REPORTS

OF

CASES DETERMINED

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

By JOHN SHEPLEY,
COUNSELLOR AT LAW.

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JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE PERIOD OF THESE REPORTS.

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

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OF CASES REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF LINCOLN,

ARGUED, MAY TERM, 1847.

Mem. — One case in this county, argued in 1847, and decided in 1848, was published in the last volume.

Josiah Myrick *versus* Andrew W. Hasey.

Although a contract of guaranty of payment of an existing negotiable note is not negotiable, yet the note itself may be negotiated by the same instrument which creates the guaranty.

Where a note was made payable to R. D. H. or order, it was held, that these words, "I hereby guaranty the payment of the within note. R. D. H." written by the payee upon the back of the note, operated as a sufficient indorsement thereof.

The defendant, being the maker of a negotiable note, will not be permitted to prove usury by his own oath in defence, where the suit is brought by an indorsee.

Where a statute has received a judicial construction, and is afterwards re-enacted in the same terms, it is to be understood, that the legislature have adopted the construction given to it.

Assumpsit by the plaintiff as indorsee against the defendant as maker of a note, of which a copy follows: —

"$40,00. Bangor, Oct. 7, 1837. For value received of R. D. Hill, I promise to pay him or order, forty dollars on demand and interest. A. W. Hasey."

There was also a count in the writ, which was dated Aug. 3, 1843, for money had and received.

On May 13, 1843, Hill, the payee, was indebted to the plaintiff, and the plaintiff's agent took the note in suit in part payment, Hill expressly agreeing to guaranty the payment of it. The note was received by the agent of the plaintiff with the following indorsement thereon. "May 13, 1843. I hereby guaranty the payment of the within note. R. D. Hill."

On leave to amend in the District Court, the defendant objecting, the plaintiff changed the writing over the signature of Hill, so that it read as follows. "May 13, 1843. Pay the within to Josiah Myrick; and I hereby guaranty the payment of the within note, for value received. R. D. Hill."

The defence set up was, that the note was originally given entirely for usurious interest, and had not been indorsed to the plaintiff; but it was admitted, that at the time of the transfer to the plaintiff, neither he nor his agent had any knowledge, that the consideration was alleged to have been usurious. The parties submitted the case to the decision of the Court under the following agreement, made in the District Court, upon a statement of facts in writing.

If the Court should be of opinion, that the plaintiff had no right to bring said action in his own name as indorsee, the plaintiff is to become nonsuit. If the Court should be of opinion, that the plaintiff might bring said action in his own name by virtue of the original writing, indorsed on said note and signed by said Hill, then the defendant is to be defaulted; unless the Court should further be of opinion, that the defendant ought to be permitted to prove the original contract usurious by his own oath, in which case the action is to be opened for a hearing upon that point.

J. S. Abbott, for the plaintiff, said, that although he had been unable to discover any defence, yet two points had been heretofore made by the counsel for the defendant.

The first is, that the note was not properly negotiated, so that the plaintiff could maintain an action upon it in his own name.

Although a guaranty is not negotiable, a negotiable note may be negotiated by a writing, which itself would be a guaranty, and as such not negotiable. *Upham* v. *Prince*, 12 Mass. R. 14. And the indorsement was properly filled up, being conformable to the facts.

The second objection by the defendant to our recovery is, that he should be permitted to show usury in the contract by his own oath.

The Rev. Stat. c. 69, the stat. 1821, c. 19, and Mass. stat. 1783, c. 55, as to proving usury in this mode, are the same. The latter statute had received a judicial construction long before either of our statutes were enacted. In such case our Court feels bound by that construction. *Putnam* v. *Churchill*, 4 Mass. R. 516; *Binney* v. *Merchant*, 6 Mass. R. 190; *Knights* v. *Putnam*, 3 Pick. 184.

E. Everett, for the defendant, argued in support of these objections to the right of the plaintiff to maintain the suit.

The writing originally signed by Hill is a mere guaranty, a contract complete in itself, of a specific character, and not negotiable, and having in it no virtue or effect to negotiate the note.

