenant objected to the recovery of the demandant, because there was no proof that the execution had been returned into the Clerk's office after the levy was made. This objection was not made until after the arguments had been concluded, and the Judge had finished his charge to the jury; and it was overruled.

The execution had been produced from the clerk's office at the trial; but no evidence had been offered, except what appeared from the production of the papers, that it had been returned into the clerk's office.

The exceptions, saving the omission of the formal part, concluded as follows: —

"The tenant contended, and requested the Court to instruct the jury, that said levy was invalid against the tenant, because there was a general count in said writ and no bill of particulars; and because the alleged judgment offered was greater than the *ad damnum* in the said writ; because the said execution did not correspond with said judgment, and did not appear to have been issued upon it, and said execution had not been returned as aforesaid; because the said oath to the appraisers and said officer's return, as to notice to the debtor,

did not conform to law ; — but the Court declined to instruct the jury as requested in these several particulars.

" The tenant also contended, that the testimony in relation to said mortgage, and the consent of said heirs, and their deed, and the deed of said Ajalon, and the mortgage deed of said Benjamin shew that the tenant held under said Thomas and his heirs ; — but the Court ruled otherwise.

" The tenant further contended, and requested the Court to instruct the jury, that if nothing was due on said notes, when they were put in suit, and said John B. paid nothing for said notes, and knew there was nothing due on them when he consented to said suit in his name, and said suit was prosecuted for the benefit of said Joseph, the demandant could not recover in this action ; — but the Court declined to give said instructions, and did instruct the jury, that if said John B. took said notes, after they were over due, he could stand in no better situation than would the payee, if the suit had been in the name of the latter ; that it was not competent in this action to overhaul the judgment and go into the inquiry of what amount was really due, or whether any thing or not, unless that judgment was collusively obtained ; but if John B. recovered that judgment when nothing was due on the notes, and he or Joseph knew or had reason to believe, that nothing was due thereon, intending thereby to gain some advantage of the tenant or any other person, and Dillingham was willing to aid them to obtain such a judgment, the judgment would be void, and the demandant could not recover ; but if there were no such designs, the judgment was a sufficient foundation for the levy ; that if the tenant purchased the demanded premises after said attachment and before said judgment, and paid for them, and was ignorant of the existence of any such attachment until said levy, yet these facts alone would not prevent a recovery ; that if Dillingham omitted to notify the tenant of the existence of the attachment, after he knew it, it was a fact for the consideration of the jury on the question, whether he was guilty of collusion, as well as his neglecting to defend the suit ; but that the latter from inability would not necessarily prove collusion.

"The tenant requested the Court to instruct the jury, that the neglect of said Benjamin to notify the tenant of said attachment, after he found it out, and of the existence and pendency of said suit, was conclusive evidence of collusion on the part of said Benjamin; but the Court declined to give said instructions.

"A verdict was rendered for the demandant."

*Wells*, for the defendant, said that the tenant was in possession under a deed, and had a right to contest the title set up by the demandant in the same manner, at least, as an after attaching creditor. The levy was invalid to pass any title, for either of several reasons.

1. When the officer returned an attachment on the writ, there was but one general count, without the specification of any particular claim; and the return had no more force, than if it had been made upon a mere printed blank writ, with the clerk's name. The Statute of 1838, c. 344, § 1 and 4, is express, that under such circumstances the attachment can have no validity. Although the original suit was then pending, the statute applies to all cases, as well such as were commenced before, as well as after the statute was in force. The case, *Fairfield* v. *Baldwin*, 12 Pick. 388, was cited as in point, to sustain this objection.

The filing of the notes afterwards and obtaining judgment thereon, was the introduction of a new cause of action, and would have vacated the attachment, if it had ever been good. 1 Pick. 156, 192 and 204; 17 Mass. R. 591; 7 Greenl. 348.

2. The levy was invalid, because the creditor took judgment for an amount exceeding the *ad damnum* alleged in the writ. The judgment was clearly erroneous, and liable to be reversed on the application of a party to it, and may be treated as a nullity by a purchaser of the property. 16 Mass. R. 74; 1 South. 351.

3. The levy was invalid, because the execution by virtue of which it was made, did not issue upon any judgment shown to have been rendered between the parties. It does not correspond to that produced and relied upon. 8 Greenl. 207; 3 Mass. R. 79; 2 Conn. R. 464.

4. There is no sufficient evidence, that the debtor was duly

notified to choose an appraiser on his part. The officer should state what notice was given, that the Court may judge of its sufficiency. *Buck* v. *Hardy*, 6 Greenl. 162.

5. The legal evidence, that the appraisers were sworn, does not appear. The return of the officer merely says, that he caused them to be sworn. He does not state what oath was administered, and does not refer to any oath administered, whereby it could be made certain. St. 1821, c. 60, § 27; *Howard* v. *Turner*, 6 Greenl. 106; *Chamberlain* v. *Doty*, 18 Pick. 495.

6. The statute requires, that when an execution has been levied upon land, that it should be returned into the clerk's office. That this has been done, is not to be presumed, but is a fact to be proved. 3 Pick. 331; 5 Greenl. 197. These cases show, that the execution need not be returned at the return day, but recognize the necessity of its being returned, in order that the levy should be valid.

7. The tenant should have been permitted to show, that nothing was due from the debtor to the demandant at the time the original suit was brought. That judgment may be conclusive, until reversed, between the parties to it; but third persons have a right to impeach it. *Downs* v. *Fuller*, 2 Metc. 135.

*Howard & Shepley*, for the demandant, proposed to notice the most plausible objections which had been made in behalf of the tenant.

The main question is, whether the judgment introduced in evidence was conclusive between these parties? If the tenant has any pretence of claim it is under a deed from the same debtor, subsequent to the attachment of the demandant. The judgment is equally binding on parties and privies. 1 Stark. Ev. 295; 2 Salk. 674; *Adams* v. *Barnes*, 17 Mass. R. 365; *Granger* v. *Clark*, 9 Shepl. 128. This principle is fully established, where there is no fraud or collusion; and the jury have found none to exist in this case. Even if there be some irregularity, which might furnish ground for reversal of the judgment on a proper application by a party to it, it is binding until reversed, and cannot be impeached collaterally. If some

of the expressions in the case, *Downs* v. *Fuller*, are to be taken in their broadest sense, and without reference to the case before the Court, they are opposed to all other decisions on the subject, and cannot be law. The language was used in reference to an alleged judgment, void on its face, and not voidable merely.

It is said that the attachment was dissolved by taking judgment for a larger amount than the *ad damnum* in the writ. The accruing interest on the notes, while the action was continued in Court, made the amount actually due, more than the *ad damnum*. No new cause of action was introduced. The only error was in not claiming all that became due. If an attempt should be made to procure a reversal of the judgment for this cause, it could easily be defeated by a *remittitur* for the excess. That question, however, is not now before the Court.

It is said, that the execution is void, because it was issued for a greater sum, than the amount of the judgment. The fact is otherwise. The officer is directed to levy for the *aforesaid sums*, amounting to the judgment, precisely, and the figures in the margin are right; the only error is in one place in the reciting part. The true amount is twice inserted, and the untrue, but once. It was a mere clerical mistake, which could injure no one, as the officer was not authorized to collect or levy for more than the true sum.

The return of the officer, that the debtor had neglected and refused to appoint an appraiser, is as full as the statute. No form is prescribed, and a general return is sufficient. *Blanchard* v. *Brooks*, 12 Pick. 47; *Bugnon* v. *Howes*, 1 Shepl. 154.

It is enough, that the execution was returned into court before the trial. But if there had been an objection of this kind made in season, it would instantly have been put at rest by calling the clerk. A party cannot keep back such objections until the case is committed to the jury, and then make them. If this can be permitted, no objections will be made until that time.

The law, that notes may be filed under the money counts

and in support of them, is too well settled to require authorities for its support. When that suit was brought, there was no law in existence, requiring that the declaration should particularly specify the demand sued, in order to render the attachment valid.

The opinion of the court, WHITMAN C. J. dissenting, on the ground, that an attachment made on a writ containing only the general money counts, although made prior to the st. 1838, c. 344, could not be valid, was drawn up by

SHEPLEY J. — The demandant caused an attachment of the premises demanded, to be made on a writ in his favor against Benjamin Dillingham, on November 29, 1837; obtained judgment, and within thirty days thereafter caused an execution issued thereon to be levied on the premises on November 14, 1840.

The tenant claims the premises by virtue of a conveyance thereof made by Benjamin Dillingham to him, on January 10, 1838. He introduced also a mortgage of the premises made by Benjamin to Thomas Dillingham on February 27, 1828. It appeared from testimony introduced by the tenant, that Thomas Dillingham died intestate soon after that mortgage deed was executed; that no letters of administration upon his estate had been granted; that he left surviving children some of whom were under age; that no guardian had been appointed for them; that there remained due upon that mortgage, on April 16, 1838, about one hundred dollars, which was then paid by the tenant to Ajalon Dillingham, who received it for the heirs at law of Thomas Dillingham, and paid it to them, and who assumed to act as guardian for those under age and to make an assignment or conveyance of their interest in the premises to the tenant. This conveyance so made without authority was properly rejected. The tenant also introduced a deed from Jonathan Chandler *et al.* to himself, bearing date on November 16, 1844, but it does not appear in the case, that the grantors had any title to the premises demanded.

Upon this exhibition of title the demandant was entitled to

recover, unless there was some fatal defect in his proceedings. The counsel for the tenant contended, that there were several fatal irregularities or defects in them, and requested, that instructions to that effect might be given to the jury.

1. The Court was requested, and refused, to instruct the jury that the "levy was invalid against the tenant, because there was a general count in said writ and no bill of particulars."

It appeared from testimony introduced by the tenant, that the writ was made at the request of Joseph Smith, who presented to the attorneys two promissory notes, made by Benjamin Dillingham payable to himself or order, and that he endorsed them in their office and directed a suit to be commenced upon them in the name of the demandant; and that the same notes were filed and were the only evidence introduced to obtain the judgment. The identity of the demands, upon which the suit was commenced, and of those, upon which the judgment was rendered, being thus established by the testimony of the tenant, the attachment cannot be considered as vacated by the introduction of any new or different demand. It was valid, unless originally void, simply, because the declaration contained only one general count for money had and received. Such a count is sufficient to enable a plaintiff by the common law to prove under it negotiable promissory notes made by the defendant and held by the plaintiff as endorsee. The statutes of this State, existing before the act of March 23, 1838, was approved, did not prescribe any particular form of declaration to be used in writs, upon which attachments of real estate were authorized to be made. The plaintiff was entitled to frame his declaration in any legal form. Of this right he could be deprived only by some statute provision. Having caused his writ and declaration to be made in a legal form, and an attachment to be made, and having recovered a judgment thereon in a legal manner, a creditor would be entitled to obtain payment from the estate so attached. No creditor or grantee of his debtor could defeat a prior right, thus secured to him, by alleging that to be irregular or invalid, which was in strict accordance with the rules of law then existing. Nor would any judicial

tribunal from a consideration, that such a declaration might be used to carry into effect unjust or fraudulent designs, be authorized to declare, that an attachment so made was invalid. The act of March 23, 1838, made an important change in the existing law respecting the form of the declaration in a writ to be used for the attachment of real estate. The first section provided, that the officer, who made an attachment of real estate, should file an attested copy of his return with the register of deeds, with the names of the parties, the date of the writ, the sums sued for, and the court, to which the writ was returnable. The fourth section provided, that the plaintiff should set out in his writ specifically the demand or claim, on which his action was founded, and that no other claim should be proved under the general counts. It is contended, that this provision was applicable to suits then pending. Such a construction cannot be admitted. The provisions of the first section are limited by the words used to cases in which real estate "shall hereafter be attached." The provisions of the fourth section are made applicable only to the attachments named in the first section by these words, it shall be "necessary to the validity of the attachment made as aforesaid." The inference from this language is clear, that it was not deemed necessary to the validity of attachments not made as aforesaid, that the plaintiff should set out in his writ specifically the demand, on which his action was founded. The case of *Fairfield* v. *Baldwin*, 12 Pick. 388, has been referred to as deciding, that an attachment made upon a writ containing only the general money counts would not be valid. The case does not appear to authorize such a conclusion. The writ, which occasioned that decision, as first framed, contained two counts only, one for $10,000 money had and received, the other for $5,000 for goods sold and delivered. The plaintiff, under leave to amend, filed nine new counts declaring particularly on notes, checks, and a balance of account, and obtained judgment on them. Among other facts it was proved, "that some of the notes and checks declared on in the new counts, and which were antedated, were given, after the commencement of the suit of Joseph

King, in exchange for notes and checks previously due to Joseph King and his partner, E. Davenport." When the remarks made in the opinion are considered with reference to the question then under consideration, as all general remarks should be, there does not appear to be any sufficient reason to conclude, that the court considered the attachment made on the writ in favor of Joseph King to be void *ab initio*, because the declaration contained only those general counts. The opinion commences with the observations. "If the prior attachment which was made by the defendant upon the writ of Joseph King against Cyrus King were vacated, the plaintiff's attachment would be the only one upon the property. Was the prior attachment vacated by the amendment introducing the new counts?" The question for decision is thus clearly stated. No language is found in the opinion declaring, that the attachment was void *ab initio*, or that such a question was considered or decided. On the contrary the opinion explicitly states what was decided by the court, by the use of the following language. "We are all clearly of opinion, that for the reasons before stated, the attachment, which was made for Joseph King prior to that, which was made for the plaintiff, was vacated." After such a declaration it is difficult to perceive the ground, upon which it can be contended, that the attachment was held to be originally void.

2. The Court was requested, and refused to instruct the jury, that the levy was invalid, because judgment was rendered for an amount larger than the sum named in the *ad-damnum* clause of the writ.

The judgment may for that cause be liable, upon error brought by the party against whom it was rendered, to be reversed in whole or in part. *Grosvenor* v. *Danforth*, 16 Mass. R. 74. It is a valid judgment until reversed. A stranger to it can neither sustain a writ of error nor take advantage of the irregularity.

3. The next request refused was, that the levy was invalid, because the execution did not correspond with the judgment, and did not appear to have been issued upon it. The judgment

was rendered for the sum of $4174,37, damage, and for $31,87 costs. The execution recited the recovery of a judgment between the same parties, at the same term of the same Court, for the sum of $4774,37, damage, and for $37,87, costs. It also commanded the officer to cause to be satisfied "the aforesaid sums, being four thousand two hundred and six dollars and twenty-four cents." This last amount exactly corresponded to the amount of the judgment recovered for damages and costs; and the true sums so recovered were also stated in figures upon the margin of the execution. It was very apparent, that there was a clerical error in reciting the amount of the judgment recovered. Such an error is amendable. *Atkins* v. *Sawyer*, 1 Pick. 351. Courts will not reverse judgments upon error brought for such clerical errors, but will allow or direct an amendment. *Moore* v. *Tracy*, 7 Wend. 229.

4. A request was made for instructions, that the debtor was not duly notified to choose an appraiser. The officer in his return states, "the debtor within named having been duly notified to choose one, but having neglected and refused to choose." It has been decided, that an officer's return, stating that the debtor neglected to choose an appraiser, was sufficient, there being a necessary implication, that he was notified. *Bugnon* v. *Howes*, 13 Maine R. 154. In this case the officer states that, which has been uniformly regarded as sufficient.

5. A request was made for instructions, that the appraisers did not appear to have been legally sworn. The documents exhibited a certificate made on the back of the execution by Thomas B. Little, justice of the peace, that he had administered the proper oath to the appraisers, who in their return upon the execution refer to it as "having been sworn as above." The officer in his return names the appraisers and states, that he caused them "to be chosen and sworn" "faithfully and impartially to appraise the estate above described." He does not refer to the certificate made by the justice, or to the return made by the appraisers. In the case of *Chamberlain* v.

*Doty*, 18 Pick. 495, relied upon by the counsel for the tenant, there was no certificate of the magistrate indorsed upon the execution, showing that the appraisers had been sworn, and there was no reference to one in the return signed by the officer, or by the appraisers. Those returns only stated that the appraisers had been duly sworn. While the Court decided, that such returns were insufficient, it remarked, that Courts had gone very far in considering the certificates of magistrates and of appraisers indorsed upon the execution, in connexion with officer's returns, as aiding any defects in the returns themselves. In the case of *Williams* v. *Amory*, 14 Mass. R. 20, the return of an officer stating "they being duly sworn faithfully and impartially to appraise the same" was held sufficient. In the case of *Bamford* v. *Melvin*, 7 Greenl. 14, the exact language used by the officer is not stated. The opinion of the Court only states, that the officer certified that they were sworn, and that was held sufficient. In the present case the certificate of the magistrate and the returns being made upon the back of the execution show, that the appraisers were legally sworn.

6. The bill of exceptions states, that there was no proof, that the execution had been returned to the clerk's office, after the levy was made, except what appeared from the papers themselves; that this objection was not taken, until after the arguments and the charge to the jury; and that it was overruled. If objections might be first interposed and points be first made at such a stage of the proceedings, the opposite counsel would be deprived of an opportunity to obviate or to comment upon them; and the Court, after its duties were closed, would be required to open the proceedings again for the consideration and presentation of new matter. Such a practice, depriving one party of his right to be heard in argument to the jury upon every question made in the cause, and introducing great irregularities ill suited to an impartial and fair administration of justice, is inadmissible; and the objection first made at that time was properly disregarded.

7. The tenant contended, that there was nothing due from Benjamin Dillingham to the demandant; and he was permitted to introduce Dillingham as a witness to prove the circumstances, under which that judgment was recovered against him. The jury were instructed, that he could not in this action "go into the inquiry of what amount was really due, or whether any thing or not, unless that judgment was collusively obtained." Collusion implies fraud. The recovery of judgment against Dillingham was a fact to be proved by the demandant to establish his title. The proof was to be made by a duly authenticated copy of it. If a stranger to that judgment might destroy a title derived under it, by the introduction of evidence proving, that the debtor did not owe the creditor, the result might be, that after a creditor by severe litigation had obtained a judgment against his debtor, he could not rest upon that judgment as conclusive, but must be prepared to enter into the same litigation anew, with any third person having no other interest in the question, than a claim of title to the estate levied upon to satisfy that judgment. And if the course pursued in this case were to be justified, he must do so with the great disadvantage of having his debtor become a witness against him to destroy the effect of that judgment. It requires no argument to prove, that such a course would be alike erroneous in principle and mischievous in practice. This Court has decided, that a judgment cannot be thus impeached collaterally, unless collusively or fraudulently obtained. *Banister* v. *Higginson,* 15 Maine R. 73; *Granger* v. *Clark,* 22 Maine R. 128.

The grounds, upon which a judgment might become inoperative against one interested in the title to land levied upon, were stated in the case of *Miller* v. *Miller,* 23 Maine R. 22. They were, that "the grantee might be allowed to show, that it was obtained by fraud, or that the cause of action accrued under circumstances, which would not give the creditor a right to impeach the conveyance."

The case of *Downs* v. *Fuller,* 2 Metc. 135, states that a judgment recovered by fraud or collusion may be impeached

by a stranger to it; and it decides, that "where a judgment is recovered contrary to law and prejudicial to a third party, he should have a right to avoid it." The attempt in this case was not to show, that the judgment was illegally recovered, but to show, that a judgment was legally recovered upon demands, which were not justly due. That was a matter to be finally settled between the creditor and debtor.

*Exceptions overruled.*

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SEWALL MILLIKEN *versus* HORATIO SOUTHGATE.

Where the defendant received a sum of money of the plaintiff and promised in writing to repay the same sum, if he should not be entitled to hold it on the settlement of a certain concern, and when the settlement did take place, repaid the amount received, nothing being said respecting interest; the plaintiff is not entitled to maintain an action to recover interest on the money during the time it was in the hands of the defendant.

Parol evidence of a promise to pay interest, in such case, is inadmissible, if made at the same time, as tending to vary the terms of a contract in writing; and if made afterwards, it would not be valid, if without consideration.

THE parties agreed upon a statement of facts, from which it appeared, that John Waterhouse, on July 13, 1836, made a mortgage bill of sale of one quarter of the hull of a vessel, then upon the stocks, afterwards called the barque Horace, to the defendant, to secure a debt due for money advanced to assist in building the vessel; that afterwards, in April, 1843, it was decided, that this bill of sale was invalid against attaching creditors of Waterhouse for want of a delivery, there then being no law in force respecting the recording of mortgages of personal property; that after the mortgage the vessel was attached by the plaintiff, a deputy sheriff, at the suits of several creditors of Waterhouse; that on Nov. 21, 1837, the defendant and the attaching creditors signed an indenture with the plaintiff, a party thereto, but who did not sign, until afterwards, authorizing him "to sell the vessel for cash, and after deducting costs and expenses to deposit the balance in some

bank for safe keeping, there to remain to abide the appropriation of it by law;" that Milliken, the plaintiff, sold the vessel, and paid over to the defendant about the amount of his debt against Waterhouse; that afterwards the defendant paid back to the plaintiff the same amount he received; that certain indefinite parol testimony should be made a part of the case, if admissible, on objection made thereto; and that a nonsuit or default should be entered, to carry into effect the opinion of the Court upon the case.

The action was assumpsit. When the money was paid to the defendant by the plaintiff, written contracts, or receipts, were given therefor, and when repaid to the plaintiff, receipts were also given by the plaintiff to the defendant. The parol testimony offered appears sufficiently in the opinion of the court. A copy of the receipts follows: —

"Scarborough, June 1, 1838. — Received of Sewall Milliken five hundred dollars in part for the amount due me on account of the sale of the ship Horace, as pr. bill of sale which I hold from Maj. Waterhouse, and which sum I promise to account for with said Milliken upon the final settlement of the concern of said ship, and to repay to him, if I am not then entitled to hold it pursuant to said bill of sale. "Horatio Southgate."

"Sept. 17, 1838. — Received one hundred and fifty dollars of Sewall Milliken as above. "Horatio Southgate."

On the back of foregoing.

"May 20, 1843. — Received of Horatio Southgate six hundred and fifty dollars, repaid to me on the within rec't this day. "Sewall Milliken."

"Portland, February 15, 1840. — Received of Sewall Milliken three hundred dollars in part for amount due me from amount of money in his hands, the avails of the Ship Horace, and which I promise to refund to him, if I am not legally entitled to hold it by virtue of my bill of sale from Maj. Waterhouse of one quarter part of said ship. "Horatio Southgate."

"Feb. 15, 1840. — Received the above according to tenor of said receipt by hand of T. C. Hearsey & Co.

"Horatio Southgate."

On the back of the foregoing is as follows:—

"May 20, 1843. — Received of Horatio Southgate three hundred dollars according to the within receipt, this day repaid to me. "Sewall Milliken."

At the April Term, 1847, the case was submitted upon their briefs by

*Rand*, for the plaintiff — and by

*Adams*, for the defendant — and continued *nisi*.

The brief of Mr. Rand was not among the papers, which came into the hands of the Reporter.

For the defendant it was said that the action could not be maintained: —

1. Because there is no engagement to pay interest in either of the accountable receipts; and interest, as such, is recoverable only on the ground of contract.

2. Interest as damages, or damages as interest, are recoverable only, where there has been some default on the part of the defendant.

The present case falls within neither of these propositions, which are supported by the following authorities. 3 Johns. R. 228; 13 Wend. 640; 15 Wend. 76; 5 Cowen, 331; 17 Maine R. 31; 22 Maine R. 116; 15 Pick. 500; 9 Pick. 368; 4 Metc. 10; 5 Pick. 106; 2 Bailey, 276; 7 Halst. 316; 2 Dallas, 182; 7 Wend. 109.

The parol testimony offered is loose and inconsistent; and if admissible, is not sufficient to prove any promise by the defendant. No time when the conversation is alleged to have taken place is stated, and it is inadmissible, as its object is to control an intelligible written instrument. 7 Mass. R. 518; 11 Mass. R. 27; 18 Maine R. 146.

If any promise is proved, it is without consideration, and not binding.

The opinion of the Court was drawn up by

WHITMAN C. J. — Upon the facts, as stated by the parties, we do not find ourselves able to come to the conclusion that the plaintiff is entitled to recover. The accountable receipts,

given by the defendant, do not contain any promise to account, in any event, for any thing more than the principal sums named therein. These sums were returned as soon as the event occurred, upon the happening of which, they were to be returned. There was, then, no breach of contract, that could authorize an award of interest, by way of damages, for any unjust detention of the money.

But it is insisted, that the defendant, at some time after the money had been received, and before it was repaid, actually promised to pay interest therefor; and there is evidence, which it is conceded might be produced, if admissible, which would tend to show that such a promise was made; but its introduction is resisted, as, if any such promise was made, it was not founded on any valuable consideration; and it is moreover alleged, that if introduced, it would tend to vary the terms of a written contract; and it is further insisted, that the principal having been paid, no action lies to recover interest thereon.

It is not pretended that any promise was made at the times of the making of the receipts. If it were, the evidence of it would clearly be inadmissible, as tending to vary the terms of a contract as expressed in writing; and, if made afterwards, it was to create a new liability; and a valuable consideration would be necessary to support it, and none such was alleged, or offered to be proved.

As to the claim for interest, when the principal has been paid, it must depend on the terms of the contract. The dicta in *Tillotson* v. *Preston*, 3 Johns. R. 228, and *Stevens* v. *Barrington*, 13 Wend. 640, cannot be sustained without qualification; they are too general. If there be a special agreement in writing, predicated upon a valuable consideration, to pay interest on a sum lent, though the principal may have been received as such, it is difficult to perceive upon what legal or equitable principle a court could refuse to enforce its payment; and in *Irish* v. *Eddy*, 15 Wend. 76, this qualification seems to be recognized. But, however this may be, as there was no apparent consideration for the supposed promise of interest, the proof of it might well be excluded.

*Plaintiff nonsuit.*

## JOSEPH BADGER *versus* THE PRESIDENT, &c. BANK OF CUMBERLAND.

If the presiding Judge is not requested to give any instructions in reference to the nature and effect of a written instrument, introduced in evidence at the trial, the omission to do so is no valid ground of exceptions, unless the liability of the party is to be determined solely by the legal construction to be put upon it.

A sale and delivery of a vessel may be good between the parties, so as to change the property, without a bill of sale or other instrument in writing; and accounts kept of the proceeds of the vessel and of the repairs prove an use and possession, which is at least equivalent to a formal delivery at the time of the transfer.

No distinction is made in the evidence applicable thereto between the sale and delivery of a vessel and any other personal property. What is competent in the one case is admissible in the other. And it is not required, that the contract of sale of either should be proved to have been made in express terms, but may be inferred from the conversations and acts of the parties.

When one is called upon as the supposed owner of a vessel for the payment of a charge upon it, the vessel having formerly belonged to another, the possession of the vessel and the receipt of her earnings are admissible, although not conclusive evidence upon the question of title.

The authority of an agent of a corporation need not be proved by record or writing, but may be shown by acts and the general course of business.

The cashier of a bank is the regularly authorized agent thereof, and whatever is done by him in that capacity, within the sphere of his duties, is the act of the bank.

ASSUMPSIT for money paid and money had and received. All the evidence written and parol, saving that there was no copy of the bond, is found in the exceptions, but the facts in the case sufficiently appear in the opinion of the Court. The trial was before TENNEY J.

The counsel for the defendants seasonably objected to the proof of any declarations or sayings of any officer of the Bank. After a statement of all the evidence the exceptions conclude thus: —

"The counsel for the Bank contended, that the only interest which it had in the ship was by virtue of Nutter's bond, which gave it no right to the earnings of the ship, and subjected them to no liability to the plaintiff; that it had only the right to

reduce one third part of the ship to specie, and therefrom take the sum, to which they were entitled, by the bond; that the money received by it, June 4, 1845, was not received as earnings of the ship, but as money from Nutter, paid by the hand of the plaintiff.

"Whereupon the Judge, not being requested, omitted to instruct the jury, whether the bond was or was not a bottomry bond; and did instruct them, that the rights and liabilities of the Bank might depend upon other evidence than the bond alone; that it was competent for Nutter and the Bank, after the execution of the bond, to enter into a contract by which Nutter should divest himself absolutely, of all his interest in one third of the ship to the Bank; or give it the right to receive that proportion of her earnings, without proceedings on their part in admiralty upon the bond; and that a bill of sale under seal, registered at the Custom house, was not the only evidence of title in a ship; that an ownership therein could be acquired by a parol contract, as well as in other personal property; that if the Bank treated one third part of the ship as belonging to it, in its dealings with the plaintiff, as ship's husband, or owner of the other part, that fact was for their consideration on the question of title; that if the Bank claimed to be entitled to one third part of the earnings of the ship, in its own right to such earnings, and called upon the plaintiff for them, as ship's husband, and the money was paid June 4, 1845, with a promise of the cashier at the time, that the Bank would refund the excess, if it should turn out on a settlement with the master or payment of other bills, that too much was paid, or if the payment was made, on the condition expressed at the time, of such a contingency, the plaintiff could recover such excess; and whether the payments, which might be made to reduce the amount belonging to the Bank thereafter were to be limited to services rendered before the time to which the accounts presented were brought down, to 4th June, 1845, or to a later period previous to the date of the writ, would depend upon the agreement, or condition; but if the Bank was absolute owner of one third part of the ship, the plaintiff

would not necessarily be limited by a time short of the date of the writ, but might recover for moneys paid in that behalf afterwards before the date of the writ; that the acts of Moulton, the President of the Bank, touching the insurance of the ship, and the Bank's interest in the vessel, as testified to by the witnesses, was evidence in the case, on the question, whether the Bank was owner of one third of the ship or claimed to be entitled to one third of her earnings; that the entry in the Bank's blotter, June 4, 1845, without the name of Nutter, was also a circumstance for the jury upon these questions. The verdict was for the plaintiff.

"To which instructions and rulings, the counsel for the defendants excepted."

*Augustine Haines*, for the defendants, argued in support of the following propositions: —

1. The presiding Judge should have instructed the jury, that the bond introduced was a bottomry bond, and that the rights and liabilities of the Bank depended upon that alone. Abbott on Shipping, Story's Ed. 125. The plaintiff introduced this bond, and he is bound by its legal effect. The general ownership remains in the bottomry borrower. 5 Robinson's R. 218; 2 Sumn. 157.

2. The instruction, "that the rights and liabilities of the Bank might depend upon other evidence than the bond alone; that it was competent for Nutter and the Bank, after the execution of the bond, to enter into a contract by which Nutter should divest himself absolutely of all his interest in one third of the ship, to the Bank;" was erroneous upon the evidence in the case.

3. The defendants contend, that the instruction, "that if the Bank treated one third part of the ship as belonging to it, in its dealings with the plaintiff, as ship's husband, or owner of the other part, that fact was for their consideration upon the question of title," was also erroneous.

By the general maritime law, a transfer of a ship should be evidenced by a bill of sale. *Weston* v. *Penniman*, 1 Mason, 306. But if a bill of sale is not absolutely necessary for the

transfer of a ship, the contract to sell, to give title, must be accompanied by delivery of possession. 8 Pick. 86; 16 Mass. R. 336 and 401; 7 Johns. R. 308. The Bank never took possession.

4. The instruction, "that the acts of Moulton, the President of the Bank, touching the insurance and the Bank's interest in the vessel, as testified to by the witnesses, was evidence in the case, on the question whether the Bank was owner of one third part of the ship, or claimed to be entitled to one third of her earnings," was erroneous.

One may insure his equitable interest in property, while the legal title is in another. 3 Mass. R. 133; 13 Mass. R. 61 and 267.

5. The instruction was erroneous, "that the entry in the Bank's blotter, June 4, 1845, was also a circumstance for the jury upon these questions," as to title.

6. If this were a mortgage of the ship, and not a bottomry bond, the instructions were equally erroneous. In the construction of the instrument, the Judge should have instructed the jury, that inasmuch as the plaintiff had introduced the bond as evidence of the defendant's interest in the vessel, the rights and liabilities of the Bank should depend upon that alone, and not upon other evidence. If the Bank were mortgagee of one third of the ship, it was not liable to the plaintiff for any thing furnished to the ship. 8 Johns. R. 159.

*Fessenden, Deblois & Fessenden* argued for the plaintiff; and took these among other positions.

By law part owners of vessels are entitled to the earnings of such vessels in proportion to their ownership, and as a corresponding obligation, they are bound to pay their proportions of all expenses incurred in the employment of such vessels. 6 Greenl. 220; Cowp. 639; Abbott on Ship. (2 Amer. Ed.) 103.

This part ownership in vessels may be proved by other evidence, than by a bill of sale. It may be proved by parol. *Bixby* v. *Franklin Ins. Co.* 8 Pick. 86; *Taggard* v. *Loring*,

11 Mass. R. 340; *Lamb* v. *Durant*, 12 Mass. R. 57; 4 Cranch, 48; 7 Johns. R. 308; 4 Pick. 300.

But the money is recoverable on another ground, entirely independent of any ownership of the vessel. The money was paid on condition, that the Bank was to pay back their proportion of the bills that came in.

And there is still another ground. The Bank, as appears from all the evidence, claimed this money as the owner of one third part of the ship; and as such owner is bound to repay it, when found due. *Hall* v. *Marston*, 17 Mass. R. 580. The Bank is estopped from saying afterwards, that it will not meet the liabilities of the one third of the ship. *Mason* v. *Waite*, 17 Mass. R. 563; *Emery* v. *Hersey*, 4 Greenl. 412; 17 Mass. R. 557.

Nor does the fact, that the Bank is a corporation, vary the rules of evidence, in proving its liability. 7 Greenl. 118; 7 Greenl. 76; 17 Mass. R. 498; 7 Cranch, 300; 16 Maine R. 439; 12 Wheat. 64; 8 Pick. 178; 24 Maine R. 490.

The President and Cashier of the Bank being executive agents of the Bank, and acting within the scope of the legitimate purposes of the institution, their acts and doings bind the Bank, and furnish evidence which may be used against it. 7 Cranch, 306; 1 Peters, 70; 16 Maine R. 448; 1 Cowen, 513; 12 Johns. R. 231; 14 Johns. R. 118; Story's Agency, c. 6, § 114, 115; 17 Mass. R. 490; 24 Maine R. 490; 6 Cowen, 90.

The opinion of the Court, SHEPLEY J. being a stockholder in the Bank and taking no part in the decision, was drawn up by

TENNEY J. — This action is for the recovery of the amount of the disbursements on account of one third part of Ship Hermitage, which the plaintiff contends was the property of the defendants, or which for the time was used and treated by them as such. The plaintiff was the owner of the residue of the ship and was ship's husband.

To prove the title of the defendants, there was introduced

evidence of a former ownership by one Nutter; a bond from Nutter to the Bank, dated Sept. 1, 1842, recorded in the city registry of Portland, Nov. 5, 1844, to secure the payment of a note made by the obligor to the Bank; also parol evidence of an agreement between Nutter and the Bank, that he was to receive a third part of the earnings of the ship for two years, and that afterwards they were to go to the defendants towards his debt; that he paid the interest on the note for a certain time; and took the earnings till the expiration of the two years, when he informed the officers of the Bank, that he could pay no more interest on the note; and though he gave no formal notice of abandonment of the vessel to them, he had received none of her earnings since that time. It was in proof that the plaintiff made repairs on the ship after Nutter relinquished his claim to her earnings; that at the request of the President accounts were rendered to the Bank from time to time containing charges against the ship for repairs, and the expenses attending her voyages, and credit given of her earnings. One of these accounts was settled between the plaintiff and the cashier of the Bank on June 4, 1845, and on the payment by the former of a balance due on account of the one third, which had belonged to Nutter, the latter gave him a receipt therefor in full for the net earnings in his official capacity; and evidence was introduced by the plaintiff of an agreement between them, that if on a final settlement of the matters appertaining to the ship, it should be found, that the Bank had received a sum exceeding one third of the net earnings, of which the plaintiff expressed some apprehension, the excess was to be refunded. It appeared also, that the President caused insurance to be effected upon the ship to the amount of $2500, for the Bank; and on being called upon at another time by authority of the plaintiff to know, if he would cause insurance to be made upon the ship from Liverpool home, he replied, that they had risked her from Mobile to Liverpool, and he thought they should risk her home. Upon a memorandum made by the cashier, upon the books of the Bank, there was an entry of the sum received of the plaintiff

as one third of the earnings of the ship Hermitage, and certain items being deducted from the amount, for insurance, a balance was found, which balance the cashier testified was applied to Nutter's note. Before this action was commenced, an account containing the items of the claim in suit was presented at the Bank by the plaintiff's agent, and a letter from the plaintiff to the defendants demanding payment of the same. Both were delivered to the President, who said he would lay them before the Directors; and afterwards they were returned by the president, who said, "tell Capt. Badger, we pay nothing back."

The Judge, not being requested to give any instructions in reference to the nature and effect of the bond introduced, the omission to do so, is no valid ground of exceptions, unless the liability of the defendants is to be determined solely by the legal construction to be put upon it. The plaintiff did not claim to hold the defendants accountable upon the matter disclosed in that bond alone, but it was evidently introduced as one of a series of agreements between the parties thereto, with a view to show the full relations, which had existed and did then exist between them.

In this country a sale and delivery of a vessel may be good between the parties, so as to change the property, without a bill of sale or other instrument in writing; and accounts kept of the proceeds of the vessel, and of the repairs prove an use and possession, which is at least equivalent to a formal delivery at the time of the transfer. *Bixby & al.* v. *Franklin Ins. Co.* 8 Pick. 86; *Lamb* v. *Durant*, 12 Mass. R. 57; *Taggard* v. *Loring*, 16 Mass. R. 340.

No distinction is made in the evidence applicable, between the sale and delivery of a vessel and any other property. What is competent in one case is admissible in the other. It is not required that the contract of sale of either should be proved to have been made in express terms, but it may be inferred from conversations and acts of the parties, like other contracts. *Waite* v. *Gibbs*, 4 Pick. 300. Where one is called upon as the supposed owner of a vessel for the payment of a

charge upon it, the vessel having formerly belonged to another, the possession of the vessel and the receipt of her earnings, unexplained, is a kind of proof of ownership, which may be highly satisfactory, and is proper for the consideration of a jury upon the question of title. Such evidence is by no means conclusive. It may not always be of so unequivocal a character as to amount to proof of ownership; or it may be qualified or entirely controlled by other evidence, but by no rule of law can it be excluded from the case.

Were the acts of the President of the Bank inadmissible? The Court say in the case of the *Bank of Columbia* v. *Patterson*, 7 Cranch, 299. "It would seem to be a sound rule of law, that whenever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action would lie. "Grants and proceedings beneficial to the corporation are presumed to be accepted, and slight acts on their part, which can be reasonably accounted for, only upon the supposition of such acceptance are admitted as presumptions of the fact. If officers of the corporation openly exercise a power, which presupposes a delegated authority for the purpose, and other corporate acts show, that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed." *Bank of U. States* v. *Dandridge*, 12 Wheat. 64. The authority of an agent of a corporation need not be proved by record or any writing, but may be shown by acts and the general course of business. *Warren* v. *Ocean Ins. Co.* 16 Maine R. 439.

The cashier of a Bank is the regularly authorized agent thereof, and whatever is done by him in that capacity, within the sphere of his duties, is the act of the Bank. *Burnham* v. *Webster*, 19 Maine R. 232; Story's Agency, sect. 114.

The receipt by the cashier of the Bank of the money paid

by the plaintiff and the entry of the same on their books were acts of the Bank, which they cannot controvert. The payment was for their benefit, and was received by their authorized agent acting within the scope of his agency. The items of the entry show that the Bank had adopted the acts of the President touching the insurance of the vessel. This was a recognition of the President's authority to take proper measures for the security and the collection of the debt from Nutter. The money which was received by the Bank was upon the settlement of the account which was rendered at the request of the President. His acts, in taking the letter of the plaintiff with the account claimed in this action, and afterwards returning them with the refusal to pay any thing back, were facts in the case, which were properly submitted to the jury, under the instructions given.

The rulings and instructions were not legally erroneous; and the *Exceptions are overruled.*

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PETER PIERRE *& ux. v.* ISAAC FERNALD.

Where one erects a building upon his own land immediately adjoining the land of another person, and puts out windows overlooking that neighbor's land, he does no more than exercise a legal right; and he cannot by the continuance of such windows without obstruction for more than twenty years acquire any prescriptive rights or easements in favor of ancient lights, which will enable him to sustain an action against the adjoining owner for erecting fences or buildings, by means of which such lights are obstructed.

The Rev. Stat. c. 147, § 14, was not designed to create or give any such rights as are therein mentioned, or to determine when, or upon what terms, they had already been acquired; but to prevent their future acquisition without conformity to certain prescribed conditions.

But if the English doctrine, that a grant or other contract securing to the party an unobstructed flow of light and air will be presumed from the use of windows on his own land, for twenty years, were the law of this State, no such right could be acquired by such use during the time that the person claiming the right was in the occupation of the adjoining land as tenant of the owner.

CASE. The plaintiffs declared against the defendant for shutting out the light and air from windows in their house by

the erection of a high fence against the windows. The fence was erected on the defendant's own land.

At the trial before TENNEY J. after the parties had introduced all their evidence, they agreed that a report thereof should be made, and that the case should be determined by the Court, without any verdict, and that such judgment should be rendered as the Court should deem proper; and that the Court should draw such inferences from the facts as a jury would be authorized to do.

The material facts, which in the view of the Court, were proved, appear in the opinion.

*Fessenden, Deblois & Fessenden*, for the plaintiffs, contended, that it appeared from the case, that the plaintiffs had quiet and uninterrupted possession of these lights for more than twenty years; and that, therefore, there was sufficient ground to presume a grant to them from the owner of the adjoining lot.

This has always been the common law, and has been so declared in this State by statute. Rev. St. c. 147, § 14, 16. This statute is merely declaratory of the common law. *Lewis* v. *Price*, 2 Saund. 175, note; Stark. on Ev. 989, 1719; 2 Chitty's Plead. 379; 2 Kent, 442; *Baker* v. *Richardson*, 4 Barn. & Ald. 579; *Cross* v. *Lewis*, 2 B. & Cres. 682; *Daniel* v. *North*, 11 East, 371. The law appears to be well settled in England. And it is also the law in this country. 3 Kent, (5th Ed.) 448; *Story* v. *Odin*, 12 Mass. R. 157; 2 Dane, c. 69, art. 2, § 2; *Hunt* v. *Hunt*, 3 Metc. 185; *Hill* v. *Crosby*, 2 Pick. 466; *Thurston* v. *Hancock*, 12 Mass. R. 224.

It is not necessary, that the adverse possession should be belligerent. It is enough, if no objection is made by the party whose rights are affected by the claims of the possessor. Acquiescence in the use, with a knowledge of it by the owner of the land adjoining, is sufficient. *Tinkham* v. *Arnold*, 3 Greenl. 122; *Butman* v. *Hussey*, 12 Maine R. 407; 3 Kent, 444; *Tyler* v. *Wilkinson*, 4 Mason, 397.