The case of *Canfield* v. *Vaughan*, 8 Martin, (Louisiana Rep.) 695, was cited as directly in point. Also, *True* v. *Fuller*, 21 Pick. 140; Bayley on Bills, 110, 411, 412; *Taylor* v. *Binney*, 7 Mass. R. 479; *Lamorieux* v. *Hewitt*, 5 Wend. 307; *Springer* v. *Hutchinson*, 19 Maine R. 359. Comments were made on these cases, and it was insisted, that on authority, as well as upon principle, the action could not be sustained by the plaintiff as indorsee of the note.

As this note was not negotiated until long after it was due, and not until just before it would have been barred by the statute of limitations, if it ever has been negotiated, the defendant is entitled to make the same defence, as if the note had remained in the hands of the payee. *Gold* v. *Eddy*, 1 Mass. R. 1; *Ayer* v. *Hutchins*, 4 Mass. R. 370. If then the action can be maintained in the name of the present plaintiff, the same defence is open, as if brought by the payee.

The plaintiff claims the right to prove usury by tendering his oath for that purpose, under Rev. Stat. c. 69, § 3. The only exception to the privilege in the statute is, where the creditor is not alive. The aspect of the law of Massachusetts, to which the construction was given, is very different from the present law of Maine. The former is highly penal, involving the forfeiture of the whole debt and costs, and has always for some reason or other, been in bad odor with the Court. The present law in this State is remedial, and but very slightly penal. Under the former statute the trial was before the court, and required an anomalous form of pleading; but the usury act of Maine admits the debtor to his oath under the general issue. There seems to be no reason now left why the Court should not give full effect to the principles laid down in *Gold* v. *Eddy*, and in *Ayer* v. *Hutchins*. The authorities cited for the plaintiff were under the old law of Massachusetts, and ought not to have any influence at the present time under a law so widely different.

Abbott, for the plaintiff, in reply, said, that in every one of the cases cited for the defendant, not sustained, the suit was brought on the guaranty by one not a party to it. They show merely, that the contract of guaranty is not negotiable. They do not assert that the same writing containing the guaranty does not also operate as an indorsement of the note. He commented upon the cases cited, and contended that his view of the cases was the correct one.

The opinion of the Court was drawn up by

TENNEY J. — The defendant made his note to R. D. Hill or order, on Oct. 7, 1837, on demand and interest. The plaintiff's agent, on the 13th day of May, 1843, settled a claim of the plaintiff against the payee, and received the note in part payment with the following agreement on the back: — May 13, 1843. "I hereby guaranty the payment of the within note. R. D. Hill," At the trial of the action the plaintiff was permitted by the Court, against the objection of the defendant, to alter the indorsement, so that it now reads, "May 13, 1843.

Pay the within to Josiah Myrick, and I hereby guaranty the payment of the within note, *for value received.* R. D. Hill."

The defendant denies that the note was ever transferred, so that an action can be maintained in the name of the plaintiff; and insists, that as the name of the payee was placed to an agreement, which was perfect in itself, it can have no other effect than that, which its terms import, therein differing from an indorsement in blank.

A blank indorsement is sufficient of itself to transfer the right of action to any *bone fide* holder. Chitty on Bills, chap. 6, page 255. The additional words permitted by the Court, would in no respect change the rights of parties. If the note had not been transferred before the alteration, it was not so afterwards. Several cases are relied upon by the defendant in support of the position taken.

The case of *Taylor* v. *Binney*, 7 Mass. R. 479, was where one Fales made his note to the defendant or order, dated April 21, 1805, payable in six months, on the back of which was the following: — "Dec. 13, 1805. I guaranty the payment of the within note in eighteen months, provided it cannot be collected of the promiser before the time," signed by the defendant. The plaintiff was not the party to the guaranty or assignment, when it was made; and no evidence was in the case of any subsequent privity or assent between him and the defendant. The question whether an action could have been sustained in the name of the party, to whom the guaranty was made, against the maker of the note, did not and could not arise. The Court say, however, "If this indorsement, in the whole tenor of it, may be construed to be not only a guaranty, but also a transfer and assignment of the note, which seems to have been the intention, and understanding of the parties; the principal objection to the title of the plaintiff remains in force." The Court held the guaranty not negotiable, and therefore the action not maintainable.

In *True* v. *Fuller*, 21 Pick. 140, three notes were given by Bryan Morse to Elisha Fuller, secured by mortgage of real estate — the payee indorsed the notes in blank, and on the same

the defendant signed the following, — "I guaranty the payment of semi-annual interest on this note as well as the principal." The action was not in the name of the person, to whom the guaranty was made. The Court held, that "the guaranty was not negotiable in itself, and could not be altered either by striking out words, so as to convert it into a general indorsement, or by filling up as in case of a blank indorsement. In the latter case an indorser, by leaving a blank over his name, tacitly agrees, that any subsequent lawful holder may insert suitable words, to render him liable in the same manner and to the same extent implied by his indorsement and the usages of business." Here the paper was negotiated and transferred by the indorsement of the payee, and the only question was, whether the guaranty of a stranger to the note in its inception was negotiable. The case of *Lamourieux, in error*, v. *Hewitt*, 5 Wendell, 307, was similar to the one last cited. The note was given by P. Williamson to S. Beecher or bearer, and while it was owned by one Tuttle, previous to its becoming due, the plaintiff in error indorsed on it the following, — "I warrant the collection of the within note for value received," and signed his name to the same. The Court held the guaranty not negotiable. The note itself being the property of the holder, and payable to Williamson *or bearer*, the decision would be no impediment to the successful prosecution of a suit against the maker.

In *Canfield* v. *Vaughan & al.* 8 Martin, 695, no such question as the one under consideration was presented for decision. But the case contains a dictum which supports the ground taken by the defendant. It is the opinion of a great Judge, and so far is entitled to consideration.

The question does not seem to have been distinctly raised in those cases, when the subject of the negotiability of guaranties, on bills of exchange and promissory notes, has been discussed, whether the contract, which was full and perfect in itself upon a note, and not containing words of transfer, did or did not have the effect to transfer it. But there are many cases, where the Court seem to consider it as a matter not admitting a doubt that the note or bill was transferred.

In *Blakely* v. *Grant*, 6 Mass. R. 386, the plaintiff, as indorsee of the payee, brought an action on a foreign bill of exchange against the defendant as drawer. The bill was on Johnson Grant & Son, payable to Dominique Lajus, and on the back was the following indorsement, "should the within exchange not be accepted and paid agreeably to its contents, I hereby engage to pay the holder, in addition to the principal, twenty per cent. damages." Signed, Dominique Lajus. Parsons C. J., in delivering the opinion of the Court, says, "as the payee, if he made the indorsement, expressly promises to pay the holder twenty per cent. damage, besides the principal, if the bill should be dishonored, we are satisfied that the indorsement is evidence of a transfer of the bill without naming the indorsee; and in this respect the indorsement may be considered as general, and a *bona fide* holder may fill it up, by inserting above the express stipulation a direction to pay the contents to his order for value received." The same principle is found in that of *Upham* v. *Prince*, 12 Mass. R. 14. A note dated March 23, 1809, made to the payee or order on demand, was delivered to one Faulkner, indorsed thus, "Boston, March 25, 1809. I guaranty the payment of this note within six months. Andrew H. Prince." Faulkner transferred the same as collateral security for a *bona fide* debt. The action was against the payee as indorser of the note. The Court say, the defendant's engagement amounts to a promise, that the note should at all events be paid within six months. Now this promise may not be assignable in law; and yet the note itself may be assignable to the party to whom it was so transferred, so that upon non-payment of it by the promiser, the holder would have a right of action against Prince as indorser."