In the occupation of the defendant's lot by the plaintiff for a part of the time, there was nothing to prevent the owner from interrupting the easement, and shutting up the windows. The hiring by the plaintiff was enabling him to use the property in his own way, and was an acquiescence in the use of the windows as they were. It would not affect the right. *Cross* v. *Lewis*, 2 B. & Cr. 682; *Corning* v. *Gould*, 16 Wend. 531; *Colvin* v. *Burnett*, 17 Wend. 568; *Bealey* v. *Shaw*, 6 East, 215; *Sargent* v. *Ballard*, 9 Pick. 254; *Tyler* v. *Wilkinson*, 4 Mason, 402; *Thomas* v. *Marshfield*, 13 Pick. 248; 4 Day, 250; *Gayetty* v. *Bethune*, 14 Mass. R. 53; Co. Lit. 113, *b*; 14 Pick. 247; 4 T. R. 71; 3 B. & Ald. 304; 2 Chitty's Pl. 379.

*Fox*, for the defendant, admitted that in England a prescriptive right might be acquired by the use of windows on the line of land for a sufficient length of time; but denied that such had ever been the received law in this country. The doctrine cannot be supported on principle, and is pernicious in practice.

By the use of lights in any way the owner chooses upon his own land, he cannot injure his neighbor, and does nothing, of which complaint can be made. He cannot, therefore, acquire the right to limit or control the adjoining owner in his occupation of his own land. *Parker* v. *Foote*, 19 Wend. 309; *Nelson* v. *Butterfield*, 21 Maine R. 220; 2 Conn. R. 597; 3 Kent, 448.

But even under the English law, the plaintiffs have acquired no prescriptive rights against us. While they were in possession of our land under a lease from us, they could acquire no such right. And without including that time, they have not shown any using of the windows for twenty years. *Sargent* v. *Ballard*, 9 Pick. 251; 3 Dane 252; 7 Metc. 401.

The opinion of the Court was drawn up by

Shepley J. — This is an action on the case brought to recover damages for the injury suffered by the obstruction of the natural flow of light and air to two windows, put out of the

north-east end of the plaintiff's dwellinghouse in the city of Portland.

That house appears to have been built during the latter part of the year 1823. The north-east end of it was placed upon the line dividing the lot, on which it was erected, then owned by Henry Titcomb, from the lot then owned by Robert Ilsley, and now owned by the defendant. The north-east corner of it appears to have been placed a few inches upon the lot now owned by the defendant, which was then unoccupied; and it so remained until the year 1831; when George Pierson, at that time the owner, built a shop upon it. That shop appears to have been placed two and a half to three feet distant from the north-east end of the plaintiff's house, and to have been about as high as the fence erected by the defendant during the year 1844, when the shop was removed. The fence was built upon the defendant's lot and within three or four inches of the back window and within about twelve inches of the other window in the end of the plaintiff's house, and so high as materially to obstruct the admission of light and air.

The plaintiff, Peter, hired that shop, with the land back of it and around it, and occupied the same, paying rent therefor, from 1835 or 6, until July, 1844, when the defendant purchased.

The first question presented is, whether the English doctrine respecting the obstruction of light and air is to be received as law in this State.

The origin and principles of the law in relation to the presumption of grants was considered in the case of *Nelson* v. *Butterfield*, 21 Maine R. 234, and it will not be necessary to repeat the remarks and conclusions there stated, or to refer again to the authorities there cited. The principle, upon which the presumption of grants or other contracts for the security of rights and easements is made, is, that when one person knowingly permits another for a long course of years and without molestation or interruption to claim and enjoy rights, easements, or servitudes, injurious to him or his estate,

it would be against man's experience and contrary to his motives of conduct to account for it so satisfactorily in any other manner, as to presume, that he had authorized it by some grant or agreement.

When it appears that the enjoyment has existed by the consent or license of the person, who would be injured by it, no such presumption can be made. Hence there must be proof of an adverse claim and enjoyment. *Bealey* v. *Shaw*, 6 East. 208; *Gayetty* v. *Bethune*, 14 Mass. R. 49; *Sargent* v. *Ballard*, 9 Pick. 251; *Tinkham* v. *Arnold*, 3 Greenl. 120; *Colvin* v. *Burnet*, 17 Wend. 564. In the latter case Mr. Justice Cowen says, "all the cases, which have considered this defence are at least uniform in one thing; that it must combine not only continuity and a peaceable possession without the hindrance of the owner in respect to whose land the easement is claimed, but in complete analogy to its archetype, the bar in ejectment, the possession must appear to have been adverse."

Nothing in the law can be more certain, than one's right to occupy and use his own land, as he pleases, if he does not thereby injure others. He may build upon it, or occupy it as a garden, grass plat or passage way, without any loss or diminution of his rights. No other person can acquire any right or interest in it, merely on account of the manner, in which it has been occupied. When one builds upon his own land immediately adjoining the land of another person and puts out windows overlooking that neighbor's land, he does no more than exercise a legal right. This is admitted. *Cross* v. *Lewis*, 2 B. & C. 686. By the exercise of a legal right he can make no encroachment upon the rights of his neighbor, and cannot thereby impose any servitude or acquire any easement by the exercise of such a right for any length of time. He does no injury to his neighbor by the enjoyment of the flow of light and air, and does not therefore claim or exercise any right adversely to the rights of his neighbor. Nor is there anything of similitude between the exercise of such a right and the exercise of rights claimed adversely. It is admitted in the

can obtain redress by any legal process. In other words, that his rights have not been encroached upon; and that he has no cause of complaint. And yet, while thus situated for more than twenty years, he loses his right to the free use of his land because he did not prevent his neighbor from enjoying that, which occasioned him no injury and afforded him no just cause of complaint. The result of the doctrine is, that the owner of land not covered by buildings, but used for any other purpose, may be deprived of the right to build upon it by the lawful acts of the owner of the adjoining land performed upon his own land and continued for twenty years.

It may be safely affirmed, that the common law originally contained no such principle. The doctrine as stated in the more recent decisions appears to have arisen out of the misapplication in England of the principle, by which rights and easements are acquired by the adverse claim and enjoyment of them for twenty years, to a case, in which no adverse or injurious claim was either made or enjoyed.

This doctrine has been examined and its want of sound principle exposed in the case of *Parker* v. *Foote*, 19 Wend. 309. Mr. Justice Bronson very justly remarked, "it cannot be applied to the growing cities and villages of this country without working the most mischievous consequences. It has never, I think, been deemed a part of our law. Nor do I find, that it has been adopted in any of the States." "It cannot be necessary to cite cases to prove, that those portions of the common law of England, which are hostile to the spirit of our institutions, or which are not adapted to the existing state of things in this country, form no part of our law."

Chancellor Kent says, "this common law right of prescription in favor of ancient lights does not reasonably or equitably apply, and it is not the presumed intention of the owners of city lots, that it ever should be applied to buildings on narrow lots in the rapidly growing cities in this country." 3 Kent's Com. 446, note *b*.

In the case of *Atkins* v. *Chilson*, 7 Metc. 398, it is stated,

that the tendency of the decisions in that State has been favorable to a reception of the English doctrine, but there is a distinct statement, that no opinion is expressed upon it in that case.

It is provided by statute, c. 147, § 14, that "no person shall acquire any right or privilege of way, air, or light, or any other easement, from, in, upon, or over the land of another by the adverse use or enjoyment thereof, unless such use shall have been continued uninterrupted for twenty years." The following sections prescribe the mode, by which the acquisition of such rights may be prevented. It is obvious, that these enactments were not designed to create or give such rights, or to determine when or upon what terms, they had already been acquired. These matters were left to be decided by the law as it previously existed. The design was to prevent their future acquisition without conformity to certain prescribed conditions. It does not even appear to have been intended to declare, that they would in future be acquired by virtue of the statute merely, but rather to prevent their acquisition without conformity to its provisions, leaving the decision to the previously existing law, whether any would be acquired. But whatever may be its true construction, it can have no influence upon the plaintiff's rights in this case.

The second question presented, is, whether from the facts proved, a grant or other contract, securing to the plaintiffs an unobstructed flow of light and air, can be presumed.

According to the English doctrine such a presumption can arise only, when the right claimed has been exercised in such a manner for twenty years against the owner of the adjoining land, that he might, during all that time, have prevented it by some erection so made as to obstruct the light and air.

The rule is more rigidly stated in the case of *Daniel* v. *North*, 11 East, 372. Lord Ellenborough says in that case, "the foundation of presuming a grant against any party is, that the exercise of the *adverse* right, on which such presumption is founded, was against the party capable of making the grant." Le Blanc J. in the same case says, "it is true that

presumptions are sometimes made against the owners of land during the possession, and by the acquiescence of their tenants, as in the instances alluded to, of rights of way and of common; but that happens, because the tenant suffers an immediate and palpable injury to his own possession, and therefore is presumed to be upon the alert to guard the rights of his landlord as well as his own, and to make common cause with him; but the same cannot be said of lights put out by the neighbors of the tenant, in which he may probably take no concern, as he may have no immediate interest at stake." The case decides, that the landlord was not precluded, where lights had been put out and enjoyed for twenty years, while the premises were in the occupation of his tenant, there being no evidence of his knowledge of the fact. And how could proof of his knowledge have made any difference? He could then do nothing to prevent it, but by making some erection upon his own land; and he could not lawfully enter upon it and do that, while it was held under a lease by his tenant.

In the case of *Barker* v. *Richardson*, 4 B. & A. 579, it was decided, that no such presumption could be made, while the premises were in the occupation of a rector as tenant for life, because he was incapable of making such a grant.

In the case of *Sargent* v. *Ballard*, 9 Pick. 251, the doctrine stated by Bracton is recognized, that "it must be with the knowledge and permission of the owner, and not merely of the tenants."

The premises overlooked from the plaintiff's windows were occupied by them about eight of the twenty years, during which the presumption must have arisen. During those eight years both estates were in the possession of the plaintiff, Peter. There could be no adverse enjoyment of the flow of air and light during that time, nor of any thing that could be likened to an adverse enjoyment of it. The landlord could not prevent such enjoyment by his tenant in any way, for he could not enter upon the land while leased to the tenant, to make an erection to obstruct the light and air. And no presumption

could be made, if the English doctrine were admitted here, which would enable the plaintiffs to maintain this action.

*Plaintiffs nonsuit.*

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JEREMIAH KIMBALL *versus* JAMES IRISH *& al.*

The justices who administer the oath to a poor debtor under Rev. Stat. c. 148, may amend their certificate by adding, in accordance with the truth, the mode in which their own selection was made, and that the debtor was examined upon his oath.

Where the certificate of the justices that the debtor had taken the oath, was without date, and did not on its face apply to this, any more than to any other similar case, but yet was introduced at the trial, as evidence that the oath had been taken as required, and went to the jury, without any objection, as affording evidence that it had been so taken; an objection for that cause cannot be allowed to prevail, if it be first taken at the argument of questions of law arising on other points.

Exceptions should be specifically taken during the trial, and should so appear in the exceptions; and if not so taken, they will be considered as waived.

The provisions of the thirty-first section of c. 148, (Rev. St.) do not apply to a case in which the debtor may be called upon to show that he has performed the conditions of a bond, made in conformity to the twentieth section of the same statute; but to a case where the debtor was actually under arrest or in prison, at the time of the proceedings preparatory to the taking of the oath.

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

A copy follows: —

This was an action of debt, on a poor debtor's bond, in which said James Irish was principal, and Marshall Irish and John Wingate were sureties. Said bond may be referred to, but need not be copied.

The execution of said bond was admitted.

The defendant introduced in his defence, papers marked A, B, C, D, & E, to prove that he had complied with one of the conditions of said bond, viz: that he had disclosed according to the provisions of the Rev. Stat. c. 148. Said papers are to be made part of the case, but need not be copied.

Plaintiff objected to the sufficiency of said papers.

1st. Because he alleged, that it did not appear by them in what manner the justices, to take the disclosure, were selected.

2d. Because he alleged, that it did not appear whether or not the oath was administered before the disclosure was made.

3d. Because he alleged that the disclosure of the debtor, as appears by paper marked C. was sworn to, before one only of the justices, while he alleged that it should have been sworn to before both of the justices.

The Court allowed the justices to amend their certificate, so that instead of reading as follows, viz: —

"Cumberland, ss. Sworn to before us.

"Josiah Pierce, } Justices of the Peace, and
"Elijah Hayes, } of the Quorum,"

it should read in the following manner, viz: —

"Cumberland, ss. Sworn to before us, Josiah Pierce, selected by James Irish, and Elijah Hayes, selected by a constable, the creditor neglecting and refusing to choose or select a justice.

"Josiah Pierce, } Justices of the Peace and
"Elijah Hayes, } of the Quorum."

The Court also allowed the Justices to amend their certificate of having administered the oath to the debtor, by inserting the following words, viz: — "and examined him on his oath."

The verdict was for the defendants. The Court ruled that said papers show a compliance with one of the conditions of the bond; to which ruling, and to the allowing of the said amendments, by the Court, when objected to by the plaintiff, the plaintiff excepted and his exceptions were allowed.

Paper A, referred to, was the application and citation to the creditor. Paper B, was the certificate of discharge, signed by two justices of the peace and of the quorum, but without date. Paper C, was a like certificate, with a date; but signed by only one of the justices. D, was a written selection of one of the acting justices by the debtor. E, was a written statement, that the creditor had neglected to select a justice, with a request, that a sheriff, deputy sheriff, or constable,

would select one, and a return by a constable, that he had selected a justice, being one of those who signed the certificate.

*Sweat*, for the plaintiff, said that either of the two first objections made at the trial, was fatal unless removed by the amendment. The only question then, upon them, is whether the amendment was within the power of the Judge.

The paper marked B, is without date and has nothing in it to connect it with this judgment or execution. This was not done, and could not be done by parol evidence. 1 Maine R. 340; 11 East, 140.

That marked C, is invalid as a discharge, because it was signed only by one of the justices.

The selection of the justices was unauthorized, being made by a constable, who was not the officer who made the arrest. Rev. St. c. 148, § 46; *Bunker* v *Hall*, 23 Maine R. 26.

Under the general ruling of the Judge, it is objected, that the papers do not show, that the justices met at the time and place appointed in the notice. Nor do the papers show, that the certificate prescribed by the St. c. 148, § 31, was given. Nor does it appear, that the debtor was examined by the magistrates. 23 Maine R. 144, 244 and 496. Nor that he took the oath before both the justices.

*E. Hayes*, for the defendants, cited *Burnham* v. *Howe*, 23 Maine R. 489.

The opinion of the Court was drawn up by

Whitman C. J. — The defendant, James Irish, on being arrested on execution, wherein he was one of the debtors, and the plaintiff, the creditor therein, gave a bond as provided in c. 148, § 20, of the Rev. Stat. and on this the present action is founded: and the defence is, that one of the alternatives mentioned in the bond has been performed, and the forfeiture of the penalty thereby avoided; and this depends on whether the debtor cited the creditor, and disclosed, and was admitted to the oath of a poor debtor, in due form, and has furnished the proper evidence of his having done so.

The objection, specifically made at the trial, to the docu-

ments introduced by the defendant, as evidence of his ground of defence, were obviated by amendments, then permitted to be made, and which were clearly allowable, similar amendments having been sanctioned by this Court on former occasions. The Judge, however, in charging the jury, instructed them in general terms, that those documents show a compliance with the provision of the section above cited; and it is now urged, that the certificate by the magistrates, of the taking of the poor debtor's oath, being one of the documents produced, is without date, and might as well be applied to any other case as to the one in question; and on inspection of the document, such would seem to be in fact true. But it was used at the trial, without objection, as applicable to this case, and as having been made in regard to the oath taken in pursuance of the process issued and pending before the proper tribunal, in reference to the condition contained in the bond in suit. Regularly, exceptions, in order to be available, should be specifically taken during the trial, and, if not so taken, they should be considered as waived. This certificate was introduced as evidence, that the oath had been taken as required, and went to the jury without objection, as affording evidence that it had been so taken. If it had been objected to on its being introduced, the defect might have been cured by an amendment, and perhaps by parol proof. The objection, therefore, if valid, when seasonably made, comes too late and cannot be allowed to prevail without manifest injustice.

It is next objected, that no certificate was produced at the trial, such as is provided for in § 31 of the statute. This too, is an objection not particularly noticed at the trial, and must be considered as arising, if at all, under the generality of the instruction of the Judge, to the jury. But this provision in the statute has reference to the case of a poor debtor, who, at the time of the proceedings preparatory to taking the oath, was actually in prison, and to procure his liberation therefrom and from a future arrest for the same debt, as is fully manifested in § 32 of the same statute, and is not essential to a case in which the debtor may be called upon to show, that he has

performed the condition of a bond made in conformity to said § 20. *Exceptions overruled,*

*Judgment on the verdict.*

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SEWARD W. PORTER *versus* CROMWELL BULLARD *& al.* and THOMAS W. O'BRION, *& al. trustee.*

If the debt for which the trustee would otherwise have been liable to be charged, has been legally assigned before service upon the trustee, and this is shown to the Court, the trustee will be entitled to be discharged.

A parol assignment of a chose in action is sufficient to transfer an equitable interest therein, which will receive protection in courts of law.

A symbolical delivery of personal property, so situated that an actual delivery of it, could not be made, has been regarded as sufficient. And upon the same principle, the assignee of a judgment, or of a book debt, may be enabled to establish his rights without proof of an actual delivery.

Under the Massachusetts insolvent act of 1841, c. 124, the mere facts, that the assignment was made about two months before the insolvency of the assignor was published, and that the assignee received as collateral security, nearly double the amount due to him in debts apparently due to the assignor, were held not to be sufficient to authorize the conclusion, that the assignee "had reasonable cause to believe such debtor was insolvent."

When the assignee has proved that the debt due from the trustee has been assigned to him before the service of the trustee process, his title to it must be considered as continuing to exist, until there be proof adduced, from which it may be inferred, that it has been impaired or destroyed.

THE principal debtors were defaulted, and the question was merely, whether the trustees, partners, doing business in the name of T. W. & D. W. O'Brion, should be charged or discharged by reason of a balance of $334,83, admitted to be due on book account.

The original disclosure was made at the Nov. Term, 1846, and at the April Term, 1847.

*Howard* and *Shepley*, for the trustees, said that since the disclosure was made, that Henry Winsor, of Boston, had made claim to have the balance due from the trustees to the principals paid to him, as their assignee under the insolvent laws of Massachusetts, and had given written notice of his claim; that

the trustees were ready to pay the amount of their indebtedness to such persons as were legally entitled thereto; that the trustees only wished to be protected against all after claims in Massachusetts as well as in this State; and to the end that all claimants should be represented, the trustees made a motion in writing, that they might be permitted to make an additional disclosure, stating such facts as had come to their knowledge since their former disclosure was made.

*W. P. Fessenden*, for the plaintiff, objected that it was now too late.

For the trustees it was replied, that the trustees were mere stockholders, and for their security ought to have the privilege of presenting all the facts within their knowledge.

The Court permitted the additional disclosure to be made.

*Augustine Haines* had previously appeared for William Stone, who had been permitted to come in and prove his claim to the debt due from the trustees to the principal debtors, under Rev. Stat. c. 119, § 37, and now moved that Henry Winsor might also come in and prove his claim. The Court permitted him to come in.

Depositions appeared to have been taken in proof of these claims; and the plaintiff, the trustees and the assignees agreed, that the Court should determine what was proved by the evidence. No copies of this evidence have come into the hands of the Reporter. The facts disclosed appear in the opinion of the Court.

*W. P. Fessenden* argued for the plaintiff. The grounds on which he contended that the assignees should be charged are stated in the opinion of the Court. He cited, *Fox* v. *Adams*, 5 Greenl. 245; 8 Law Rep. 499; 7 Metc. 164; 6 Greenl. 60; 3 Greenl. 346.

*Haines*, in his argument for the assignees, contended that an assignment of a contract not under seal, or of instruments not evidenced by sealed instruments, need not be by deed. *Quiner* v. *Marblehead S. I. Co.* 10 Mass. R. 476.

A judgment may be assigned by parol, or by writing not

under seal. *Ford* v. *Stuart*, 19 Johns. R. 342; 13 Mass. R. 304; 15 Mass. R. 485; 5 Greenl. 282; 2 Greenl. 147 and 322.

In this State, as in Massachusetts, the equitable interest in the debtor passes immediately on the assignment to the assignee, and it is sufficient, if notice of this be given to the person summoned as trustee, in season for him to resist the claim made on him by a creditor of the assignor. This is settled by repeated decisions. It is enough to cite the first. *Dix* v. *Cobb & trustee*, 4 Mass. R. 512.

The opinion of the Court was drawn up by

Shepley J. — The trustees admit, that there was a balance due from them to the defendants, on book account, at the time of the service made upon them.

William Stone and Henry Winsor have been admitted according to the provisions of the statute, c. 119, § 37, to present and prove their claims to the debt due from the trustees.

The claim of Stone arises out of an alleged assignment of the debt made by the defendants to him on August 10, 1846.

Winsor is the assignee of the defendant under the provisions of a statute of the Commonwealth of Massachusetts passed in the year 1841, c. 124, for the relief of insolvent debtors.

If the debt had been legally assigned to Stone before service was made upon the trustees, they will be entitled to be discharged.

The counsel for the plaintiff allege, that the debt had not been legally assigned. That no order had been drawn by the defendants upon their debtors in favor of the assignee. That no document is presented, signed by them, purporting to transfer the debt. That no delivery of the account, or of a transcript of it, is proved.

A receipt bearing date on August 10, 1846, signed by the assignee is introduced, by which he acknowledges, that he has received an assignment of this debt with others as collatera security for the indorsement of two promissory notes described.

The assignors by taking such a receipt from him fully admit, that they had assigned the debt to him. There is proof of a parol assignment by the admission of both the parties to it as well as by the other testimony. Such an assignment is sufficient to transfer an equitable interest in a chose in action, which will receive protection in courts of law.

From the testimony introduced the Court cannot properly come to the conclusion, that a transcript of the account was not made and delivered to the assignee. The receipt states, that the notes and accounts enumerated in it had been received by him. It describes a note of the assignors and declares "which note was given me with the collateral this day."

Elisha Stone, speaking of this account in his answer to the second interrogatory, says, "William Stone had other collateral security with that." In his answer to the fifth cross interrogatory he speaks of having "turned over to him securities to save him harmless against indorsements." And says, "the books show nothing of such transactions, except that the accounts so turned over to him were marked in pencil with his name."

Asa T. Richards, in his answer to the sixth cross interrogatory, says, "other collateral was passed to William Stone with the Obrion account as is shown by the receipt, but without it I cannot state it." The meaning of the witness appears to be, that without the receipt he cannot state what other securities were passed to him with the Obrion account. The witnesses thus speaking of the account as turned over, or passed to the assignee, must be supposed to have reference to a copy or transcript of it as the only thing, to which such language could have been properly applicable. The entry by a pencil, of the name of the assignee on the book, affords no indication that a transcript of the account was not made and delivered. The witnesses were not asked by either party, whether such a transcript was made and delivered to the assignee, and this may well account for the incidental manner, in which the proof is presented.

But if the proof should be regarded as doubtful the Court is not prepared to decide, that the assignment was not legally made and proved.

A symbolical delivery of personal property so situated, that an actual delivery of it could not be made, has been regarded as sufficient. The assignee of a judgment or of a book debt may, upon the same principle, be enabled to establish his rights without proof of an actual delivery. For a delivery of a transcript of them would not prove a delivery of the debt or judgment. It would only prove the delivery of something indicative of their existence and of the intention of the parties. Other evidence, shewing that the transfer had been completed, might be sufficient. The receipt of the assignee admits the delivery to himself; the reception of it by the assignors and the entry of the assignee's name upon the book by them would seem to be equivalent to the usual proof of a symbolical delivery. In the case of *Robbins* v. *Bacon*, 3 Greenl. 349, this Court, taking notice that a book debt cannot be delivered to an assignee, expressed the opinion, that a copy might be considered, when delivered, as equivalent to the delivery of a bond or note. It did not intimate, that such would be the only mode of proving a symbolical delivery.

It is further contended, that the assignment should be regarded as invalid by virtue of the insolvent law of Massachusetts, because the assignee, when he received such security, "had reasonable cause to believe such debtor was insolvent."

The testimony shews, that the assignee, being the father of one of the assignors, resided at a distance from their place of business, and that he had never visited it. That the only information respecting their business communicated to him was, that they were doing very well.

The fact, that the assignment was made about two months before their insolvency was published, and the fact, that he received as collateral security nearly double the amount in debts apparently due to them, are not sufficient to authorize the conclusion, that he had reasonable cause to believe that they were then insolvent.

It is further contended, that the trustees should be charged, because the assignee has not shown, that he had not received from the other securities assigned to him, sufficient to repay the amount which he had paid for the assignors. When the assignee has proved, that the debt due from the trustees, had been assigned to him, before service was made upon them, his title to it must be considered as continuing to exist, until there be some proof adduced, from which it can be inferred, that it has been impaired or destroyed. There is nothing in the testimony presented in the case to authorize such an inference.

*Trustees discharged.*

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JOHN B. CUMMINGS *versus* JUDAH CHANDLER.

When a statute, upon which a penal action is founded, is repealed after the bringing of the suit, the action can no longer be sustained.

If the instructions of the District Judge upon one point be erroneous, but at the same time wholly immaterial, it can furnish no sufficient cause for sustaining exceptions.

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

This is an action of debt brought on the 51st c. of the Rev. St. and the amended statute passed March 9, 1844.

There were two sets of counts, a copy of one of each set follows: — "For that the said Chandler, on the second day of April last past, at Portland aforesaid, knowingly did sell to T. & F. Cummings, a certain parcel or quantity, to wit, two casks of lime, manufactured within this State, in casks, each of which casks was less than seventeen inches in width between the chimes, contrary to the form of the statute in such case made and provided, whereby and by force of the statute, said Chandler hath forfeited for his said offence the sum of one dollar for each cask so sold as aforesaid. And an action hath accrued to the plaintiff to sue for and recover

the said sum of one dollar for each of said casks, amounting in the whole to the sum of two dollars.

2. "Also for that the said Chandler, on the second day of April now last past, at Portland aforesaid, knowingly did sell to T. & F. Cummings a certain parcel or quantity, to wit, two casks of lime, manufactured within this State, in casks not made, marked and branded, according to the provisions of the 51st c. of the Rev. St. and an act amending the 9th section of said chapter, approved March 9, 1844, contrary to the form of the statute, in such case made and provided; whereby and by force of the statute, the said Chandler hath forfeited for his said offence the sum of one dollar for each cask so sold as aforesaid; and an action hath accrued to the plaintiff to sue for and recover the said sum of one dollar for each of said casks, amounting in the whole to the sum of two dollars."

The writ was dated Feb. 16, 1846. The general issue was pleaded.

The plaintiff offered evidence tending to prove, that the defendant had sold thirty-four casks of lime not seventeen inches between the chimes, and not made, marked and branded according to the provisions of law, knowing the same to be less than seventeen inches between the chimes, and not made, marked and branded as the statute required.

The defendant relied on the statute passed the 10th day of August, 1846, and contended, that said statute having repealed the ninth section of chap. 51, and the act amending said section, approved March 9, 1844, without any saving clause of penalties incurred, or of actions commenced for the recovery of such penalties, that the plaintiff could not maintain said action; and requested the Judge so to instruct the jury.

But the Judge instructed the jury, that notwithstanding the act of August 10, 1846, by which the 9th section of chap. 51 and the act amending the ninth section of said act, chap. 51, were repealed without any saving clause, that the action could be maintained, if the jury were satisfied from the evidence, that said casks were not seventeen inches between the chimes

and were not made, marked and branded as required by said act, chap. 51, and that the defendant sold said casks of lime knowing them to be thus deficient.

The jury returned a verdict for the plaintiff, and the defendant filed exceptions to the rulings and instructions of the Judge.

*Deblois*, for the defendant, said that this suit for penalties was founded on the ninth and twelfth sections of Rev. Stat. c. 51, and the Stat. 1844, c. 98. When this case was tried, neither the ninth or twelfth sections of statute c. 51, nor the statute of 1844, were in force. They were repealed by the statute of 1846, c. 213. The repealing act contains no saving clause for suits commenced or penalties incurred. The subject matter is re-enacted in the repealing act, with changes, and this operates also as a repeal of the former provisions. 12 Mass. R. 545; 4 Burr. 2026; 1 Leach's Cases, 23; 12 Mass. R. 23; 10 Mass. R. 39; 1 Stewart, 506; 5 Pick. 168; 3 Greenl. 22; 4 Wash. C. C. R. 691; 5 Mass. R. 380; 2 Dana, 330; 4 Yeates, 392; 5 Rand, 657.

A penalty to a prosecutor, is not a vested right, and equitable constructions are never extended to penal statutes, or mere arbitrary regulations of public policy. 4 Mass. R. 473; 18 Maine R. 109; 1 Gallison, 177.

After the repeal of the law creating the offence, no penalty can be enforced for violations of its provisions. 5 Cranch, 281; 1 Cranch, 110; 1 N. H. Rep. 61; 11 Pick. 350; 10 Pick. 37: 21 Pick. 374.

*McCobb* and *Barnes*, for the plaintiff, contended that the right of action was not taken away by the repeal of the statute.

This is not a *qui tam* action, as the government has no part of the penalty. The right was vested by the bringing of the suit before the repeal, and the legislature had no power to take it away. 4 Burrow, 2460; 7 Johns. R. 477; 5 Law Rep. 293 and 460.

The first set of counts are founded on the ninth section, and that section only is repealed. The second set of counts are

upon the seventh and tenth sections for selling lime, when the casks containing it were not branded and marked, and those are still in force. Under the instructions of the Judge, at the trial, the jury must necessarily have found, that the casks sold were neither made, marked nor branded according to law. They, therefore, found for the plaintiffs the facts necessary to support the action on both sets of counts. The instructions of the Judge relative to these last counts were unquestionably correct, and we are entitled to judgment on them.

*S. Fessenden,* for the defendant, replied.

The opinion of the Court was drawn up by

WHITMAN C. J. — This is an action of debt, instituted to recover certain penalties, supposed to have been incurred under the Rev. Stat. ch. 51, and an act passed in 1844, in amendment thereof. The declaration contains two sets of counts; the first for selling lime, contained in casks not seventeen inches in width between the chimes; the second set, for selling lime in casks not made, marked and branded according to the requirements contained in said statutes. After the action was commenced, and while it was pending in Court, an act was passed (ch. 213 of 1846,) repealing § 9 of the c. 51; and also the amendatory act of 1844. And now the defendant contends, that the action cannot be maintained, because, as he supposes, § 9 alone prescribed the offences set forth in the declaration. To this it is replied, first, that the right to the forfeiture had vested in the plaintiff upon his bringing his action therefor, before the repealing act was passed; and, therefore, that it was not competent for the Legislature to deprive him of the same, by a posterior act; and, secondly, that § 10 of said ch. 51, remains unrepealed; and provides, that each lime cask, shall be branded on the outside of the bilge, with the initial of the christian, and the whole of the surname, of the manufacturer thereof; and the second set of counts, being for selling casks, containing lime, not made, marked and branded, are within its terms.

As to the first ground, relied upon by the plaintiff to obviate the effect of the repealing act, he relies, with much apparent confidence, upon the principles which governed the courts in the decisions of *Couch, qui tam,* v. *Jeffries,* 4 Burr. 2460, and *Dash* v. *Van Kleeck,* 7 Johns. R. 477. These cases, however, upon examination will not be found, at all points, parallel with the one before us. In neither of those cases was there a direct repeal of the provisions upon which the actions were respectively founded. In the first, which was for not paying the stamp duties upon an indenture of apprenticeship, and the defendant after verdict against him therefor, paid to the proper officer the duty, relying upon a law enacted after the action was instituted, that such delinquents, on paying the duty within a certain time, should be discharged from the penalty, the court held the act to be prospective, and that it could not affect actions in which the defendant had no day in Court to interpose such a defence. In the latter case, a sheriff was sued by a creditor, and for an escape of his debtor, who had given bonds for the liberties of the jail, which was a security only to the sheriff; and afterwards an act was passed declaratory of the law, to the effect, that such actions should not be brought against the sheriff, but, that bonds, so taken by him, should be assigned to the creditors, upon which they might seek their remedies. The Court held the act to be prospective; and that it did not interfere with the right of the plaintiff, which was considered as previously vested.

But the authorities cited by the defendant's counsel are abundant to show, that where a penal action, as the one before us undoubtedly is, the penalty being given to any one who may sue for the same, is founded on a statute repealed after action brought, it takes away the foundation upon which the superstructure is based; and this Court has often decided that actions so situated must fail to be sustained. A large number of actions, lately pending for penalties, which had accrued under the militia law, were ruled to be no longer sustainable, when that law was abrogated.

But with regard to the other ground, relied upon by the plaintiff, our conclusion is different. The 10th section is clearly in force. From the finding of the jury, under the instruction of the Court, we must regard it as a fact, that the casks were not branded as required in that section. The instructions were as favorable to the defendant as he could properly claim to have had them. The jury were required, in order to a conviction, to find that the casks were not seventeen inches in width between the chimes, and were not made, marked and branded as required by that statute. They were not instructed that a deficiency in either particular would be sufficient to sustain the action, but that they must find them all, conjunctively, to be as alleged, before their verdict could be returned against the defendant. Hence, in finding the defendant guilty, they must be regarded as having found, that the casks were not branded as required in § 10; and, having so found, the defendant was not aggrieved by the instruction, and had no right to except thereto; and the second set of counts may be sustained. The instruction, as applicable to the first set of counts, was erroneous, but were immaterial, and therefore can form no cause for sustaining the exceptions.

*Exceptions overruled*

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CHRISTIAN F. PUDOR *versus* BOSTON & MAINE RAIL ROAD.

Where the plaintiff proved, that he had delivered to the defendants, who were common carriers, a box, to be carried to a certain place; that the box was not delivered; that he had made a demand thereof; and that the defendants admitted its loss, and then "offered to show by his own testimony (it not appearing that he had any other means of showing it,) what was in said box and the value of the articles," the declaration having alleged, that the box contained medical books, medicines, surgical instruments and chemical apparatus; it was held, that the plaintiff's oath was inadmissible.

THIS action came before the Court upon the following report by TENNEY J. presiding at the trial.

This was an action on the case, in which the plaintiff claims to recover of the defendants, the value of a certain box, containing divers goods and chattels, to wit: five volumes of medical works, worth seventeen dollars, two volumes of the dictionary of literature, worth ten dollars, fifty vials of medicine, surgical instruments, and worth thirty-five dollars, chemical apparatus, ten dollars, five pounds of sugar of milk, and articles of clothing, fifteen dollars, all of the value of ninety-three dollars.

It was in proof, that the said box with two trunks was, on the 24th day of February, A. D. 1846, delivered by the plaintiff to the baggage master of the defendants at their depot in Boston, to be carried in the cars of the defendants to Portland; that the plaintiff paid said baggage master for the transportation of said box to Portland, that the said box was demanded of the baggage master of the defendants at their depot, in Portland, at various times before the commencement of this action; and that it was not delivered, and could not be found.

The delivery of said box to the defendants, the loss thereof, and a due demand of the same, and also that the defendants were common carriers on the said 24th day of February, were admitted by the defendants for the purposes of this trial, but there was no admission as to the contents of said box.

The plaintiff then offered to show by his own testimony (it not appearing that he had any other means of showing it) what was in said box, and the value of said articles. His testimony was excluded; and the defendants were defaulted for the value of the box only, viz: the sum of one dollar.

If in the opinion of the Court the plaintiff's testimony should have been admitted in the trial for the purposes mentioned, the default is to be taken off and a new trial granted; but if in their opinion it was properly excluded, the default to stand.

The case was argued on April 21, 1847.

*Sweat*, for the plaintiff, cited 1 Greenl. on Ev. (2d Ed.)

§ 348, and notes, and cases there referred to, as sustaining the position, that the presiding Judge erred in excluding the plaintiff's own statements on oath, under the circumstances of the case.

*Fox*, for the defendants, commented upon the authorities cited, and denied that the doctrine had ever been extended beyond clothing and personal ornaments, unless the case of *Herman* v. *Drinkwater*, 1 Greenl. 27, may be so considered. That was a case of such rascality, that the Court tried to find some law to support the plaintiff's claim; but it should not be made a precedent for any other case.

At a subsequent day in the same term, the opinion of the Court was communicated orally, by

SHEPLEY J. — In which it was said, that the admission of such testimony, as was offered in this case, should be limited to clothing and personal ornaments. It was held, that the testimony of the plaintiff was in this case rightly excluded by the presiding Judge.

Judgment was rendered for the plaintiff for one dollar, as damages, the value of the box.

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

## COUNTY OF YORK.

ARGUED AT APRIL TERM, 1847.

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### INHABITANTS OF SANFORD *versus* INHABITANTS OF LEBANON.

An action by a town, wherein a pauper is found in need of immediate relief, may be maintained, to recover the expenses, incurred, against the town in which his settlement may be, as soon as the town notified has returned an answer, denying that the settlement of the pauper was in their town, and negativing their liability for the expenses, although commenced within two months after notice given.

THIS action was brought to recover the sum of $80,31 for the support of certain paupers, whose settlement was alleged to have been in Lebanon. The notice to Lebanon was delivered on Feb. 27, 1845. On the 18th day of March following, the overseers of the poor of Lebanon delivered a notice to those of Sanford, "denying that the settlement of the paupers was in Lebanon, or that they would make provision for their support." The writ was dated the second day of April of the same year.

At the trial before SHEPLEY J. the defendants thereupon objected, that the action was prematurely commenced, and could not be sustained, it having been brought within two months from the time, that notice was given by the plaintiffs to the defendants, that the paupers in question had become

chargeable. The presiding Judge overruled the objection. If in the opinion of the Court, the objection should have prevailed, the plaintiffs were to become nonsuit; and if the decision of the Court was correct, the action was to stand for trial.

*Appleton*, for the defendants, contended that the defendants were entitled to two months wherein to make examination, and determine whether the settlement of the pauper was in their town or not, and to make settlement, if they chose, without expense. *Belmont* v. *Pittston*, 3 Greenl. 453; *Belfast* v. *Leominster*, 1 Pick. 128.

The returning of an answer within the two months cannot vary the case. The letter, in its terms, contains no waiver, and there can be none by implication. And the overseers had no power to waive any rights of the town. 7 N. H. R. 299; 13 Mass. R. 178; 17 Mass. R. 129; 2 N. H. R. 133. The cause of action did not accrue until the expiration of two months after the notice was sent, and therefore this suit cannot be maintained.

*Paine* and *Kimball*, for the plaintiffs, said that the cause of action accrued immediately upon furnishing the supplies, and the statute does not forbid bringing a suit immediately. If the defendant town chooses to wait until the last moment of the time allowed for making their determination, whether to take the pauper and pay the expenses, or contest the claim, the case cited from the third of Greenleaf might be in point, that the action could not properly be brought before that time. But even that decision can be supported only by the particular language of the stat. 1821, c. 122, § 17. The word "*then*" in that statute, implying that the action could not be commenced until *then*, is omitted in the corresponding section of the Revised Statutes. Rev. Stat. c. 32, § 43.

When the defendants answered the notice, all the preparatory steps were at an end, and the action might then well be brought. 8 Mass. R. 104; 3 Conn. R. 553 and 588.

The opinion of the Court was drawn up by

WHITMAN C. J. — Certain paupers, having become chargeable to the plaintiffs, and they supposing them to have their settlement in the town of Lebanon, notified the overseers of the poor of that town, as by law provided, in order to have the paupers removed and to obtain payment of the expenses of their support; to which the defendants, by their overseers, replied, that the paupers had no settlement in their town, and of course negativing their liability for the expenses incurred. Thereupon, and before the expiration of two months after the notice was given, this action was commenced.

The defendants contend, that the action was prematurely commenced; and whether so or not is the question now raised for our decision. The statute does not in terms require, that such delay should take place. But it is insisted, by the counsel for the defendants, that this Court has decided, that such a rule is deducible from the provisions contained in the Rev. Stat. c. 32. The case cited, and relied upon to establish the point, is that of *Belmont* v. *Pittston*, 3 Greenl. 453. The reasoning of the Court in that case does seem, in its general aspect, to be to that effect. But it does not appear that the Court in that instance had in view the facts as developed in the case before us. The action may have been commenced in that case within the two months after notice, and before any reply had been returned negativing the liability of the defendants. In such case it is manifest, that the Court might well come to the conclusion that it did, for undoubtedly the defendant town is entitled to that space of time, if it sees fit to use it, in making the necessary inquiries to ascertain its liability; and if liable, to remove the pauper and pay the expenses incurred. But if it comes to the conclusion that it is not chargeable, and gives notice accordingly, there is nothing in the statute which could authorize an inference, that the plaintiff town is bound to delay the institution of a suit, to try the question of liability, a moment after receiving a negative reply. There could be no imaginable reason for such delay. It is not conceivable,

that it could be of the slightest benefit to the town sought to be charged. When the reason of a rule ceases the rule itself should cease to operate; and will do so unless positively enjoined by statute or otherwise for the particular case.

The action, as agreed by the parties, must stand for trial upon other grounds.

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JOSEPH G. TOWLE, *Adm'r*, *versus* JAMES LARRABEE.

A promissory note, made on the Lord's day, given and received as the consideration for articles purchased on that day, is void, the act done being in violation of law.

ASSUMPSIT upon a promissory note, dated Feb. 25, 1831, given by the defendant to the intestate, for the sum of fifty dollars and interest.

The defendant, with the general issue, filed a brief statement, wherein he alleged, that the note was made and delivered by the defendant to the plaintiff's intestate on the Lord's day between the midnight preceding and the sunsetting of that day; that the note was given as the consideration for a horse, sold by the intestate to the defendant; and that the contract of sale was entered into and executed, and the horse delivered, on that day, between the hours aforesaid.

The parties agreed, that the facts were truly stated in the brief statement, and submitted the case to the decision of the Court thereupon.

*Jameson*, for the plaintiff, contended that the action could be maintained. Here the consideration for the note was legal. The defendant has had the horse, and has not paid for it. The act only is illegal, and the only penalty is the fine. The contract, being for a good and legal consideration, is binding. Such was the decision of the Court in Massachusetts before the separation, in *Geer* v. *Putnam*, 10 Mass. R. 312. The enactment of the statute in this State in the same words, must be considered as enacting it with the judicial construction

put upon it. That case has been sustained by a later decision. *Clap* v. *Smith*, 16 Pick. 247; See also 1 N. H. Rep. 266; 2 N. H. Rep. 202; 1 Cowan, 76 and note.

*Bourne*, for the defendant, said that he should contend, that the note was void, and that the case of *Geer* v. *Putnam*, which had been relied upon for the plaintiff, was not law. That case was contrary to decisions of the same Court, on the subject of illegal contracts, and to the decisions directly in point in England and in the United States. He cited *Clough* v. *Davis*, 9 N. H. Rep. 500; *Wight* v. *Geer*, 1 Root, 274; *Fox* v. *Abel*, 2 Conn. R. 541; *Kepner* v. *Keefer*, 6 Watts, 231; *Northrup* v. *Foot*, 14 Wend. 248; *Lyon* v. *Strong*, 6 Verm. R. 219; Story on Con. § 121 and note; *Williams* v. *Paul*, 19 Com. L. Rep. 192; *Norton* v. *Powell*, 43 Com. L. Rep. 31; *Smith* v. *Sparrow*, 13 Com. L. Rep. 353; 12 Com. L. Rep. 253; Amer. Jurist No. 26, 381; Amer. Jurist, No. 45, 10, 11.