Judge Story, in view of all these cases, remarks, "an indorsement by the payee, or other lawful holder, may enlarge his responsibility beyond that ordinarily created by law, without in any manner restraining the negotiability of the bill." "An indorser may absolutely guaranty the payment of the bill in all events, and dispense with demand or notice." In such case there is no reason to infer, that the indorser means to re-

strain the further negotiability of the bill, even if he does mean to restrain the effect of the guaranty to his immediate indorsee. And if the indorsement is either without the name of any person, to whom it is indorsed, but a blank is left for the name, or if the bill is indorsed to a person or his order, or to the bearer, with such a guaranty, there is certainly strong reason to contend that he means to give the benefit of the guaranty to every subsequent holder, and at all events such a holder has a right to hold him as indorser of the bill, as he has left its negotiability unrestrained." Story on Bills, § 215. The author's references are to cases, where there was no other indorsement of the name of the party, than that affixed to the guaranty. In reference to the case of *Upham* v. *Prince*, he remarks in a note to the section referred to, "this last decision seems to me to contain the true doctrine, and it is not easy to perceive what reasonable objection lies to it. The indorsement amounts in legal effect to an agreement to be bound as indorser for six months, and that a demand need not be made upon the maker of the note for payment at an earlier period. It is therefore a mere waiver of the ordinary rule of law as to reasonable demand and notice upon notes payable on demand."

The right to sustain this action in the name of the plaintiff, the *bona fide* holder of the note, against the maker, is fully supported by the authorities of Massachusetts, while we were a part of that state, and since the separation, and by all the authorities, which have been examined, excepting by the *dictum* of the court of Louisiana, which, notwithstanding its high character, is by no means sufficient to overbalance all which exists against it.

2. By the agreement of the parties, if the Court should be of the opinion, that the defendant is entitled to prove the note usurious by his own oath, the action is to be opened for a hearing upon that point as the Court shall order.

The statute of 1783, chap. 55, sect. 2, was the subject of judicial construction, and held to mean, that "the statute contemplates causes only, where the original contracting parties are also parties to the suit." *Putnam* v. *Churchill*, 4 Mass. R. 516; *Binney* v. *Merchant*, 6 *ibid.* 190.

The language of the statute of 1834, chap. 122, § 3, and Rev. Stat. c. 69, § 3, is substantially the same so far as it relates to the right of the parties to tender and take their oaths respectively. When a statute has received a judicial construction of the Court of the State where it was in force, and the same statute has been re-enacted with the same provision, which has been the subject of judicial discussion and decision, the legislature are understood to have adopted the construction given. *Rutland* v. *Mendon*, 1 Pick. 154.

By agreement of the parties the defendant is to be defaulted.

WILLIAM PATTEN *& ux. versus* JAMES C. TALLMAN.

In the trial of an action at law, if a will be offered in evidence, to show title to real estate under it, which appears by the record of the probate court to have been duly proved, approved and allowed in that court, it may still be treated as wholly inoperative, if the judge of probate, who approved and allowed such will, had not jurisdiction of it.

If it was otherwise a matter within the jurisdiction of the judge of probate, to decide upon the probate of a particular will, the mere fact that he had attested it as one of the three subscribing witnesses thereto, does not deprive him of that jurisdiction.

If a will has been duly approved and allowed by a probate court, having jurisdiction, its validity cannot be called in question by a court of common law. Such adjudication of the court of probate, not vacated by an appeal, is final and conclusive upon all persons. And whether the court of probate decided any questions, necessarily arising and involved in its adjudication, correctly or incorrectly, can never be made a matter of inquiry and decision in a common law court, to affect that adjudication.

The competency of an attesting witness to a will is not to be determined upon the state of facts existing at the time when the will is presented for probate, but upon those existing at the time of the attestation.

If it be impossible, upon legal principles, to present the testimony of one of the three attesting witnesses to a will, it may be approved without his testimony.

If one of the three attesting witnesses to a will be otherwise a competent witness, he is not rendered incompetent, because he was, at the time o its attestation and at the time of its approval and allowance, judge of pro bate for that county.

Patten *v.* Tallman.

Where the testator provided in his will, that if his two sons J. and H. or either of them, should, after his decease, become surety for any person or persons, " they shall in such case forfeit all bequests, legacies and devises given them in this will ;" and where afterwards, by a codicil to the same will, the testator devised " to my son H. in trust for my son J. during the natural life of the said J., the Gardiner's neck farm ;" — *it was held*, that the estate, so devised in trust, was not forfeited, if J. and H. had become sureties for others.