The principle, that when a statute has once received a judicial construction, it is to be always received as law, has been frequently departed from. Several cases were mentioned, where other decisions understandingly made, were directly opposed. 1 Mass. R. 129, in 4 Greenl. 143; 12 Mass R. 337, in 1 Greenl. 110; 3 Pick. 96, in 8 Pick. 187 and in 6 Greenl. 307; 5 Pick. 120, in 14 Maine R. 348; 9 Mass. R. 496, in 7 Metc. 500; 6 Mass. R. 347, in 23 Maine R. 527.

He contended that there was nothing in the case, *Geer* v. *Putnam*, which entitled it to respect.

The contract of sale was illegal and void, and therefore the note is without consideration and void. Chitty on Con. 419; Long on Sales, 133, 144, 145; 4 S. & R. 159; 1 Binney, 118; 3 B. & C. 232; 5 B. & Cr. 406; 17 Mass. R. 260; 22 Maine R. 488; 14 Maine R. 404; 4 N. H. Rep. 153.

The opinion of the Court was by

SHEPLEY J. — The promissory note, upon which this suit was instituted, was made on the Lord's day, for the purchase money

to be paid for a horse sold and delivered on the same day before sunset.

The statute then provided "that no person or persons whatsoever shall keep open his, her or their shop, warehouse, or workhouse, nor shall upon land or water do any manner of labor, business, or work, works of necessity and charity only excepted," "on the Lord's day, or any part thereof, upon penalty of a sum not exceeding six dollars and sixty-six cents, nor less than four dollars for each offence." Stat. 1821, c. 9, § 2. This language is so explicit, that any doubt of the intention to prohibit trade and business of every description, which could not be a work of necessity or charity, on that day, would seem to be precluded. It is however insisted, that it had received a construction in Massachusetts, which must be presumed to have been adopted by the legislature on its reenactment in this State. Such a rule of construction has been admitted in several decided cases; and if that language had been commented upon and judicially explained, so that the legislature could have known the meaning assigned to any word, or sentence, such rule of construction should be allowed to prevail in this case. But the cases cited do not exhibit any exposition of the meaning of any word, line, or sentence, so that it could have been understood and acted upon by our legislature. The report of the case of *Geer* v. *Putnam*, 10 Mass. R. 312, states, that the plea alleged, that the note was made on the Lord's day, to which there was a demurer. The case came before the court upon a writ of error, and the judgment in favor of the original plaintiff was affirmed. The plea does not appear by the report to have contained any allegation, that the note was made on that day before sunset; and without it, the plea would be bad. The Chief Justice is reported to have said, that he recollected a case, in which the court held a contract made on that day to be good; if such unknown case could be received as an authority here, there is no intimation, that any explanation of the language of the statute was made in it. These cases were the only source of information for our legislature, when the act of February 5, 1821, was passed, and

it is quite obvious, that it could derive therefrom no knowledge of any peculiar meaning engrafted upon any portion of the language by a judicial exposition. Since that time, there has been a decision in the case of *Clap* v. *Smith*, 16 Pick. 247, that the annexation of a schedule of property to complete a sale was not a void act, because done on Sunday. In that case, however, there does not appear to have been any attempt to explain the language of the statute and to show, that it did not prohibit such a transaction; and it cannot therefore operate to convince the judgment of any other tribunal. Several decisions have been made in the English courts upon the construction of the statute of 29 Car. 2, c. 7, respecting the observance of the Lord's day, which provides, that no tradesman, artificer, workman, laborer, or other person whatsoever, shall do or exercise any worldly labor, or business, or work of their *ordinary callings* on Sunday, works of necessity and charity only excepted.

In the case of *Drury* v. *Defontaine*, 1 Taunt. 131, it was decided, that the sale of a horse on Sunday, at private sale, by one whose business it was to sell horses by auction on commission, was not an illegal act, because it was not done within his ordinary calling.

In the case of *Bloxsome* v. *Williams*, 3 B. & C. 232, it was decided, that one, who had bargained for the sale of a horse on Sunday, and who delivered him and received his pay on the following Tuesday, was bound by the contract of warranty.

In the case of *Fennel* v. *Ridler*, 5 B. &. C. 406, it was decided, that one, who in the exercise of his ordinary calling purchased a horse on Sunday, could not maintain an action upon the contract of warranty. Mr. Justice Bayley very properly said, "this statute is entitled to such a construction, as will promote the ends, for which it was passed, that it applies to private as well as public conduct, and that the purchase by the plaintiff was within the mischief intended to be suppressed, and within the words made use of to suppress it."

In the case of *Smith* v. *Sparrow*, 4 Bing. 84, it was decided, that an action for breach of contract in not accepting merchandise sold on Sunday could not be maintained. Best C. J. said, "unless it be permitted to a party to profit by a contract in defiance of the laws of the country, the plaintiff cannot recover."

Statutes of a similar character have been made in several of the United States, and it is believed, that they have received a similar construction, unless that of Massachusetts must be excepted. The statute of New Hampshire appears to have been a copy of the English with the omission of the word, "worldly," and the substitution of the word, "secular," for the word, "ordinary." In the case of *Frost* v. *Hill*, 4 N. H. Rep. 157, Richardson C. J. says, "It will be perceived, that our present statute omits the word "ordinary" and substitutes the word "secular," so that any work, labor, or business, relating to secular concerns, works of necessity and mercy excepted, seems to be within the prohibition of the statute. And it is believed the statute has been so understood always by the community in general, and we cannot doubt, that this was the intention of the legislature."

In Vermont it has been decided, that an action brought upon a warranty made on the sale of a horse on the Lord's day, could not be maintained. *Lyon* v. *Strong*, 6 Verm. R. 219.

In Connecticut contracts made on the Lord's day have been decided to be invalid. *Wight* v. *Geer*, 1 Root, 474; *Fox* v. *Abel*, 2 Conn. R. 584.

In New York, a demand made on that day for the delivery of personal property was held to be inoperative. *Delameter* v. *Miller*, 1 Cow. 75. So an award made and published on that day was held to be void. *Story* v. *Elliot*, 8 Cow. 27.

In the case of *Northrup* v. *Foot*, 14 Wend. 248, it was decided, that an action on the case for deceit in the sale of a horse, made in Connecticut on that day, could not be maintained, it appearing, that the statute of that State provided, that no person or persons shall do any secular business, work, or labor on the Lord's day.

In the case of *Boynton* v. *Page*, 13 Wend. 425, it was decided, that the prohibitions of their own statute were directed against the exposure of commodities to sale on that day, and that they did not extend to mere private contracts; the language of their statute then being, that "no person shall expose to sale any wares, merchandise, fruit, herbs, goods, or chattels on Sunday, except meats, milk, and fish, which may be sold at any time before nine o'clock in the morning."

In Pennsylvania a contract made on the Lord's day was held to be void. *Kepner* v. *Keefer*, 6 Watts, 231.

If the language of the statute of this State be permitted to have a literal and fair exposition, it cannot be denied, that the transaction, upon which this action is founded, was a violation of law. And the law will not assist a party to enforce a contract made in violation of its provisions. There can be no excuse for any attempt to destroy, by a forced construction of the language, the effect of an enactment so suited to enable man to derive the benefit designed to be bestowed upon him by Providence, in the consecration of the Lord's day to the duty of doing good and of seeking endless happiness, in accordance with the precepts of the gospel of our Lord Jesus Christ.

*Plaintiff nonsuit.*

## Oliver Fernald *versus* Hiram W. Dawley.

Where the form of a note is that of a joint and several promissory note, and it is signed by three persons, the two first in order merely affixing their signatures, and the third adding to his the word *surety*, it is competent for the second signer, in an action against the third for contribution as a co-surety, to show by parol evidence, that the first signer was the principal, and that the other two were sureties.

And if such second signer places his name upon the note at the request of the first and as his surety, and it is then taken by the first signer and carried away, and afterwards delivered by him to the payee with the additional signature of the third, with the word surety attached thereto, the second signer may prove by parol, in such action, that the third, when he signed the note, understood that he signed as surety for the first signer only and not for both, and that he knew that the second signer was but a surety.

This case came before the Court on the following exceptions: —

"This is an action of assumpsit for contribution of an alleged co-surety. The plaintiff, to sustain the issue on his part, introduced a note of which the following is a copy: —

"For value received we jointly and severally promise to pay the President Directors and Company of the Rochester Bank, or order, two hundred dollars in sixty days and grace.

"1844, December 16th. "Jas. H. Clark,
"Oliver Fernald,
"H. W. Dawley, Surety."

"On which had been paid by James H. Clark $60, and on January 5, 1846, by Oliver Fernald, the plaintiff, $143,07. The plaintiff introduced the testimony of John McDuffee, jr. cashier of said Bank, who swore that the above note was discounted by the Bank on the day of its date. That $80 of the money was applied to pay and take up a note of said Clark to the Bank, signed by himself, Samuel W. Fox and John Moore, and the balance, discount out, being $117,90 was paid over to said Clark; that the sum of sixty dollars had been paid on the note by Clark, and the balance, $143,07, was paid to the Bank by the plaintiff on the 5th of January, 1846. That it was the custom of the Bank to require two sureties to a note, and that in a majority of notes taken at the Bank,

there was no addition to the names of signers distinguishing between the principals and sureties. The $143,07 was paid by Fernald after Clark's decease, he leaving no property, upon being called upon by the Bank.

"Thomas Shapleigh swore that some time about the date of this note, Oliver Fernald was in his store, at Great Falls, and James H. Clark came in and asked Mr. Fernald if he would lend him his name. Fernald was reluctant, said he did not like to do such business, finally he signed it. The note he signed, was like the one herein; it was for two hundred dollars. After Fernald signed it, Mr. Clark went out of the store, taking the note with him. It was also proved by Jordan, defendant's attorney, that he believed it was the signature of H. W. Dawley to the note.

"Upon this evidence the Court instructed the jury, that it would be proper for them to determine, whether the note spoken of by Thos. Shapleigh was the same that was discounted at the Bank, (a copy of which is in this case); and that they might infer, that it was, from the amount, date, &c. there being no evidence of any note of like sum, and payable to the Bank; and if they found the note the same, and that Fernald signed it as surety, they might infer from all the circumstances, Clark being the first signer, leaving Fernald with the note, the custom of the Bank, and the use that was made of it; that Dawley understood, when he signed it, that he was signing as surety for Clark *alone*, and not for Clark and Fernald, and that Fernald was only surety. If they considered it reasonable so to conclude, the plaintiff might be entitled to recover one half of the sum of $143,07, and interest from the date of the writ.

"The Jury returned a verdict for the plaintiff for the amount of $73,49, damages.

"To this instruction the defendant excepts, upon the ground that the whole evidence was insufficient, and prays that the exceptions may be allowed by the Court.

"Ichabod G. Jordan, Defendant's Attorney.

"By N. D. Appleton."

The exceptions were allowed and signed by Goodenow, District Judge, presiding at the trial.

*Appleton*, for the defendant, contended that it appeared upon the face of the note, that the defendant signed it as surety for the plaintiff and Clark. 21 Pick. 195. The charge of the Judge, that the jury might infer that the defendant knew, that Fernald signed as surety is erroneous.

On the note itself it appears, that Dawley, the defendant, signed as surety for all the preceding signers. The plaintiff cannot deny the fact, and prove it to be otherwise by parol evidence. 9 Metc. 511; 4 N. H. Rep. 124; 3 Wend. 397; 8 Taunt. 837.

*W. A. Hayes*, for the plaintiff, said that the parties to a note, as between each other, were always at liberty to prove the true relation in which they stood; to show who was actually a principal, and who was a surety. And such were the decisions in the cases cited for the defendant. *Warner* v. *Price*, 3 Wend. 397; 9 Metc. 511; 21 Pick. 195; 12 Mass. R. 102; 4 N. H. Rep. 221.

And it was the province of the jury to decide upon the effect of the evidence.

The opinion of the Court was drawn up by

Whitman C. J. — This is an action, on the part of the plaintiff as surety, against the defendant, as his co-surety, for a contribution of a moiety of what he had paid for their principal. Exception was taken at the trial, of a character somewhat indistinct and novel. It purports to be to the charge of the Judge to the jury, "upon the ground, that the whole evidence was insufficient;" it is not stated wherein it was so, whether to entitle the plaintiff to recover, or to authorize the Judge to submit the cause to the jury, with instruction that they might find for the plaintiff. If the former, it formed no ground for exception. It was not matter of law, but of fact, within the exclusive province of the jury for decision. If the latter, it should appear, that there was no evidence from which the jury could reasonably infer the facts necessary to entitle

the plaintiff to recover. But it is apparent that there were acts in the case tending to raise the presumption, that the defendant might have understood, at the time of affixing his signature, that the plaintiff was but a co-surety. It was evident that Clark brought the note to Fernald, and induced him to sign it for his, Clark's, accommodation; that Clark thereupon took the note, and carried it away, and, before it was discounted at the Bank, it appears that the defendant must have added his signature to it. It may well be presumed, therefore, that Clark alone presented it to him for his signature; and, being made payable to the Bank, it was apparent it was to be there negotiated for the benefit of Clark, or of Clark and Fernald, and as Fernald did not request his signature and Clark did, the presumption might well be, that it was for Clark's accommodation. Again it can scarcely be presumable, that he should put his name to a note without ascertaining what the object of it was; and this presumption may be entertained more readily as Clark has deceased, so that his testimony, for any thing more decisive, cannot be had.

But it is not clear that the instruction was not quite too favorable for the defendant. In *Warner* v. *Price & al.* 3 Wend. 397, SAVAGE C. J. remarked, that the plaintiff, upon its appearing that all but the first signer had put their names to the note in suit in that case as sureties, they must all be regarded as co-sureties, "unless a state of facts be shown to the Court from which it shall appear positively, or by legal intendment, that the defendants intended, as to the subsequent signers, to stand in the character of principals." This was a case like the one at bar, in which it appeared, that the plaintiff had signed as surety, when all the others, so far as indicated by the note itself, were principals. No such positive evidence or legal intendment is to be found in the case at bar, except such as arises from the manner in which the names appear upon the note; and this the Chief Justice did not consider of any force, after it appeared in fact that the previous signers, with the exception of the first, were but as sureties.

It was argued by the counsel for the defendant, that the

ruling of the Court, that the plaintiff, notwithstanding it does not appear on the note that he signed as surety, might show by parol evidence, that he was in fact but a surety, was erroneous. But the exception can scarcely be deemed to embrace such a point; it is to the sufficiency of the evidence; not to the admission of it. But if the exception could be considered as embracing such a point, it is far from being clear, that it could have prevailed. Nothing is more common in legal proceedings, than for one, who may have signed a note with another, without naming himself as surety, to be allowed to show, that he was such, whenever it becomes necessary to have a remedy against his principal for money paid thereon for him. And by parity of reasoning it is evident, that the same may be done against a co-surety in a suit for a contribution; and the authorities, are fully to the effect that he may do so. *Warner* v. *Price & al.* before cited; *Bank* v. *Kent*, 4. N. H. Rep. 241; *Carpenter* v. *King*, 9 Metc. 511; *McGee* v. *Prouty*, *ib.* 547.

*Exceptions overruled.*

JOHN S. JENNESS & *al. versus* JOHN LANE & *al.*

If the holder of a note, then due and payable, take a new note for a less sum, whereon the same person only is liable, payable in thirty days, and agree, that if the smaller note shall be paid at maturity, the maker shall be discharged from his liability on the larger one, the contract cannot be enforced for want of consideration; but should another person be also liable on the smaller note, as indorser thereof, the contract would have sufficient consideration to support it, and would be binding.

Where such contract is made for a sufficient consideration, and is a valid contract, still it does not of itself, at the time it is made, operate as a payment of the larger note, or discharge the payee from his liability thereon; but to make out a defence to a suit upon that note, it must be made to appear, that the smaller note was paid, or payment thereof tendered, at the time it became payable, or that payment was prevented by the wrong of the holder, or that he has adopted the new note in discharge of the old one.

Such payment *at the time the new note became payable*, is not waived or excused, if the holder, being the whole time an inhabitant of another State, takes the new note with him to his place of residence; nor if he omits to make a demand and notify the indorser; nor if he does not notify the payee, that he elects to rely on payment of the old note; nor if he omits to return or offer the new note to the payee, until the time of trial.

ASSUMPSIT on a note dated at Bangor, Jan. 29, 1839, for $202, payable at the Suffolk Bank, Boston, in sixty days, given by the defendants, Lane & Sandford, to Joshua Lane, or order, and by him indorsed to the plaintiffs, Jenness & Lane.

At the trial before SHEPLEY J. the defendants offered in evidence a receipt, a copy of which follows: —

"Bangor, Aug. 22, 1840. Received of John Lane his note for fifty-three dollars twenty-seven cents, indorsed D. Mossman, dated this day, at thirty days; now it is agreed, that if this note is paid at maturity, the said Lane is to be discharged from his liability on note to Jenness & Lane dated Jan. 29, 1839, for two hundred dollars at sixty days.

"John S. Jenness, for late firm of Jenness & Lane."

The defendants also introduced the depositions of Hollis Bowman and David Mossman. The contents of these depositions sufficiently appear in the opinion of the Court.

Mossman was never notified as indorser of the note for

$53,27, mentioned in the receipt, and at the trial, this note was produced by the plaintiffs, and filed in the case. On Jan. 22, 1845, at Bangor, John Lane tendered to John S. Jenness, one of the plaintiffs, whose residence was at Boston, but who was then at Bangor, a sum of money, said by him to be $68,43, in payment "of a note to Mr. Jenness," for $53,27. Lane asked Jenness, if he would count the money, and he replied that he would not, and, in the language of the witness, "Jenness refused to receive the money, and said he had no such note against Mr. Lane." There was no other evidence as to what had been done with that note.

The presiding Judge ruled, that upon the evidence, which was all on paper, a defence was not made out. A default was then entered by consent, to be taken off, if in the opinion of the Court the ruling was erroneous.

*Bourne* argued for the defendants.

1. The compromise of the note in suit, if the defendants were insolvent, by giving a negotiable security with a good and sufficient indorser, was a valid contract, binding on the plaintiffs, and founded on a good consideration. 11 East, 390; 8 Taunt. 277; 2 Maule & S. 121; *Boyd* v. *Hitchcock*, 20 Johns. R. 76; *Colburn* v. *Gould*, 1 N. H. Rep. 279; *Brooks* v. *White*, 2 Metc. 283; *Brown* v. *Stackpole*, 9 N. H. Rep. 478.

2. The defendants have the right to prove by parol testimony, that the compromise note was payable in Bangor. The presumption is, that the maker contemplated paying the note where it is dated, no other place being stated. 3 Kent, 96; 4 Johns. R. 288; 1 Peters, 89; 4 Law Reporter, 68.

3. If the plaintiffs carried the compromise note out of the State, the defendants were not bound to pursue them there to tender the amount; and in such case no tender is necessary. 5 Bac. Abr. 6; 1 Co. Lit. 210; 2 M. & S. 120; 6 Wharton, 331; Chitty on Con. 728, note; 9 Wheat. 598; 6 Metc. 290; 8 N. H. Rep. 413.

4. If so carried out of the State, the readiness to pay the note at Bangor, on the day of its maturity, is equivalent to a

tender; and the tender of debt and interest to Jenness the first time he came into the State is equivalent to a tender on the day of its maturity, and an estoppel to any suit on the original note. *Otis* v. *Barton*, 10 N. H. Rep. 433; *McKenny* v. *Whipple*, 21 Maine R. 98; 2 Saund. 48; Jacob's Law Dic. Bond; 2 M. & S. 120; *Brinley* v. *Tibbets*, 7 Greenl. 70; *Brown* v. *Stackpole*, 9 N. H. Rep. 478; Willes, 108; 17 Maine R. 45; 18 Maine R. 55; Cro. Eliz. 755.

5. The keeping of the compromise note, after arriving at maturity, and from that time to the time of trial, more than six years, without notifying the defendant of a repudiation or rescinding of the compromise contract, is presumptive evidence, either of a waiver as to the time of payment, or of a determination to abide still by the compromise contract. 6 Hammond, 171; *Coolidge* v. *Brigham*, 1 Metc. 547; Long on Sales, 239; *Ayers* v. *Hewett*, 19 Maine R. 281; *Cushman* v. *Marshall*, 19 Maine R. 122; 5 S. & R. 323; *Roberts* v. *Marston*, 20 Maine R. 275; 4 B. & Cr. 513; 5 Johns. R. 71; 9 Metc. 42.

6. The transferring of the compromise note at any time after maturity, is such a user of it, as to determine the election of the plaintiffs to look to that note for their pay. *Harris* v. *Johnson*, 3 Cranch, 318; 5 T. R. 513; *Chase* v. *Bradley*, 17 Maine R. 89.

7. If the plaintiff did any act to prevent the defendants from paying the note at maturity, such prevention excuses payment till removed. *Borden* v. *Borden*, 5 Mass. R. 67; *Williams* v. *Bank U. S.* 2 Peters, 102.

8. The plaintiffs, having taken a negotiable security in satisfaction of their debt, were bound to demand the same of the acceptor, or indorser, and to exhaust the remedies provided for them by the compromise note before they could be remitted to their original demand. 8 Taunt. 277; 1 Cranch, 181; 3 Johns. R. 230; 1 Cowen, 713; 23 Wend. 346; 7 N. H. Rep. 205; 11 East, 390; 9 N. H. Rep. 478.

9. To avoid circuity of action the payment of the compromise note is a discharge from the original note. *Trevet* v. *Aggas*, Willes, 108.

*Appleton*, for the plaintiff, said that the most that could be made of the case for the defendant was an accord without satisfaction; and that is no extinguishment of the original contract. Chitty on Con. 760; Com. Dig. Accord. B. 4; 2 M. & S. 121; 5 N. H. Rep. 136; 9 Coke, 79; 2 H. Bl. 317; 5 Pick. 44; 17 Mass. R. 583. And the payment should have been made at the time. Even the payment of a lesser sum after the time, would not extinguish the original contract. 5 East, 230; 5 Metc. 283; 2 Johns. R. 448; 3 N. H. Rep. 518; 4 Greenl. 428.

The payment of the fifty-three dollar note, at the time it became payable, was a condition precedent, and the contract must have been strictly performed, in order that it should furnish any defence.

As no place of payment was mentioned in the note, it was to be paid at the place of residence of the payee. 24 Pick. 168; 8 N. H. Rep. 413; 10 N. H. Rep. 433. The tender, therefore, at Bangor, if it had been legally made and in due time, would not have aided the defendants.

But there is no proof of any legal tender at any time or place. 5 N. H. Rep. 440.

The note was of no value whatever, after the time of payment had elapsed, and no payment, or offer of payment, had been made. It was soon enough to have delivered it when demanded, or to produce it at the trial. 8 Metc. 227.

It is needless to inquire, what would have been the effect of negotiating the note, as it was never negotiated.

The opinion of the Court was drawn up by

TENNEY J. — On August 22, 1840, the plaintiffs, residing in Boston, held the note of the defendants, indorsed by one Joshua Lane, for the sum of $202, payable at the Suffolk Bank in Boston, which had long been overdue; on that day a note was received by one of the plaintiffs, in the following terms, viz: — "Bangor, Me. Aug. 22, 1840. Thirty days after date, value received I promise to pay to the order of D. Mossman & Co. 53, and $\frac{27}{100}$ dollars," signed by one of the de-

fendants and indorsed by David Mossman & Co. and at the same time it was agreed in writing on the part of the plaintiffs, that if the new note should be paid at maturity, the signer thereof should be discharged from his liability on the other note. No evidence was offered of any agreement, that payment of the latter note should be made at a place different from that fixed by law, arising from its terms; though Mossman testified, that he considered such a note payable at the place of its date. It does not appear, that the defendants made any attempt to pay the new note, when it became payable, or were in readiness so to do, if called upon; one of the firm, however, who indorsed it, testified, that he was not notified of its dishonor, but if he had been so notified, he should have paid it. Evidence was introduced, of a tender of specie, made by the maker of the last note, at Bangor, on January 22, 1845, to take it up, declared by him to be a sum, which was equal to the principal and interest, to one of the plaintiffs, who refused to receive or to count it, saying he had no such note. The present suit is brought upon the note first given by the defendants, and they contend that the suit cannot be maintained.

The last note, though for a sum less than that, for which the defendants were previously holden, was against another party; and the contract modifying the time of payment and the amount to be paid, upon the performance of a condition, was upon sufficient consideration, and binding according to its import. The agreement of the plaintiff, that if the defendants should pay a sum of money less than that then due, in thirty days, he should be discharged from further liability, and nothing further was contained in the contract, it could not be enforced against the plaintiffs, there being no consideration therefor. It was necessary, therefore, that there should be some promise or contract from the other party, to render the plaintiff's conditional promise binding. The purpose of the maker of the new note was to obtain the other at a discount, and his own conditional promise alone, created no legal obligation in the plaintiffs, inasmuch as they then had the absolute

promise of him and others for a greater sum; but the obtaining a party not before liable would give validity to the plaintiffs' contract, and the form of a note, it seems, was adopted to carry into effect, in a legal manner, the intention of those interested in the arrangement.

It cannot be, and is not contended, that the agreement entered into on Aug. 22, 1840, of itself discharged the defendants from their previous indebtedness. The former note was outstanding and the maker of the new note was still liable on his original promise, the obligation of which would cease only by the payment of the new note, or by some act of the plaintiffs, which would substitute it for their former claim. To make out the defence, it must be shown, that the condition in the agreement of the 22d Aug. 1840, was performed, or that its performance was prevented by the wrong of the plaintiffs, or that they have adopted the new note in discharge of the old note. It is not contended that John Lane paid his note on the 22d of Aug. 1840, but it is insisted, that the facts, that it was carried out of the State, and that one of the firm, who indorsed it would have paid it at maturity, if he had been notified of its dishonor by the maker, were equivalent to a tender on the day of payment.

"All debts between the original parties are payable everywhere unless some special provision to the contrary be made; and therefore the rule is, that debts have no *situs* but accompany the creditor everywhere." "A negotiable note made payable generally, without any specification of place, is a contract to pay at any place, where it is negotiated, so as to be deemed a contract of that place and governed by its laws." It creates a debt payable any where by the very nature of the contract, and it is a promise to whomsoever shall be the holder. Story's Con. Laws, § 317; *Braynard* v. *Marshall*, 8 Pick. 194.

The firm whose name is upon the note of 22d of August, 1840, cannot be regarded as original promisors upon it, but are indorsers and only conditionally liable. If the plaintiffs had wished to avail themselves of the new contract, they could have done so against all the parties, whether maker or

indorsers, or against the one or the other. The indorsers were discharged from all liability by the omission to make a demand upon the maker, and give notice of the dishonor to them; they have no cause of complaint for this omission as they have suffered and can suffer nothing thereby. The liability of the maker was not affected by the discharge of the indorsers to his prejudice. The plaintiffs therefore were under no obligation to take the steps to render the indorsers' liability absolute. If the evidence authorized the conclusion, that the indorsers were in readiness to pay the note at maturity, had they received notice of its non-payment, there is nothing showing that this was by the maker's procurement, and could not avail him in his defence, even if the note was improperly carried out of the State. But the case finds, that the residence of the plaintiffs was in Boston, where the first note was payable, and it was there that it must have been expected to be paid. It cannot be well doubted from the terms used in the new note and agreement, and the omission therein of any specific place of payment, that the new note would be carried by the one who received it to Boston, whenever he should go there, and that it was so understood by both parties; indeed the only proof that it was in fact carried out of the State is an inference from the evidence, that the plaintiffs resided in Boston, for there is no direct evidence upon the point. If the plaintiffs had taken the note of the 22d August, 1840, in discharge of the former, instead of annexing to its receipt a condition, and a suit had been brought thereon, after its maturity, against the maker, no fact introduced in evidence here could have operated as a defence to such suit; the note being in Boston at its maturity, and the indorsers, whom the plaintiffs took no measures to hold liable, being ready and willing to pay the note had they been notified, that the maker had failed to make payment on demand, could not have prevented a recovery. Consequently the same facts, do not dispense with the necessity of a literal fulfilment of the condition, or a legal offer to do so, at the time specified in the agreement of August 22d, 1840.

It is insisted, that the failure of the plaintiffs to notify the defendants, that they should rely upon the old note, raises a presumption, that he waived the time of payment of the new note; or that he elected to abide by the new arrangement. The agreement of Aug. 22, 1840, was executory. Either party could take the steps necessary to carry it into effect. If nothing was done by either to make it available, it ceased to be operative, and both would be restored to the condition in which they were previously. The maker of the note could have made payment at the time mentioned, or made a tender of the amount, and kept it good, and his former liability would be discharged. The plaintiffs, could have substituted the new for the old note, if they had preferred to have done so. The defendants' liability on the old note could be discharged at their option only by the payment of the new note, at maturity, or the entire payment of the other before the trial of the action brought thereon. The original liability was to cease, not upon the failure of the plaintiffs to give notice, that they should rely on the first note, but solely upon the fulfilment of the condition in the new contract. And unless this condition was literally performed, all right to enforce payment of the old note was restored. It was still at the election of the plaintiffs to rely upon the new note, notwithstanding the maker thereof could not compel them to do so. There is no evidence in the case tending to show, that they had made the election to make absolutely the substitution, but the omission to secure the liability of the indorsers, is some evidence of a contrary intention.

If the plaintiffs had actually transferred the note last received, it might have been an adoption thereof, and a discharge of the maker's former indebtedness; but there is no evidence of such transfer; the only proof relied upon, on this point, is the refusal of one of the plaintiffs to receive the money tendered in January, 1845, with the declaration that he had no such note; this declaration might have been evidence of various intentions of the one who made it, but could not have

been sufficient to present the question to the jury, whether the note referred to, had been adopted and sold to another.

It is contended that negotiable security, having been taken by the plaintiffs, which was to be satisfaction of the debt, if paid, imposed upon the plaintiffs the duty of taking steps to hold the indorsers, before they could resort to an action upon the original claim; and that this was necessary also to prevent circuity of action. If the plaintiffs had received as collateral security, a note which was valuable to the other party, it would have been incumbent on them, to take all the measures necessary to prevent a discharge of the parties, who could be liable to the one, from whom they received it. But this is not required, when the defendants could in no manner be prejudiced by the omission. We have seen that a demand upon the maker, and notice to the indorsers of the note of Aug. 22, 1840, could not have benefitted the maker in any event, and the law requires no useless ceremony. Neither was it necessary for the plaintiffs to return the new note, before the action upon the former was commenced; its retention by them gave them no advantage, nor was it injurious to the maker of it. It was filed in Court, after a tender to him, which prevents any exposure to risk, that he may be called upon by a stranger to this suit for payment. *Thurston* v. *Blanchard*, 22 Pick. 18; *Ayers* v. *Hewett*, 19 Maine R. 281.

No evidence was adduced, showing any neglect of duty in the plaintiffs, or any act of theirs injurious to the defendants, which could create a liability; and there can be no circuity of action, when one party only is exposed to a suit.

*Default to stand.*

JAMES BUTLER *versus* NATHANIEL STEVENS.

If a prior grantee, whose deed is unrecorded, would maintain his title against a grantee under a deed, made afterwards, but recorded first, the burthen of proof is on him to show, that the grantee whose deed was first recorded had, in the language of Rev. Stat. c. 91, § 26, "*actual notice*," of the existence of the unrecorded deed.

If there be a change in the possession of real estate, if one leaves it, and another takes actual possession and occupies it exclusively in pursuance of a conveyance thereof in fee, though his deed be unrecorded, a conveyance to a third person by the same grantor will be inoperative against the former deed.

But if a man conveys his estate in fee, and the grantee immediately enters upon the estate, and there continues, and duly records his deed, although the grantor remains on the estate with his grantee, and even continues his labors thereon, as before his conveyance; no one is bound to infer therefrom, that he has in his possession a deed of re-conveyance; and especially, when the entry of his grantee was simultaneous with the execution of the conveyance.

In an action upon a mortgage, demanding the land, where it appeared that the tenant had given an absolute deed in fee of the premises, which was recorded, and at the same time took back a mortgage deed, to secure the support of himself, his wife and daughter, during their lives, which remained unrecorded; and the mortgagor afterwards made a second mortgage to a third person, to secure the re-payment of money loaned, which was immediately recorded; *it was held*, that information, given by a third person to the second mortgagee, prior to his taking his mortgage, that the mortgagor "was going to N. (the place where the first mortgagee resided,) and was going to have property worth six or seven hundred dollars by taking care of his wife's father and mother," was not sufficient notice, to give priority to such unrecorded mortgage.

WRIT OF ENTRY, declaring upon a mortgage of land in Newfield.

Nathaniel Stevens, the tenant, was admitted to have been once the owner of the demanded premises. At the trial before SHEPLEY J. it appeared in evidence on the part of the demandant, that Stevens, on Feb. 11, 1839, conveyed the demanded premises to Edwin Brown, by an absolute deed; that on Feb. 21, 1840, Brown made a mortgage of the same premises to Rowe, to secure the payment of certain notes; that on March 2, 1842, Rowe assigned the mortgage and notes to C. N. Cogswell; that on Feb. 19, 1845, Cogswell

having deceased, his administrator assigned the mortgage and notes to the demandant. The deed of Stevens to Brown, was recorded February 21, 1840; and the mortgage from Brown to Rowe was recorded Feb. 21, 1840, the day of its date, and was witnessed by the register of deeds.

The tenant, on his part, introduced a mortgage of the premises from Brown to himself, bearing date the day of his deed to Brown, Feb. 11, 1839, to secure the maintenance of himself and his wife and daughter during their lives; but this mortgage was not recorded until Feb. 24, 1842. Brown died Feb. 20, 1842, before the recording of his mortgage to Stevens. The tenant proved by a brother of Brown, that the witness, with his brother, was at the house of Rowe, the mortgagee, in Feb. 1839, to obtain of him a loan of money for Edwin, and that the witness there stated to Rowe, that his "brother was going up to Newfield, and was going to have property worth six or seven hundred dollars by taking care of his wife's father and mother, and described to him the property, and that they had been up and made the writings." Edwin Brown married a daughter of Stevens, the money was obtained, and a note was given therefor, signed by Edwin Brown, as principal, and by the witness and Butler, the demandant, as his sureties, and a mortgage given to secure it. The same witness testified, that Edwin Brown "moved from Dover on to the farm in Newfield about the middle of March, 1839, and lived in the same house with the tenant about three years, they all eating at the same table." Another witness testified, that in March, 1842, the witness, Brown, "asked the demandant, if he knew there was a life lease or a mortgage of the farm, that should have been on record, and he said yes, he knew all about it." An additional witness testified, that "he had resided within half a mile of the tenant for many years; that Stevens had always lived on the farm, and had exclusive possession of it ever since he knew him, that Edwin Brown lived on the farm about three years, commencing in the winter of 1838–9; that he lived there with him; and that so far as he saw, the tenant's family relations continued to be as before."

The tenant was then defaulted by consent, and it was agreed, that if in the opinion of the Court the demandant was entitled to recover, judgment was to be rendered in his favor; and that if he was not, that the default was to be taken off, and a nonsuit entered.

*Clifford*, for the tenant, said that the mortgage from Brown to the tenant was recorded before the assignment of Rowe's mortgage to Cogswell was made, and therefore that he and the demandant had record notice of its existence before they took an assignment.

The notice to Rowe from the oral proof is full and explicit.

No one will deny the principle, that a deed duly recorded is good against a prior unregistered deed, if the second purchaser has no notice, express or implied, of the first conveyance. 2 Mass. R. 506; 5 Mass. R. 438; 16 Mass. R. 406; 3 Pick. 52; 22 Pick. 542.

But if a second purchaser or attaching creditor have notice, express or implied, of the previous conveyance, no title passes by the second deed, and none can be acquired by an attachment. *Priest* v. *Rice*, 1 Pick. 164; *Adams* v. *Cuddy*, 13 Pick. 460; *McMechan* v. *Griffin*, 3 Pick. 149. And the notice is sufficient, if it be such as men usually act upon in the ordinary affairs of life. *Curtis* v. *Mundy*, 3 Metc. 405. Evidence that the tenant cut wood on uninclosed woodland is competent to prove constructive notice, that the tenant held under an unrecorded deed of the land. *Kendall* v. *Lawrence*, 22 Pick. 540. Knowledge that another has claim to land, is enough to put the party on inquiry, and charge him with presumptive notice. *Jackson* v. *Cadwell*, 1 Cowen, 622. The same principles have been adopted in our State and extended to mortgages on personal property. *Sawyer* v. *Pennell*, 19 Maine R. 167. A few cases are added from other States. 4 N. H. Rep. 397; 1 Whart. 303; 8 Verm. R. 373; 1 Ham. 264; 12 Johns. R. 452; 8 Johns. R. 137; 9 Johns. R. 163; 10 Johns. R. 457 and 466. Here the facts were examined by the counsel, and the conclusion drawn, that there was no change of possession, or in the family arrangements. The

principles of law applicable to the case are stated with great clearness and precision in the case of *Matthews* v. *Demerit*, 22 Maine R. 316. In that opinion the case of *Webster* v. *Maddox*, 6 Greenl. 256, is cited with marked approbation. The latter case, 6 Greenl. 256, cannot be distinguished from this. In all its essential elements it is precisely like the present. There is no distinction between an attachment and a conveyance. *Nason* v. *Grant*, 21 Maine R. 160.

The words "actual notice," in the Revised Statutes, was only intended to confirm the decisions made under the statute of 1821. 3 Metc. 406.

It is not necessary, that there should be precise knowledge of the deed, or that there should be notice given of it. It is sufficient notice, if it reasonably aught to put the party on inquiry, and which by ordinary diligence would lead to a discovery of the fact. 4 Kent, 168 to 172; 3 Pick. 149.

The following additional authorities are cited. — 2 Verm. R. 544; 3 Verm. R. 255; *Clark* v. *Jenkins*, 5 Pick. 280; *Jackson* v. *Page*, 4 Wend. 585; 6 Verm. R. 411; 6 Halst. 385; 1 Root, 388.

*Hayes* argued for the demandant, commencing with the remark, that no conveyance could "be good and effectual against any person, other than the grantor, his heirs and devisees, *and persons having actual notice thereof*, unless it is made by deed recorded" in manner required by the statute. Rev. St. c. 91, § 26.

In the present case Stevens neglected to record his deed; and therefore it is not good against the deed of Edwin Brown to Rowe, unless it appears from the facts stated in the case that Rowe had *actual notice* of the unrecorded deed of Brown to Stevens.

It is admitted, that it has been decided that actual notice does not require positive and certain knowledge, such as seeing the deed, but that it is sufficient notice, if it be such as men usually act upon in the ordinary affairs of life. *Curtis v. Mundy*, 3 Metc. 405.

This notice may be express or implied. To make out ex-

press notice the proof must be clear and unequivocal. There is no pretence, that Rowe had express notice. The only subject of inquiry is, whether notice to Rowe of the unrecorded deed of Brown to Stevens can be implied from the testimony introduced at the trial, and which appears in the report of the case.

It is immaterial whether Butler, the demandant, knew of Stevens' deed or not. The tenant, to prevail, must prove notice to Rowe. If Rowe had a good title, he conveyed it to Cogswell, and Cogswell's administrator to the demandant. 1 Story's Equity Jurisprudence, § 409.

The counsel for the demandant here entered into a critical examination of the testimony; and contended, that no notice of Stevens' unrecorded mortgage was given to Rowe, or could reasonably be suspected by him to have been in existence, when he took his mortgage from Brown.

In all the cases where possession has been held to give implied notice of a conveyance, the Courts have held, that the possession must be open and exclusive. *Norcross* v. *Widgery*, 2 Mass. R. 506; 2 Verm. R. 547. The case of *Webster* v. *Maddox*, 6 Greenl. 256, mainly relied upon for the tenant, differs from the present case in the most essential particular. There, Bean was never in possession for a moment. Here, Brown entered under his deed, and continued in the occupation for three years and to the time of death.

The possession of the grantor jointly with the grantee is not sufficient notice of the unrecorded deed. 2 Hilliard's Abr. 430; 2 Verm. R. 544; 2 Aiken, 235.

The secresy attending a want of registration is itself a badge of fraud. Hilliard's Abr. c. 89, § 43; 3 Mass. R. 581; 3 Pick. 155.

The notice of an unrecorded deed, whether express or implied, must be clearly proved. 6 Watts & S. 469; 3 Pick. 155.

The opinion of the Court was by

WHITMAN C. J. — A default has been entered in this case, under an agreement, if the plaintiff is not entitled to recover

upon the facts reported by the Judge who presided at the trial, that the default shall be taken off, and a nonsuit entered. The plaintiff claims as the assignee of a mortgage, made by Edwin Brown to one Rowe, and assignment thereof to him; and a deed in fee by the defendant to said Brown, duly recorded. This makes out a *prima facie* case for the plaintiff.

The defendant then exhibited a mortgage of the premises from said Brown to him, and executed before the one made to Rowe, but not recorded till about two years after that conveyance. The defendant insists that Rowe, at the time he took his deed, must be regarded as having had notice of the existence of the one to the defendant. To establish this the burthen of proof is on the defendant. He must show, in the language of the Rev. St. c. 91, § 26, that Rowe had "actual notice" of the existence of the deed to him. It is not pretended that he ever received any explicit communication from any one of the existence of such a fact; but that he was bound to have inferred it from facts that did come to his knowledge; and therefore that he must be regarded as having had "actual notice" of it.

In the first place it is urged, that what was said to Rowe, at the time he made the loan and took his mortgage as collateral security, should have indicated to him, that the defendant had not conveyed his estate to Edwin Brown, without taking back a mortgage as security for the maintenance of himself and wife. The language used upon that occasion, and by way of inducing Rowe to make the loan, was, that Edwin "was going up to Newfield, and was going to have property worth 6 or 700 dollars by taking care of his wife's father and mother." It is said in argument, by the counsel for the defendant, that the practice is such throughout the country, that Rowe could but have known that Edwin must have given the defendant security by mortgage to comply with the terms upon which he was to receive a conveyance of the estate. This argument assumes a fact not contained in the Judge's report, to wit, the general practice throughout the

country; and it is denied by the opposing counsel, that there is any such practice. We are not authorized, therefore, to admit the premises, and of course the conclusion fails. The statement to Rowe was not of a character to indicate to him such an incumbrance. A loan was applied for, and the mortgage was recommended as being ample security for the amount wanted. No intimation was given him that the estate was or would be otherwise incumbered. This, therefore, was very far from being actual notice to Rowe, that the estate was incumbered, or was to be incumbered with a mortgage, not only conditioned for the support of the parents, but for the support of a third person, wholly unknown to Rowe.