THIS was a writ of entry wherein the demandants, in right of the wife, claim an undivided seventh part of certain lands in Woolwich, as one of the heirs at law of Peleg Tallman, deceased.

It was admitted that Peleg Tallman was seized of the demanded premises at the time of his decease, and that Mrs. Patten was one of the seven children, heirs at law of said deceased; and also, that James C. Tallman was in the occupation of the premises at the time the action was commenced. Peleg Tallman died in March, 1841, and the tenant claimed under the will of the deceased.

The tenant then offered in evidence, an instrument as the last will and testament of said deceased, with a copy of the record, whereby it appeared that after notice to all interested, the will was duly proved and allowed under the hand and seal of Nathaniel Groton, judge of probate, on March 29, 1841. The decree states, that "whereas it is proved to me by the testimony of Nathaniel Groton, William Rouse and James Rouse, being the three subscribing witnesses thereto, that the said instrument was signed, sealed and published by the said Peleg Tallman, as his last will and testament," &c.

To the admission of this instrument, as the last will of Peleg Tallman, the demandants objected, when offered at the trial of this action, on the grounds, that the will was not legally executed, because Nathaniel Groton, one of the attesting witnesses to the will, at the time his signature was affixed as a witness, was judge of probate for the county of Lincoln, in which county the deceased lived at that time and until his death. And because the said Nathaniel Groton had no jurisdiction, and could not legally act in the probate of said will,

being one of the attesting witnesses. It was admitted that the same Nathaniel Groton drew the will, attested it as a witness, and approved and allowed the same as judge of probate. And objected because said Groton was not legally sworn as a witness when the will was admitted to probate.

At the trial, before WHITMAN C. J., the demandants further offered to prove, "that James C. Tallman had forfeited his life estate in the demanded premises, by breach of the conditions under which the same was devised to him, under and by virtue of such will, by becoming bondsman and surety for other persons, contrary to the twentieth item of said will. And further offered to prove, that said Henry Tallman had forfeited all estate he might have in the demanded premises by breach of the conditions of the instrument on which he was to take and hold what was or might be devised to him, by becoming bondsman and surety for other and divers persons, contrary to the twentieth item of said will, if it was ever legally executed and approved and allowed."

The evidence offered was rejected. Other questions were made at the trial, not considered by the Court in the decision.

A nonsuit, default, or new trial was to be ordered, as in the opinion of the Court, the law applicable to the questions presented, should require.

By the codicil to the last will of Peleg Tallman, there was this devise of the demanded premises. "I give and devise to my son, Henry Tallman, in trust, and for my son, James C. Tallman, during the natural life of the said James, the Gardiner's neck farm in Woolwich." The reversion of the Gardiner's neck farm was given to others, Henry Tallman not being one of them. By the twenty-second and last clause in the will, Henry Tallman was made "sole legatee and devisee of all my estate not devised in this my last will and testament." The twentieth item in the will was in these terms: — "20th. The bequests, devises and gifts I have made to my two sons, James and Henry, are made to them on condition and expressly, that they, nor either of them, at any time become bondsmen or sureties for any person or persons whatever after my decease;

and in case they or either of them should do so, they shall in such case forfeit all bequests, legacies and devises, given them in this my will."

The case was argued by

S. Fessenden and *W. P. Fessenden*, for the demandants — and by *H. Tallman* and *M. H. Smith*, for the tenant.

For the demandants it was contended, that the paper writing, called the will of Peleg Tallman, was not attested and subscribed in the presence of said Peleg Tallman by three credible witnesses, and is therefore void — not voidable, but void, a mere nullity.

The language of the statutes, stat. 1821, c. 38, § 2, Rev. Stat. c. 92, § 2, is strong and decisive on this point — "shall be attested and subscribed in the presence of the testator by three credible witnesses, or the same shall be utterly void." By credible witnesses, in the sense of the statute, is intended competent witnesses. *Amory* v. *Fellows*, 5 Mass. R. 219; *Hawes* v. *Humphrey*, 9 Pick. 350; 1 Day, 35; 1 Ld. Raym. 505; 2 Strange, 1253.