It is next contended, that the defendant went into possession under his mortgage, and continued to occupy the estate, as he had done before he conveyed it to Edwin. If there be such a change in the possession of real estate, if the one leaves it, and another takes actual possession and occupies it exclusively, in pursuance of a conveyance thereof in fee, though unrecorded, a conveyance to a third person by the same grantor will be inoperative against the former deed. But if a man conveys his estate in fee, and the grantee immediately enters upon the estate, and there continues, and duly records his deed, although the grantor remains on the estate with his grantee; and even continues his labors thereon as before his conveyance, is any one bound to infer, that he has in his possession a deed of reconveyance; especially, when the entry of his grantee was simultaneous with the execution of his conveyance? There is no precedent or dictum authorizing such an inference; nor would such an inference be reasonable. Much less could it be reasonable to infer, that a mortgage like the one in question had been taken back, and was in the possession of the grantor, and unrecorded. We think, therefore, that Rowe became seized under his mortgage; and his estate having been transmitted, by assignments to the plaintiff, that he has a right to a judgment as on mortgage upon the default.

## Francis Bacon *versus* York County Commissioners.

The returns of the votes by the selectmen and town clerk, made and returned in manner provided by law, are the only evidence from which it is to be determined what person, if any, has been chosen register of deeds, under Rev. Stat. c. 11. The County Commissioners, therefore, have no power to go beyond the returns of the selectmen and town clerks, and receive other evidence, and from that decide, that one of the town meetings was illegally called, and for that cause reject the votes of such town.

At an adjournment of the November Term of the Supreme Judicial Court for the county of Cumberland, 1846.

*G. F. Shepley*, for Francis Bacon, presented a petition for a *mandamus* to the county commissioners of the county of York, and moved for an order of notice thereon, returnable at the next April Term of this Court in the county of York.

A copy of the petition and order of the Court thereupon follows: —

"To the Honorable Justices of the Supreme Judicial Court now holden at Portland within and for the county of Cumberland."

"Francis Bacon of Buxton, in the county of York, Esquire, respectfully represents, that on the sixteenth day of November last past, the qualified electors of the county of York (which said county constituted a registry district) gave in their votes at the several town and plantation meetings, holden on that day in pursuance of the warrants of the county commissioners, for the choice and election of a register of deeds for said county and registry district; that prior to the twenty-ninth day of December last past, the clerks of the respective towns and plantations in said county, caused to be delivered into the office of the clerk of the county commissioners, fair copies of the lists of votes aforesaid, attested by the selectmen and clerks of said towns, and by the assessors and clerks of said plantations, and duly sealed up in open town or plantation meeting, to be by the said commissioners opened and compared with the like returns from the several towns and plantations in said county; on the said twenty-ninth day of December last

past, the county commissioners aforesaid of said county of York, which county commissioners were, and now are, Moses Swett, John Bailey and Timothy Shaw, Jr., assembled at Alfred, in said county, to open and compare the said returns of the lists of votes, given in as aforesaid in the several towns and plantations in said county; and that they did proceed to open and compare said returns as aforesaid.

"And your petitioner further represents that by the returns of the lists of votes aforesaid, duly signed, attested, sealed up and returned as aforesaid, it then and there appeared, that your petitioner had received a majority of the votes, so given in by the electors aforesaid, for a person to fill the office of register of deeds for said county, and was then and there entitled to be declared register of deeds for said county, and then and there personally appeared before the said commissioners, and requested and demanded of the said commissioners to be declared register of deeds for said county, and then and there offered and was ready to file the bond and take the oath required by law of the register of deeds.

"Yet the said commissioners, unmindful of their duty in this behalf, and of the requirements of the statute in such case provided, and disregarding the rights of your petitioner, wholly refused and neglected to declare your petitioner register of deeds as aforesaid, and still refuse and neglect so to do, and did decide and declare that no person had a majority of the votes so returned as aforesaid, and that there was no election of any person to said office.

"By reason of which acts, doings and omission, your petitioner is greatly aggrieved; and is wrongfully deprived and kept out of said office and the emoluments thereof.

"Wherefore he prays this honorable Court that a rule of this Court may issue to the said county commissioners of the county of York, commanding them to appear before this honorable Court and shew cause, if any they have, why the said county commissioners refused and neglected to declare your petitioner register of deeds as aforesaid, and why a *writ of*

*mandamus* should not issue from this Court, commanding the said commissioners to declare him register as aforesaid.

"Francis Bacon."

"Cumberland, ss. Portland, January 1, A. D. 1847. — "Personally appeared Francis Bacon, above named, and made oath that the foregoing petition was true, according to his best knowledge and belief. Before me,

"G. F. Shepley, Justice Peace."

"Cumberland, ss. Supreme Judicial Court. November Term, 1846. Upon the foregoing petition, it appearing to the Court by a certified copy of the lists of votes, and by the affidavit of the petitioner, that by the returns of the lists of votes, duly signed, attested, sealed up, and returned into the office of the clerk of the county commissioners, that the said petitioner had received a majority of all the votes given in at the election aforesaid, for a person to fill the office of register of deeds for said county of York; and it further appearing that the said county commissioners, thereupon refused and neglected to declare the petitioner register of deeds as aforesaid: —

"The Court thereupon order that a rule of this Court should issue to the said county commissioners of the county of York, commanding them to appear at a term of this Court, next to be holden at Alfred, within and for the county of York, on the Tuesday next but two preceding the last Tuesday of April, then and there to show cause, if any they have, why the said county commissioners refused and neglected to declare the petitioner register of deeds as aforesaid, and why a *writ of mandamus* should not issue from this Court, commanding the said county commissioners to declare the said petitioner register as aforesaid, and that the said commissioners be notified thereof by serving upon them an attested copy of the said petition, and of this rule of Court, thirty days before the term of this Court next to be holden at Alfred as aforesaid.

[L. S.] "Given under the Seal of said Court.

"*Attest*, Charles C. Harmon, *Clerk, pro tem.*"

At the April Term, 1847, of this Court in the county of York, the county commissioners, by their counsel, *Preble* and *Leland*, appeared to show cause; and offered in evidence a copy of the record of the proceedings of the county commissioners, of which the following is a copy: —

"STATE OF MAINE.

"YORK, ss. — At a meeting of the county commissioners of the said county of York, held at Alfred, within and for said county, on Tuesday, the twenty-ninth day of December, A. D. 1846, being an adjournment from their regular session held at said Alfred on the second Tuesday of October, A. D. 1846.

"By Moses Swett, Chairman, } Esquires,
"John Bailey, } County
"Timothy Shaw, Jr., } Commissioners.

"On the first day of the session, the copies of the lists of votes given in the several towns in the county of York, on the third Monday of November, being the sixteenth day of said month, 1846, for register of deeds, and duly returned to the office of the clerk of the county commissioners, were opened and compared by the county commissioners, who make their report in the premises as follows, to wit: —

"YORK, ss. — At a session of the county commissioners of the said county of York, held at Alfred, within and for said county, on the twenty-ninth day of December, A. D. 1846, being an adjournment from the regular session held at said Alfred, on the second Tuesday of October, A. D. 1846.

"The copies of the lists of votes for Register of Deeds for said county of York, given in on the sixteenth day of November, A. D. 1846, were duly returned to the clerk's office; and we, the said county commissioners, proceeded to open and compare the returns from the several towns in said county, and found the same to be as follows, to wit: —

| | |
|---|---|
| "For Francis Bacon, | 1881 |
| "Edward Chase, | 1357 |
| "Benjamin J. Herrick, | 332 |
| "Joseph Dennett. | 125." |

Here follows a list of the names of seventeen persons voted for, the highest on the list having seven votes and several having one vote each, amounting to forty votes for the whole seventeen.

"But at the time of comparing the copies of said lists of votes, it being proved by legal evidence before said commissioners, that the copy of the lists of votes from the town of Biddeford (which votes were as follows, viz: — for Francis Bacon, 192; Benjamin J. Herrick, 32; Edward Chase, 3, and Joseph Dennett, 1; and which return certified that the votes cast in said town of Biddeford for Register of Deeds, on said sixteenth day of November, 1846, were cast "at a legal meeting of the inhabitants of the town of Biddeford, held on the said sixteenth day of November,) was fraudulent and untrue, in this, that said meeting was not a legal meeting of said inhabitants, inasmuch as said inhabitants were not warned and notified as required by law, seven days previous to said meeting, to vote for Register of Deeds, but was first warned and notified on the eleventh day of November, 1846, and not before, to meet for the purposes aforesaid on said sixteenth day of November, being five days only previous to said meeting on said sixteenth day of November, instead of seven days as required by law; and that the selectmen and town clerk of said town of Biddeford, were in possession of the facts aforesaid, at the time of making their said return and well knew the same were true. And sufficient and legitimate evidence having been produced to us to sustain the facts and fraud aforesaid, we have decided and do hereby adjudge that for the reasons aforesaid, the copy of the lists of votes from the town of Biddeford, given on said sixteenth day of November, 1846, ought to be and the same are hereby rejected in the count of the copies of the lists of votes given for Register of Deeds for said county, on the said sixteenth day of November, 1846. And we hereby further decide and adjudge, that from a comparison of the copies of the returns of votes from the several towns in said county, it appears to us that no person has a majority of the whole number of votes for said office of Register of Deeds, and we do hereby ad-

judge and declare that no person has been elected to the office of Register of Deeds for said county of York.

"And we therefore order that warrants be issued to the selectmen of the several towns in said county to call meetings of the qualified voters in their respective towns, said meetings to be duly and legally warned and notified according to law, to meet on the second Monday of March next, to give in their votes for Register of Deeds for the said county of York, and that fair copies of the recorded lists of votes, attested by the selectmen and town clerk, so given, to be delivered into the office of the clerk of the county commissioners on or before Thursday the twenty-second day of April next, to be by the county commissioners examined and compared with the like returns from the several towns in said county.

"Moses Swett,
"John Bailey,
"Timothy Shaw, Jr. } County Commissioners.

"Which report is ordered to be recorded."

"Recorded according to the original.

"Attest. William Trafton, Clerk."

They also called the town clerk of the town of Biddeford, who produced the town records, from which it appeared, that the warrant for calling the meeting on the 16th of November, 1846, was dated on the eleventh day of the same month, and was first posted up on that day.

The counsel for the petitioner objected to the introduction of any evidence, except the returns of votes from the several towns. The Court said, that it might be received *de bene esse;* and that whether it could be legally received might be determined afterwards.

It appeared, that by accident seven towns had not received warrants from the county commissioners for calling meetings, among which was Biddeford; that the selectmen of Biddeford called a meeting, giving but five days notice; and that the other six towns did not call any meetings for the sixteenth of November.

The counsel for the petitioner then offered in evidence a

copy of the return from Biddeford; a copy of which and of the direction thereon follows: —

"STATE OF MAINE.

"To the Justices of the Court of County Commissioners, to be held at Alfred, within and for the county of York, on the fifth Tuesday of December, A. D. 1846.

"At a legal meeting of the inhabitants of the town of Biddeford qualified by the constitution to vote for Representatives, held on the third Monday of November, being the sixteenth day of said month, A. D. 1846, the said inhabitants gave in their votes for a Register of Deeds, for said county, and the same were received, sorted, counted and declared in open town meeting by the Selectmen who presided, and in presence of the Town Clerk, who formed a list of the whole number of ballots given in, and of the persons voted for, and made a record thereof, as follows, viz: —

"The whole number of ballots given in was two hundred and twenty-eight. The persons voted for severally received the number of votes following, viz: —

| | |
|---|---|
| "For Francis Bacon, one hundred and ninety-two, | 192 |
| "Benjaman J. Herrick, thirty-two, | 32 |
| "Edward Chase, three, | 3 |
| "James Dennett, one, | 1 |
| | 228 |

"Samuel F. Chase,
"Moses Bradbury,
"Joseph Smith, Jr,
} Selectmen of Biddeford.

"*Attest*, William Smith, *Town Clerk*."

"To the clerk for the county commissioners of the county of York, Alfred, Maine.

"This contains a list of votes given by the inhabitants of the town of Biddeford, in the county of York, for Register of Deeds, for said county, on the third Monday of November, 1846. Sealed up in open town meeting, by

"Samuel F. Chase,
"Moses Bradbury,
"James Smith, Jr.
} Selectmen of Biddeford.

"*Attest*, William Smith, *Town Clerk*."

*Preble* argued for the county commissioners — and

*Howard* and *Appleton*, for the petitioner.

The counsel for the petitioner cited the opinion of the Court, given at the request of the Governor in the case of the clerk of the court in the county of Lincoln (25 Maine R. 567) as decisive of the present question. They also cited Rev. Stat. c. 11, § 3, 6, 13, 14; *Strong*, Pet. 20 Pick 484; 5 Pick. 328; 9 Mass. R. 388; 21 Pick. 258; 10 Pick. 244; 4 Pick. 68; 22 Pick. 263; 4 Cowen, 323; Stat. 1842, c. 3, § 2.

At the same term the opinion of the Court was stated orally by

SHEPLEY J. — In delivering the opinion it was said, that this is a question of importance, and the Court would have taken time for consideration, had it not been decided in principle in the case of the clerk of the courts in the county of Lincoln. (25 Maine R. 567.)

After stating the facts of the present case, it was remarked, that the Court were unable to perceive any substantial difference between the power, delegated to the county commissioners, to declare what person, if any, had been chosen register of deeds, by the eleventh chapter of the Revised Statutes, and the power given to the Governor and Council, by the third chapter of the statutes of 1842, to determine who had been chosen clerk of the courts.

The law provides, that the returns of the votes shall be made, signed and sealed in open town meeting, and the legislature have thought it expedient to provide, that these returns shall be the only evidence from which to determine what person, if any, is chosen register of deeds, or clerk of the courts.

In the present case, the return of the votes of the town of Biddeford appears to be regular; and if those votes are to be counted, the commissioners admit, that the petitioner received a majority of the votes for register of deeds. The commissioners had no power to go beyond the return of the selectmen and town clerk, and receive other evidence, and determine

therefrom, that the town meeting was not legally called; and for that cause reject the votes of that town.

*The mandamus prayed for must issue.*

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NATHANIEL FERGUSON, JR. *versus* JAMES THOMAS.

The mortgagee of personal property, where there is no agreement, that the mortgagor shall retain the possession, may maintain replevin therefor before the expiration of the time of credit.

And these words, inserted in a mortgage of personal property: — "And I hereby give the mortgagee full power and authority to enter my premises or elsewhere, and take possession of the same property, and make sale thereof for the purpose of paying the note hereinafter mentioned, provided the same should not be paid at maturity," — do not take away the right of the mortgagee to take immediate possession of the mortgaged property.

THIS case came before the Court upon the following statement of facts: —

"This was an action of replevin, originally commenced before a justice of the peace, to recover a heifer, as described in the writ, dated Sept. 1, 1845. The defendant pleaded the general issue and brief statement, which may be referred to.

"It was proved, that the plaintiff on the fourth day of December, 1844, loaned twenty dollars to Rowell Marshall, who owned the heifers, and that said Marshall gave to the plaintiff his note for the same, payable in one year with interest, and at the same time executed to the plaintiff the annexed mortgage deed of two yearling heifers, to secure the payment of said note, as specified in said mortgage, which was recorded by the town clerk of Shapleigh, where the parties lived, Dec. 5, 1844; and that said heifers were delivered to the plaintiff in said Marshall's barn yard in presence of one of the witnesses to said mortgage deed, but were left in the possession of said Marshall, and continued in his possession until the 26th day of August, 1845, when the heifer replevied was attached by the defendant, as an officer, upon a writ in favor of B. F. Chadburn and Israel Chadburn, against said Marshall, for a debt due to them, upon which judgment and execu-

tion were afterwards duly recovered. At the time of said attachment said heifers were yoked, and said Marshall was using them to haul stones, and the officer removed the one he attached.

"If in the opinion of the Court the plaintiff could not maintain this action of replevin at the time it was commenced, he is to become nonsuit; otherwise judgment is to be rendered against the defendant.

"Wm. C. Allen, *Att'y for plaintiff.*

"N. D. Appleton, *Att'y for defendant.*"

The following is a copy of the mortgage deed to which reference is made in the statement: —

"Know all men by these presents, that I Rowell Marshall, of Shapleigh, in the county of York, and State of Maine, yeoman, in consideration of twenty dollars, to me paid, by Nathaniel Ferguson, jr. of said Shapleigh, yeoman, the receipt whereof I do hereby acknowledge, do hereby give, grant, sell and convey unto him, the said Nathaniel Ferguson, the following personal property, to wit: — two heifers, one year old last spring, one of which is of red color with two white stars on the forehead; the other is red color with a brownish head. The aforesaid heifers are now on my farm in Shapleigh. And I hereby give the said Ferguson full power and authority to enter my premises, or elsewhere, and take possession of the same property, and make sale thereof for the purpose of paying the note hereinafter mentioned, provided the same should not be paid at maturity. Provided, nevertheless, that if a certain note of even date, herewith given, and signed by me, the said Rowell Marshall, for the sum of twenty dollars, payable to the said Ferguson or order, in one year, with interest from this date, shall be paid and discharged in full, then this conveyance shall be void and of no effect; otherwise shall be and remain in full force and virtue. Witness my hand and seal, this fourth day of December, A. D. 1844.

"Rowell Marshall. [L. S.]

"Signed, sealed and delivered in presence of John F. Bodwell, Elisha Bodwell, Daniel Morrison."

*W. P. Haines*, for the plaintiff, contended, that the suit was not prematurely brought.

The right of possession follows the deed, unless there is a clear provision to the contrary. There is nothing in this bill of sale to take the case out of the general rule. The provision in the mortgage deed, that the plaintiff may take possession and sell the property, is a mere stipulation for the benefit of the mortgagee, and cannot impair his right to immediate possession. The officer has no right to remove the property because an equity of redemption remains in the mortgagor, without first paying or tendering the amount due on the mortgage. *Paul* v. *Hayford*, 22 Maine R. 234; *Melody* v. *Chandler*, 3 Fairf. 282; *Pickard* v. *Low*, 15 Maine R. 48.

*Appleton*, for the defendant, said that the plaintiff had no right to the possession of the property at the time this action of replevin was commenced; and therefore the action cannot be maintained. 3 Greenl. 183; 3 Pick. 255; 15 Pick. 68; 15 Maine R. 48 and 373.

By any fair construction of the language, the meaning is this. If the note is not paid at maturity, the mortgagee may then enter and take possession of the property and make sale thereof, and has no right to intermeddle until then. And the acts of the parties were in accordance with this view. 15 Maine R. 48; 2 N. H. Rep. 453; 7 Metc. 373.

The plaintiff, by taking the deed, is bound by the recitals contained in it. 9 Mass. R. 482; 8 Pick. 392.

The opinion of the Court was drawn up by

Whitman C. J. — No other question seems to be intended to be raised by the agreed statement of facts than, whether the plaintiff had a right, at the time he sued out his writ of replevin, to possess himself of the heifer; and this depends upon the construction to be put upon the clause in the mortgage, introduced by him, constituting a part of the description of the condition upon which it was made, which is in these words, "and I hereby give the said Ferguson full power and authority to enter my premises, or elsewhere, and take posses-

sion of the same property, and make sale thereof for the purpose of paying the note hereafter mentioned, provided the same should not be paid at maturity." The note, at the time of suing out the writ of replevin, had not become payable; and the argument is, that, therefore, the plaintiff had not, then, a right to possess himself of the property mortgaged. The terms descriptive of the conveyance, in the preceding part of the mortgage, are as if an absolute sale were intended; and being recorded, as provided by statute, it has been held to be unnecessary to prove an actual delivery of the property mortgaged in order to render it effectual. Unless the above recited clause would restrict the right of the plaintiff to do so, he might possess himself of the heifer at his pleasure. In *Ingraham* v. *Martin*, 15 Maine R. 373, it was so held; but that, if otherwise agreed by the parties, the case would be different. The question is, had the plaintiff, in the case at bar, other wise agreed. The deed to the plaintiff speaks the language of the mortgagor. It does not, in express terms, reserve the right of possession till the note shall have become payable. The first part of the deed, by itself, and without the condition, would give an immediate right of possession; and the clause recited does not negative such right in express terms. It seems rather to be an enabling provision, in furtherance of the security intended for the benefit of the plaintiff. If the note, when due, should not be paid, the plaintiff is thereby authorized to take and sell the heifer to pay the debt. Aside from such a provision he would not be justifiable in so doing until sixty days after the breach of the condition. The plaintiff cites and relies upon the case of *Melody* v. *Chandler*, 3 Fairf. 282, as an authority in his favor. And it would seem, if the plaintiff in that case could be allowed to prevail, that the plaintiff in this should also. In that case it appears, that the agreement was express, on the part of the plaintiff, a mortgagee, that the mortgagor "should retain the possession of the goods, make sale of them in the regular course of his business, render an account of sale, and appropriate the proceeds to the

payment of the mortgage debt." In the case at bar there was certainly, on the part of the plaintiff, no express agreement. At most it is by implication only, if at all. But we think it can hardly be considered as amounting even to that, on the part of the plaintiff; but rather that it should be taken to be an enabling provision, authorizing him to enforce payment sooner than otherwise, under the statute, would have been lawful. As, by the previous terms of the mortgage, the plaintiff would have had a right to take possession at any time, by the terms in the condition he was empowered to take possession at a particular time for a particular purpose, viz. to sell the property and pay his debt.

*Defendant defaulted.*

## Elbridge Cox *versus* Tobias Walker & *al.*

In trespass upon land, conveyed in trust, the trustees can maintain an action; but if the *cestui que trust*, be in actual possession, he should be the plaintiff, though it is otherwise in ejectment.

An action can be maintained by a corporation legally existing, for any invasion of their rights in real estate, in the same manner, that it could be done by an individual who should be the owner; but one who is neither trustee, or *cestui que trust*, cannot maintain an action in his own name for the use of one or the other.

Under a deed in trust the legal estate is in the trustee; and if there be several trustees, it is not in the power of one or more to exclude from the possession of the land conveyed, another trustee. An attempt to do so would be inconsistent with rights, which the law secures by such a deed. A lease given by a part of the trustees would confer no power superior to that possessed by the lessors, and possession taken under the lease could not in the least abridge the right of possession of other trustees; the latter, although a minority, would be equally entitled to possession with those who might constitute the majority, without being guilty of a trespass.

If a grant of land be made to certain individuals named, to be by them held "as one entire property, never to be divided or severed, for the use of the first baptist society in K. to be forever kept for the sole use and support of a minister of the baptist denomination;" and at the time there was a society by that name, usually attending worship at a particular place, but which had never been legally organized as a parish, or authorized to act as such; and a society by the same name, and claiming to be the same society, is afterwards incorporated under the Stat. 1821, c. 135; this society, so incorporated, is to be considered as a new society, and not the one intended by the grant, or entitled to the benefit thereof.

Trespass *quare clausum*, originally commenced before a justice of the peace. As the writ was, when the action was commenced, there was no allusion in the declaration or writ, to the plaintiff's bringing the suit in any other character, or capacity, than his own. While the action was pending in the District Court, the plaintiff, by leave of Court, amended his writ by adding after the plaintiff's name in the declaration, these words, "as minister of the first Baptist society in Kennebunk." The defendants were Tobias Walker, Israel Taylor and Jamin Smith.

The following, is a copy of the pleadings, with the omission of the description of the premises and the long list of names.

"And the said Tobias Walker, Israel Taylor and Jamin Smith come and defend the force and injury when, &c., and as to the force and arms or any thing against the peace, and as to the whole trespass aforesaid, excepting the breaking and entering the close aforesaid and then and there taking twelve loads of manure, and using the same thereon, and ploughing and digging up the soil and treading down the grass in said close, they say they are not guilty thereof.

"By their Attorney, and plaintiff likewise by his Attorney.

"And as to breaking and entering the close aforesaid and taking twelve loads of manure and using the same thereon and ploughing and digging up the soil, and treading down the grass in said close, the said Tobias, Israel and Jamin say, that the said plaintiff, his action against them therefor, ought not to have and maintain, because they say the close aforesaid, in which the trespass aforesaid is supposed to be committed, contains seventeen acres, and situate in Kennebunk in the county of York; (there was no controversy as to the description,) being the same tract described in the plaintiff's writ, which said close as before described, of seventeen acres, was by deed of one George Taylor, dated the twentieth day of October, A. D. 1835, in Court to be produced, conveyed to John Roberts, (and twenty-five other persons named) to hold in trust for the First Baptist Society of said Kennebunk, and for the use and support of a minister of the Baptist denomination, and the said Tobias and Israel for themselves and the surviving trustees before named, said John Taylor (and five others) having since deceased, and said Jamin, as servant of the said Tobias and Israel, and by their command, at the time when said manure was taken and used as aforesaid, and said ploughing and digging up of the soil and treading down the grass in said close as before described, being the close soil and freehold of said Tobias and Israel and other trustees before mentioned, broke, entered, took and used as aforesaid, said twelve loads of manure, and ploughed and dug up the soil and trod down the grass, as they might lawfully do: and this the said Tobias, Israel and Jamin are ready to verify. Therefore they pray

judgment, if the said plaintiff his action ought to have and maintain against them, and for their costs.

"By their Attorney.

"And the said Cox, as to the said plea of the said Walker, Taylor and Smith above pleaded, saith, that he ought not to be precluded from having and maintaining his action thereof against them, by any thing in said plea alleged, because, he says, that at the time when said trespasses were committed, as alleged in the plaintiff's declaration, he was minister of the first Baptist Society in Kennebunk, and in possession and improvement of the premises described, as such minister, and by virtue of a lease, from a committee of said society, they being also three of the trustees mentioned in the aforesaid deed of George Taylor; without this, that the said Tobias and Israel for themselves and the surviving trustees before named, and said Jamin as servant of said Tobias and Israel, at the time when said manure was taken and used as aforesaid, and said plowing and digging up of the soil and treading down the grass in said close, broke and entered the same and committed the trespasses aforesaid *by the command of said surviving trustees*; and of this puts himself on the country. By his Attorney.

"And the defendants likewise by their Attorney."

At the trial in this Court before SHEPLEY J. the plaintiff proved, that the defendants entered upon the premises and removed two or three loads of manure from the barn yard into the field, the plaintiff being then present and forbidding them; that the plaintiff had been in the actual possession and occupation of the premises for about two years preceding, under a lease from John Roberts, William Taylor and Seth Taylor, three of the persons named in the deed as trustees, and calling themselves a committee of "The First Baptist Society in Kennebunk;" and that the plaintiff had during that time been the minister and preacher of a society called by that name.

The counsel for the plaintiff at first here rested, but after consultation with their clients, with the hope of having the controversy between the rival claimants settled, they introduc-

ed witnesses, and papers; and the history of the acts of those claiming to be the first Baptist Society in Kennebunk was given. This sufficiently appears in the opinion of the Court.

The material words in the deed from George Taylor to John Roberts and others, mentioned in the defendants' plea, dated Oct. 20, 1835, so far as it can relate to this question, are these. "To be by them held in proportion to the sums by them respectively paid, as abovementioned, as one entire property however, never to be divided or severed, for the use of the First Baptist Society in Kennebunk, to be forever kept for the sole use and support of a minister of the Baptist denomination." It was not, however, made to appear on the trial, *that at the time this deed was given*, there was, or ever had been, a legal First Baptist Society in Kennebunk, although there had been a voluntary society, composed of persons residing in Kennebunk and other towns, under that name, usually attending public worship at an old house, owned by certain persons, some of whom called themselves of that society, and some did not.

After this evidence had been introduced, the presiding Judge ordered a nonsuit; which was to be set aside, if it was erroneously ordered.

This case was argued at the April Term, 1847, by

*J. Shepley* and *Appleton*, for the plaintiff — and by

*Bradley* and *Bourne*, for the defendants.

The briefs of the counsel were handed to the Court, but by some accident did not come into the hands of the Reporter. The points made for the plaintiff are therefore taken from the loose minutes from which the brief was prepared, with but few of the authorities cited; and for the defendant from the Reporter's minutes.

For the plaintiff, it was said, that in order to determine, whether the nonsuit was rightly ordered, it was necessary to find what the issue to be tried was. And that issue, and the only one to be tried was believed to be simply, whether the defendants did or did not enter as the servants or under the

authority of the grantees, or trustees as they have been called, named in the deed.

There was no general issue pleaded, and there was no brief statement; but merely one special plea, the introductory part of which goes only to the formal part of the declaration, the force and arms and whatever is against the peace and specially excepting the breaking and entering and carrying away the manure, and an issue to the country on this matter of form. This is proper, and according to precedent, but is no answer to the declaration; and alone no plea. The residue and substantial part of the plea, is, that the land was the property of certain persons named as trustees, and that the defendants acted as their servants and entered under them. Together they form one plea. The plaintiff, in his replication, tendered an issue, denying that the defendants acted under or had any authority from the trustees. This issue was joined, and was the only one to be tried. The defendants thereby admit the trespass stated in the declaration, and undertake to justify it. The plaintiff has nothing to do, but to prove his damages, and the burthen is on the defendants to make out the justification set up by them. 1 Chitty's Pl. 534, 535; 5 Mass. R. 438; 10 Mass. R. 80. And it is wholly immaterial, whether the declaration is by the plaintiff in his individual capacity, or as minister of the parish. If the latter is the case, that there was such parish, and that he was the minister of it, was admitted by the plea. The plaintiff had nothing to do; his case was made out, *prima facie;* and the only question was, whether the defendants could make out their justification. It is believed, that it is perfectly clear, that the nonsuit was erroneously ordered.

There is no pretence, that there is any thing in the evidence reported, which would prove this issue. But had there been, it was for the decision of the jury, and not of the Court. All the evidence reported, save the amount of damages, is irrelevant, having no tendency to prove or disprove the only issue presented.

If the issue had been tried, and found for the plaintiff, as

we have a right to say it would have been as to this order of a nonsuit, the plea would have been avoided, and by the unquestioned rules of pleading, judgment must have been rendered for the plaintiff.

But were it possible, that this case could present the more important question, whether under such a grant as this, where six and twenty men are made trustees to hold the estate *as one entire property never to be divided* and *forever kept for the sole use of the First Baptist Society*, two out of the twenty-six, without authority from the others, can enter and turn out any one in the actual possession, especially, if in possession under three of the same trustees, then we say, that the trustees could act only by majorities, or by agents constituted by a majority. The private unauthorized acts of individual members, are like the unauthorized acts of any other individuals, who were not trustees, the acts of entire strangers.

It does not seem to be material to inquire, whether the action was by the plaintiff, or by him in the right of the parish, as in either case, it is an admitted fact, and not in issue. The words, however, inserted after the plaintiff's name, are merely descriptive of the person, and not enough to make it an action in behalf of the society. *Weston* v. *Hunt*, 2 Mass R. 502; Stearns on Real Actions, 386, 388, and Stearns' Forms, No. 9, 15, 19.

Whatever is said by way of protestations, before the traverse in a replication, is mere surplusage and cannot vitiate. At all events, it can only be taken advantage of on special demurrer. 1 Chitty's Pl. 534, 535.

*Bourne*, for the defendants.

Corporations must sue in their own names, unless the statute provides a different method.

No man can become a minister of a parish, but by a vote of the society. The church have nothing to do with it. 4 Greenl. 374.

The society, with which the plaintiff claims to be connected, is a new society, and not a continuation of the old one. 1 Greenl. 208; 1 Fairf. 17.

The deed makes the grantees tenants in common, or joint tenants. And one tenant in common cannot maintain trespass against another for occupation merely. 13 Maine R. 28; 13 Maine R. 417; Harper's R. 430.

A tenant cannot deny the title of his landlord. 1 J. J. Marsh. 38. And the acceptance of a lease from a third person is a fraud on the lessor. Case last cited, and 4 S. & R. 467; 3 Fairf. 478; 6 Wend. 666.

A surrender of a lease can be proved only by deed or writing. 16 Maine R. 212.

The plaintiff has not shown any authority to hold the premises as minister of any society. 2 Mass. R. 500; St. 1821, c. 135.

The case was continued *nisi*, and the opinion of the Court, WHITMAN C. J. concurring in the result only, was drawn up by

TENNEY J. — This is an action of trespass, *quare clausum fregit*, brought by the plaintiff as the minister of the First Baptist Society in Kennebunk and for their use. The defendants, in their first plea, admit that they broke and entered the close described in the writ and declaration, and did certain acts complained of therein, but deny that they did any of the acts by force and arms and against the peace, and the plaintiff joined the issue tendered. In a second plea, as to the acts admitted to have been done, the defendants say, that the close was conveyed by the deed of George Taylor, dated October 20, 1835, to two of the defendants and others, therein named, to be held in trust for the First Baptist Society of Kennebunk, for the use and support of a minister of the Baptist denomination, and that the said two defendants, for themselves and the other surviving trustees named in the deed, and the other defendant as their servant, did the acts complained of and admitted by the defendants to have been done, as they might fully and lawfully do. To this plea the plaintiff replied, that when the alleged trespass was committed, he was the minister of the First Baptist Society of Kennebunk and in the posses-

sion and improvement of the premises described, as such minister, and by virtue of a lease from a committee of said society, they being also three of the trustees mentioned in the deed of George Taylor, and tendered an issue to the country, which was joined by the defendants.

The plaintiff introduced the deed referred to in the plea to two of the defendants and several other persons their heirs and assigns forever, in consideration of a certain specific sum paid by each grantee, and to be held by each in proportion to the sums respectively paid by them, as one entire property however, never to be divided or severed, for the use of the First Baptist Society in Kennebunk, to be forever kept for the sole use and support of a minister of the Baptist denomination. From evidence introduced by the plaintiff, it appeared, that prior to and at the time of the conveyance, there was a house situated in Kennebunk, appropriated for public worship, called the old school house afterwards, and occupied by an unincorporated society, having connected therewith a church of the Baptist denomination. Subsequently a new meetinghouse was built in the town of Lyman, and the old house was sold and taken down. Before the latter was removed meetings were held simultaneously for public worship in both houses. Two societies were incorporated under the statute, each bearing the name of the First Baptist Society in Kennebunk, and composed of certain of the grantees named in the deed, with others, and a part of the church connected with the old society, attached itself to one of the new societies and a part to the other. One society established public worship at the old and the other at the new house, and each claimed to be entitled to the premises in dispute. The plaintiff also professes to occupy the land under a lease from certain persons, who are named as grantees in the deed, as a committee of the society which worshipped in the new house, and the two defendants, who were grantees in the same deed, claimed to have a right to perform the acts complained of in the writ. Upon the pleadings and the above mentioned facts adduced by the plaintiff, a nonsuit was directed by the Court.

In trespass upon land, conveyed in trust, the trustees can maintain an action; but if the *cestui que trust* be in actual possession, he should be the plaintiff, though it is otherwise in ejectment. 1 Chitty's Pleadings, 49. An action can be maintained by a corporation, legally existing, for any invasion of their rights in real estate, in the same manner that it could be done by an individual who should be the owner. But one who is neither trustee or *cestui que trust* cannot maintain an action in his own name for the use of one or the other.

Assuming that the plaintiff was the minister of the society named in the deed, which is the *cestui que trust*, he cannot by virtue of that relation alone sustain the action for the use of that society, the minister not being, according to the terms of the deed, either trustee or *cestui que trust.*

But it is contended for the plaintiff, that the only issue presented by the pleadings, is, whether the committee (being three of the trustees named in the deed) under whom he claims by virtue of a lease, had authority to give him the right of possession and improvement of the premises described; and that it is immaterial, whether he is the minister of the first Baptist Society in Kennebunk or not, that term being used in the writ merely as *descriptio personae.*

Under a deed in trust the legal estate is in the trustee, and if there be several trustees, it is not in the power of one or more to exclude from the possession of the land conveyed another trustee. An attempt to do so would be inconsistent with rights, which the law secures by such a deed. A lease given by a part of the trustees would confer no power superior to that possessed by the lessors, and possession taken under the lease could not in the least abridge the right of possession of other trustees; the latter, although a minority, would be equally entitled to possession with those who might constitute the majority, without being guilty of a trespass. *Porter* v. *Hooper & al.* 13 Maine R. 28.

When the deed was given by George Taylor, under which both parties claim, the society therein named as *cestui que trust*, does not appear to have had such an existence as would

authorize them to act as a corporation; but it was well understood as being the society, which worshipped at the old house in Kennebunk. It does not appear from the evidence, that any attempt was ever made to obtain from the legislature an act, by which that society could exercise corporate powers. It was probably supposed by the grantees named in the deed, at the time of the execution thereof, that their purposes could be carried out by the trustees. But afterwards, a division of the old society having taken place, and two new societies having been formed, each having some of the trustees in their number, and bearing the name of the First Society in Kennebunk, claim to be identical with the society referred to in the deed. Neither of these societies can be so considered. They are new corporations, having as such, no relation whatever to the old society. They may or not be composed partly of those who were trustees, or members of that society, for whose benefit the conveyance was made. Being so, and assuming the name of that society is no foundation at all for the claim to be legally treated as the same. To yield to the truth of the proposition, that one or the other is the same thing as that, which was the *cestui que trust* in the deed, would be no less than to admit the absurdity, that an unincorporated society could be subdivided into an unlimited number of parts, and each be incorporated under the statute, preserving the name of the entire society, with which each might be identical and entitled to the use of the property appropriated.

Where it is alleged in the plaintiff's replication, that he was the minister of the First Baptist Society in Kennebunk and in possession and improvement of the premises described, as such minister, and by virtue of the lease from the committee of said society, we are to understand, that the society referred to is the same named in the deed. The proof adduced upon the issue presented, does not sustain or tend to sustain the affirmaitve of this issue, but proves the contrary, and therefore the lease can transfer no right greater, than that possessed by the trustees, who are the lessors; and we have seen that their

rights were not superior to those of the two defendants, who were also trustees under the deed.

*Nonsuit confirmed.*

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SAMUEL W. LUQUES, *Adm'r, versus* BENJAMIN THOMPSON.

Where the condition of a bond was, that the obligor should annually deliver certain articles to such wife, as the obligee might afterwards marry, should she survive him; and after his marriage and decease there was a failure to deliver the articles; *it was holden*, that an action could be maintained upon the bond by an administrator of the obligee, to recover the damages incurred by such failure.

And where the condition of the bond, in reference to any person who might be married to the obligee and become his widow, was, that "she shall enjoy one fifth part of the produce (of the farm conveyed to the defendant,) delivered to her free from all expense on her part, also the privilege of keeping one cow and one pair of sheep and furnishing her with the back room and bedroom adjoining, with the use of the kitchen, together with a sufficient quantity of firewood cut in suitable lengths for her fire, sufficient for her use during her natural life," *it was holden*, that she was not entitled to hay or firewood to be by her carried away from the farm and disposed of at her pleasure.

THIS action was commenced by Hannah Thompson, as administratrix of Benjamin Thompson, deceased. During its pendency the administratrix died, and Samuel W. Luques was appointed administrator, *de bonis non.*

The action was submitted upon the following statement of facts: —

"*Hannah Thompson, Adm'x*, v. *Benjamin Thompson.* — The parties agree to submit the action to the decision of the Court on the following statement of facts: —

"The action is debt on a bond dated Nov. 4, 1820, made by defendant to Benjamin Thompson, senior, deceased. The said Hannah Thompson was duly appointed administratrix on the estate of Benjamin Thompson, senior, late of Kennebunkport, deceased, intestate, in the year 1839. The defendant made and executed a bond, by the name of Benjamin Thompson, jr. to said Benjamin Thompson, senior, on Nov. 14, 1820,

a copy of which is hereunto annexed and makes a part of the case.

"Said Hannah Thompson was married to said Benjamin Thompson, senior, in the year 1822. So far as this present question is affected, and for the opinion of the Court, it is admitted that the defendant has fulfilled and performed all things on his part to be performed, unless as to the provisions made in said bond for the benefit of the wife which the said Benjamin Thompson, senior, might marry. It is agreed, that the defendant has not offered said Hannah one fifth of the hay, grown on said premises, and that said Hannah has demanded said one fifth part of hay grown on said premises, to be delivered to her thereon; that said defendant refused to deliver any quantity of hay to be carried away from said place and denies the right of the said Hannah to have and receive the same, but has always been ready to grant to said Hannah "the privilege of keeping one cow and one pair of sheep," on said premises.

"That said defendant has had at the house ready for the use of said Hannah, "a sufficient quantity of firewood cut in suitable lengths for her fire, sufficient for her use," to be burned and used on the premises; that said Hannah has demanded of the defendant "a sufficient quantity of firewood cut in suitable lengths for her fire, sufficient for her use," delivered at said premises and to be by her carried away and used elsewhere; that said defendant refused to deliver to said Hannah firewood as aforesaid to be by her carried away and used elsewhere than on the premises, and denies her right so to remove it, but has ever been ready to deliver wood as aforesaid to be burned on the premises.

"And for the purposes of this hearing, it is admitted, that in other respects the condition of said bond has been performed.

"And for the purposes of this question, it is admitted, that the defendant has pleaded the general issue, and by brief statement has alleged a performance of the condition of said bond on his part; and has also further alleged in his said brief statement, that if there had not been a perfect performance, that the plaintiff cannot maintain this action as administratrix

of said deceased on account of any omission to furnish, or any refusal to permit the said Hannah to enjoy any of the provisions in the said bond, in favor of any wife the said Benjamin Thompson, senior, might marry after the execution and delivery of said bond.

"If the Court shall be of opinion, that the action cannot be maintained, the plaintiff to become nonsuit; and if the action can be maintained, the defendant to be defaulted and damages are to be assessed by the Court.

"*Samuel Bradley*, plaintiff's Attorney.

"*John Shepley*, Att'y to defendant."

By the terms of the condition of the bond, the defendant was to pay certain sums to his brothers and sisters; was to allow certain privileges in the house to the obligee, his father, who was also to have the right to "improve the one half of said premises mentioned in the deed of said Benjamin Thompson, senior, to said Benjamin Thompson, jr." Benj. Thompson, senior, was then unmarried, and the following was in the condition of the bond, immediately following the provision made for himself:—

"And in case the said Benjamin, my father, should in the course of Divine Providence marry a wife, and she, my mother-in-law, should survive the said Benjamin, my father, at his decease, she shall enjoy one fifth part of the produce, delivered to her free from all expense on her part, also the privilege of keeping one cow and one pair of sheep and furnishing her with the back room and bedroom adjoining, with the use of the kitchen, together with a sufficient quantity of firewood cut in suitable lengths for her fire, sufficient for her use during her natural life."

The case was argued in writing.

*Chisholm*, for the plaintiff.

1. A cause of action existing, the action is properly brought in the name of the Administratrix; as it could not be maintained in any other name. *Saunders* v. *Filley*, 12 Pick. 554; *Richardson* v. *Learned*, 10 Pick. 264. And the provision in

said bond for the benefit of any wife the said Thompson, senior, might thereafter marry, was a valid contract to pay to a third person who was to be subsequently appointed by the obligee; the appointment to be made by act of marriage.

2. The provision for the widow's benefit of "one third part of the produce of the premises, is independent of the "keeping of one cow and one pair of sheep." The two are connected by the word "*also.*" There is nothing to signify that the latter was intended as a substitute for any portion of the former. Nor could they be so substituted, to accomplish any conceivable object of the parties, as the one is no measure for the other. The delivery of the produce, is without condition or restriction. It is therefore to be hers, absolutely. "Produce" includes hay. "Produce" has the largest signification of any word which could be used in this connection; and cannot be so limited as not to include hay, without putting in its place, by way of construction, some other word of less meaning, which the parties themselves might as easily have used, if intended. The legal import of the word "produce," wherever found in the books, accords with its popular use, as a word of the largest meaning. *Flagg* v. *Flagg*, 11 Pick. 475; Chitty on Contracts, 368; *Staples* v. *Emery*, 7 Greenl. 203; *Dockham* v. *Parker*, 9 Greenl. 137. Jacobs' Law Dict. Title "Emblements," where the word "products" is used in contradistinction to emblements.