The legislature could never have contemplated, that the judge of probate, having such an important jurisdiction in relation to the estates of deceased persons, and who must necessarily be called on to adjudicate in the most delicate as well as important questions in the discharge of his official duty, should take the place of counsel, scrivener, adviser and witness in drafting and attesting the execution of a will, which might, and in all probability would come before him for his adjudication thereon. He could not be an impartial judge upon the questions, which would necessarily come before him.

The sanity of a testator at the time of executing the will is not by law to be presumed, but must be proved. *Gerrish* v. *Nason*, 22 Maine R. 438. And such proof must be by witnesses competent at the time of the attestation. No change afterwards can operate to make the witness competent, if he is not so at the time. Phill. Ev. 374; Willes, 665; 1 Ld. Raym. 505; 2 Strange, 1253; 5 Mass. R. 219; 12 Mass. R. 358; 2 Root, 303; 2 Greenl. Ev. § 691.

There are many things which render a person incompetent to testify, and therefore incompetent to attest the execution of a will. One class of cases arises out of an interest in the question in the proposed witness. Another class of cases where the witness will be incompetent is, where, from motives of public policy, the law makes the witness incompetent. Within this class of cases is that of husband and wife, who cannot testify for or against each other. 1 Greenl. Ev. § 236, 254, 364, 408. It is laid down in section 364, that the same person cannot be both witness and judge in the same case. If he sits as judge he cannot be sworn as a witness. It is directly against the policy of the law, that the judge of probate should be a competent witness to the execution of a will, the probate of which, should the testator die while he is judge, must come before him. The same person, in this case, acts as counsel in drawing up and advising as to the will, attests it as a witness, acts as a witness to sustain his own doings, testifying before himself to the facts necessary to sustain the will, and approving it as judge of probate. The legislature of this State has clearly indicated in their view, the gross impropriety of such course. Rev. Stat. c. 105, § 20.

If Judge Groton were not a competent witness to that will, then it was utterly void, and being so, the judge of probate had no jurisdiction to approve it, and his proceedings are void. *Griffith* v. *Frazier*, 8 Cranch, 9; *Smith* v. *Rice*, 11 Mass. R. 507; *Sumner* v. *Parker*, 8 Mass. R. 83; *Wales* v. *Willard*, 2 Mass. R. 120; *Hunt* v. *Hapgood*, 4 Mass. R. 117; 2 Greenl. Ev. § 672.

The case of *Dublin* v. *Chadbourne*, 16 Mass. R. 433, does not conflict with our position. It is said in the opinion, that if it can be shown, that the probate was a mere nullity, it would undoubtedly be fatal to the title of the devisees. A case may be cited from 1 Root, 462, adverse to us. It is not supported by argument or authority, and appears to have been given at the moment without consideration. Another case from 2 Root is of the same character, and rests solely on the first. Much stronger authority is wanted to sustain such a proceeding.

But if Groton were a competent witness, he was not competent to sit as a judge to decide on his own testimony. All the witnesses should be summoned and examined, if living. 1 Wilson, 216; 3 Dallas, 386.

As there was no lawful will, lawfully proved of Peleg Tallman, who died seised of the demanded premises, the demandants are entitled to recover, as Mrs. Patten is admitted to be his daughter.

It was also contended, that unless the demandants were precluded, by their omission to make an entry, from taking advantage of the forfeiture on that ground, that if the will was to be considered as established, still they were entitled to recover on the ground, that both the tenant and the residuary devisee had forfeited the estate by having violated the provisions of the twentieth item in the will.

For the tenant, it was replied, that this will was duly proved and allowed; and by statute c. 92, § 25, "the probate of such will shall be conclusive, as to the due execution thereof." *Tompkins* v. *Tompkins*, 1 Story, 547, and cases there cited. In all cases in which the judge of probate has jurisdiction, his decree is final and conclusive, unless appealed from, or unless fraud is proved. In this case there was no appeal, and it is not pretended that there was fraud. 1 Daniel's Ch. Pl. & Pr. 23, note 2, and Vol. 2, 1019, note 1; *Osgood* v. *Breed*, 12 Mass. R. 525, 534; *Laughton* v. *Atkins*, 1 Pick. 535, 549; *Dublin* v. *Chadbourne*, 16 Mass. R. 433, 441; 1 Day, 170; 1 Conn. R. 476; 3 Day, 318; 8 N. H. R. 124; 8 Ohio R. 239; 3 Binney, 498; 5 S. & R. 22.