The object in view, to provide a competency for a widow, demands this construction, taking the premises to be a common farm. One half of it, it seems, was deemed little enough to reserve so long as he lived. One fifth of the whole produce would seem barely adequate for her; and but little better than her bare dower in the same premises.

If hay was not included in the word "produce," the provision might fail, by the defendant's laying the whole down to grass, or a large portion of it, and cultivating adjoining land for other purposes. This consideration, so prominent as to strike any one who looks at the case, must be presumed to have influenced the parties to use the word "produce"; and in the sense contended for.

3. As to the "firewood for her fire."

Why should it be burned and used on the premises, and not elsewhere? the plaintiff's claim is not founded on a right of dower or any other tenancy for life in land; but on a bond that the defendant will cut and deliver it to her, "free of expense;" and there is no condition or restriction in the terms of the delivery.

The provision for her having two rooms in the house is a mere privilege; and there being nothing in the other stipulations, for wood and produce, to render them dependent on the other, for rooms; she might waive the latter without affecting the others. A forced construction will not be resorted to, to affix to a contract, a proviso, which may place in the way of its enjoyment the burden of imprisonment.

This is simply a contract for the delivery of specific articles; the plain established rules of which are violated by the defendant. Nor will any appearance of its being a maintenance for life alter the case. For in that case there must be a plain, express stipulation for place, or the maintainee is entitled to her maintenance, in any reasonable place. *Wilder* v. *Whittemore*, 15 Mass. R. 262; *Thayer* v. *Richards*, 19 Pick. 398.

But this is not a maintenance. The provisions are specific, and might exceed, or fall short of a maintenance.

*J. Shepley*, for the defendant.

From the statement of facts it appears, that the only breach alleged is a failure to deliver, to be carried away, certain hay and firewood, under the provision in the bond, in reference to a second wife, should the obligee marry again.

This provision is a part of the same sentence wherein it is said that Benjamin, the father, should improve half the premises mentioned in the deed, showing where the rooms were located.

1. The first inquiry is, (if there be a cause of action, which is denied) can the action be maintained in the name of the administratrix of Benjamin Thompson, senior, deceased, to whom the bond declared upon was given in 1820, on account

of the alleged breach. We say, that an *administrator* can maintain no action for any breach of this stipulation.

The power and duty of an administrator is pointed out in the Rev. St. c. 106, § 3, which is a mere re-enactment of the prior statute. It requires the administrator to make out an inventory of "all the goods, chattels, rights and credits of the deceased," and administer the same according to law. Could there be an inventory taken of this hay and firewood? And could it be administered upon as the property of the deceased? Or could the administrator inventory this bond, collect of the defendant claims under it, if such there can be, accruing to others, coming into existence after his death, and put the amount into his administration account to be distributed according to law? This is not the case of an existing demand or of existing property, where the intestate was the trustee of others, or the assignor of a chose in action. The subject matter of this action could never be the property of the intestate, either for himself or in trust for another. It is believed, that it is certain, that if the intestate had lived until the time of the commencement of this suit, that he could not have maintained any action for any of the alleged breaches of the condition of this bond, assigned by the plaintiff. If this be so, how can the administrator, his representative only, maintain the suit? I can find no authority, which, in my view, will authorize the maintenance of this action; nor can I discover any principle upon which it can be sustained. And it is beyond my power to perceive, that the cases cited for the plaintiff on this point, have any tendency towards enabling the plaintiff to succeed.

2. There was no cause of action. The provision for a wife, the obligee might at some after time marry, was a mere personal privilege for her, and depending upon her living upon the premises, and wholly ceasing to exist, whenever she removed therefrom.

The principle, that to ascertain the meaning of an instrument the whole of it must be taken into consideration, is too familiar to require authorities for its support. In the exam-

ination of the whole bond, it would seem to be conclusive that, with the exception of the money payment and the few specific articles given outright to David and Livina, the benefits provided for were to be "enjoyed" upon the premises, and no where else. It was so with the obligee himself. "I hereby agree, that the said Benjamin shall improve one half of said premises," also "furnishing the said Benjamin with the back room and bedroom adjoining," &c., "the privilege of the northwest bedchamber to my brother David," &c. and the provision for the unmarried daughter, and, as we say, clearly so as to the future wife. On looking at the contingent provision, as to some wife and widow the obligee might afterwards marry and leave, the whole in relation to her must be taken together, in order to ascertain the true meaning. The plaintiff cannot separate the different provisions and make independent clauses of them. The first, the produce, must be connected with the very last words, "during her natural life," or it would be but the provision for a single year, and so the plaintiff would then fail on that ground. Indeed the whole is in one connected sentence. So the keeping of the cow and sheep must necessarily be upon the farm. She was merely to have "the privilege of keeping them;" the back room was to be furnished *to her* and the bedroom adjoining; that particular one, and not any one, "*with the use of the kitchen, together with a sufficient quantity* of firewood cut in *suitable lengths* for *her* fire, *sufficient for her use.* It was for her fire and not the fire of another, and for that fireplace and not for any other, and for her use and not the use of another; the wood was to be cut in suitable lengths for that fireplace, and the quantity was to be determined only by what would be "sufficient" for her in that room. The whole was intended as a privilege there, depending upon her living there, and not assignable; the rooms, the produce, the keeping of the cow and sheep, the firewood; all was a provision for her alone, and at that place. If she removes from the premises, as she did, she abandons the whole provision. Such was the intention of the parties, and so, it is believed, is the law. The case of *Wood* v. *Bar-*

*stow*, 10 Pick. 368, is directly in point. The provision there was by will and not by bond, but the same words must have the same meaning, whether used in a will or a bond; and more especially, where the person to be benefited is not a party to the bond, any more than to the will. In *Wood* v. *Barstow*, the words were, — "I give to my daughters Mary, Rose and Elizabeth the *use and improvement* of my dwellinghouse, the *two gardens* before mentioned, *apples for their use*, green or dry, *wood sufficient for one fire, delivered at the door*, the *use of a good cow kept on the farm* summer and winter, after the death of my wife, during their remaining single, and a seat in my pew, which they are to occupy immediately after my decease." It was held by the Court, that the *whole provision* was a mere personal privilege, and wholly ceased on their ceasing to reside in the house. The words in our case are much stronger in favor of the construction for which we contend, than in *Wood* v. *Barstow*; *White* v. *Cutler*, 17 Pick. 248. The use of the rooms was to be "together with a sufficient quantity of firewood," and not separate therefrom.

3. If either of the grounds of defence already taken are tenable, the plaintiff must fail. But it is unnecessary for us to contend as to any thing but the firewood and the hay. The firewood and hay, for two years only, are in controversy. Still the principle is the same, as if a greater amount was depending.

We say then, in the third place, that she was not entitled to the firewood, or to the hay, to be carried away from the premises, and sold or used elsewhere; and indeed not entitled to the hay, if she had remained upon the premises. The case shows, that she has been offered the firewood to be used for her fire upon the premises, and that the defendant has been always ready to allow her "the privilege of keeping one cow and one pair of sheep" upon the premises.

*Firstly*, as to the firewood. On this point the Court is referred to the remarks already made on that subject under our second objection, without repeating them here.

It was the manifest intention of the parties to the bond, she not being one of them, that the firewood should be used only "*for her fire*" upon the premises. If it were otherwise, why was it said, that it "*should be cut in suitable lengths for her fire,*" in that fireplace? How could the defendant know in what lengths to cut it for another fireplace, and at a distance? Why say "*sufficient for her use*"? The quantity was dependent on how much was necessary to warm that room. What would be sufficient in that room, might be wholly inadequate in a different one. The wood was to be for "*her use*", not for the use of any other person. If she could carry it away, she might sell it. It was to be sufficient for "*her fire,*" not fires. And it should be taken into consideration, that the provision for her husband, for the other son, and for the unmarried daughter, were all to be upon the premises. It was to be wood for her fire in that place, and, like the keeping of the cow and sheep, was to be used there, if anywhere, and not carried away. *Wood* v. *Barstow*, 10 Pick. 368, before cited.

And secondly, as to the one fifth part of the hay.—By reading the condition of the bond, it will appear, that it was drawn by an unskilful person, wholly ignorant of technical terms, and dictionary learning. No rule of law is better settled, than that the intention of the parties, ascertained by an examination of the whole instrument, is to govern, in giving it a construction, as before stated. An inspection of the original bond will show, that it is in the handwriting of the defendant, who was then the mate of a vessel. The provision made by the obligee for himself, in addition to rooms in the house, was, that "he, the said Benjamin, shall improve the one half of said premises." This would not authorize him to sell the hay off the farm, as it would be waste. The provision for whatever person might become his wife, was better than that for himself. The first provision for her was, that "at his decease she shall *enjoy* one fifth part of the produce delivered to her free from all expense on her part;" and then follows immediately after, "also" (*enjoy*, again, probably, being in-

tended to be understood) "the privilege of keeping one cow and one pair of sheep." This would include keeping on hay in the winter as well as pasturing them in the summer. She therefore could not want the hay to keep her stock, which were to be kept on the farm by the defendant, as well in winter as in summer. The plaintiff claims the right to have one fifth part of the hay delivered to her, *to be carried off from the farm, and sold*, to the impoverishment of it, *in addition to the keeping of the stock.* This right the defendant denies. In the law books, as well as in fact, the hay is no more the produce of annual cultivation, and would no more go to the executor in the event of the decease, than the pasturing. And to me it appears, as absurd, that she, under this provision, should claim the hay to be carried off, and not used on the premises for the keeping of the cow and sheep, as that she should in the same way claim the one fifth of the pasturing in addition to keeping the cow and sheep. There is a provision for firewood, and so there is for keeping the cow and sheep. The object was to provide for her a support upon the farm, and not in the town or the city, and to enable her to keep house there, in the style and mode to which she well knew farmers were accustomed. On the plaintiff's ground, this was a mode of raising money for her benefit. She could not want it for the keeping of her cows and sheep, for they were to be kept otherwise. If such had been the design, why should not a sum of money have been required to be paid, instead of compelling her to sell hay for that purpose, especially as the sale of hay from the farm would injure it? And why should she have such fund provided, when he provided nothing of the kind for himself.

In reply.

There is no soundness in the argument, that the plaintiff is entitled to the fifth part of the hay, because that without it, the provision would be inadequate. One fifth part of what was raised upon the farm, "delivered to her free from all expense," with firewood ready for the fire, and the keeping of the cow and sheep, with a house to live in, is much better than dower,

and is so admitted to be, and indeed is better than the provision for himself, "the right to improve one half of the premises," without adding thereto the one fifth of the hay. It is assuming a fact, and drawing an erroneous inference from it.

The "consideration so prominent as to strike any one who looks at the case," "that if hay was not included in the word produce, the provision might fail by the defendant's laying the whole down to grass," does not appear to me to be so very overwhelming. He might much more easily lay the whole down to pasturing, and more easily still, abandon the whole, and have neither produce, hay, nor pasturing, or he might turn the whole into *produce* and pasturing and have no hay. But in either case, if she remained there to avail herself of them, he must keep the cow and sheep, and furnish the firewood. But is it to be presumed, that the defendant would do any such thing, when by so doing the injury to himself must be far greater, than to a lady seventy-five years of age, whose right, whatever it was, ceased with her life.

The counsel for the defendant here contended, that the word "*produce*" was indefinite in its meaning, and was used in the very cases cited for the plaintiff, in an entirely different sense in one place from what it was in another; and that it had acquired no technical meaning. He commented upon the cases cited, and insisted that they negatived the position they were cited to sustain.

It is said in the plaintiff's argument, that this is simply "a contract for the delivery of specific articles." This is not a question whether the articles were offered at the right place, but whether *an action* can be maintained against the defendant for his declining to deliver the firewood and hay to be carried away and sold, when she had left the premises. I do not perceive, that there is anything involving any question as to the place of delivery, whether in Kennebunkport; Lyman or Alfred. I will merely remark, that where the intention of the parties as to the place of delivery of specific articles can be ascertained from the contract, the authorities all agree, that a delivery there is sufficient. It has been held that a note payable in

"*farm produce*" is payable at the farm of the contractor. 2 Kent, (3d Ed.) 508, referring to 5 Cowen, 514. See *Howard* v. *Miner*, 20 Maine R. 330, and *Sheldon* v. *Purple*, 15 Pick. 528. The inquiry here is, is she entitled to have the firewood and hay to be carried off and sold.

Comments were here made upon the cases of *Wilder* v. *Whittemore*, 15 Mass. R. 262, and *Thayer* v. *Richards*, 19 Pick. 398 ; and it was contended, that they did not conflict with the case, *Wood* v. *Barstow*, or aid the plaintiff's case.

*Bradley* and *Chisholm*, in reply.

The defendant on his part has objected, first, that this action cannot be maintained by the administratrix, that power to maintain it is not given by chap. 106, § 3, Rev. Stat. which defines the powers of administrators. In reply, the bond in suit was a legal right vested in the intestate. The administrator's power to sue it, if not named in the statute, is incident to his ancient and comprehensive office, the mere name of which adopted in a statute, implies among other powers, that of suing for the breach of any contract made solely with his intestate. 2 Blackstone, 489, 510; Chitty on Contracts, 19.

The defendant asks, could the administratrix inventory this bond? If any obscurity rests on the answer, it equally affects all claims of the intestate, where the legal right is in him whilst the equitable interest is in another; such as assigned choses in action. Because, in principle it matters not whether this equitable interest in a third person is created by assignment to him, or by making him a beneficiary at the origin of the contract.

It is said by defendant's counsel, "this was not the case of an existing demand." But it was an existing valuable contract, though performable at a future time ; *the legal property* in which was in the plaintiff's intestate at his decease, and as such must have passed to his legal representatives.

Again he says, "the subject matter of this contract could never be the property of the intestate, either for himself or in trust for another." That is to say: the hay and firewood being payable after his decease, could never be his property.

But is it the legal property in the specific thing to be paid, or is it, in the contract, while existing in contract, that gives to a party and his executors the right to sue?

*The cause of Action.*— The defendant's counsel argues that *hay* is not included in "1-5 part of the produce," to be delivered to the widow.

And further, that whatever was included in the provisions for her benefit, was a personal privilege, depending on her using and enjoying it on the farm. We deny both positions.

The comprehensiveness of meaning of the word *produce*, either in its popular use, or according to legal precision, is not narrowed by the authorities and comments offered in defendant's argument. Ignorance and unskilfullness in the draftsman, therefore, if existing, as is said, afford no reason for narrowing its construction.

Nor can any doubt arise, on this point, in consequence of the other provision, to wit: "also the privilege of keeping one cow and one pair of sheep." Strike out this provision, and would there then be any pretence that hay was not included in produce? And why should the addition of it *alter* a preceding stipulation? It is connected with what precedes by "also," a word of *addition*, not of *qualification*. But it is said they must eat hay. Very well: If any question arises thereupon, it is, *whose* hay shall they eat? Shall they feed from her 1-5 or from his 4-5ths? The mere *privilege* of *keeping them* on the place, does not necessarily imply whose hay they should eat when both were provided with hay. The only question then is, whether upon the strict rule of construction, that where a clause is doubtful, it shall be taken most strongly against the party who uses the language. The plain terms of the instrument, the rules of construction if they are ambiguous, the objects of the parties to it, and the circumstances of the case, are all opposed to such a construction.

The defendant inquires why the plaintiff did not demand manure, trees and pasturing? Satisfactory answers are promptly suggested. Manure, she had no use for; and it is not commonly considered, like hay, as produce. Trees, unlike

the other articles claimed, have no such specific annual produce, as could well render them the subject of such claim and delivery. Pasturing could not be delivered.

Selling hay off the farm *is not* "*waste.*" It is a common practice with widows whose dower is assigned in hay land, and other tenants for life.

It is also asked, "why should not a sum of money have been required to be paid instead of compelling her to sell hay?" It is answered: any specific sum of money deemed adequate, might have been difficult for the defendant to raise on farm produce, *particularly twenty-eight years ago.* His ability to raise it would at all times depend on the crops.

If the widow was compelled to live in his house, and have her hay consumed in his barn, the many ways in which the defendant, if so disposed, might annoy and wrong her, for which there would be no adequate remedy, might poison the whole living. Unless the contract in the plainest terms subjects her to this liability, the law will not. As to the firewood, the language is not "for her use," but "sufficient for her use," "cut in suitable lengths for her fire," not "for her fire *place*". She would be at liberty to alter the existing fireplace, or use a stove. Or with equal propriety burn it elsewhere or dispose of it to another.

The stipulations for her benefit, as to articles, are all specific as to quantity. And the import of the language is, that they shall all be *delivered* to her, without condition of special purpose; which denotes an absolute change of property.

The counsel for the plaintiff here commented upon the cases cited for the defendant, as well as on those cited in the opening.

The opinion of the Court was made known at the September Term, 1848, in the county of York, drawn up by

WHITMAN C. J. — The first question raised on the part of the defendant, is as to the right of the administrator to maintain an action on the bond, for the causes assigned as breaches of the condition annexed to it. The contract was between the

defendant and the intestate; and the suit is between the representative of the latter, and the defendant. At common law we have only to look to the parties on record; and then to the cause of action. If the parties to the record are such as may sue and be sued, on the contract set forth, we must then see if there be a cause of action. Whether some other person is ultimately to be benefited by a recovery at common law we have no occasion generally, to inquire. Whether the interest to be consulted be of a legal or equitable character has but little, if any thing, to do with the cause of action. If there has been a breach of the condition of the bond, whether it took place before or since the decease of the intestate, his legal representative must be the one, at common law, entitled to maintain an action to recover the damages accruing in consequence of it.

It is true, however, that Courts of law have been in the habit of lending their aid to protect the rights of those beneficially interested, in a merely equitable point of view; but never to defeat such claims; nor to allow such considerations to interfere with the cause of action. In the present instance it does not appear to be necessary for the Court to know for whose benefit this action was instituted; or whether it was brought by the intestate's representative, of his own accord, and with a view to the benefit of the estate; or by some one in the name of such representative, with a view to avail him or herself of an equitable right, arising under that bond. The defendant has no release, from the intestate or his representative, to set up. If he had, we might be called upon, in consequence of some equitable right, appearing in some third person, to determine whether it should operate or not. He gave his bond, and at the time of giving it acknowledged himself to be then indebted to the intestate. The indebtment was to be avoided by the performance of certain conditions. If those conditions have not been performed, as agreed, the indebtment remains; and payment may be enforced by the representative of the obligee. The first objection, therefore, to the maintenance of the action, fails.

We come now to the consideration of the question whether the condition of the bond has been performed. The condition of it, in reference to the widow of the intestate, is in these words, "she shall enjoy one fifth part of the produce (of the farm conveyed to defendant,) delivered to her free from all expense on her part; also the privilege of keeping one cow, and one pair of sheep and furnishing her with the back room and bedroom adjoining; with the use of the kitchen together with a sufficient quantity of firewood, cut in suitable lengths for her fire, sufficient for her use during her natural life."

The questions raised under this part of the condition are, first, was the defendant bound to deliver to the widow one fifth part of the hay, raised on the farm annually, to be by her carried away, and be disposed of by her at her pleasure; and, secondly, was she entitled to have the firewood to be furnished, and to carry it away, and dispose of it at her pleasure.

The defendant contends that she was not entitled to any part of the hay, except such as her cow and sheep might consume on the place, where they were to be kept; and there is much reason to believe that such must have been the intention of the parties to the bond; and if such was the intention, it is conclusive. This intention is to be sought for in the instrument declared upon, taken together, having reference, at the same time, to the nature of the contract, and the situation of the parties, and the object to be accomplished. It is not said in terms, that she shall "enjoy" one fifth of the hay, but that she shall "enjoy" one fifth of the produce. Was one fifth of the hay included in these terms? Hay, it is true, is an annual product of the farm, and so is pasturage. And it is not perceived, why she might not claim the one fifth of the latter as well as of the former. They are, however, both regarded, by farmers, as products to be consumed in keeping the stock on the farm; and from the products of the stock the remuneration for the hay and pasturage is expected to be derived. Good husbandry requires that such should ordinarily be the course of management upon a farm. Farms are sometimes let in the country at the halves, as farmers express it, that is, for one

half the produce. What is meant in such case? Is the landlord to take one half of the crop of hay and pasturing, and then come in to share with the tenant the half of the products of the stock, kept on the other half of the hay and pasturing? It would seem irrational to suppose that such would be the undestanding of any farmer, who did not intend the ruin of his farm. Under such a letting it is believed that the tenant could not be allowed to do otherwise, than to use the hay, cut on the farm, in feeding stock upon it, and that the landlord would have no right to prevent his doing so. And the latter would, instead of one half of the hay and pasturing, be understood to be entitled to one half of the produce of the stock.

Besides, the widow was to *enjoy* one fifth of the produce. The expression, to enjoy one fifth of the hay, would be inappropriate. To *enjoy* would seem to be applicable only to what would be adapted to her personal use and accommodation.

The keeping of her cow and sheep is specially provided for, and, according to her construction, she is to have one fifth of the hay set apart for her use, and then her cow and sheep are to be kept upon as much as may be necessary of the remaining four fifths. This cannot have been the intent of the parties to the bond.

As to the wood, we think it very clear, that the defendant was not under obligation to furnish it, except so far as she might need it in the place reserved for her residence and occupation. The whole provision, taken together, shows that such was the case. Rooms were provided for her accommodation. The cow and sheep were to be kept on the place or farm. The wood was to be cut suitable for her fireplace there. It could not have been contemplated that the defendant should adapt it to a fireplace elsewhere. The setting apart of the rooms for her accommodation of residence, the keeping of the cow and sheep on the farm, and the preparation of the wood for her fireplace by the defendant, all concur to show, that the parties to the bond could never have contemplated or have understood that she was to be furnished with the wood, except for her fire in the house of the defendant, and in the room reserved for her use. *Plaintiff nonsuit.*

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF OXFORD.

ARGUED AT APRIL TERM, 1847.

[MEM. — This case was prepared for publication with the Oxford cases argued in 1846, but was accidentally mislaid.]

## MARY CHASE *& al. Ex'ors, versus* JOHN BRADLEY *& al.* and ISRAEL B. BRADLEY, *as Trustee.*

Executors by the common law, are authorized to discharge or release at pleasure, choses in action of their testator, although such release may in certain cases be evidence of assets in their hands.

The Rev. Stat. (c. 106, § 33,) which provides, that an executor or administrator may compound with and discharge a debtor, unable to pay all his debts, with the approbation of the Judge of Probate, on receiving a fair proportion of the debt, does not restrict the power of executors and administrators. It merely affords them protection against being called upon to account for more than they have received, when they have acted with the approbation of the Judge of Probate.

In giving a construction to an instrument in writing, the intention of the parties, to be collected from the whole instrument, is to be carried into effect, although a literal construction of a single clause, considered without reference to the others, would lead to a different result.

When a levy is made upon land previously attached, the estate is appraised at its value at the time of the levy, and the statute purchaser pays no more for it, although the title acquired has relation to the time of the attachment.

If a debtor, after an attachment, and before the levy of the execution thereon, makes a conveyance of the land, *bona fide*, and for a valuable consideration; and after such conveyance and before the levy, a third person cuts timber trees, as a trespasser upon the land, and converts the same to his own use, and settles therefor with the grantee of the land, and pays him

the value of the timber; the grantee does not thereby become chargeable as the trustee of the debtor, in a process commenced by the creditor, after the levy, wherein the grantee is summoned as the trustee of the debtor.

THIS was an action of debt on two several judgments in favor of Stephen Chase, deceased, of whose estate the plaintiffs are executors, against the principal defendants.

The parties agreed upon a statement of facts, which facts sufficiently appear in the opinion of the Court.

The parties agreed, that the Court should render such judgment on the facts, as the law should require.

The release was in the following terms: —

"Whereas Stephen Chase, Esq. late of Fryeburg, deceased, did at the term of the Supreme Judicial Court, begun and holden at Portland, in and for the county of Cumberland, on the second Tuesday of November, 1836, recover judgment against John Bradley and Isaiah Warren, for the sum of three thousand and thirty-one dollars and sixty-seven cents, damage, and costs of Court, taxed at ten dollars and seventy cents, on which said judgment three executions have issued and on one of which the said John Bradley now stands committed to the jail in the county of Cumberland: — And whereas the said Stephen Chase did at the Supreme Judicial Court, holden at Paris, in and for the county of Oxford, on the third Tuesday of May, 1839, recover judgment against the said Bradley and Warren for the sum of five thousand seven hundred and sixty-five dollars and fifty-six cents debt, and seventeen dollars and twenty-seven cents cost, on which said judgment several executions have issued, and on which is remaining unsatisfied of the principal about fourteen hundred dollars. — And whereas the said Stephen Chase did at the Supreme Judicial Court, begun and holden at Paris, in and for the county of Oxford, on the second Tuesday of October, 1844, recover judgment against the said Bradley and Warren, for the sum of nineteen hundred and thirty-eight dollars and eight cents debt, and fifty-seven dollars and fifty cents cost of suit; and at the same term of said Court, another judgment against said Bradley and Warren for the sum of seven thousand and eight hundred

and eighty-eight dollars and forty-one cents debt, and fifty dollars and ninty-seven cents cost of suit. And at the same term of said Court another judgment against the said Bradley and Warren for the sum of thirteen thousand, nine hundred and fifty-nine dollars and twenty cents debt, and twenty-six dollars and thirty-eight cents cost; — and which said judgments are satisfied only in part: —

"Now know all men by these presents, that we, Mary Chase, widow, and Stephen Henry Chase, Esquire, of Fryeburg, Executors of the last will and testament of the said Stephen Chase, Esquire, deceased, and which will has been duly proved, approved and allowed, in consideration of the sum of five thousand dollars to us in our said capacity as Executors aforesaid, well and truly paid by the aforesaid Isaiah Warren, the receipt whereof, we, in our said capacity, do hereby acknowledge, have remised, released and discharged, and do hereby remise, release and forever discharge for ourselves, and in our said capacity of executors, our successor or successors in the administration of said estate, and for the due execution of said will and of the trust on us or them imposed, the said Isaiah Warren, his heirs, executors and administrators, from the payment of one moiety or half part of the aggregate sums due on the before recited judgments, executions and demands, hereby acknowledging to have received of the said Isaiah full satisfaction of said moiety, or half part of said judgments, executions and demands before recited; and this discharge or release to the said Isaiah is not to be applied to any one particular judgment, suit or process, existing, pending or that may be further prosecuted or hereafter commenced, and this instrument is not to be considered as, or have the effect of a release or discharge of any existing judgments or executions so long as the other moiety or half part of the debt due from said Bradley and Warren, not provided for herein, remains due and unpaid, except for the purpose of exempting the said Isaiah and his personal property, from any liability for the debt of said Bradley and Warren as hereinafter set forth, and this instrument is not to be pleaded or used by said Bradley and Warren, or either of them, as a defence to any suits

that are or may hereafter be instituted against said Bradley and Warren, so long as the other moiety or half part of the debt due from said Bradley and Warren remains unpaid, not provided for herein. And this instrument is not to enure to the benefit of John Bradley, to discharge him the said Bradley, his person or property, from liability, or as a bar or defence to any legal suit or process till the other moiety or half part of the debt not herein provided for is paid; reserving to us in our said capacity of executors the right to demand, receive and enforce the payment of the remaining half part of the same, from and out of the goods, chattels, or lands of the said John Bradley, and to enforce payment thereof against the body of the said John Bradley according to law, and subject to the covenants and agreements by us in our said capacity of executors made as hereinafter set forth, and in consideration of the aforesaid five thousand dollars, paid as aforesaid, do in our capacity aforesaid hereby remise, release, and forever quitclaim to the said Isaiah Warren, his heirs and assigns, one half in common and undivided of two lots of land in said Fryeburg, the one called the Mount Tom lot, and the other called the Dark Brook lot, and also the whole of two lots of land in the town of Denmark, in said county of Oxford, the one called the Bay lot and the other Mast Swamp lot, and the same which were levied upon by virtue of one of the executions issued on one of the judgments before mentioned, and all right title and interest acquired by said estate by virtue of said levy, to said half part of the two first mentioned lots, and the whole of said two last mentioned lots, he, said Warren, having redeemed the aforesaid premises by payment to our full satisfaction.

"And in consideration of the five thousand dollars aforesaid, in our capacity aforesaid, we do covenant and agree with the said Warren, his heirs, executors and administrators, that we will not, and our successors in the settlement of said estate, and in the execution of said will, shall not, satisfy any of the half part, remaining due on said judgments and executions, out of the goods and chattels of the said Isaiah, or in the hands of his executors or administrators, or out of the lands of the said Warren, as may appear by the record, when said

judgments may be enforced or executions levied; nor levy any executions issued or that may at any time hereafter be issued, upon any of said judgments or upon any judgments that may hereafter be recovered thereon, or cause it to be done upon or out of any of the money, goods and chattels of the said Isaiah, or of the lands of the said Isaiah, as may have so appeared by the records and, *bona fide*, been the property of the said Isaiah previous to the time that any attachments have been made on said lands in suits on said judgments; nor cause the body of said Warren ever to be arrested on any execution or executions, issued or that may hereafter issue on said judgments, or cause him, the said Warren, at any time to be committed or held in duress thereon; we, the said Mary and Stephen Henry Chase, in our said capacity of executors and in behalf of said estate, reserving to ourselves all liens by attachment or any right to the same, on the property of said John Bradley, to the extent and no more, of one half part of the aforesaid judgments, executions and demands, and all right to prosecute to final judgment any suits now pending or hereafter brought, and for such purpose alone to use the name of said Warren as principal defendant, in any process, and to satisfy the same out of the property of the said Bradley alone, subject to the exceptions herein before stated, to the amount of one half part of said judgments, executions and demands now remaining unsatisfied and no more; also reserving all right to any levys heretofore made on the property of said Bradley and Warren, same as hereinbefore excepted, and also reserving all rights acquired, or that may hereafter be perfected, against all persons declared against as trustees in any trustee process now commenced.

"In witness whereof, we, the said Mary Chase and the said Stephen Henry Chase have hereunto set our hands and seals, this twenty-first day of December, in the year of our Lord, 1844.

"Mary Chase, [L. s.]

"Signed, sealed and delivered in presence of,

"S. Henry Chase. [L. s.]

"Edward L. Osgood."

Israel B. Bradley was summoned as trustee of the principal defendants, and made his disclosure, the substance of which is stated in the opinion of the Court.

The arguments were in writing, by

*Chase*, for the plaintiffs,— and by

*Fessenden*, *Deblois* and *Fessenden*, for the defendants and trustee, but are too extended for publication.

For the *plaintiffs*, it was contended, that the paper signed by the executors in favor of Warren, was executed by them, as such, without legal authority, and therefore could not be of any avail against the estate they represented. By Rev. Stat. c. 106, § 33, the executors are authorized to "compound with a debtor and give him a discharge" "with the approbation of the Judge of Probate." Here was no such approbation, and the stipulations contained in it may bind them personally, but cannot affect the estate. The executors cannot bind the estate in a manner that the law prohibits.

But if it can be considered, that the executors had authority to make the instrument, it cannot operate as a discharge of any judgment or demand, or of any part thereof. The whole instrument is to be taken together, to ascertain the proper construction to be given to it. The whole instrument was here examined, and it was said, that it was to have no effect as a release or discharge until Bradley had paid what was due from him; by it the right is reserved to commence and prosecute any suits against Bradley and Warren; it is not to be applied in any suit or process pending, or to be commenced; and it is not to be pleaded or used as a defence to any suit instituted, or to be instituted, against Bradley and Warren. The judgments are to be rendered for the whole amount, and Warren is to be protected only by the covenants. If the judgments are to be rendered for but one half the amount, still Warren must resort to his covenants, should the execution for the half be levied upon his property, and that would be his only remedy. This, therefore, was the only remedy provided, and no part was intended to be released, until Bradley's half was paid.

He also contended, that the trustee should be charged. The general grounds of argument to charge the trustee, appear in the opinion of the Court.

For the *defendants*, it was contended, that the instrument was a release and discharge, and conclusive evidence of the payment of one half of the demands mentioned therein, reserving to the executors the right to maintain, against Bradley and Warren, joint actions to recover joint judgments for one half, with a covenant not to satisfy any such judgment out of the property of Warren, or to molest his person. They cited 2 Salk. 574; 2 Co. Lit. 232 *(a)*, § 376; Hobart, 70; *Bradley* v. *Boynton*, 22 Maine R. 287; 5 Dane, c. 166, art. 3; 2 Saund. 48 *(a)*; Willes, 108; *Walker* v. *McCulloch*, 4 Greenl. 426; *Tuckerman* v. *Newhall*, 17 Mass. R. 581; *Ward* v. *Johnson*, 13 Mass. R. 148; 22 Pick. 308; 2 Johns. R. 448; 7 Johns. R. 209; 9 Wend. 336; 1 Bos. & P. 630; 4 Wend. 607. The authorities go to the extent, that the release to Warren, would operate as a release to Bradley also. 2 Johns. R. 448; 18 Pick. 415; 4 Greenl. 421.

In contending that there was no ground for charging the trustee, the following authorities were cited. *Hastings* v. *Baldwin*, 17 Mass. R. 556; *Whitman* v. *Hunt*, 4 Mass. R. 272; *Hatch* v. *Smith*, 5 Mass. R. 49; *Cleaveland* v. *Clap*, 5 Mass. R. 201; *Hawes* v. *Langton*, 8 Pick. 67; *U. States* v. *Langton*, 5 Mason, 280; *Rundlett* v. *Jordan*, 3 Greenl. 49; *Chase* v. *Bradley*, 17 Maine R. 89; *Lamb* v. *Franklin Man'g Co.* 18 Maine R. 187; *Bissell* v. *Strong*, 9 Pick. 564; *Guild* v. *Holbrook*, 11 Pick. 101; *Sanford* v. *Bliss*, 12 Pick. 116; *Ripley* v. *Severance*, 6 Pick. 474; 7 Mass. R. 438; 2 Mass. R. 503; 16 Mass. R. 62; 19 Maine R. 42; 12 Pick. 383; 2 Metc. 376; 3 Metc. 297.

The opinion of the Court was drawn up by

Shepley J. — The validity and effect of a sealed instrument, executed by the plaintiffs and delivered to the defendant, Warren, on December 21, 1844, is to be considered.

The defendants contend, that it is a release of one moiety of two judgments declared on in this action. The plaintiffs insist, that it is invalid, because they, as executors, had no legal right to compound and discharge debts due to their testator without the approbation of the Judge of Probate. And that if valid, it cannot operate to discharge the defendants, in such a manner as to prevent the recovery of the whole amount due by those judgments.

Executors by the common law are authorized to discharge or release at pleasure choses in action of their testator, although such release may in certain cases be evidence of assets in their hands. *Brightman* v. *Keighly*, Cro. Eliz. 43. The statute, c. 106, § 33, which provides, that an executor or administrator may compound with and discharge a debtor, unable to pay all his debts, with the approbation of the Judge of Probate, on receiving a fair proportion of the debt, does not restrict the powers of executors and administrators. It affords them protection against being called upon to account for more than they have received, when they have acted with the approbation of the Judge of Probate. The objection to the validity of the instrument cannot prevail.

It contains these words of release to the defendant, Warren, used by the plaintiffs in their capacity as executors. Have remised, released and discharged, and do hereby remise, release and forever discharge the said Warren, his heirs, executors and administrators from the payment of one moiety or half part of the aggregate sums due on the before recited judgments, executions and demands, hereby acknowledging to have received of the said Isaiah full satisfaction of said moiety or half part of said judgments, executions and demands, before recited.

The plaintiffs do not contend, that this language will not legally operate to discharge both the defendants from the payment of one moiety of the judgments, unless it is controlled by other language subsequently used, and found in the instrument immediately following that already quoted; and it is: —

"this discharge and release to the said Isaiah is not to be applied to any one particular judgment, suit or process, existing, pending, or that may be further prosecuted, or hereafter commenced; and this instrument is not to be considered as, or to have the effect of, a release or discharge of any existing judgments or executions, so long as the other moiety or half part of the debt due from said Bradley and Warren, not provided for herein, remains due and unpaid; except for the purpose of exempting the said Isaiah, his person and property, from any liability for the debt of said Bradley and Warren as hereinafter set forth; and this instrument is not to be pleaded or used by said Bradley and Warren, or either of them, as a defence to any suits, that are, or may hereafter be, instituted against said Bradley and Warren, so long as the other moiety or half part of the debt due from said Bradley and Warren remains unpaid not provided for herein."

It is apparent, that the instrument was drawn most carefully to guard against the loss of the other moiety and against any injury to their attachments and remedies to recover it from Bradley. This may account for the introduction of clauses or phrases which might not be necessary for such a purpose, but were rather used *majora cautela*. There are obviously three distinct clauses in that part of the instrument last quoted.

The purpose and effect of the first clearly was to declare, that by the discharge of one "half part of the aggregate sums due" no "one particular judgment, suit, or process, existing, pending" or to be commenced, should be discharged. The intention appears to have been to prevent the large amount discharged from being applied to discharge any one judgment or suit pending or to be commenced.

The intention of the second clause, so far as it could operate favorably for the plaintiffs, appears to have been to prevent any existing judgments or executions, on which no suits had been commenced, from being discharged, so long as the other moiety due from Bradley should remain unpaid. The intention exhibited in these two clauses is not in conflict with the

operation of the release to discharge one moiety of each judgment or demand.

A literal construction of the third clause would perhaps prevent the instrument from being used "as a defence to any suits" pending or to be commenced, so long as the other moiety should remain unpaid.

Was it the intention of the parties to be collected from the whole instrument, that the entire debt should remain due from Bradley, the release of one moiety to Warren notwithstanding, so that the plaintiffs might collect the whole of Bradley, if he did not voluntarily pay his own moiety and thereby obtain a discharge of the whole? If so, it might be important to prevent the release from operating as a discharge of one moiety of each judgment, that Bradley might be induced to pay his own moiety to free himself from liability to pay the whole amount. If in no event more than a moiety could be collected of him, there would not appear to be any more sufficient motive for the introduction of that clause, than to secure to the plaintiffs the right to commence, maintain and prosecute to final judgment a suit upon each of the judgments for the recovery of the moiety due from Bradley. In such case it would seem to be to little or no purpose to provide for a recovery of the whole amount due by the judgments against both defendants, when one moiety only could in any event be collected of Bradley. It would be more reasonable to conclude, that the words "defence to" were used instead of, or in the same sense, as the words "discharge of" in the preceding clause, than to infer, that they were designedly used for a useless purpose. The effect of the clause would then be to provide, that the instrument should not be pleaded or used in discharge of any suit, unless the other moiety was first paid. This construction will leave the instrument to operate harmoniously in all its parts. That it was not the intention, that more than one moiety should in any event be collected of Bradley, is quite certain. The latter part of the instrument contains this clause:—

"Reserving to ourselves all liens by attachment, or any

right to the same, on the property of said John Bradley, to the extent, and no more, of one half part of the aforesaid judgments, executions and demands; and all right to prosecute to final judgment any suits now pending or hereafter brought, and for such purpose alone to use the name of said Warren, as principal defendant in any process, and to satisfy the same out of the property of said Bradley alone, subject to the exceptions herein before stated, to the amount of one half part of said judgments, executions and demands now remaining unsatisfied and no more." It cannot with propriety be contended, that it was the intention to effect a valuable purpose in preserving to the plaintiffs the right to recover in each suit the whole amount; that they might thereby obtain the whole of some one or more of the judgments from the property of Bradley, which had been attached, while they would not collect of him more than a moiety of the whole amount due; for this last clause provides for the preservation of the liens on his property by attachment, "to the extent, and no more, of one half part of the aforesaid judgments." It is apparent, that the two latter clauses relied upon by the plaintiffs, provide by implication, that one moiety would be discharged by the release, by the provision, that the judgments shall not be discharged, so long as the other moiety remains unpaid. In the last clause quoted, the plaintiffs reserve to themselves the right to use the name of Warren as a defendant, in process for the purpose alone of obtaining satisfaction from Bradley of one moiety and no more.

While any other construction, would make some of the phrases or clauses repugnant to others, this construction will have no such effect, and will at the same time preserve to all every valuable right secured to them by the instrument.

The plaintiffs are entitled to judgment for one moiety of the amount due upon the two judgments at the time, when the instrument was executed, disregarding the indorsements made on executions issued upon them by officers from the sales of personal property, the title to which failed to be in the debtor,

with legal interest on the moiety not released to the time of judgment.

Another question presented for consideration is, whether the person summoned as a trustee is chargeable on his disclosure.

The testator caused certain land of John Bradley to be attached upon a writ; obtained judgment in that suit, and caused an execution issued thereon to be levied upon the estate attached. After the attachment and before the levy, John Bradley conveyed the lands to the trustee. During that time, one King cut timber trees as a trespasser upon those lands, and converted them to his own use; and settled therefor with the trustee, and paid him more than three thousand dollars.

The plaintiffs, among other things insisted on, contend, that the property thus taken from the lands, should have been applied to satisfy the debt, the estate proving to be insufficient without it; that the statute, c. 114, § 30, provides that real estate attached should be "held as security" to satisfy the judgment. That to withdraw a part of it in any manner, and prevent its appropriation to that purpose is a fraud upon the law. That the person, in whose possession any proceeds from such lands converted into money are found, may be required by the trustee process to pay it over to the creditor. That in this case, especially, should the trustee be held to account to the plaintiffs, because they made application to the Court, according to the provisions of the statute, c. 119, § 14, for a writ of injunction to stay waste upon the lands, which application was withdrawn upon an agreement made between the counsel of the creditor and the debtors, that a receiver should be appointed to receive the proceeds and hold them for those, who might be legally entitled to them; and that these proceedings were communicated to the trustee.

The disclosure states, that the trustee purchased the lands, *bona fide* and for a valuable consideration, without notice of the attachment. When a levy is made the estate is appraised at its value at that time, and the statute purchaser pays no more for it, although the title acquired has relation to the time

of the attachment. If the creditor might have prevented the waste by obtaining a writ of injunction against it, and have obtained by a levy at a higher value, satisfaction of his execution to a greater amount, he did not do so, but appears to have relied upon an arrangement, which may prove to be illusory. If it could be admitted, that the provision of the statute, which requires, that the estate shall be held as security to satisfy the judgment, would prevent the purchaser from acquiring a legal title to the proceeds of timber trees, limestone, or other material derived from the estate attached, it would seem to follow, that those proceeds might belong to the attaching creditor after the levy had been made. And yet he would not appear to have paid for them, because he would have purchased at the appraised value after such proceeds had been obtained from it. If they became the property of the attaching creditor, they could not be goods and effects of his debtor in the hands of a trustee to be reclaimed by this process. The creditor must bring his action for money had and received to his use against the receiver of them, if he would obtain them. The law permits a debtor to convey his estate under attachment, and the purchaser to acquire a good title against all other rights, than those secured by the attachment. Any such proceeds of property obtained from the estate after such a conveyance, made *bona fide* and for a valuable consideration, cannot be the property of the debtor and grantor, or goods and effects of his in the hands of the purchaser. If it be admitted to be a fraud upon the law to cut and carry away timber trees from the land attached, it is not perceived how the debtor, who had thus conveyed the lands subsequent to the attachment, could, by the purchaser's committing a fraud upon another, acquire property to the proceeds derived from them. The conveyance by the debtor cannot be considered fraudulent and void by events happening after it was made, and for the purpose of converting the proceeds of timber trees, thus cut and carried off, into goods and effects of the debtor, and at the same time a *bona fide* conveyance to pass a good title to the estate, which carried with it the property in those

timber trees then growing upon it. It is not contended, that it can, upon the answers of the trustees, be considered as wholly fraudulent and void as to creditors.

As it respects the proceedings on the application for an injunction, they can have no operation upon the legal title to the proceeds of the timber trees, whether communicated to the trustee or not, unless he authorized some one to act for him, or subsequently assented to them; and this is distinctly denied in the disclosure.

In whatever aspect the case is presented and examined, the trustee does not appear to hold any goods or effects of the principal debtors in his hands.

*Trustee discharged.*

## JOHN DOLLOFF *versus* ZEBEDIAH HARDY.

If the proprietors of common lands, at a meeting regularly called, establish by their votes a mode of calling their future meetings, under the authority given by law for that purpose, the right of calling their meetings in manner provided by the statute, by application of the requisite number of proprietors to a justice of the peace, still remains; and meetings may be legally called in either of the modes.

If a meeting of the proprietors be called on the application of persons calling themselves proprietors, and the meeting takes place, and no objection is made by any one at the meeting, that it was not rightfully called, and the records of the meeting show that the proprietors met on such application; the legality of the meeting cannot afterwards be controverted, on the ground that the applicants were not all, or a sufficient number of them, proprietors.

And where the person to whom a warrant from a justice of the peace to call a meeting is directed, makes his return thereon generally, that he had notified the proprietors "by posting notice in said town of R. and causing the same to be published in" two papers named, "as the law directs;" and the proprietors meet at the time and place, and cause their corporate acts to be entered on their records, and the proceedings are ratified at a subsequent legal meeting; it cannot afterwards be objected, that the meeting was not legally notified.

If a sale of land of such proprietors be made through the agency of a committee and their doings be accepted at a meeting of the proprietors, but the meetings at which the committee was chosen and at which their report was accepted were not legally called, still if those proceedings were ratified at a subsequent legal meeting, the ratification would give validity to the doings, and would relate back to the time of the transactions, and would have a complete retroactive efficacy; no rights of third persons having intervened.

When the clerk of a proprietors' meeting makes minutes on a paper of the proceedings of a meeting, but dies before he has regularly entered the same upon the book of records, the proprietors' clerk, subsequently chosen, may rightfully make up the record from such minutes.

In an action of trespass *quare clausum* by one claiming title under the proprietors of common lands, the defendant who shows no title whatever, cannot defeat the action by raising objections, that the plaintiff acquired no title by reason of informalities in the mode of proceeding of the proprietors in making the grant.

The proprietors of common lands may convey the common estate by vote. And this may be done by appointing a committee to make the sale, and accepting their report of having done so.

TRESPASS *quare clausum.* The case came before the Court

upon an agreed statement of facts, wherein it was agreed, that either party should put into the case any records of the proprietors of New Pennycook, now Rumford, in which the land lies. The facts appear at the commencement of the opinion of the Court.

The return signed by the person to whom a warrant to call a meeting was directed, to which objection was made, was in these words: —

"Rumford, January 26, 1828. Pursuant to the foregoing warrant, to me directed, I have notified the proprietors of said Rumford to meet at the time and place and for the purposes above mentioned, by posting notice in said town of Rumford and causing the same to be published in the Maine Gazette, published at Portland, and Oxford Observer, published in the county of Oxford, as the law directs."

The vote of the proprietors, appointing the committee was: "to choose a committee to make sale of the common land at private sale."

The vote of the proprietors, accepting the report, was: —

"Voted to accept the report of Francis Keyes, Kimball Martin and Stephen G. Stevens, their committee, which is as follows." The whole report of the committee is then set out, in which the committee say: — "We have sold to John Dolloff the following parcel of land, bounded beginning at," &c. particularly describing the land mentioned in the plaintiff's declaration, and stating that they had taken the note of the plaintiff to the proprietors for the amount of the consideration.

*Howard & Shepley*, for the plaintiff, contended that the nonsuit should not have been ordered, as the plaintiff had shown good title in himself against all persons; and certainly against the defendant, a mere trespasser, without pretence of claim under any proprietor.

The first meeting of the proprietors was regularly called under the resolve of Massachusetts granting the land. The old acts of 1712, 1735 and 1753, as well as the Mass. st. of 1784, and the Maine of 1821, c. 43, and Rev. St. c. 85, each provides a mode of calling meetings of the proprietors

of common lands, and each is substantially the same. The proprietors are also empowered to agree upon a mode in which their future meetings are to be called. But the proprietors by agreeing on a mode to suit themselves, do not take away the right to call a meeting in the mode provided by the statute. If it did, then in a case like the present, there would be no mode whatever of calling a meeting, if the clerk should decease. The meetings were therefore legally called.

The proprietors of common lands may convey by vote. When the report of their committee was made, and it was duly accepted by the proprietors, it operated as a conveyance of this lot to the plaintiff. *Pike* v. *Dyke*, 2 Greenl. 213; *Williams* v. *Ingell*, 21 Pick. 288, and same, 2 Metc. 83; *Adams* v. *Frothingham*, 3 Mass. R. 360; *Codman* v. *Winslow*, 10 Mass. R. 150; *Springfield* v. *Miller*, 12 Mass. R. 415; *Folger* v. *Mitchell*, 3 Pick. 396.

It is competent to prove by parol, that the oath was administered by the clerk. 2 Greenl. 218; 3 Fairf. 234; 9 Mass. R. 313; 13 Pick. 317.

After the death of the clerk, his records were completed by the new clerk from the minutes of the old one, and were sanctioned by the proprietors as their records. A proprietor could not deny that these were the proprietors' records, and much less a mere stranger, like the defendant.

The defendant sets up no title, but contends, that he can commit the trespass with impunity, because there is, as he supposes, some defect in the plaintiff's title which he can take advantage of, although the proprietors themselves admit it to be good. He has no right to contest the regularity of the proceedings of the proprietors. *Copp* v. *Lamb*, 3 Fairf. 312.

*S. May*, for the defendant, said that the plaintiff has introduced no deed, but relies upon certain votes and proceedings of the original proprietors, to whom the township was granted by Massachusetts, in 1774.

Our objection to the plaintiff's title is — 1. The illegality of the proceedings under which the plaintiff claims. And 2.

The insufficiency of those proceedings, even if legal, to pass any title to the land.

At an adjournment of the first meeting of the proprietors, they agreed upon a mode of calling future meetings. The second and third meetings of the proprietors were not called in the mode they had agreed on. When the proprietors had once agreed upon the manner of calling the meetings, as the law authorized them to do, it was the only way in which a meeting could be legally called. *Evans* v. *Osgood*, 18 Maine R. 213.

But if the proprietors had another mode, at the same time, of calling a meeting under the statute, as they would have had, if they had not agreed upon a different one, still the meeting was not legally called, because there is no evidence that the persons applying for the warrant were proprietors.

Again, the return of the person to whom the warrant was directed does not state such facts as show the meeting to have been called in the manner provided by the statute. He should state the facts, and the Court should determine the law. *Perry* v. *Dover*, 12 Pick. 206.

If the meetings were properly called, the record of the proceedings cannot be received in evidence, because not duly authenticated. No part of the record, which was made up by the clerk from loose papers of another person, is admissible. *Whitman* v. *Pro. Granite Church*, 24 Maine R. 236. The copy of a vote of a corporation is not competent evidence of the vote, unless it be sworn to or certified by some person who is made by law a certifying officer for such purpose. *Hallowell & Augusta Bank* v. *Hamlin*, 14 Mass. R. 178. In the present case, neither the vote choosing the committee, nor that accepting their report, was certified by the person who was clerk at the time of their passage.

In regard to the second question, the votes and proceedings of the proprietors, even if legally before the Court, do not pass the title to the land in question to the plaintiff. The power granted to the committee was a mere authority to bargain and sell. And the committee so understood it, for they

did not attempt to sell. The land, in such case, does not pass without a deed. *Thorndike* v. *Richards*, 13 Maine R. 430; *Lambert* v. *Carr*, 9 Mass. R. 185. If towns and proprietors of lands may convey land by vote, the principle does not extend to a committee, authorized to sell. *Codman* v. *Winslow*, 10 Mass. R. 146; *Springfield* v. *Miller*, 12 Mass. R. 415; *Adams* v. *Frothingham*, 3 Mass. R. 360. The vote of the proprietors is merely an expression of their satisfaction with the doings of the committee, and does not purport to convey the land.

Even the power of proprietors to convey by vote has been called in question. 3 Mass. R. 360; 2 Pick. 425; 10 Pick. 364.

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

TENNEY J. — The land on which the trespass is alleged to have been committed is a part of the township which now constitutes the town of Rumford, and which in 1774 the legislature of the Province of Massachusetts granted to the proprietors of New Pennycook, and authorized Timothy Walker to call the first meeting, and the proprietors, when met, to agree upon a mode of calling future meetings. The first meeting was held in May, 1779, and the proprietary duly organized by the choice of a moderator and clerk, and adjourned meetings were held from time to time till August 3, 1807, when it was dissolved. At one of these meetings it was voted, that the clerk be directed and fully empowered, upon the request of one sixteenth part of the owners of the township, to call future meetings, by advertising in one of the Boston newspapers. The proceedings of the original meeting under the warrant of Walker and of all the adjournments thereof were duly certified in the records of the proprietors.

From the records it appears that subsequent meetings were called on application of five or more persons, styling themselves proprietors, and held in pursuance of warrants issued by justices of the peace, to persons who were therein directed

to notify the proprietors, and not in pursuance of the mode agreed upon by a vote of the proprietors at a previous meeting. Many of the meetings so called and held, were continued by adjournments from time to time, at which, business touching their interests was done. At one of these meetings, held by adjournment on February 16, 1828, it was voted to choose a committee to make sale of the common land; and at an adjournment of the same meeting, held on Dec. 29, 1828, the committee made report, that they had sold to the plaintiff, the lot on which the trespass is alleged to have been committed, and in consideration therefor, had taken his note for $85, payable in one year, with interest, which report the proprietors accepted. At a meeting called for the purpose, and held Sept. 31, 1846, the doings of former meetings were ratified and confirmed. The warrant for the meeting, at an adjournment of which the sale to the plaintiff was made, and the return of the individual to whom it was directed, are a part of the record of the proprietors, and it is not stated in the return, that the notices were posted in places, which were *public*, or that the same were posted up, and published in the newspapers, *fourteen* days before the meeting, but that such notices were posted up in Rumford, and published in the newspapers named "as the law directs." The proceedings of the meeting and of the adjournments, at which the sale of the land in question, was reported and accepted, down to a time posterior to the sale, were fully entered upon the records by Francis Keyes, the clerk, who the case finds, was qualified by taking the oath, but he died before the dissolution of the meeting, and the proceedings at some of the last adjourned meetings were not entered upon the records; and before its dissolution, Josiah Keyes was chosen clerk to finish the record under the warrant for this meeting, from minutes left by his father, Francis Keyes, the said Francis Keyes being the former clerk, and leaving them unfinished; and the record of that meeting, and its several adjournments was completed and bears the attestation of "Josiah Keyes, clerk."

The defendant admitted, for the purpose of settling the law,

upon the facts reported, that he did the acts complained of; but offered no evidence of right in himself, but insisted that the title to the land was still in the original proprietors.

It is not contended, that the records introduced are not the records of the original proprietors, and that the proceedings were not legal and regular, up to Aug. 3, 1807. But it is urged that all subsequent meetings were illegal, because they were not held in pursuance of an application of one sixteenth part of the owners, to the clerk. The case of *Evans & al.* v. *Osgood & al.* 18 Maine R. 213, relied upon by the defendant, is not in point. In that case the call of the meeting was intended to be according to a method agreed upon by the proprietors, but proved to be defective, and was not according to the mode provided by the statute. By the statutes of 1712, 1735 and 1753, meetings of proprietors of common lands could be called by an application by five or a major part of the proprietors, to a justice of the peace, who could issue his warrant, &c., and they were authorized at a meeting so called, "to agree upon and appoint, any other way or method of calling and summoning meetings for the future, that shall be most suitable and convenient for the proprietors;" and similar provisions are incorporated into the statutes of 1784, and of 1821, c. 43, § 1; and Rev. Stat. of 1841, c. 85, § 1, and 6.

The language of the resolve of 1779, and of the subsequent statutes touching the mode of calling meetings of proprietors of common lands, &c., do not restrict them to the use of the method alone, which they may agree upon and adopt; but on the other hand, the terms used in the provision for calling meetings by application to justices of the peace, are so comprehensive as to embrace cases, when the owners have agreed upon another method; the mode by application to the clerk, could not always be carried into effect, as in the case of his death; and if the construction contended for, by the defendant should prevail, in such an event, the statute has provided no means by which a meeting could be called. It was evidently intended, that the general provision would not cease to be applicable, when another method had been agreed upon.

The objection to the legality of the proceedings of the proprietors because the evidence, that the persons who made application for the meetings, was insufficient to show them owners, cannot prevail. It is certified in the records, that the "proprietors met," under such application, and votes passed; the application signed by those, styling themselves proprietors, is a part of the record. No objection on this ground was made by any one at the meeting, and no attempt to repudiate or annul the doings for this reason. By records, they have adopted the facts stated in the application, and it becomes a truth, which they cannot controvert.

Again it is submitted by the defendant, that the return of the notice given for the meeting at which the sale to the plaintiff made by the committee was accepted, is too defective to give validity to the proceedings of the proprietors. In the case of *Thayer* v. *Stearns & al.* 1 Pick. 109, where the defect was greater than in the return, which we are considering, the Court say, "when it appears of record, that the meeting has been regularly called; and the meeting has been held, and the officers chosen at such meeting without any objection on account of a deficiency of warning, we think that any anterior irregularity, provable only by parol, cannot vitiate the choice." In the case from the 12th of Pickering, 206, cited for the defendant, it is said, in the opinion of the Court, "the case of *Thayer* v. *Stearns & al.* is clearly distinguishable from this" "and it is to be recollected that the return now under consideration is much more defective than that." In both of the above named cases, the question arose in actions brought to recover back money, which it was insisted had been illegally obtained as taxes of the plaintiffs. In the case at bar, the person who gave the notice, certifies that he posted and published the notices, and the place, and newspapers in which it was done, as the law directs, are named; and there is no evidence tending to show that the warning was not in strict accordance with law. By the records, it appears, that the proprietors met at the day appointed, and under the same warrant and notice, many adjourned meetings were held, and there was no dissolution till

June, 1834. The proprietors, who must have known, if there was in fact any want of legal notice, made no objection to the alleged defect, but proceeded with their business, sold and alienated valuable portions of their property upon full consideration paid, and caused their corporate acts to be entered upon their records. Neither the proprietary nor any of its members have interposed any objection to the legality of the warning or the validity of the proceedings, but on the other hand, at a meeting held under a warrant, to the notice given under which, there is no objection, all doings at previous meetings were ratified and confirmed.

The sale to the plaintiff was made through the agency of a committee, and their doings were accepted by the proprietors.

If the committee was not chosen at a legal meeting, or if when their report was accepted, the same objection would apply, a ratification at a subsequent meeting, which was legal, would give validity to the doings of the committee and of the proprietary. The ratification would relate back to the time of the inception of the transaction and would have a complete retroactive efficacy. Story's Agency, § 244.

But it is contended that the proceedings of the proprietors, touching the sale of the land to the plaintiff, are not duly certified, inasmuch as they have not the attestation of the clerk, who was such at the time. The case finds, that the clerk entered upon the records in his own handwriting every thing in reference to the sale ; his death occurred before the dissolution of the meeting, between the times of holding two adjournments of the same meeting. It was not necessary for an attestation until the close of the record of the meeting with all its adjournments. After his death, the proprietors chose a clerk, properly qualified, to finish the records left incomplete. They are now full, and the proprietary cannot object to their truth and are bound by them. It must often happen, that records are left imperfect by the one who was clerk at the time of the transaction recorded. When death, or accident of any kind, leaves the records of a town, a court, or a private corporation in this condition, it is not to be admitted that all the rights

intended to be brought into existence or secured, are to be lost by such occurrences.

But the defendant does not stand in such a relation to the proprietors or to the plaintiff as to authorise the technical objections, on which he relies. The plaintiff is bound only to show that the land was in his possession either actual or constructive, at the time of the alleged trespass, and this rightfully as against the defendant. The proprietor's records disclose the facts on which the plaintiff relies, and both they and he treat them as valid. He has paid the consideration for the land, and they have received it. The defendant is a stranger to these transactions, has no rights to be affected whether they stand or fall; no claim to the land or to the trees cut by him has he presented. As the case finds the facts, his acts are equally a trespass, whether the land or its possession passed from the proprietors to the plaintiff or not, and in an action like this the wrongdoer cannot set up a title in a third person, without showing some authority or right derived from the owner to justify his acts. He cannot avail himself of defects in the mode of calling meetings of the proprietors, to invade the rights, of those to whom they in good faith intended to sell the land, and then relieve himself from liability by invoking the title of those, who do not claim it for themselves, but by their records assert that they have parted with it to another.

But it is denied, that any interest whatever passed from the proprietors to the plaintiffs, if every step taken by them was legal; and the case of *Thorndike* v. *Richards*, is relied upon in support of the proposition. When that case is examined it will be found not to conflict with other cases, which fully establish the contrary doctrine; and it cannot be material, whether the vote of the proprietors, be direct upon the subject, or whether a committee is appointed to make the sale, and they report it so made, and the report is duly accepted. *Adams* v. *Frothingham* 3 Mass. R. 352; *Springfield* v. *Miller*, 12 Mass. R. 415; *Williams* v. *Ingell*, 2 Metc. 83; *Codman & al.* v. *Winslow*, 10 Mass. R. 146.

The evidence on which the plaintiff claims the right to main-

tain the action as against the defendant, shows such a right derived from the proprietors, that the possession must be regarded as constructively in him; this is all that is required; and by the agreement of the parties the nonsuit must be taken off, and the action stand for trial.

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MARY CHASE *& al. versus* HENRY WALKER.

If two distinct parcels of land be conveyed in the same deed, it may be avoided as to one parcel by creditors, who have a right to impeach it, because fraudulent as to them, when, as to the other parcel, it might be deemed *bona fide*, and unimpeachable.

A judgment of a Court having jurisdiction, with proof that the decision was upon the same ground, is conclusive between the same parties upon the same subject matter, coming directly in question in another suit, although the controversy may not arise in relation to the identical thing.

And where the course of the proceedings is such, that the judgment cannot be pleaded, it may be given in evidence under the general issue.

THIS case was tried before TENNEY J. and came before the law Court on the following report: —

This was a writ of entry in which demandants demand against the defendant the possession of a certain tract of land in Fryeburg, as set forth in the writ, which may be referred to. The demandants claim title under an extent of execution duly made upon the demanded premises in favor of their devisor, July 20, 1839, which may be referred to.

The tenant, to sustain his title, offered a deed from Isaiah Warren to himself, dated July 27, 1837, of one of the lots described, in which is the one demanded in this action, which deeds may be referred to. The demandants objected to this deed as void on the ground of fraud; and to prove the fraud, offered the record of a judgment in their favor against the defendant, recovered at the S. J. Court for this county, holden at Paris on the 2d Tuesday of October, A. D. 1845, for possession of another parcel of land described in said deed, as conclusive evidence, it being admitted by the tenant, that on the trial of that action, the verdict of the jury was return-

ed in favor of the demandants, on the ground that the deed was fraudulent as to the premises demanded in said writ. The tenant contended, that this verdict was not evidence that his deed was fraudulent, except as to the particular tract of land described in that writ, and that in the present action the question, whether the deed is fraudulent as to the demanded premises, is open for trial, in the same way and manner, it would have been, if it had been described in a separate deed.

For the purpose of settling this question, the presiding Judge ruled in favor of the demandants; whereupon the tenant consented to a default; which is to be set aside and the cause stand for trial, if this ruling was incorrect, otherwise judgment is to be rendered on the default.

*Codman* and *A. R. Bradley*, for the defendant, said that the case presented but one question: — Is the record of the former judgment conclusive evidence of fraud? They contended that it was not. If the land had been conveyed by a different deed, it could not be supposed by any one, that the record was conclusive evidence, or indeed any evidence as to fraud in the other.

The deed was not fraudulent in every thing, but certainly good for many purposes. The record was evidence, as to the land in question, at that trial, only so far as that the deed was constructively fraudulent as against creditors. The land now in question was not then in controversy, and there was no judicial inquiry touching it. If both the tracts described in the deed had been included in the former writ, the jury might have found the conveyance fraudulent as to one tract, and good as to the other. The defendant might have taken a conveyance for sufficient consideration as to one, when as to the other it was merely voluntary. In order that the record should be a bar, the judgment must have been upon the same subject matter, and what was directly in issue. Stark. Ev. Part 2, 196; 1 Greenl. Ev. § 528, 532, 565; *Jones* v. *Fales*, 4 Mass. R. 255; *Bridge* v. *Austin*, *ib.* 117; 2 Pick. 20; 8 Pick. 350; 15 Pick. 416; 2 Metc. 368; 15 Pick. 276; 17 Pick. 13.

The cause of action in the present case was not in any manner brought into controversy in the former suit; and the record of that can in no way prevent a trial upon the merits in this. 17 Mass. R. 237; 14 Pick. 55; Rosc. on Ev. 101; Stark. Ev. 2d part, 190, 198, 201, 202; 3 Greenl. 169; Steph. *Nisi Prius*, 1664.

*S. H. Chase,* for the plaintiffs, said that he should admit, that it was necessary that the judgment in the former case must be upon the same subject matter as in this. The only difficulty was in the application.

He contended, that the record was upon the same subject matter in both cases, to wit: — the validity of the levy and of the deed from Warren to the tenant. The former was good; the latter bad. It is impossible that the same deed can be fraudulent and void in part and good in part; that the tenant should fail of holding one tract, because the deed was fraudulent, and at the same time under the same deed, hold the other, on the ground, that the same deed was good. 2 Hen. & Mumf. 55; 4 Cowen, 559; 8 Wend. 9; 4 Rawle, 273.

The conveyance, being fraudulent in part, is so in toto. 3 Cowen, 120; 5 Cowen, 447; *Harris* v. *Sumner*, 2 Pick. 137; 6 Hill, 438; 7 Metc. 520; Am. Jurist, Oct. 1839, page 22; 8 Mass. R. 51; 8 Johns. R. 213; 4 Yerg. 164 & 415. A deed can no more be fraudulent in part, than illegal in part.

The opinion of the Court, SHEPLEY J. not having been present at the argument, and taking no part in the decision, was drawn up by

WHITMAN C. J. — The report in this case was probably drawn up by the counsel for one of the parties, and hastily agreed to by the counsel for the other, and hence it may have been signed by the presiding Judge without examination. It is certainly very defectively drawn. A deed introduced by the defendant is said to have been found by the jury, in a former suit between these parties, and in reference to another piece of

land, therein purporting to have been conveyed, so tainted with fraud as to be void. It is not stated under what circumstances it was so found to be void; whether the fraud set up was such as to render the deed void as between the grantor and grantee, and therefore totally inoperative; or whether it was so only under the statutes of Elizabeth, so far as *bona fide* creditors were concerned, and were disposed to question its validity. If the former, then the former verdict, with proof that the decision was upon the ground, that the deed was absolutely null and void, might well be regarded, under the circumstances of this case, where the plaintiff could not plead the former judgment specially, as conclusive between the parties, for it is not essential, that the subject matter to be affected by the decision is not the same. Buller's N. P. 332; 2 Stephens' N. P. 1665; *Gardner* v. *Buckbee*, 3 Cowen, 126. If the latter, then the former decision might be admissible, and be conclusive, if upon the trial there should be no ground to support the validity of the defendant's title, other than was set up in the former case. A deed void only as against the interfering rights of creditors, is good as between the parties, and against all who have not a right as creditors to impeach it. And, if a deed conveys two distinct parcels of land, it may be avoided as to one parcel by creditors, when, as to the other, it might be deemed *bona fide* and unimpeachable. Of one parcel, for instance, the vendee may have held a bond for many years, stipulating to convey it on the payment of the agreed consideration, which might have been paid, so that a right to a conveyance would have become absolute; and this parcel might be conveyed with another, which might be inserted for the purpose of defrauding creditors. In such case the deed, as to the former, might be deemed *bona fide*, but not so as to the latter; the deed being voidable only so far as *bona fide* creditors, who had become such before the making of the deed, or were designed to be defrauded by it, might be injuriously affected by it.

When the presiding Judge intimated an opinion that the former decision was conclusive, it must probably have been with the understanding, that no other ground was relied upon,

as to the one parcel of the estate conveyed, than as to the other; yet, in drawing up the report, there is an omission to state that such was the case. Upon the supposition, that the fraud set up in the former case, was merely such as arises under the statutes of Elizabeth, and it seems to be probable that no other was thought of, and as it does not appear, that the two parcels of the estate purporting to have been conveyed were affected with the same taint, it seems to be necessary that we should grant a new trial to ascertain how the fact, in reference to that particular, may be.

I have remarked, that the former judgment, with proof that the decision was upon the ground, that the deed to the defendant was fraudulent as against creditors, and no other ground appearing to uphold it, in reference to the premises in question, might be conclusive; and this seems to be well settled in the cases of *Wood* v. *Jackson*, 8 Wend. 9; *Howard* v. *Mitchell*, 14 Mass. R. 241; *Gardner* v. *Buckbee*, 3 Cowen, 120; *Burt* v. *Steenburgh*, 4 *ib.* 559; *Adams* v. *Barnes*, 17 Mass. R. 365. In those cases it was distinctly held, that if the party in whose favor a judgment had been obtained, in which the same point had directly occurred as the ground of decision, and which he could not present in a plea, he might give it in evidence against the same adverse party; and that, under such circumstances, it would be as effectual as if pleaded specially.

The case at bar, being a writ of entry, it may be presumed, although nothing appears in the report about it, that *nul disseizin*, was pleaded. In such case, the plaintiffs could not be apprised, that the defendant would again set up his deed in defence. Hence he could not, with propriety, reply that the deed had been adjudged fraudulent and void. His only alternative was, on the introduction of it, to give that matter in evidence. In the case of *Gardner* v. *Buckbee*, before cited, it appeared that a note of hand, then in suit, formed part of the supposed consideration for the promise contained therein, and that another note, forming another part of the same consideration, had before been put in suit, and had been adjudged

void on account of fraud, affecting the whole of the supposed consideration; and, thereupon, it was held, that the question, then pending between the parties, had been judicially settled, affecting both notes alike; and this adjudication was had without any special plea setting forth the ground relied upon, when it would seem that a special plea for the purpose, might well have been pleaded; and it may admit of a doubt whether it should not in that case have been deemed requisite. But in the case at bar, as we have before seen, it would be otherwise; and in other respects can scarcely be distinguishable from that case, if the defendant's conveyance is liable to be affected, in reference to the lot now demanded, by the same taint that prevented its operation before.

*New trial granted.*

# CASES

IN THE

# SUPREME JUDICIAL COURT,

IN THE

# COUNTY OF LINCOLN.

ARGUED AT MAY TERM, 1847.

## GEORGE GAULT *versus* AMBROSE HALL.

A motion by the defendant to dismiss a suit, "because of the defectiveness of the records in the Court below," was overruled where he appeared in the District Court and pleaded, and the plaintiff demurred to the plea, and, upon adjudication that the plea was bad, the defendant appealed and entered into a recognizance to prosecute his appeal with effect.

Where a levy was made under the provisions of the stat. of 1821, c. 60, *it was held*, that a sufficient cause was shown by the officer for his appointing an appraiser for the debtor, by returning that he "gave due notice to the within named debtor to choose an appraiser (by leaving a written notice at his usual place of abode) and he neglecting to choose an appraiser."

In making a levy, if the setting off be made, "reserving and excepting therefrom the granite on said premises," that fact should be so stated in the return of the officer, if the debtor had previously conveyed it. And if such reservation be made in the appraisement, and the return merely states, that it was done because the creditor had represented that the debtor had before that time conveyed the granite, the burthen is on the creditor, in order to sustain his levy on a trial, to show that such conveyance had been made.

Where a deed is made to take effect only after the decease of the grantor and his wife, and no valuable consideration is expressed in the deed, and none is in fact paid, and the grantee is not of the blood of the grantor, and there is no consideration of marriage, nothing passes by the deed.

THIS case came before the Court upon the following report of the trial before SHEPLEY J.: —

In this action the defendants moved, that the action be dismissed because of the defectiveness of the records in the Court below.

It appeared that the docket entry of the District Court for the August Term, 1840, is as follows, viz: —

"No. 151. *George Gault* v. *Ambrose Hall & al.*"

"Demurred. Plea bad."

"Defendant appeals."

"No papers on file."

The certified copy of the docket entry, dated September 19, 1844, which may be referred to, was the only record in the case.

A copy of the original writ was shown, with the following indorsement on it: — "Lincoln ss. Clerk's office, Sept. 14, 1844. — Original writ filed this day by H. C. Lowell, Esq. Attest, J. Smith, Clerk."

The 42d Rule of the District Court was read, which may be referred to.

Whereupon the presiding Judge declined to dismiss the action, and the defendant pleaded title in the heirs of James Matthews.

The demandant's title was founded on a levy of an execution on the demanded premises, as the property of the defendant, which is to be a part of the case without copying, made Oct. 3, 1839.

It appeared, that James Matthews was the original owner of the demanded premises, and that he conveyed the same to the defendant by deed, dated Aug. 28, 1828, for the consideration, as expressed in the deed, "of myself and Betsey my wife being well maintained with meat, drink, clothing and lodging during our natural lives, and decently buried when dead, by Ambrose Hall of St. George, State of Maine, yeoman;" and next preceding the habendum is this clause: "N. B. The above named Ambrose Hall is to come into possession of said land at our decease."

A deed was read from said Matthews to Caroline Hall, wife of defendant, and daughter of the wife of Matthews by a

former husband, dated June 15, 1837, acknowledged June 16th, and recorded July 11, 1837; and another from the defendant to said Matthews, dated June 14, 1837, acknowledged June 25, and recorded July 11, 1837.

Counsel for defendant proposed to prove, that the said deed from Matthews to wife of Hall, which was a warranty, and the said deed from Hall to Matthews, were respectively executed and delivered on the day they were respectively acknowledged, that is to say, that the deed from Hall to Matthews, was executed and delivered nine days after the execution and delivery of the deed from Matthews to his wife.

Whereupon the presiding Judge, admitting such proof could be made, arrested the cause and ruled, that the effect of these deeds was that they gave to him a life-estate, which would be conveyed by the levy of the execution to the demandant.

And the Judge recommended a default subject to the opinion of the whole Court on the matters of law involved; and a default was entered by consent, to be set aside and the cause stand for trial, provided the whole Court shall be of opinion that the action cannot be maintained.

The validity of the levy and the return thereof is to be considered; and said deeds are to be referred to without copying.

By the papers referred to it appeared that the portions of the officer's return of the levy, on which the objections were founded, were in these words: —

"I further certify, that I gave due notice to the within named debtor to choose an appraiser (by leaving a written notice at his usual place of abode) and he neglecting to choose an appraiser, I thereupon chose and appointed," &c. "Reserving and excepting therefrom the granite on said premises, with a right to take the same off; the said creditor representing that said debtor deeded away said granite before the attachment on the original writ."

The consideration in the deed from Matthews to Mrs. Hall was in the same language as that in the deed from him to her husband, given in the foregoing report; and immediately following the description of the premises were these words: —

"The above named Caroline Hall is to come in possession of said land at our decease."

The deed from Matthews to Mrs. Hall contained these words, immediately preceding the description, "Give, grant, bargain, sell and convey unto the said Caroline Hall, her heirs and assigns forever a certain tract of land *to hold separate from her husband* lying in St. George and bounded," &c.

*Ruggles*, for the tenant, argued in support of these positions:—

The levy of the demandant's execution gave no title.

1. The return does not state, that the notice was left at his *last* and usual place of abode, but at his usual place. No inference can be drawn from the word *neglecting*, because he has stated what notice he gave. It also ought to appear, that the notice was left so long before the extent, as to raise a presumption at least in favor of actual notice being received. *Means* v. *Osgood*, 7 Greenl. 146.

2. The appraisers had no right to deduct from the value of the land, the supposed value of the granite, which might be found there. The appraisers seem to have made no inquiry, whether the granite had or had not been sold, and to have made the deduction upon the mere statement of the creditor, that the sale had been made. If this course of proceeding is to be upheld, a wide door will be opened to fraud.

3. The land was not the property of the debtor, and for that cause, the demandant took nothing by his levy. This deed was intended by the parties to it to be conditional. No form of words is necessary to constitute a condition, and it may be as well found in the consideration, as in any other part. Shep. Touchstone, c. 6, p. 117, 118, 123. The consideration is the condition, and the condition is the only consideration. The condition not having been performed, no re-conveyance was necessary.

4. The deed from Hall to Matthews, was after the deeds to his wife and to himself. As the deed to Mrs. Hall was a warranty, Matthews might be estopped to set the title acquired from her husband, against her. But there is no principle of

law, which would give him a life-estate through his wife against his deed.

5. The deed from Matthews to Mrs. Hall, being for her separate use only, nothing passed to the husband by it, which could be the subject of attachment and levy. *Smith* v. *Wells*, 7 Metc. 240; 5 Law Rep. 15; 2 Story's Eq. § 1392; *Mussey* v. *Pierre*, 24 Maine R. 560; Clancy's Hus. and Wife, 256, 257.

*H. C. Lowell* argued for the demandant.

The officer in his return, gives a sufficient reason for his appointment of an appraiser on the part of the debtor. The levy was in 1839, and comes under the St. 1821, c. 60. He certifies, that he left a notice at the actual place of abode of the debtor, and that he neglected to choose an appraiser. This is sufficient. *Bugnon* v. *Howes*, 13 Maine R. 158; *Thompson* v. *Oakes*, *ib.* 407; *Sturdevant* v. *Sweetser*, 3 Fairf. 520; *Means* v. *Osgood*, 7 Greenl. 146; *Blanchard* v. *Brooks*, 12 Pick. 47.

The next objection, now made, that the appraisers should not have deducted the value of the granite, was not made at the trial, and ought not to avail the tenant, if it had force. But there is no ground for it. It is the duty of the appraisers to deduct all existing claims upon the estate, such as a right of dower, or the laying out of a highway, although the incumbrance of an attachment cannot be. 3 Fairf. 520; 4 Metc. 404; 3 Conn. R. 528; 19 Maine R. 278. The appraisers may as well ascertain and deduct the value of the granite in this case, as that of the incumbrances, in the cases referred to. The burthen is on the objector, to show that the appraisers conducted erroneously in making the allowance. 18 Maine R. 397; 1 Metc. 345. The Court will not declare a levy void, merely because it appears to have been injudiciously made, as the determination of that fact is entrusted by law to the appraisers; and their determination is conclusive, where there is no fraud. 18 Maine R. 397. The levy cannot be avoided merely because the value of the granite was deducted.

The demandant claims under a statute purchase, of the

right of the husband of Caroline Hall. The tenant sets up a title under the heirs of her grantor, as both Matthews and his wife, had deceased before our attachment and levy. The inquiry then is, which title is to prevail?

A conveyance of land by deed may be regarded as any species of conveyance, not repugnant to its express terms, necessary to uphold the grant, and carry into effect the intention of the parties. A conveyance by deed of warranty to a family friend for the consideration of future support, and declaring that the grantee shall come into possession at the death of the grantor, will be regarded as a present conveyance in fee, reserving to the grantor, a life-lease to himself. And if a man conveys, by deed of warranty, land to which he has then no title, and subsequently acquires one, the title so acquired enures to the benefit of his own grantee. Therefore, when the deed was given by the tenant to Matthews, whatever title passed, enured to the benefit of Mrs. Hall, and the tenant took a life-estate in it, as her husband. The levy took all the title which the tenant had, a life-estate in the premises. The authorities to support these propositions are very numerous. But few will be cited. 2 Smith's Leading Cases, 455 to 460, and authorities there cited; *White* v. *Patten*, 24 Pick. 324; *Fairbanks* v. *Williamson*, 7 Greenl. 96; *Wallis* v. *Wallis*, 4 Mass. R. 135; *Gale* v. *Coburn*, 18 Pick. 397; *Brewer* v. *Hardy*, 22 Pick. 376; *Litchfield* v. *Cudworth*, 23 Pick. 23; *Rogers* v. *Eagle F. Co.* 9 Wend. 611; *Jackson* v. *Delancy*, 4 Cowen, 427; *Kimball* v. *Fenner*, 12 N. H. Rep. 428.

If this had been a conditional conveyance, as contended by the counsel for the tenant, still it was on a condition subsequent, and the legal estate vested at once in the grantee, subject only to be defeated by the non-performance of the condition and re-entry of the grantor for condition broken.

The opinion of the Court, after a continuance *nisi*, was drawn up by

Whitman C. J. — The motion made to dismiss this action was properly overruled. The defendant appeared in the Dis-

trict Court, and pleaded, and the plaintiff demurred to his plea. The adjudication was, that the plea was bad. From that judgment the defendant appealed to this Court; and of course recognized to prosecute his appeal with effect. After so doing, on coming into this Court, a motion by him to dismiss the action from this Court could not be entertained. He should not have pleaded to the action in the court below till he found one properly before the court there; and assuredly he should not, till such was the case, have entered into a recognizance to prosecute his appeal with effect, which required that he should enter the case here, and produce copies of the case, and file the same here.

The report of the presiding Judge brings before us all "the matters of law involved" in the case. And a default having been entered by consent, it is to be removed, and the cause is to "stand for trial; provided the whole court shall be of opinion, that the action cannot be maintained." We are to understand by this, probably, that, if the action is not sustainable upon the evidence as now presented, it shall stand for trial upon further evidence to be adduced.

In the first place it may be remarked, that, upon a new trial, if one is to be had, there should be an issue joined. None appears to have been joined at the former trial. A special plea was filed by the defendant, denying that he was tenant of the freehold in the premises demanded; and the plaintiff tendered an issue upon that fact; and, if it had been joined, there would have been no other question to have been tried, but whether he was so or not. In such case the defendant could not have made any objection to the title relied upon by the plaintiff. The only question would have been, whether the defendant was a deforciant of the plaintiff. On trial it might, perhaps, have been proved, that he was in possession, claiming in right of his wife, and so of a life-estate; or it might have been proved that he was not tenant at will, as in his plea is pretended, under the heirs of Matthews; but was in as a wrongdoer, denying their right. In one or the other of these modes the issue, if it had been joined, might possibly have

been determined against him. But these defects upon a new trial, if one should be granted, may be cured, and new pleadings may, by leave of Court, be filed presenting a new issue.

But the case seems to have proceeded to trial, by tacit consent, upon questions involving the titles of the parties generally; and the report presents the case accordingly; and the arguments of counsel have been elaborate in reference to such points. It will therefore be useful and proper, with a view to future proceedings, to proceed to consider the points connected with a final disposition of the cause.

The first piece of evidence offered, and relied upon by the plaintiff, is a levy upon real estate, by virtue of an execution in his favor; and against the defendant; and his right to recover, in the first instance, must depend on its validity. The first objection made to it is, that the defendant, the debtor in the execution, was not duly notified to choose an appraiser of the estate. The officer, who made the levy, certifies, that the debtor was duly notified for the purpose, and neglected to choose one. He states, however, that he notified him by leaving a written notice at his usual place of abode. To be duly notified it must be understood, that the place where the notice was left was one in which it could be believed to be most likely to be received by him in sufficient season. Otherwise the return would not be true, that he duly notified the debtor; nor could he fairly return that the debtor had neglected to make the choice; and officers' returns are to be presumed to be in accordance with the truth. This objection therefore is not sustainable.

The next objection urged against the levy is, that the setting off was made with the exception and reservation of the granite on the premises, and liberty to take the same off. This, in the officer's return, is said to have been so done because, as stated by the creditor, the debtor had previously sold it. If there had been such a sale the levy might well be upon the residue of the debtor's interest in the land. If in fact there had been no such sale, the levy could not be deemed to have been well made. In such case there could be no

authority for any such exception and reservation; and by the making of it, if the residue of the estate could pass under the levy, it would necessarily be attended with mischievous consequences to the debtor. It might remove him from his farm at a valuation greatly depreciated by the exception and reservation, when, in consequence of such a carving and severance, the reservation would be of very little value to him. The statute authorizing levies never contemplated such a splitting up of the interests in real estate. When it can be taken entire it must be so taken, if taken at all. If practicable, according to the express language of the statute, it must be taken by metes and bounds. It did not appear at the trial that any such previous sale had been made by the debtor; and the officer has not returned it as a fact, that such was the case. There was, therefore, no reason to presume it. Under such circumstances it would seem to be proper that the plaintiff, in order to support his levy, should be required to come prepared to show that such previous sale had been made. That not having been done, the title, depending upon the levy, was defectively made out. But upon a new trial this defect may, perhaps, be supplied by proof of such previous sale.

But, if on a new trial this difficulty should be obviated, we will proceed to consider whether he would not meet with another, quite insurmountable. As to the deed from Matthews to the defendant, it may be stated at once, that nothing passed by it. It was to take effect not till after the decease of the grantor and his wife, till then the possession was to be withheld. It was not a deed of bargain and sale, as there was no valuable consideration for making it, and none is expressed in the deed as having been received. It could not, therefore, operate as a covenant to stand seized to uses, so as to convey an estate *in futuro*; for the defendant was not of the same blood with the grantor. *Wallis* v. *Wallis*, 4 Mass. R. 135; *Pray* v. *Pierce*, 7 ib. 381; *Parker* v. *Nichols*, 7 Pick. 111; *Gale* v. *Coburn*, 18 ib. 397; *Brewer* v. *Hardy*, 22 ib. 376; *Jackson* v. *Sebring & al.* 16 Johns. R. 515; *Rogers* v. *Eagle Fire Co. of N. Y.* 9 Wend. 611; *Jackson, &c.* v. *John and Mary*

*Delancy*, 4 Cowen, 427; *Jackson* v. *Cadwell*, 1 ib. 622; *Wilkinson* v. *Tramer*, 2 Wils. 75.

The deed to Mrs. Hall stands upon a basis equally unfounded. She was not of the blood of the grantor; nor can the consideration be regarded as arising from marriage; and the deed is without any valuable consideration expressed in it as having been received; and is to take effect, if at all, in *futuro*. The language of the deed is altogether that of the grantor. It imposed no obligation upon her; and being a feme covert she could assume none. The case of the *Eagle Fire Co.* v. *Delancy*, is much in point. The grantee there was a son-in-law of the grantor. The consideration expressed therein was, as to a part of the estate, precisely like that contained in the deed to Mrs. Hall. It was not, as to that part, to take effect till the decease of the grantor. It was not considered as a deed of bargain and sale, for the want of a consideration expressed in it. It was not considered as having been made in consideration of marriage, although the grantee's wife was the daughter of the grantor. No such consideration was alluded to in the deed. In the case at bar there can be no pretence for blood relationship, the grantee being but the daughter of the grantor's wife, by a former marriage; and there is no ground for considering the conveyance as in consideration of marriage, for no such consideration is expressed; and there can be no pretence, that any marriage was had in consequence of it, or with reference to it.

The case of *Jackson, &c.* v. *Sebring*, in the Court of Errors in N. Y., was disposed of upon an elaborate opinion delivered by the late Chancellor Kent, containing a review of all the authorities up to that time. His opinion is lucid and conclusive. Some of the cases cited from Massachusetts are, however, not at all points in accordance with it. But as far as those opinions are applicable to this case the variance is not material. All agree, that to constitute a bargain and sale there must be a valuable consideration to support it; and, if to take effect *in futuro*, there must be proper covenants; and a blood relation between the parties to the deed; or the consideration

of marriage, to raise a use first for the bargainor, and afterwards for the bargainee. In the case before us there was no valuable consideration for the deed to Mrs. Hall, no blood relation between her and the grantor, and no consideration of marriage expressed or inferable.

*Default taken off and new trial granted.*

# A TABLE

OF THE

# PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

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## ACTION.


1. Where a levy was made on real estate, and the creditor made a lease thereof to another for a year, but to become void whenever the land should be redeemed, the rent to be paid quarterly; and the lessor assigned the lease to a third person, who was to be accountable to the lessor for the rent received under the lease; and at the end of the second quarter the land was redeemed from the levy; but, nevertheless, the lessee paid rent for three quarters to the assignee, *it was held*, that the lessor could not recover of the assignee the rent for the third quarter.
*Southard* v. *Parker*, 214.
2. Where the undertaking of a principal to repay to a surety the amount paid by him for the principal, by a levy upon land of the surety, is but one implied by law, it seems that the surety cannot recover of the principal the expenses of the levy. *Emery* v. *Vinall*, 295.
3. In case of the avoidance of a levy for informality, the creditor may, in an action of debt, recover judgment against the debtor for the amount of the debt levied for *and interest*. *Ib.*
4. Where the defendant received a sum of money of the plaintiff and promised in writing to repay the same sum, if he should not be entitled to hold it on the settlement of a certain concern, and when the settlement did take place, repaid the amount received, nothing being said respecting interest; the plaintiff is not entitled to maintain an action to recover interest on the money during the time it was in the hands of the defendant.
*Milliken* v. *Southgate*, 424.
5. Parol evidence of a promise to pay interest, in such case, is inadmissible, if made at the same time, as tending to vary the terms of a contract in writing; and if made afterwards, it would not be valid, if without consideration. *Ib.*
6. When a statute, upon which a penal action is founded, is repealed after the bringing of the suit, the action can no longer be sustained.
*Cummings v. Chandler*, 453.



See ATTORNEY AT LAW. BOND, 1. CONTRACT, 1, 7 CORPORATION, 3. GUARDIAN, 2. POOR, 9 RECOGNIZANCE, 1, 2. RIPARIAN RIGHTS, 2. SCHOOLS, 1, 3. TAXES, 3, 5, 6, 7. TRUST. TRUSTEE PROCESS, 3. WAYS, 4, 5, 6.


## ADMINISTRATORS AND EXECUTORS.


1. A sale of real estate by an administrator for the payment of debts, under a license from the Probate Court, is invalid, and no title passes to the purchaser by a deed thereof from the administrator, and no estoppel is created thereby, if the administrator neglects to take the oath required by law prior to the sale. *Campbell* v. *Knights*, 224.
2. Where one, without lawful authority, assumes the administration and disposition of the estate of one deceased, and receives and pays out money belonging to the estate, although professing to act for the deceased on the supposition that he might be alive; he is liable to a creditor of the deceased, as *executor de son tort*. *White* v. *Mann*, 361.

3. Executors by the common law, are authorized to discharge or release at pleasure, choses in action of their testator, although such release may in certain cases be evidence of assets in their hands. *Chase* v. *Bradley*, 531.
4. The Rev. Stat. (c. 106, § 33,) which provides, that an executor or administrator may compound with and discharge a debtor, unable to pay all his debts, with the approbation of the Judge of Probate, on receiving a fair proportion of the debt, does not restrict the power of executors and administrators. It merely affords them protection against being called upon to account for more than they have received, when they have acted with the approbation of the Judge of Probate. *Ib.*

See Bond, 1. Levy on Lands, 3, 4, 10.

## AGENT AND FACTOR.

1. The limitation of the authority of a general agent may be public or private. If it be public, those who deal with him must regard it, or the principal will not be bound. If it be private, the principal will be bound, when the agent is acting within the scope of his authority, although he should violate his secret instructions. *Bryant* v. *Moore*, 84.
2. A special agent may have a general authority, or it may be limited in a particular manner. If the limitation respecting the manner be public, or known to the person with whom he deals, the principal will not be bound, if the instructions are exceeded or violated. If such limitation be private, the agent may accomplish the object in violation of his instructions, and yet bind his principal by his acts. *Ib.*
3. If one person knows, that another has acted as his agent without authority, or has exceeded his authority as agent, and with such knowledge accepts money, property, or security, or avails himself of advantages derived from the act, he will be regarded as having ratified it. But this will not be the case, when the knowledge that the person has exceeded his authority is not received by the employer so early as to enable him, before a material change of circumstances, to repudiate the whole transaction without essential injury. *Ib.*

See Bank, 3. Evidence, 2, 3, 15.

## AMENDMENT.

See Court, 2. Levy on Lands, 2, 11. Poor Debtors, 4. Recognizance, 3.

## ARBITRAMENT AND AWARD.

1. Where it appeared by an agreement in writing, that certain individuals named, "as proprietors of the Lilly Cove Township, on the one part, and W. M. R. and J. A. as owners of the Winnegance Mills, of the other part, have agreed to submit all claims existing between said proprietors and said Mill Company to the determination of "three persons (named) as referees;" "and said parties further agree, that said referees shall take into their account, and include in their award, all claims of said proprietors and of said company against each other, although other persons beside these parties may be or may have been joint proprietors or members of said company; and these parties severally agree to be accountable therefor;" which writing was signed by "R. & W. att'ys to said Mill Co." and by "J. S. S. att'y to Lily Cove Township Pro."— In an action against the "Winnegance Mill, Company," as a corporation, and which corporation owned the "Winnegance Mills," on an award, made by the arbitrators; — *it was held*, that the *corporation* was not a party to the agreement of submission, and was not bound by an award made by authority thereof.
*Sawyer* v. *Winnegance Mill Co.* 122.
2. When a demand, not negotiable, has been assigned for value, with notice, such demand is embraced within the terms of a submission of "all matters, claims and demands, either at law or equity" by the assignee and alleged promisee; and the arbitrator, or referee, has authority to allow to the promisee all payments made upon the claim, and every thing in the way of set-off, as if between the original parties, which existed previous to the assignment and notice thereof. *Brown* v. *Leavitt*, 251.
3. Where a demand has been submitted by bonds, under the hands and seals of the parties, to an arbitrator, it is not competent for the party against whom

the award is made, in an action upon the bond, to show by testimony what the evidence before the arbitrator was, touching the merits of the respective claims, or how he regarded it. *Ib.*

4. It is a general rule, that any party may revoke his submission to an arbitrator before award made, giving notice thereof to the arbitrator. But if the submission be by deed, the revocation can be by deed only. And if such revocation be made, the party thereby forfeits his bond, given to abide the award. *Ib.*
5. If the arbitrator be a relative of one of the parties, and that fact is unknown at the time to the other, and objection is made on that account, when known, and the objection is disregarded, his award is not binding; but if the party, with knowledge of the fact, proceeds to a hearing, and interposes no objection for that cause, such objection cannot avail him afterwards. *Ib.*
6. When the parties agree to submit their mutual claims to the arbitration of a person named, "whose decision, made within one month after he has notified the parties, and heard them, to be final and binding upon the parties," without any mention of an *ex parte* hearing, and the parties are notified and meet, and a partial hearing takes place when both parties are present, and the hearing is adjourned until another day, when one of them does not attend, and a further hearing takes place; it is not a valid objection to the award, that the final hearing was *ex parte*. *Ib.*

## ASSIGNMENT.

1. While the Statute of April 1, 1836, concerning assignments, was in force, all assignments, which provided only for such creditors as should consent to release the assignors from all claims and demands, saving under the assignments, were void. *Wheeler* v. *Evans*, 133.
2. Where such void assignment was made, and the assignors drew an order on the assignees, requesting them to pay the amount in their hands to their creditors who had become parties to that assignment, and the same was accepted by the assignees, *it was held*, that this was an assignment of such funds to those creditors, and that the assignees could not be charged as trustees of the assignors by reason of having such funds in their hands, in a process commenced after such acceptance. *Ib.*
3. The thirty-fifth and thirty-seventh sections of c. 119 of Revised Statutes include assignments of every description. *Ib.*
4. A parol assignment of a chose in action is sufficient to transfer an equitable interest therein, which will receive protection in courts of law. *Porter* v. *Bullard*, 448.
5. A symbolical delivery of personal property, so situated that an actual delivery of it, could not be made, has been regarded as sufficient. And upon the same principle, the assignee of a judgment, or of a book debt, may be enabled to establish his rights without proof of an actual delivery. *Ib.*
6. Under the Massachusetts insolvent act of 1841, c. 124, the mere facts, that the assignment was made about two months before the insolvency of the assignor was published, and that the assignee received as collateral security, nearly double the amount due to him in debts apparently due to the assignor, were held not to be sufficient to authorize the conclusion, that the assignee "had reasonable cause to believe such debtor was insolvent." *Ib.*

See ACTION, 1. ATTORNEY AT LAW. TRUSTEE PROCESS, 1, 2.

## ATTACHMENT.

An attachment of real estate upon a writ containing but one general count for money had and received, without any bill of particulars, was valid, if made prior to the St. 1838, c. 344. And that statute does not apply to attachments made before it was in force. *Smith v. Keen*, 411.

See LEVY ON LANDS, 15. OFFICER, 1. TRUSTEE PROCESS, 3.

## ATTORNEY AT LAW.

If the creditor draws an order on an attorney with whom he has left a demand for collection, therein requesting him to pay the amount to the order of the creditor; and this order is accepted by the attorney, payable when the money should be collected and come into his hands, and is assigned by the creditor; and the assignee gives notice thereof to the attorney, who says nothing at the time, of any demand of his own, against the assignor;

and the money is afterwards collected by the attorney; the assignee may maintain an action in his own name against the attorney to recover the money collected; and the attorney will not be entitled to set off his own demand against the original creditor, existing at the time of the acceptance of the order, and arising out of other transactions.
*McLellan* v. *Walker*, 114.

BAILMENTS.

Unless a carrier by water limits his responsibility by the terms of a bill of lading or otherwise, he cannot escape from the obligation to deliver a shipment according to its destination, unless prevented by the public enemy or by the act of God. A loss of the property by an accidental fire furnishes no sufficient excuse; although the carrier might be excused, if the non-delivery was caused by lightning. *Parker* v. *Flagg*, 181.

See EVIDENCE, 16.

BANK.

1. The acts repealing the charter of the Frankfort Bank, and providing for the distribution of its funds by receivers, incapacitated it any longer to sue or be sued in a court of law, otherwise than to promote the objects confided to the receivers. *Whitman* v. *Cox*, 335.
2. A stockholder of the bank, against which a suit is brought, whose property was attached and who had a copy of the writ left with him, is no party to such suit individually, and has no right to appear and defend it; and may impeach the judgment rendered therein, when introduced against him. *Ib.*
3. The cashier of a bank is the regularly authorized agent thereof, and whatever is done by him in that capacity, within the sphere of his duties, is the act of the bank. *Badger* v. *Bank of Cumberland*, 428.

BASTARDY.

1. After the passage of the act establishing a municipal court in Portland and the acts in addition thereto (st. 1821, c. 72; st. 1825, c. 294; st. 1826, c. 324) and before the revised statutes were in force, a justice of the peace had no jurisdiction over complaints under the bastardy act, where both parties lived in Portland, and had no authority to require a bond. A bond, therefore, taken by direction of a justice of the peace, in that place, during that time under that act, is void, if the parties lived there.
*Robinson* v. *Swett*, 378.
2. A judgment of affiliation under the process, in which a bond was so taken, does not, in a suit upon the bond, preclude the defendant from questioning the validity of such bond. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A protest of a bill or note, duly certified by a notary public, is made by statute (c. 44, § 12) legal evidence of the facts stated in it, "as to the notice given to the drawer or indorser in any court of law;" but it is not conclusive of those facts. *Bradley* v. *Davis*, 45.
2. The protest ought to be specific, as to the mode in which the notices were given, by stating whether they were verbal or in writing; and if in writing, whether the writing was delivered to the person or persons notified, or despatched by some other mode of conveyance; and if the latter by what mode, and when sent, and to what place addressed. But if the protest be defective, the necessary facts may be supplied by other proof. *Ib.*
3. It is not essential to the validity of a notice, that it should be stated therein who was the owner of the note or bill, or at whose request the notice was given. When a notice is signed by a notary public, he is to be presumed to have been duly authorized by the holder of the bill or note, whoever he may be. *Ib.*
4. If notice of the non-payment of a note, though left at an improper place, be nevertheless, in point of fact received in due time by the indorser, and so proved, or could from the evidence be properly presumed by the jury; it is sufficient in point of law to charge the indorser. *Ib.*
5. The transfer by the indorser of a previously indorsed and protested draft by delivery, is equivalent to the drawing of a new draft on the acceptor,

payable on demand or at sight; and it becomes the duty of the holder to present it to the acceptor for payment within a reasonable time. and to give notice thereof, if not paid, to the indorser.' *Hunt* v. *Wadleigh*, 271.

6. The insolvency of the acceptor of a bill or draft does not excuse the holder for neglecting to make presentment thereof. *Ib.*
7. If the drawer or indorser, after full knowledge of the fact of an omission to make due presentment, promises to pay the bill, it will amount to a waiver of such presentment, and bind the promisor to pay the bill. But such a promise, made in ignorance of the facts, will not be binding, or a waiver of the laches. *Ib.*
8. And the plaintiff must show affirmatively, that the defendant knew he had not been regularly charged. *Ib.*
9. Where the payee of a negotiable note, before it became payable, indorsed it thus — "Phineas Wood holden for the within note," the Court held, that he was liable without demand or notice; and that he was not discharged by delay for a year to collect the note of the maker.

*Blanchard* v. *Wood*, 358.

See CONTRACT, 7, 8, 9. EVIDENCE, 17, 18. LIMITATIONS, 1. LORD'S DAY.

## BILL OF PARTICULARS.

See ATTACHMENT.

## BOND.

1. Where the condition of a bond was, that the obligor should annually deliver certain articles to such wife, as the obligee might afterwards marry, should she survive him; and after his marriage and decease there was a failure to deliver the articles; *it was holden*, that an action could be maintained upon the bond by an administrator of the obligee, to recover the damages incurred by such failure. *Luques* v. *Thompson*, 514.
2. And where the condition of the bond, in reference to any person who might be married to the obligee and become his widow, was, that "she shall enjoy one fifth part of the produce (of the farm conveyed to the defendant,) delivered to her free from all expense on her part, also the privilege of keeping one cow and one pair of sheep and furnishing her with the back room and bedroom adjoining, with the use of the kitchen, together with a sufficient quantity of firewood cut in suitable lengths for her fire, sufficient for her use during her natural life," *it was holden*, that she was not entitled to hay or firewood to be by her carried away from the farm and disposed of at her pleasure. *Ib.*

See ARBITRAMENT AND AWARD 3, 4. BASTARDY. CONSTABLE.

## BRIDGE.

See CONSTITUTIONAL LAW, 3, 4.

## CERTIORARI.

See COUNTY COMMISSIONERS, 2. PUBLIC LOTS, 5, 6.

## COLLECTORS OF TAXES.

See TAXES.

## COMMON CARRIER.

See BAILMENTS. EVIDENCE, 16.

## COMMON LANDS.

1. If the proprietors of common lands, at a meeting regularly called, establish by their votes a mode of calling their future meetings, under the authority given by law for that purpose, the right of calling their meetings in manner provided by the statute, by application of the requisite number of proprietors to a justice of the peace, still remains; and meetings may be legally called in either of the modes. *Dolloff* v. *Hardy*, 545.
2. If a meeting of the proprietors be called on the application of persons calling themselves proprietors, and the meeting takes place, and no objection is made by any one at the meeting, that it was not rightfully called, and the records of the meeting show that the proprietors met on such application; the legality of the meeting cannot afterwards be controverted, on the

ground that the applicants were not all, or a sufficient number of them, proprietors. *Ib.*

3. And where the person to whom a warrant from a justice of the peace to call a meeting is directed, makes his return thereon generally, that he had notified the proprietors "by posting notice in said town of R. and causing the same to be published in" two papers named, "as the law directs;" and the proprietors meet at the time and place, and cause their corporate acts to be entered on their records, and the proceedings are ratified at a subsequent legal meeting; it cannot afterwards be objected, that the meeting was not legally notified. *Ib.*

4. If a sale of land of such proprietors be made through the agency of a committee and their doings be accepted at a meeting of the proprietors, but the meetings at which the committee was chosen and at which their report was accepted were not legally called, still if those proceedings were ratified at a subsequent legal meeting, the ratification would give validity to the doings, and would relate back to the time of the transactions, and would have a complete retroactive efficacy; no rights of third persons having intervened. *Ib.*

5. When the clerk of a proprietors' meeting makes minutes on a paper of the proceedings of a meeting, but dies before he has regularly entered the same upon the book of records, the proprietors' clerk, subsequently chosen, may rightfully make up the record from such minutes. *Ib.*

6. In an action of trespass *quare clausum* by one claiming title under the proprietors of common lands, the defendant who shows no title whatever, cannot defeat the action by raising objections, that the plaintiff acquired no title by reason of informalities in the mode of proceeding of the proprietors in making the grant. *Ib.*

7. The proprietors of common lands may convey the common estate by vote. And this may be done by appointing a committee to make the sale, and accepting their report of having done so. *Ib.*

## CONSIDERATION.

1. The payment in money of a sum less than the full amount, of a debt due and payable in money, by the debtor, at the place where he was bound to make it, and at the same time an agreement of the creditor to discharge the residue, will not operate as a defence to a suit for the balance of the debt — because the agreement of discharge is without consideration. *Bailey* v. *Day*, 88.

2. It is not essential, at common law, that the consideration for a promise in writing should appear in the writing itself. Parol evidence of it is admissible; and to ascertain whether there was a good consideration, not only the writing, but all the circumstances connected with it, must be taken into view. *Cummings* v. *Dennett*, 397.

3. If application is made to a mechanic or manufacturer for articles in his line of business, and he undertakes to prepare and furnish them in a given time, such a contract is not affected by the statute of frauds. *Ib.*

See ACTION, 5. CONTRACT, 7, 8. CONVEYANCE, 5. GUARANTY, 2.

## CONSTABLE.

1. In an action against a constable to recover the penalty incurred by serving a writ before having given a bond in conformity with the provisions of the thirty-fifth section of the one hundred and fourth chapter of the Revised Statutes, every fact and averment necessary, to show that the defendant has incurred the penalty, must be found in some one count of the declaration, or it will be insufficient. *Eustis* v. *Kidder*, 97.

2. It is a fatal defect, if the declaration does not allege that the defendant, at the time of the service of the writ, was a constable. And an allegation that he then had a writ in his custody "in the capacity of a constable," and that he did then and there "in the capacity of a constable as aforesaid make service of said writ," is not an averment, that he was one. A man may act as a constable without being one. *Ib.*

3. A constable does not incur such penalty by serving a writ, if he has conformed in all respects to the provisions of Rev. Stat. c. 104, § 35, relative to giving bond, saving that the approval of the selectmen of the town has not been indorsed thereon; that provision being merely directory to them. *Ib.*

## CONSTITUTIONAL LAW.

1. The legislature had the constitutional power, as by the st. 1839, c. 400, § 3, to make the stockholders of a corporation, created in 1833, personally liable to the amount of their stock for debts of the corporation, contracted while they were stockholders after the last act went into operation.
*Stanley* v. *Stanley*, 191.
2. It is competent for the legislature, by an act passed for that purpose, to cause the private property of stockholders in a corporation to be made liable to be taken on executions against their corporations. *Ib.*
3. The legislature of this State cannot create a corporation, and so authorize it to build a bridge, extending out of the limits of this State, as to empower such corporation to collect toll of one who passes only upon that part of the bridge without the limits of this State.
*Middle Bridge Corporation* v. *Marks*, 326.
4. And where no express promise is made, the law will not enable such corporation to recover toll or compensation, as on an implied one, against a person for merely passing over without their permission, and under a claim of right, such portion of the bridge, as was erected by such corporation upon the territory of a foreign government. *Ib.*

## CONSTRUCTION.

In giving a construction to an instrument in writing, the intention of the parties, to be collected from the whole instrument, is to be carried into effect, although a literal construction of a single clause, considered without reference to the others, would lead to a different result.
*Chase* v. *Bradley*, 531.

See BOND, 2.

## CONTRACT.

1. A contract made in Massachusetts between resident citizens thereof, during the time the insolvent law of that State of April 23, 1838, was in force, and there to be performed, is discharged in that State, and no suit can be further prosecuted thereon, if the debtor, by a course of proceedings in due form of law, obtains his certificate of discharge, and pleads the same in bar of an action on such contract. *Stone* v. *Tibbetts*, 110.
2. The discharge of a contract in the State where the parties resided, and where it was made and to be performed, is a discharge thereof in every other State. *Ib.*
3. If the conveyance of a vessel, held as security for a loan, and the payment of the money loaned, are by the contract to be simultaneous acts, it is sufficient for the party claiming from the other a performance of the contract, to show a readiness and an offer to perform. A formal and technical tender is not required of him. *White* v. *Mann*, 361.
4. But in such case if a tender were necessary, it would be sufficient to show, that he had done all that could be done on his part to accomplish what, by the contract, he was bound to do. *Ib.*
5. The rule, that if a thing become physically impossible to be done by the act of God, performance is excused, does not prevail, when the essential purpose of the contract may be accomplished. If the intention of the parties can be substantially, though not literally, executed, performance is not excused. *Ib.*
6. Where the fourth part of a vessel was conveyed to the master thereof, as collateral security for the payment of a sum of money loaned, within one year; "it being well understood, that if said quarter of said vessel is not redeemed within the time above named, then it is to be considered as a *bona fide* sale; it being further understood, that if the vessel meets with any loss not covered by insurance, by not obtaining successful business, or any misfortune or casualty of any name or description, it is to be borne by you, (the mortgagor); and all net earnings and profits, after deducting insurance and charges of every name or kind, shall be paid over to you, when you claim to redeem her;" and insurance is effected on the vessel "for the owners thereof;" the vessel is lost, and the fourth part of the insurance money is paid to the representative of the mortgagee within the year, and the mortgagor within that time claims the right to redeem, and to have the insurance money accounted for to him. *It was held*, that the mortgagor was entitled to redeem, and to have the amount received of the insurers for the loss accounted for to him. *Ib.*

7. If the holder of a note, then due and payable, take a new note for a less sum, whereon the same person only is liable, payable in thirty days, and agree, that if the smaller note shall be paid at maturity, the maker shall be discharged from his liability on the larger one, the contract cannot be enforced for want of consideration; but should another person be also liable on the smaller note, as indorser thereof, the contract would have sufficient consideration to support it, and would be binding.
*Jenness* v. *Lane*, 475.

8. Where such contract is made for a sufficient consideration, and is a valid contract, still it does not of itself, at the time it is made, operate as payment of the larger note, or discharge the payee from his liability thereon; but to make out a defence to a suit upon that note, it must be made to appear, that the smaller note was paid, or payment thereof tendered, at the time it became payable, or that payment was prevented by the wrong of the holder, or that he has adopted the new note in discharge of the old one.
*Ib.*

9. Such payment *at the time the new note became payable*, is not waived or excused, if the holder, being the whole time an inhabitant of another State, takes the new note with him to his place of residence; nor if he omits to make a demand and notify the indorser; nor if he does not notify the payee, that he elects to rely on payment of the old note; nor if he omits to return or offer the new note to the payee, until the time of trial. *Ib.*

See Consideration. Estoppel. Guaranty. Lord's Day.

## CONVEYANCE.

1. If a prior grantee, whose deed is unrecorded, would maintain his title against a grantee under a deed, made afterwards, but recorded first, the burthen of proof is on him to show, that the grantee whose deed was first recorded had, in the language of Rev. Stat. c. 91, § 26, "*actual notice*," of the existence of the unrecorded deed. *Butler* v. *Stevens*, 484.

2. If there be a change in the possession of real estate, if one leaves it, and another takes actual possession and occupies it exclusively in pursuance of a conveyance thereof in fee, though his deed be unrecorded, a conveyance to a third person by the same grantor will be inoperative against the former deed. *Ib.*

3. But if a man conveys his estate in fee, and the grantee immediately enters upon the estate, and there continues, and duly records his deed, although the grantor remains on the estate with his grantee, and even continues his labors thereon, as before his conveyance; no one is bound to infer therefrom, that he has in his possession a deed of re-conveyance: and especially, when the entry of his grantee was simultaneous with the execution of the conveyance. *Ib.*

4. In an action upon a mortgage, demanding the land, where it appeared that the tenant had given an absolute deed in fee of the premises, which was recorded, and at the same time took back a mortgage deed, to secure the support of himself, his wife and daughter, during their lives, which remained unrecorded; and the mortgagor afterwards made a second mortgage to a third person, to secure the re-payment of money loaned, which was immediately recorded; *it was held*, that information, given by a third person to the second mortgagee, prior to his taking his mortgage, that the mortgagor "was going to N. (the place where the first mortgagee resided,) and was going to have property worth six or seven hundred dollars by taking care of his wife's father and mother," was not sufficient notice, to give priority to such unrecorded mortgage. *Ib.*

5 Where a deed is made to take effect only after the decease of the grantor and his wife, and no valuable consideration is expressed in the deed, and none is in fact paid, and the grantee is not of the blood of the grantor, and there is no consideration of marriage, nothing passes by the deed.
*Gault* v. *Hall*, 561.

See Administrator, 1. Evidence, 12. Fraud, 3.

## CORPORATIONS.

1. By the provisions of the Statute, 1836, c. 200, § 3, the stockholders of corporations were made individually liable to the extent of their stock, upon failure to obtain satisfaction from the corporate property, for all debts against

the corporation existing at the time of the judgments, although the debts were contracted before the persons called upon became stockholders.
*Longley* v. *Little*, 162.

2. The Statute, 1836, c. 200, was repealed when the Revised Statutes went into operation; and the statute then in force on the same subject (Rev. St. c. 76, § 18) makes a stockholder liable in the same manner only for "debts of the corporation contracted during his ownership of such stock." *Ib.*
3. The cause of action against individual corporators under the St 1836, c. 200, did not accrue until a failure to obtain the amount of the judgment against the corporation from the corporate property by a due course of proceedings for that purpose. And where the cause of action was not established by such proceedings before the Revised Statutes went into effect. it was not saved by the exceptions in the repealing act; and could be enforced only according to the provisions of Rev. St. c. 76. *Ib.*

See ARBITRAMENT & AWARD, 1. CONSTITUTIONAL LAW. EVIDENCE, 8, 15. TRUST, 2.

## COSTS.

1. *Scire facias*, in favor of the State, upon a recognizance entered into by the defendant to prosecute an appeal in a criminal process, is an action; and the defendant, if he be the prevailing party. is entitled to his costs against the State under the provisions of Rev. St. c. 115, § 91.
*State* v. *Harlow*, 74.
2. By the provisions of Rev. St. c. 96, § 16, as amended by st. 1842, c. 31, § 8, where the plaintiff brings his action, not coming within the excepted cases, originally in this Court, and does not "recover more than two hundred dollars damage," he cannot recover costs, although the amount was reduced below that sum in consequence of the allowance to the defendant by the jury of an account filed by him in set-off. *Foster* v. *Ordway*, 322.

See INDORSER OF WRIT.

## COUNTY COMMISSIONERS.

1. An application to the County Commissioners for the location, alteration, or discontinuance of a highway is made "at one of their regular sessions," if presented at an adjournment of a regular session.
*Harkness* v. *Waldo County Commissioners*, 353.
2. A petition for a *certiorari* to quash the proceedings of the County Commissioners in laying out a highway, because they have adjudged the way prayed for to be of common convenience and necessity and yet have laid out but a portion of it, will not be granted on the application of such persons only, as have no interest to be affected, otherwise than as members of the community, by the omission to lay out the remaining portion of that way. *Ib.*
3. The County Commissioners by adjudging that the way prayed for is of common convenience and necessity, adjudge each portion of it to be so. *Ib.*
4. Under the provisions of the Revised Statutes, County Commissioners have power to lay out a highway wholly within the limits of one town. *Ib.*
5. No particular words or form of words are required by the statute in applications to the County Commissioners for the location of roads; and the greatest technical accuracy and precision are not to be expected. Nor is it necessary, that those who are authorized to judge of the necessity and convenience of ways should use technical terms in their adjudication and location, provided their intention is manifest, and they have jurisdiction on the subject. *Windham* v. *Cumberland County Commissioners*, 406.
6. The jurisdiction of that court does not fail, merely because the word, "road," instead of highway, is used in the petition or in the record, if an examination of the whole will show what description of road was intended. *Ib.*
7. It is not necessary that the road located should be described in the same language used in the petition therefor. It is sufficient, if there be a substantial compliance therewith. *Ib.*
8. County Commissioners, under the Revised Statutes, have power to lay out a highway wholly within the limits of one town. *Ib.*
9. The returns of the votes by the selectmen and town clerk, made and returned in manner provided by law, are the only evidence from which it is to be determined what person, if any, has been chosen register of deeds, under Rev. Stat. c. 11. The County Commissioners, therefore, have no

power to go beyond the returns of the selectmen and town clerks, and receive other evidence, and from that decide, that one of the town meetings was illegally called, and for that cause reject the votes of such town.
*Bacon* v. *York County Commissioners*. 491.

COUNTY TREASURER.

See TAXES, 14, 15, 16.

COURT.

1. The St. 1845, c. 172, "concerning judicial process and proceedings," does not authorize the transfer of an action from the District Court to the Supreme Judicial Court, for the decision of "legal points," upon an incidental or incipient question, which may arise; but only when questions of law are found to have arisen therein, upon the decision of which the final determination of the cause, one way or the other, must ultimately depend.
*Loring* v. *Proctor*, 18.
2. Where the writ contains but one count, and that upon an alleged agreement to become insurer of a vessel, by a policy to be effected, it may be amended in the District Court, by leave of Court, by declaring, in a new count, upon a policy as actually made for the purpose. But the amendment must be allowed and made in the District Court before the action can proceed to trial on such new count, and questions arising thereon be transferred from the District Court to this Court for decision. *Ib.*
3. A policy of insurance may be a valid instrument between the parties without any formal delivery of the paper by one party to the other. And what the intentions of the parties may be, as to a writing prepared between them on the subject, with reference to its efficacy, is a question referable to a jury as matter of fact, and not altogether of law referable to the Court.
*Ib.*
4. If the question in the District Court be a mixed one of law and fact, to be decided by the jury, under proper instructions from the Court as to the law, it cannot be transferred from that court to the Supreme Judical Court for decision, under the St. 1845, c. 172, until the facts have been determined by the jury. *Ib.*
5. The rule, that it must appear by the record, that courts of local and limited jurisdiction have verified every fact necessary to give them jurisdiction, is not applicable to the District Courts of this State. Where, therefore, the process contains the proper averments to give that Court jurisdiction, and the Court acts in the matter, the presumption arises, that it had become satisfied of the existence of all the facts necessary to give it jurisdiction.
*Farrar* v. *Loring*, 202.

DAMAGES.

In an action of trespass for mill logs, cut upon land of the plaintiff and removed to a distance therefrom, the true rule in the assessment of damages is, that the plaintiff should recover the value of the logs, as it was the moment after they were severed from the freehold.
*Cushing* v. *Longfellow*, 306.

DECLARATION.

See CONSTABLE.

DEED.

See CONVEYANCE. EVIDENCE, 10.

DELIVERY.

See ASSIGNMENT, 5. COURT, 3.

DISSEIZIN.

See LEVY ON LANDS, 3.

DISTRICT COURT.

See COURT. INDICTMENT, 5, 6.

EQUITY.

1. After a final decree in a bill in equity, a petition for a rehearing will not be granted for the purpose of allowing evidence, touching the merits of

the cause, to be introduced, which evidence was fully known to the petitioner before publicatton of the proofs taken, and might have been produced at the hearing. *Robinson* v. *Sampson*, 11.

2. A misapprehension of the effect of the evidence taken, or a mistake of the law respecting the admissibility of evidence, either by the party or by his counsel, will furnish no sufficient ground for granting a rehearing after a final decree in a cause in equity. *Ib.*

3. Where a bill in equity alleges, that the plaintiffs were induced to relinquish a portion of their original just and legal demand, against the defendants, upon payment and security of the balance, by reason of false and fraudulent representations by the latter of the amount and condition of their property; but does not ask, that the contract of settlement should be rescinded, nor that the contract as originally existing, should be restored, nor asks for discovery, but seeks only to recover compensation in money for the injury sustained by the fraudulent representations of the defendants; this Court as a court of equity, cannot entertain jurisdiction, there being a perfect remedy at law. *Denny* v. *Gilman*, 149.

4. The statute of limitations applies to suits in equity as well as at law. *Ib.*

5. Fraud cannot be imputed, where no design to deceive, is manifest. *Ib.*

6. But although the statement of what another said, in relation to property liable to the payment of the debt, was literally true; yet if the persons making such statement knew that it was false, and made it with the intention to deceive, and to induce those to whom it was made to give up a portion of their claim, and the statement did deceive, and the party was defrauded thereby; the literal truth of the statement of what was said furnishes no excuse. *Ib.*

See FRAUD.

## ERROR.

If judgment be rendered for an amount larger than the sum named in the *ad damnum* clause in the writ, it may be liable to be reversed in whole or in part for that cause, upon error brought by the party against whom it was rendered. It is, however, a valid judgment until reversed; and a stranger to it can neither sustain a writ of error, nor take advantage of the irregularity. *Smith* v. *Keen*, 411.

## ESTOPPEL.

1. An agreement entered into concerning real estate, wherein certain recitals and admissions are made in reference thereto, does not estop the party to deny the truth of such recitals and admissions, saving for the accomplishment of the purpose for which they were made, unless they become a part of or work upon the title. *Gerrish* v. *Union Wharf*, 384.

2. An executory agreement, never executed, does not estop a party to it from acting in such manner as to violate its stipulations. *Ib.*

3. A person cannot be barred by an unsealed instrument by way of an estoppel, of his right to real estate, but only by deed or record. *Ib.*

See ADMINISTRATOR, 1.

## EVIDENCE.

1. On the trial of an indictment against a man for the crime of adultery, the husband of the woman, with whom the crime is alleged to have been committed, is not a competent witness to prove the act of adultery. *State* v. *Welch*, 30.

2. Where an action is brought for an alleged injury to the plaintiff's property, while in the care and keeping of his servant or agent, arising from the negligence or misconduct of such servant or agent, the servant or agent is not a competent witness for the plaintiff, because a verdict for the master would place the witness in a state of security against any action, which the master might otherwise bring against him. *Littlefield* v. *Portland*, 37.

3. But the liability must be direct and immediate to the party; for if the witness is liable to a third person, who is liable to the party, such circuity of interest is no legal ground of exclusion. *Ib.*

4. In an action by the plaintiff against a town to recover the value of his goods, alleged to have been lost by reason of a defect in a highway within the town, where the goods at the time of the loss were loaded upon a wagon

which, as well as the team, was the property of another, and under the care of, and driven by a man hired by the owner for that purpose, *it was held*, that the driver was a competent witness for the plaintiff. *Ib.*

5. If a witness has before him books, wherein daily entries of the transactions in a certain business are made, and the witness knows that they are the genuine books, and on that ground, only, believes that the facts are truly stated therein, but yet the books are not in his handwriting, nor were the entries made in his sight; and on inspection of the books, he still has no recollection of the facts; the testimony is inadmissible. *Bradley* v. *Davis*, 45.

6. The declarations of a person while in possession as the owner of personal property, may be received as evidence against the title of another person, who has afterwards derived his title through him. And they may be received, although the person, who made them, might have been called as a witness. *Holt* v. *Walker*, 107.

7. And if the title of such person had passed to his assignee in bankruptcy, he remaining in possession of the property, his declarations, made immediately before the sale, and at the request of the assignee, are admissible to affect a title afterwards acquired through the assignee. *Ib.*

8. Under the statutes in force in July, 1841, the books of a corporation, so far as creditors were concerned, were to be deemed conclusive evidence as to who were, and who were not to be considered as stockholders. Parol evidence, therefore, was inadmissible, to show that a person had ceased to be a stockholder. *Stanley* v. *Stanley*, 191.

9. The declarations of a witness, made to others, that he is interested in the event of a suit, do not prove him to be so, or that he is an incompetent witness. *George* v. *Stubbs*, 243.

10. A party cannot prove by a witness the contents of a deed, until he has taken proper measures to have the deed produced, or shown some sufficient reason for not having produced it. *Emery* v. *Vinall*, 295.

11. In the absence of evidence or testimony to the contrary, a note is presumed to have been made at the time it bears date. *Ib.*

12. A conveyance of land as an absolute gift is void as to prior creditors of the grantor. An instruction to the jury, therefore, that if the conveyance was made by the grantor for the purpose of preventing his creditors from availing themselves of it, and he intended and expected to receive a benefit therefrom, and the grantee was aiding him, that the demandant, being a prior creditor, should recover, is erroneous, as it requires of the demandant proof of a fact, which could not legally be required in such case. *Ib.*

13. When a person leaves his usual place of residence with an intention of returning to it, and continues to be absent from it for seven years, without being heard of, he is presumed to be dead. But the time when such presumption will arise, may be greatly abridged by proof, that the person has encountered such perils as might be reasonably expected to destroy life, and has been so situated, that according to the ordinary course of human events, he must have been heard of, if he had survived. No general or certain rule can in such cases, be established; but each case must be decided by the competent tribunal upon proof of the facts and probabilities, that life has been destroyed. *White* v. *Mann*, 361.

14. When one is called upon as the supposed owner of a vessel for the payment of a charge upon it, the vessel having formerly belonged to another, the possession of the vessel and the receipt of her earnings are admissible, although not conclusive evidence upon the question of title. *Badger* v. *Bank of Cumberland*, 428.

15. The authority of an agent of a corporation need not be proved by record or writing, but may be shown by acts and the general course of business. *Ib.*

16. Where the plaintiff proved, that he had delivered to the defendants, who were common carriers, a box, to be carried to a certain place; that the box was not delivered; that he had made a demand thereof; and that the defendants admitted its loss, and then "offered to show by his own testimony (it not appearing that he had any other means of showing it,) what was in said box and the value of the articles," the declaration having alleged, that the box contained medical books, medicines, surgical instruments and chemical apparatus; it was held, that the plaintiff's oath was inadmissible. *Pudor* v. *Boston & Maine Rail Road*, 458

17. Where the form of a note is that of a joint and several promissory note and it is signed by three persons, the two first in order merely affixing their

signatures, and the third adding to his the word *surety*, it is competent for the second signer, in an action against the third for contribution as a co-surety, to show by parol evidence, that the first signer was the principal and that the other two were sureties. *Fernald* v. *Dawley*, 470.

18. And if such second signer places his name upon the note at the request of the first and as his surety, and it is then taken by the first signer and carried away, and afterwards delivered by him to the payee with the additional signature of the third, with the word surety attached thereto, the second signer may prove by parol, in such action, that the third, when he signed the note, understood that he signed as surety for the first signer only and not for both, and that he knew that the second signer was but a surety. *Ib.*

See ACTION, 5. ARBITRAMENT & AWARD, 3. BILLS & NOTES, 1, 2, 3, 8. CONSIDERATION, 2. CONVEYANCE, 1. FRAUD, 1. INDICTMENT, 14. JUDGMENT. LEVY ON LANDS, 4, 5, 8, 9, 10, 13, 14, 16, 17. LIMITATIONS. TAXES, 3, 4, 5, 6, 14. WAYS, 4.

## EXCEPTIONS.

1. When exceptions are taken on the trial of an action, every matter of law intended to be insisted on, should, at sometime during the trial, be brought particularly to the notice of the Court. And no question can be raised on the argument, which does not appear from the exceptions to have been made at the trial. *Parker* v. *Flagg*, 181.
2. In the trial of an action, every point of law intended to be made, should be presented to the presiding Judge explicitly, or he cannot be expected to give an opinion upon it; and no exceptions will lie in reference to any point, whereupon no opinion is given, or refused to be given, and no ruling is made by the Judge. *Emery* v. *Vinall*, 295.
3. It is not enough for a party to say, that he excepts to the introduction of a witness; he should explain why and wherefore he so objects. *Ib.*
4. If the presiding Judge is not requested to give any instructions in reference to the nature and effect of a written instrument, introduced in evidence at the trial, the omission to do so is no valid ground of exceptions, unless the liability of the party is to be determined solely by the legal construction to be put upon it. *Badger* v. *Bank of Cumberland*, 428.
5. Exceptions should be specifically taken during the trial, and should so appear in the exceptions; and if not so taken, they will be considered as waived. *Kimball* v. *Irish*, 444.
6. If the instructions of the District Judge upon one point be erroneous, but at the same time wholly immaterial, it can furnish no sufficient cause for sustaining exceptions. *Cummings* v. *Chandler*, 453.

See PRACTICE.

## EXECUTION.

See LEVY ON LANDS.

## EXECUTOR.

See ADMINISTRATOR.

## EXTENT.

See LEVY ON LANDS.

## FLATS.

1. The right to use the waters covering flats between high and low water marks for the purposes of navigation, was not abridged by the ordinance of 1641, in reference to that subject; and owners of vessels exercised only their legal right of navigation by passing over such flats, when covered by water, and remaining upon them for commercial purposes from the ebb to the flow of the tide. *Gerrish* v. *Union Wharf*, 384.
2. The rightful use of one's own estate, whether covered by water or not, may, not unfrequently, have some effect to diminish the value of an adjoining estate, or to prevent its being used with the comfort which might have been otherwise anticipated. This, however, is *damnum absque injuria* for which the law does not make compensation. *Ib.*

3. If individuals have acted unlawfully or injuriously in extending their wharf into the water beyond low water mark, they may be amenable to the sovereign power, but they cannot be called upon by those who have no interest in the land covered by such wharf, to make compensation to them for its use. *Ib.*
4. By the colonial ordinance of 1641, (Ancient Charters, c. 63,) the title of the proprietors of flats extended only to the ordinary low water mark, and not to the place to which the tide ebbed, when from natural causes it ebbed the lowest. *Ib.*
5. If a person can acquire any title to flats, covered by water at ordinary flood tides, but rising above the water at low tides, by cutting "thatch grass," growing thereon, each year for forty successive years, such title will not extend beyond the line of the actual occupation by cutting the grass. *Thornton* v. *Foss*, 402.
6. But if the party had title to such "thatch islands," or elevations of the flats, and in consequence of the colonial ordinance of 1641, c. 63, that title was extended to low water mark, it would extend only to flats lying between the thatch islands and low water mark, and not to flats lying to the right or to the left of the land not covered by water at ordinary low tides. *Ib.*

## FOREIGN ATTACHMENT.

See TRUSTEE PROCESS.

## FORGERY.

See INDICTMENT, 11, 12, 13.

## FRANKFORT BANK.

See BANK.

## FRAUD.

1. Where fraud is alleged, and all the representations made by the party to the witness were in letters to himself, and the letters are introduced in evidence, the statements of the witness, of their contents, his motives and inferences, are all inadmissible, and are to be disregarded. *Thompson* v. *Hallett*, 141.
2. If there be any just ground of complaint that the agent to make sale of a mortgage on real estate, who had stated that a certain price was the most he could obtain for it, when it was of much greater value, and it was sold for that price, had in fact himself become the purchaser, the proper mode for the principal to obtain redress, in a court of equity, for such an injury, is not to make an allegation of fraudulent representation, but to call upon the agent to annul the assignment, or to account to the principal for the true value. *Ib.*
3. If two distinct parcels of land be conveyed in the same deed, it may be avoided as to one parcel by creditors, who have a right to impeach it, because fraudulent as to them, when, as to the other parcel, it might be deemed *bona fide*, and unimpeachable. *Chase* v. *Walker*, 555.

See EQUITY, 3, 5, 6. TAXES, 5.

## GRANT.

See TRUST, 4.

## GUARANTY.

1. Where the plaintiff had contracted to deliver a quantity of rock to a third person at an agreed price; and before the delivery to him, made known to the defendant his determination not to deliver the rock upon the credit of such third person; and the defendant thereupon said to the plaintiff—"*You bring the rock and I will see you paid for it*"—*it was held by the Court*, that such parol promise was within the statute of frauds, and not binding upon the defendant. *Doyle* v. *White*, 341.
2. And in such case, if the delivery of the rock was upon the credit of the defendant as an original promisor, the plaintiff would be entitled to recover. But if the original contract was made with the third person, and the defendant agreed only, by parol, to pay for the rock as a surety or guarantor, the plaintiff could not sustain his action, unless the promise was made upon some new consideration, other than the delivery of the rock. Any

expectation of profit or hope of benefit from the sale of goods by the defendant to such third person, in consequence of his proceeding to build a house on being furnished by the plaintiff with rock for the cellar, would not constitute a sufficient consideration for such promise. *Ib.*

3. Where "a mortgage was given to secure the gross sum of twenty-five hundred dollars, which might be furnished in goods and materials towards the erection of a house for the mortgagor," a collateral liability, or one assumed as surety or guarantor would not be within its terms, and would not be secured thereby. *Ib.*

## GUARDIAN.

1. In this State the guardian of an infant has by statute the care and management of the estate of his ward, and may sell and transfer his ward's personal estate, subject to certain statute limitations and restrictions. But the choses in action of the ward do not become the property of the guardian, and are not transferred to him, on his appointment, either by the common law or by statute. *Hutchins* v. *Dresser*, 76.
2. The provisions of the Revised Statutes, (c. 110, § 21,) do not authorize the guardian of an infant to maintain a suit *in his own name* to recover a chose in action of his ward. *Ib.*

## HUSBAND AND WIFE.

See EVIDENCE, 1.

## INDICTMENT.

1. Where a party to a suit, on the trial thereof, presents himself as a witness in support of the charges against the adverse party on his account book, and voluntarily takes the general oath, to tell the truth, the whole truth, and nothing but the truth, legally administered, instead of the more restricted oath, to make just and true answers to such questions as shall be asked by the Court or by the order thereof, and testifies untruly, wittingly and willingly, to matters material and legitimately derivable from him, he will come within the purview of Rev. Stat. c. 158, § 1, and may be convicted of perjury. *State* v. *Keene*, 33.
2. And if the trial is before referees, duly authorized in pursuance of Rev. Stat. c. 138, to determine the controversy between the parties, and a party there testifies falsely as to such matters as might legally be drawn from him at common law, he will be liable to the same punishment, as if the oath had been administered in a court of common law jurisdiction. *Ib.*
3. If the indictment alleges, that the false testimony of the accused was in reference to whether it was his book of original entries of his daily charges; whether the charges therein were or were not copied into it from another book; and whether, in general terms, the account had not been settled on such other book; it is not necessary to specify the particular items of the account to which the testimony related. *Ib.*
4. It is not necessary, that the indictment should allege that there was a final determination of the controversy by the referees. It is sufficient, if it be alleged that they proceeded to hear the parties, and that the false testimony was given in a due course of proceeding before them. *Ib.*
5. The District Courts of this State are Courts of the State, and when holden, are District Courts for the counties, and not for the districts. The allegation, therefore, "for the eastern district," in an indictment found in a county within that district, is unnecessary. *State* v. *Roberts*, 263.
6. A description of the Court, in an indictment, as "the District Court of the State of Maine, holden at Bangor in the county of Penobscot, for the county aforesaid," is a sufficient description. *Ib.*
7. And in an indictment wherein the Court is so described, it is enough to allege, that a warrant, issued by order of the Court, was "under the seal of said Court." *Ib.*
8. In this country, usually, in an indictment, the place where an offence is alleged to have been committed, is a town named, which is within a county also named, where the Court have jurisdiction; but it is not necessary, that the town should be stated, if the place mentioned is equally specific. If the particular place named is shown to be within the county, over which the Court have jurisdiction, it is sufficient. *Ib.*
9. If an indictment alleged, that an offence was committed either within the

town of E. or the town of H. in the county of Penobscot, without indicating more specifically the particular spot, there would be an uncertainty, which, in cases on this subject, has been held to be fatal. But if it allege that the acts, constituting the offence, were done on the Penobscot river, on a particular part of it, within the county, it is sufficiently certain. *Ib.*

10. Where there are several counts in an indictment, the Court may, in the exercise of its discretion, compel the prosecuting officer to select on which charge he will proceed; but when different counts are inserted in good faith for the purpose of meeting a single charge, the Court will not compel the prosecuting officer to make a selection. *State* v. *Flye*, 312.
11. Where an indictment for forging an order, set it out as it was when altered, and the proof was, that it was originally drawn for nine dollars, and had been altered to nineteen dollars, *it was held*, that the indictment was sufficient. *Ib.*
12. If the indictment alleges, that the accused "forged and counterfeited a certain order for the payment of money, purporting to be made and drawn by Eaton Clark and Isaac Somes, selectmen of the town of M.", it is not necessary, to sustain the indictment, to prove, that those men were in fact selectmen of the town. *Ib.*
13. It is not necessary, that the characters and figures in the margin of an order for the payment of money should be set out in an indictment for counterfeiting and forging the same. *Ib.*
14. On the trial of an indictment, if a *prima facie* case be made out against the accused, the burden of proof is not upon him to show his innocence of the charge but remains upon the State, on the whole evidence in the case, to satisfy the jury of his guilt. An instruction, therefore, "that if it was proved, that the order came into the hands of the defendant unaltered, and came out of his hands altered, the burthen of proof was on the defendant to prove that he did not alter it," *was held* to be erroneous. *Ib.*
15. It is essential that it should appear in an indictment, that it was found upon the oath of the jurors. And each count in the indictment must appear to have been found by the jurors upon oath.
*State* v. *McAllister*, 374.
16. One count in an indictment may refer to another, and thereby that, which if alone considered would appear to be defective, may be sufficient. But a defective count can be thus aided, only when there is a reference therein to another count for the allegation or fact required to make the defective count perfect. *Ib.*

See EVIDENCE, 1. JUSTICE OF THE PEACE, 2, 3.

## INDORSER OF WRIT.

1. Where a person places his name upon the back of a writ, no liability to pay costs which the defendant in the action may recover, is incurred thereby, unless it is done under such circumstances as make him liable under the provisions of the sixteenth, seventeenth and nineteenth sections of Rev. Stat. c. 114. *Crossman* v. *Moody*, 40.
2. The eighteenth section of the same statute has reference merely to cases, where indorsers of writs are made liable under the provisions of the other sections. *Ib.*
3. If an indorsement be made upon a writ, where no liability under the statute provisions is incurred thereby, by order of the presiding Judge, or as a condition prescribed by him, upon the performance of which a motion, for the benefit of the indorser, should be allowed by the Judge, still no liability is incurred by such indorsement. *Ib.*

## INFANT.

See GUARDIAN.

## INNHOLDER.

See LICENSING BOARD.

## INSOLVENCY.

See ASSIGNMENT, 6. BILLS AND NOTES, 6. CONTRACT, 1, 2.

## INSURANCE.

See CONTRACT, 6. COURT, 2, 3.

## JUDGMENT.

1. A judgment of a Court having jurisdiction, with proof that the decision was upon the same ground, is conclusive between the same parties upon the same subject matter, coming directly in question in another suit, although the controversy may not arise in relation to the identical thing.

*Chase* v. *Walker*, 555.

2. And where the course of the proceedings is such, that the judgment cannot be pleaded, it may be given in evidence under the general issue. *Ib.*

See Error. Levy on Lands, 8, 9, 10, 14. Practice.

## JURISDICTION.

See Court. Licensing Board.

## JURORS.

A justice of a Town Court is not, by holding that office, rendered incompetent to serve as a juror at the Supreme Judicial Court or District Court.

*Page* v. *Lewis*, 360.

## JUSTICE OF THE PEACE.

1. A justice of the peace has no jurisdiction or power to try and decide finally upon the guilt or innocence of persons accused of having committed a riot; and has no legal authority to administer an oath to a witness on a trial where he assumes such jurisdiction. *State* v. *Furlong*, 69.
2. If it appears in an indictment for perjury, that the accused was sworn only by and before a justice of the peace who had no jurisdiction of the case before him, and therefore had no authority to administer the oath, such indictment is bad, on demurrer, and will be quashed. *Ib.*
3. Where it appears from the indictment, reciting the record of the justice, that the accused "was put upon trial"; that the justice "proceeded to hear and determine the matter of said complaint"; "that upon the trial of said complaint", it became necessary to prove certain facts; and that the witness on that trial, now indicted for perjury, testified falsely "to cause the accused to be convicted of the offence charged", it must be understood, that the justice had assumed jurisdiction to try and decide finally upon the guilt or innocence of the accused, and not that he assumed only to examine into the guilt or innocence of the person complained of, for the purpose of deciding, whether he should be bound over to appear before some other tribunal for trial, or be discharged. *Ib.*

See Bond.

## LEASE.

See Action, 1. Trust, 3.

## LEVY ON LANDS.

1. The statute authorizing the levy of an execution upon land requires, that the appraisers should be disinterested; and the law requires, that it should appear by the return of the officer making the levy, that they were so. If, therefore, the officer merely states, that the appraisers were freeholders and discreet men, wholly omitting to certify that they were disinterested, the levy is void. *Pierce* v. *Strickland*, 277.
2. The court will not permit an amendment of the officer's return to be made, by inserting that the appraisers were disinterested, where the motion was filed more than six years after the levy, and when the officer had gone out of office, and where there was nothing appearing on the proceedings authorizing the amendment, and when the officer making the levy had become the party interested to have the amendment made. *Ib.*
3. If an administrator has caused an execution to be levied on land, to satisfy a judgment recovered by him as such on a debt due to the deceased, and is afterwards disseized, he may recover the land, declaring either on his own seizin, or on his seizin in his capacity of administrator. *Ib.*
4. The proper evidence to prove, that real estate, acquired by levy at the suit of an administrator, will not be necessary for the payment of debts, is his final account settled in the probate office. Parol evidence of the declarations of the administrator is inadmissible for that purpose. *Ib.*
5. A return by the officer making a levy, that he "appointed an appraiser for

the within named debtor, S. S., he having neglected to choose an appraiser although I gave him a notice in writing to appear and choose an appraiser, at least twenty-four hours before the time of the levy," was held to be sufficient evidence of legal notice. *Ib.*

Where there are several separate levies, made on several tracts of land, in satisfaction of one execution, and the total amount of the levies exceeds the sum for which the officer was authorized to make the extent, the amount of the appraisement of the last tract levied upon exceeding the excess, none of these levies, unless the last, are void for that cause. *Ib.*

7. Where separate levies, at different times, are made on several tracts of land, the interest upon the judgment should be calculated upon the principle, that each levy should be considered a payment to the amount of each appraisement at the time it was made, until the final satisfaction is accomplished. *Ib.*

8. The presumption of law is, that all judgments rendered by Courts of competent jurisdiction are properly rendered, and upon due proceedings had preparatory thereto; and between the parties thereto and privies, such judgments are conclusive, unless fraudulently obtained. Between a party thereto and a stranger, they are evidence only that such judgments were rendered upon due proceedings had therefor, and in support of proceedings had thereupon, as in case of levies upon real estate to satisfy them, in which case they become muniments of title. *Ib.*

9. But when a judgment is introduced collaterally as a muniment of title which was rendered *inter alios*, it is not conclusive upon one not a party to it. It will be competent for him to show, that it was unduly or irregularly obtained. *Ib.*

10. Where a suit is brought in this State by a person residing in another State, as administrator of the estate of one residing there at the time of his decease, and judgment is rendered therein in his favor, and a levy on land is made by virtue of an execution issued upon such judgment, in an action to recover the land by the administrator against one claiming under the debtor, the judgment is *prima facie* evidence, that he had been duly appointed in this State. But such fact may be put in issue by the defendant, and such presumption may be rebutted by proof. *Ib.*

11. A levy on land is not invalid, merely because there was a clerical error in the recital of the amount of the judgment, where the true sum was apparent on an inspection of the whole execution. Such an error is amendable *Smith* v. *Keen*, 411.

12. Where in making a levy upon land, before the Revised Statutes were in force, the officer returned that "the debtor within named, having been duly notified to choose an appraiser, but having neglected and refused to choose," he appointed one for the debtor; *it was held* by the Court, that the levy was not void for that cause. *Ib.*

13. And where there was a certificate upon the execution, signed by a justice of the peace, stating that he had administered the proper oath, which was set out in full, to the appraisers; and the appraisers referred to it in their return as "having been sworn as above;" and where the officer in his return, named the appraisers, and stated that he had caused them "to be chosen and sworn faithfully and impartially to appraise the estate above described;" *it was held* by the Court, that there was sufficient evidence that the appraisers had been legally sworn. *Ib.*

14. Where the demandant claims under a judgment and levy, and the tenant under a subsequent deed from the debtor, it is not competent for the tenant to show, that the judgment was recovered upon demands which were not justly due; that being a matter to be finally settled between the creditor and debtor. *Ib.*

15. When a levy is made upon land previously attached, the estate is appraised at its value at the time of the levy, and the statute purchaser pays no more for it, although the title acquired has relation to the time of the attachment. *Chase* v. *Bradley*, 531.

16. Where a levy was made under the provisions of the stat. of 1821, c. 60, *it was held*, that a sufficient cause was shown by the officer for his appointing an appraiser for the debtor, by returning that he "gave due notice to the within named debtor to choose an appraiser (by leaving a written notice at his usual place of abode) and he neglecting to choose an appraiser." *Ib.* *Gault* v. *Hall*, 561.

17. In making a levy, if the setting off be made, "reserving and excepting therefrom the granite on said premises," that fact should be so stated in the return of the officer, if the debtor had previously conveyed it. And if such reservation be made in the appraisement, and the return merely states, that it was done because the creditor had represented that the debtor had before that time conveyed the granite, the burthen is on the creditor, in order to sustain his levy on a trial, to show that such conveyance had been made. *Ib.*

See ACTION, 1, 2, 3. TRUSTEE PROCESS, 3.

## LICENSING BOARD.

1. The jurisdiction of the licensing board, under Rev. St. c. 36, like that of all inferior magistrates, must appear affirmatively, and cannot be presumed or inferred. *State* v. *Lamos*, 258.
2. Unless the proceedings of the licensing board in revoking the license of an innholder, by virtue of the provisions of Rev. St. c. 36, § 15, show that they were founded upon a *complaint* to them, their acts in that respect will have no validity. *Ib.*
3. But it is not necessary, that the complaint should be in writing, signed and sworn to, as the law requires in complaints in criminal proceedings before a magistrate, to authorize him to issue a warrant. *Ib.*

## LIMITATIONS.

1. Witnessed notes, after the lapse of twenty years since they became payable, are barred by the statute of limitations. Rev. St. c. 146, § 11. *Joy* v. *Adams*, 330.
2. A mortgage security has not been deemed to be within any branch of the statute of limitations. He, who would avoid such security, must show payment; otherwise the mortgagee will not be precluded from entering upon and holding possession of the mortgaged premises. *Ib.*
3. The mortgagor has not been allowed to defeat the right of the mortgagee to enter upon the land, or obtain possession thereof, by showing merely, that the personal security, to which the mortgage security is collateral, has become barred by the statute. But he has been allowed to allege payment, and for proof thereof, to rely upon the lapse of time, when it amounted to twenty years from the accruing of the indebtment. *Ib.*
4. The lapse of twenty years after the debt secured by the mortgage became payable, has been deemed to be sufficient evidence of payment, in the absence of any countervailing considerations. In such case the fact of payment is admitted as a presumption of law, which may be removed by circumstances tending to produce a contrary presumption. *Ib.*
5. Whether such presumption has, or has not, been removed by proof, or by circumstances, is a question for the determination of the jury. *Ib.*

See EQUITY, 4.

## LORD'S DAY.

A promissory note, made on the Lord's day, given and received as the consideration for articles purchased on that day, is void, the act done being in violation of law. *Towle* v. *Larrabee*, 464.

## MORTGAGE.

1. The mortgagee of personal property, where there is no agreement, that the mortgagor shall retain the possession, may maintain replevin therefor before the expiration of the time of credit. *Ferguson* v. *Thomas*, 499.
2. And these words, inserted in a mortgage of personal property: — "And I hereby give the mortgagee full power and authority to enter my premises or elsewhere, and take possession of the same property, and make sale thereof for the purpose of paying the note hereinafter mentioned, provided the same should not be paid at maturity," — do not take away the right of the mortgagee to take immediate possession of the mortgaged property. *Ib.*

See CONTRACT, 6. CONVEYANCE, 4. FRAUD, 2. GUARANTY, 3. LIMITATIONS, 2, 3, 4.

## NEW TRIAL.

Where the writ sets forth an undertaking on the part of the defendant and a promise to perform it, with an averment of carelessness and neglect by

him to fulfil it; and the defendant pleads, that he never promised, and this issue is joined by the plaintiff; and thereupon a trial takes place, and a verdict is returned for the defendant — the verdict will not be set aside, on the plaintiff's motion, for this cause, and a new trial granted.
*Winslow* v. *Bank of Cumberland*, 9.

## NOTARY PUBLIC.

See BILLS AND NOTES, 1, 2, 3.

## OFFICER.

1. Where an attachment of additional personal property was made upon a writ by the direction of persons liable upon the note in suit, but not parties to the action, and the officer declined to make a return of the attachment unless the property was receipted for by a receipter approved by them, and such receipter was procured by them, and the return of the attachment made, and afterwards, the plaintiff, finding the return of the attachment upon the writ, but having no knowledge of the circumstances under which the attachment was made, claimed the benefit of it, *it was held*, that the officer was responsible to the plaintiff for the safe keeping of the property, so that the same might be taken on execution to satisfy the judgment. *Franklin Bank* v. *Small*, 136.
2. The returns of officers should be explicit, and contain all that is requisite to enable them to justify their doings. They are bound so to express themselves as to be intelligible; and must so express all that is essential. They are not, however, expected to use technical language with technical precision. *Stanley* v. *Stanley*, 191.
3. Where an officer, under the provisions of the statute, 1836, c. 200, returned that he could find no corporate *property* wherewith to satisfy the execution, instead of using the words of the statute, "*corporate property or estate*," *it was held* to be sufficient. *Ib.*

See CONSTABLE. LEVY ON LANDS.

## PAYMENT.

See CONSIDERATION, 1.

## PENAL ACTION.

See ACTION, 6. CONSTABLE.

## PERJURY.

See INDICTMENT, 1, 2, 3, 4. JUSTICE OF THE PEACE, 2, 3.

## PLEADING.

See NEW TRIAL.

## POOR.

1. The notice required to be given by one town to another under the provisions of the twenty-ninth section of the pauper act (Rev. St. c. 32) is the same as the one required to be given under the thirty-fifth section. Such notice should contain the substance of that which the statute requires, but no particular form is necessary. *Kennebunkport* v. *Buxton*, 61.
2. A notice of the following tenor: — "Selectmens' Office, K., Feb. 1, 1843, Gent., L. S. of B. has become chargeable in this town as a pauper. You are hereby notified, that we are supporting her at your expense and shall continue so to do, until she is removed or otherwise provided for. Per order of the board of overseers of the poor of the town of K., J. H., Chairman. To the overseers of the poor of B." — was holden to be sufficient. *Ib.*
3. A notice once given is not waived by an after letter, reminding the overseers of the poor of the town notified, of the amount of the expense claimed in consequence of its having been incurred for the support of their pauper, referring to the former notice, and requesting payment. *Ib.*
4. If a legal notice under the statute is not seasonably answered, the town notified is not entitled, in defence, to show that the settlement of the alleged pauper was in any other but the plaintiff town. *Ib.*
5. An instruction to the jury — "that in order to constitute a legal settlement

of the supposed pauper in K. under the sixth mode of acquiring a settlement, provided in the statute, it must be proved, that she dwelt and had her home there five full years in succession since March 21, 1821, without receiving supplies from any town,"—is not erroneous. *Ib.*

6. If a person, who afterwards becomes a pauper, removes from the town wherein he usually resides, by order of the selectmen of the town, to prevent his gaining a settlement therein, and his removal is for that purpose only, to remain in the town to which he removes for a few weeks only, with an intention not to abandon his former residence, but to return there as his home; such removal and return will not prevent his gaining a settlement by a residence in the former town, "for the term of five years together." *Clinton* v. *York*, 167.
7. If it be proved, that a minor daughter "had lived about in a good many places, since she was a child;" that during her minority, her father said, "that he would not have her at his house; that his wife was quarreling with her; and that he was not able to take care of her, under the circumstances she was then in;" and that her brother took her to his house, and she was there delivered of a child, while she was a minor; this does not show that she was emancipated. *Ib.*
8. If supplies are furnished to a minor daughter, living in the same town as her father, by the overseers of the town, and such supplies are necessary, it is not material, at whose request they were furnished. Her father must thereby be considered as having received supplies indirectly. *Ib.*
9. An action by a town, wherein a pauper is found in need of immediate relief, may be maintained, to recover the expenses, incurred, against the town in which his settlement may be, as soon as the town notified has returned an answer, denying that the settlement of the pauper was in their town, and negativing their liability for the expenses, although commenced within two months after notice given. *Sanford* v. *Lebanon*, 461.

## POOR DEBTORS.

1. It is not essential to the validity of the proceedings of two justices of the peace and of the quorum, who may administer an oath to the principal in a poor debtor's bond, that the justices should be selected and organized as a Court *within the hour* appointed in the notice, as the time of the intended disclosure. There may be cases where the proceedings will be upheld, although the selection and organization did not take place until after the hour named in the citation had passed. *Perley* v. *Jewell*, 101.
2. To save a forfeiture, a liberal construction should be given to a statute. *Ib.*
3. A debtor who discloses property in his hands in "any bank bills, notes, accounts, bonds or other choses in action," is not entitled to have the poor debtor's oath administered to him until he has complied with the provisions of the statute of 1839, c. 412, by having appraisers appointed to appraise off property, so disclosed, sufficient to pay the debt. *Metcalf* v. *Hilton*, 200.
4. The justices who administer the oath to a poor debtor under Rev. Stat. c. 148, may amend their certificate by adding, in accordance with the truth, the mode in which their own selection was made, and that the debtor was examined upon his oath. *Kimball* v. *Irish*, 444.
5. Where the certificate of the justices that the debtor had taken the oath, was without date, and did not on its face apply to this, any more than to any other similar case, but yet was introduced at the trial, as evidence that the oath had been taken as required, and went to the jury, without any objection, as affording evidence that it had been so taken; an objection for that cause cannot be allowed to prevail, if it be first taken at the argument of questions of law arising on other points. *Ib.*

The provisions of the thirty-first section of c. 148, (Rev. St.) do not apply to a case in which the debtor may be called upon to show that he has performed the conditions of a bond, made in conformity to the twentieth section of the same statute; but to a case where the debtor was actually under arrest or in prison, at the time of the proceedings preparatory to the taking of the oath. *Ib.*

## PRACTICE.

1. Where exceptions may be alleged in the District Court, questions arising at the term of the Court at which the exceptions are taken, can alone be pre-

sented. The regularity of the proceedings at any former term of the Court cannot be presented by exceptions at a subsequent term.
*Lothrop* v. *Page*, 119.

2. Every Court of record has power over its own records and proceedings, to make them conform to its own sense of justice and truth, so long as they remain incomplete, and until final judgment has been entered. *Ib.*
3. The authority to vacate a final judgment, irregularly entered at a former term has also been asserted and exercised. And it is the well established practice and course of proceedings in such Courts, to regard all actions in which a final judgment has not been entered, whether on the docket of the existing or a former term, as within the jurisdiction and control of the Court. *Ib.*
4. It is the duty of the Judge to instruct the jury upon every point of law raised by the case, if thereto requested by either of the parties; but he is not bound to give the instruction in the language of the request, even if the principle therein contained be correct. In determining whether the instructions requested were properly withheld or given, they must be examined in connection with the cause of action, the proof adduced, and the other instructions given. But it is never required, that the jury should be instructed upon abstract principles of law, or upon hypothetical points and cases. *Merrill* v, *Hampden*, 234.
5. It is the duty of the Court, on request, to instruct the jury what the law is, applicable to the testimony in the case; but it is not its duty to express an opinion, on request, as to the effect of that testimony, when it is contradictory, or as to its tendency to produce a particular result.
*George* v. *Stubbs*, 243.
6. If an objection be first taken, at the trial, after the arguments had been concluded, and when the presiding Judge had finished his charge to the jury, it may for that cause be rightly overruled. *Smith* v. *Keen*, 411.
7. A judgment of a court, having by law jurisdiction of a cause, cannot be impeached collaterally, unless obtained fraudulently; but remains in force until reversed. *Ib.*
8. A motion by the defendant to dismiss a suit, "because of the defectiveness of the records in the Court below," was overruled where he appeared in the District Court and pleaded, and the plaintiff demurred to the plea, and, upon adjudication that the plea was bad, the defendant appealed and entered into a recognizance to prosecute his appeal with effect.
*Gault* v. *Hall*, 561.

See EXCEPTIONS. LICENSING BOARD, 1. LIMITATIONS, 5. NEW TRIAL.

## PRESCRIPTION.

1. Where one erects a building upon his own land immediately adjoining the land of another person, and puts out windows overlooking that neighbor's land, he does no more than exercise a legal right; and he cannot by the continuance of such windows without obstruction for more than twenty years acquire any prescriptive rights or easements in favor of ancient lights, which will enable him to sustain an action against the adjoining owner for erecting fences or buildings, by means of which such lights are obstructed.
*Pierre* v. *Fernald*, 436.
2. The Rev. Stat. c. 147, § 14, was not designed to create or give any such rights as are therein mentioned, or to determine when, or upon what terms, they had already been acquired; but to prevent their future acquisition without conformity to certain prescribed conditions. *Ib.*
3. But if the English doctrine, that a grant or other contract securing to the party an unobstructed flow of light and air will be presumed from the use of windows on his own land, for twenty years, were the law of this State, no such right could be acquired by such use during the time that the person claiming the right was in the occupation of the adjoining land as tenant of the owner. *Ib.*

## PRINCIPAL AND SURETY.

See ACTION, 2. EVIDENCE, 17, 18.

## PROBATE.

Se ADMINISTRATOR.

## PROPRIETORS OF COMMON LANDS.

See COMMON LANDS.

## PUBLIC LOTS.

1. Where application is made, under the statute of 1842, c. 33, by the county commissioners to the District Court, to appoint a committee to locate the land reserved for public uses in townships granted by the State, after the statute of 1828, c. 393, went into operation, it is not necessary that notice should be given to the owners of the land prior to the appointment of such committee. If the owners of such townships have any title whatever to the lands thus reserved for public uses, such proceedings to which they are not a party cannot have any effect to destroy or impair it. Notice, however, is to be given by the committee before they proceed to the performance of their duties. *Farrar* v. *Loring*, 202.
2. Inhabitants of the county wherein the lands lie may be legally appointed as such committee. *Ib.*
3. The Court would not readily grant a writ to bring proceedings before it to be quashed for neglect to comply with statute provisions, when compliance was shown to be impossible. But it is a sufficient answer to an objection, that the notices were not posted in the township by the committee, or in public places therein, that the record states that they were. *Ib.*
4. Where lands were granted by the State subsequent to the act of 1828, c. 393, it is not necessary that the committee should designate, at the time of locating the reservations, the uses for which they were reserved. *Ib.*
5. It is no sufficient cause for granting a writ of *certiorari* on the petition of the owners of the township, that the lots located for public uses contain a less quantity of land, than there is reserved in the grant. *Ib.*
6. Whether lands better than an average quality have been run out and located for public uses, may or may not be properly presented and considered in the District Court, when the acceptance of the report is under consideration; it cannot properly arise or be discussed upon a petition for a writ of *certiorari* to quash the proceedings. *Ib.*

## RECEIPTER.

See OFFICER.

## RECOGNIZANCE.

1. An action of debt may be maintained upon a recognizance to the State in a criminal proceeding. *State* v. *Folsom*, 209.
2. If an action of debt be brought upon a recognizance to the State, and the declaration sets out the facts in manner appropriate to a declaration in *scire facias*, it will be bad on demurrer. *Ib.*
3. But the declaration may be amended by declaring appropriately in debt, upon terms; such as relinquishing costs for the State. *Ib.*

See COSTS, 1.

## REFERENCE.

See ARBITRAMENT & AWARD.

## REGISTER OF DEEDS.

See COUNTY COMMISSIONERS, 9.

## REPLEVIN.

See MORTGAGE.

## RETURNS OF VOTES.

See COUNTY COMMISSIONERS, 9.

## RIPARIAN RIGHTS.

1. By the common law of this State, as at first adopted by a colonial ordinance and continued by usage after the ordinance had been virtually abrogated, the beds of creeks, less than one hundred rods in width, where the tide ebbs and flows, became the property of the owners of the land through which they passed, except that such proprietors are not allowed "to stop

or hinder the passage of boats, or other vessels, in or through any creeks or coves to other men's houses or lands." *Low* v. *Knowlton*, 128.

2. Any such proprietor, therefore, may make use of the land forming the bed of such creek, and of the space above it, provided he does not obstruct such navigation. Any such obstruction would be a public nuisance; and though abateable by any one, or indictable as such, could not form the subject of an action at the suit of an individual, unless he could make it appear, that he had sustained special damage thereby. *Ib.*

SALE.

1. Where chattels are sold on condition of receiving a certain sum in payment within a stipulated time, the title to the chattels does not pass until the money is paid. *George* v. *Stubbs*, 243.
2. But if one man sells chattels to another, and the title thereto passes, that title so far as it respects creditors, cannot be transferred again to the seller merely by an acknowledgement in writing, that the property is his, without the payment of a valuable consideration therefor. *Ib.*
3. A sale and delivery of a vessel may be good between the parties so as to change the property, without a bill of sale or other instrument in writing; and accounts kept of the proceeds of the vessel and of the repairs prove an use and possession, which is at least equivalent to a formal delivery at the time of the transfer. *Badger* v. *Bank of Cumberland*, 428.
4. No distinction is made in the evidence applicable thereto between the sale and delivery of a vessel and any other personal property. What is competent in the one case is admissible in the other. And it is not required, that the contract of sale of either should be proved to have been made in express terms, but may be inferred from the conversations and acts of the parties. *Ib.*

See ADMINISTRATOR, 1.

SCHOOLS.

1. If the instructer of a district school has performed his duties acceptably, and according to his contract with the legal agent, yet if he did not obtain the certificates required by the statute, c. 17, he cannot maintain any suit against the town for the recovery of his wages. *Dore* v. *Billings*, 56.
2. Towns alone are responsible for the support of schools, and they alone are liable for the payment of the instructers. The agent of the school district is the agent of the town for the employment of an instructer in the district. *Ib.*
3. But if it was not the pleasure of the town to refuse to pay an instructer his wages, because he had neglected to comply with the provisions of the statute as to procuring the required certificates; and if the town has paid to the person who held the place of agent of the district so much money as would be sufficient to pay the instructer and for his use, and it was so received by the agent, it would become the property of the instructer, and he might maintain an action against the agent to recover it. But if it was not so paid and received, the instructer would have no legal claim upon it. *Ib*

SCIRE FACIAS.

See COSTS, 1. RECOGNIZANCE, 2.

SET-OFF.

See ATTORNEY AT LAW.

SETTLEMENT.

See POOR.

SHIPPING.

1. A bill of lading of lumber shipped on board a vessel, in the usual form, and what is called a clean bill of lading, would bind the person so undertaking, to carry it under deck, if there was no agreement, express or implied, to the contrary. But when there is a well known usage in reference to a cargo of this description, to carry it as convenience may require, either upon or under deck, and more especially when the shipper saw the cargo

stowed on deck, and intimated no objection on that account, the bill of lading may import no more, than that it shall be carried in the usual manner. *Sproat* v. *Donnell*, 185.

2. Where a vessel is sailed by the master on shares, and he undertakes to carry lumber to a market, he and not the general owner of the vessel, is liable to the owner of the lumber, if any part of it is used as fuel during the voyage. *Ib.*

3. Goods of every description, including lumber, shipped on deck and lost by jettison, are not entitled to the benefit of general average. *Ib.*

See CONTRACT, 3, 4, 5, 6. EVIDENCE, 14. SALE, 3, 4.

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## SUPREME JUDICIAL COURT.

See COURT.

## SURVEYORS OF HIGHWAYS.

See TAXES, 2, 3.

## TAXES.

1. Where a collector of taxes employs the proprietor of a newspaper to publish such collector's notice of an intended sale of lands on account of the non-payment of taxes thereon, the inhabitants of the town, within which the lands are situated, are not liable to pay the expenses of such publication. *Millet* v. *Stoneham*, 78.

2. The law presumes, that official persons conduct legally and perform their duties, until proof is made to the contrary. And this principle applies to the acts of highway surveyors. *Treat* v. *Orono*, 217.

3. Where a surveyor of highways has made a return to the assessors of a deficiency in working out, or otherwise paying highway taxes, and they have assessed the amount in the next town tax, such assessment cannot be shown to be illegal and void, by proof of payment to the surveyor. The remedy of the aggrieved party is in a different manner. *Ib.*

4. Where a person claims to recover back money paid as the consideration for a deed of land sold to pay the taxes thereon, the burden of proof is on him to show a failure of consideration, and he must prove every fact necessary to make out his position, that the sale was void; although when a person attempts to establish a title by proof of an assessment and sale, the burden of proof is on him who would set up such title. *Ib.*

5. Ordinarily a collector of taxes, on making sale of land to obtain payment of the taxes thereon, inserts covenants in his deed respecting the regularity of his proceedings, but none respecting the title. The purchaser pays his money for such conveyance; the only security he expects to obtain is by his deed; and he cannot, without proof of some fraudulent representation or concealment, recover back the consideration. And in such case, it can only be recovered of a party to the fraud. *Ib.*

6. If a collector's sale of land to obtain payment of taxes is made under such circumstances, that no valid title passes to the purchaser, and this purchaser conveys the premises to another by quitclaim deed, there can be no recovery back of the purchase money by the last purchaser of his grantor on the ground of a failure of consideration, without proof of a total failure. *Ib.*

7. And if the last purchaser has entered into possession of the premises by virtue of his deed, and has received rents and profits therefrom, or has never been dispossessed or evicted, or has otherwise received benefit, by obtaining payment of those taxes, or by obtaining the title at a very reduced valuation, on account of the existence of his apparent title, he cannot recover back the consideration paid. *Ib.*

8. The statutes of this State have regarded the sale of the estate assessed, to be one mode of collecting taxes. And the provisions of the second section of the statute of 1831, c. 501, were continued in force by the tenth section of the act of amendment to the Revised Statutes, so far as it respected sales of land for the payment of taxes, assessed before the Revised Statutes took effect. *Shimmin* v. *Inman*, 228.

9. When the law provides, that the assessors shall set forth in their lists "the number of acres of unimproved land, which they may have taxed on each non-resident proprietor of lands, and the value at which they have estimated the same," if several such lots are taxed, the number of acres in each lot, and the valuation thereof should be stated separately. *Ib.*

10. Where a tax is assessed on unimproved lands of non-resident proprietors whose names are known and stated, the collector must give the name of the owner in his advertisements. *Ib.*

11. If taxes are assessed upon several lots of unimproved land, as the property of non-resident owners whose names are unknown, it is essential to the validity of the tax, that each lot should be valued and assessed separately. *Ib.*

12. When the statute requires, that the collector shall record and return to the town treasurer "his particular doings in the sale of unimproved lands of non-resident proprietors" within thirty days after the sale, he must comply with the provision, or the sale will be invalid. *Ib.*

13. A mere statement by the collector, that on a certain day "C. D. bought of D. W. collector, lots of land as follows, (describing three lots by their numbers,) containing 230 acres, $5,82. Recd. payment, D. W. Collector of H. for the year 1835," is not a sufficient return. *Ib.*

14. Where the question to be decided is the validity of a sale of non-resident, unimproved lands in an unincorporated place, to pay the taxes assessed thereon by the County Commissioners, to be expended in making a road, whether the doings of the County Commissioners having jurisdiction of the subject matter, can be impeached collaterally, or must be considered as correct until reversed by *certiorari*, respecting which no opinion is given, the doings of the county treasurer in making the sale may be examined. And parol testimony is admissible to affect them. *Cushing* v. *Longfellow*, 306.

15. The county treasurer, in making such sale, is bound to a strict performance of his duties. *Ib.*

16. The giving credit for the purchase money by the county treasurer, at such sale, renders it invalid against the original proprietor. *Ib.*

## TENDER.

See CONTRACT, 3. 4.

## TOWN COURT.

See JURORS.

## TOWN MEETING.

Since the Revised Statutes were in force (c. 5, § 6 and 7) the return of the person warning a town meeting must state "the manner of notice, and the time it was given," and must state that an attested copy of the warrant was posted up "in some public and conspicuous place in said town, seven days before the meeting," unless the town has appointed a different mode, or the meeting will be illegal. *Christ's Church* v. *Woodward*, 172.

## TRESPASS.

See COMMON LANDS, 6. DAMAGES. TRUST. TRUSTEE PROCESS, 3.

## TRUST.

1. In trespass upon land, conveyed in trust, the trustees can maintain an action; but if the *cestui que trust*, be in actual possession, he should be the plaintiff, though it is otherwise in ejectment. *Cox* v. *Walker*, 504.
2. An action can be maintained by a corporation legally existing, for any invasion of their rights in real estate, in the same manner, that it could be done by an individual who should be the owner; but one who is neither trustee, or *cestui que trust*, cannot maintain an action in his own name for the use of one or the other. *Ib.*
3. Under a deed in trust the legal estate is in the trustee; and if there be several trustees, it is not in the power of one or more to exclude from the possession of the land conveyed, another trustee. An attempt to do so would be inconsistent with rights, which the law secures by such a deed. A lease given by a part of the trustees would confer no power superior to that possessed by the lessors, and possession taken under the lease could not in the least abridge the right of possession of other trustees; the latter, although a minority, would be equally entitled to possession with those who might constitute the majority, without being guilty of a trespass. *Ib.*
4. If a grant of land be made to certain individuals named, to be by them held "as one entire property, never to be divided or severed, for the use of the first baptist society in K. to be forever kept for the sole use and support of a minister of the baptist denomination;" and at the time there was a society by that name, usually attending worship at a particular place, but which had never been legally organized as a parish, or authorized to act as such; and a society by the same name, and claiming to be the same society, is afterwards incorporated under the Stat. 1821, c. 135; this society, so incorporated, is to be considered as a new society, and not the one intended by the grant, or entitled to the benefit thereof. *Ib.*

## TRUSTEE PROCESS.

1. If the debt for which the trustee would otherwise have been liable to be charged, has been legally assigned before service upon the trustee, and this is shown to the Court, the trustee will be entitled to be discharged. *Porter* v. *Bullard*, 448.
2. When the assignee has proved that the debt due from the trustee has been assigned to him before the service of the trustee process, his title to it must be considered as continuing to exist, until there be proof adduced, from which it may be inferred, that it has been impaired or destroyed. *Ib.*
3. If a debtor, after an attachment, and before the levy of the execution thereon, makes a conveyance of the land, *bona fide*, and for a valuable consideration; and after such conveyance and before the levy, a third person cuts timber trees, as a trespasser upon the land, and converts the same to his own use, and settles therefor with the grantee of the land, and pays him the value of the timber; the grantee does not thereby become chargeable as the trustee of the debtor, in a process commenced by the creditor, after the levy, wherein the grantee is summoned as the trustee of the debtor. *Chase* v. *Bradley*, 531.

## USAGE.

See SHIPPING, 1.

## WAYS.

1. The return of the proceedings of the selectmen of a town in laying out a road or way, to be valid, must state whether the way laid out is a town way or a private way. *Christ's Church* v *Woodward*, 172.
2. And this should be distinctly stated in the return, and is not to be inferred from other facts. *Ib.*
3. A *conditional* acceptance of a town or private way by the town is void. And there is no provision, as in the case of a public highway laid out by the county commissioners, that a town or private way may be considered as not laid out or established, if the damages assessed should be greater in amount, than the public convenience would require to be paid. *Ib.*
4. In an action against a town to recover damages for an injury alleged to have been caused by a defect in a highway, the defendants are not bound to prove that the plaintiff's carelessness was the cause of the injury, to be relieved from liability; but the plaintiff is bound to prove, that he was in the use of ordinary care at the time of the accident, or he is not entitled to a verdict. *Merrill* v. *Hampden*, 234.
5. If there be a defect in the road, however small, which occasions an injury, the party injured using common and ordinary care, the town is liable. *Ib.*
6. If a road be safe and convenient, it is all that is required of the town. Such a state of repair in a road as would free a town from exposure to an indictment and conviction, would protect it also against a claim for damages for an injury sustained by an individual, while traveling thereon. *Ib.*
7. The law has not prescribed what imperfections in a road will constitute the defect referred to in the statute; it is a fact for the jury to settle, what condition of the road would render it safe and convenient, or otherwise. *Ib.*

See COUNTY COMMISSIONERS EVIDENCE, 4.