The judge of probate had jurisdiction of this case. By stat. c. 105, § 3, he has jurisdiction of "the estates of all persons deceased, who were, at the time of their decease, inhabitants of, or resident in the same county," with certain exceptions, which the demandants do not contend exist in the present case. The testator, as the case finds, was an inhabitant of, and resident in the county of Lincoln, at the time of his decease.

We coincide with the counsel for the demandants, that the

word *credible*, in the statute, has the same meaning as *competent*, and shall so speak of it.

The same statute provides, that if the witness was competent at the time of the attestation, no subsequent incompetency can affect the question. Having been duly attested, the will may be proved without all, and even without any of the subscribing witnesses. And so are the decisions. At the time of attestation, Mr. Groton was a competent witness, unless the mere fact of his being then judge of probate rendered him otherwise. There was no certainty, or even probability, that this witness would be the judge of probate to decide upon the validity of the will. He might cease to be judge of probate, in various modes, or the testator might remove out of the state or out of the county; or the witness might have deceased first. Neither reason nor law disqualifies a judge of probate from attesting a will. We have not found, that this question has ever been before the courts, excepting in the state of Connecticut, where it has been twice decided, under a similar statute, that a judge of probate is a competent witness to a will. 1 Root, 462; 2 Root, 232. It is said, that the judge of probate cannot swear himself, and therefore it is insisted that he was an incompetent witness. The will might be proved by the testimony of the other witnesses, or if the heirs were dissatisfied, they might appeal, and then all the witnesses would be competent. It was decided, before the separation of this State from Massachusetts, that because a witness to a will was incompetent to testify at the trial, that he was not thereby rendered an incompetent witness to the will. *Sears* v. *Dillingham*, 12 Mass. R. 359. It is enough, that he was competent at the time of attestation.

The heirs at law were not only duly notified, but were all actually present at the probate of the will; and as the witnesses were competent, and the judge of probate had jurisdiction, if there was any error in his mode of proceeding, the remedy was by appeal, and in that mode only.

It was contended, that the *cestui trust* could not create a forfeiture of the estate designed for his benefit. The very

object of placing it in trust was to prevent his wasting or destroying it. *Russel* v. *Lewis*, 2 Pick. 510. Nor can a forfeiture of such estate be created by any act in contravention of the provisions of the twentieth item of the will on the part of the trustee. The trust estate is not liable for the payment of the debts of the trustee; and it could not have been the intention of the testator, that the trustee should have the power at his pleasure to deprive another of the benefit intended for him by the will. If the counsel for the demandants are right, the effect of such act of the trustee would be, to deprive the *cestui que trust*, of the estate intended by the testator for his benefit, and transfer a portion of it to the trustee himself, in his own right, as one of the heirs at law.

Several other grounds of defence were strenuously urged, but as the decision was made without taking them into consideration, it becomes unnecessary to state them.

The opinion of the Court was drawn up by

Shepley J. — The demandants have commenced this action in right of the wife to recover one undivided seventh part of the Gardiner neck farm in the town of Woolwich, owned by the late Peleg Tallman at the time of his decease. The wife of the demandant, being a daughter of the deceased, claims title as one of his heirs at law. The tenant presents a title by devise, made in the last will of his deceased father, to a trustee, for his benefit during his natural life. To prove such title he offered that will, as duly proved and allowed in the probate court for the county of Lincoln. Its admission as evidence was objected to on the ground, that it had not been legally executed, or legally proved and allowed. The facts, upon which these objections rest, were admitted, to wit, that Nathaniel Groton, one of the three attesting witnesses to the will, was at the time of its attestation, and at the time of its approval and allowance, judge of probate for that county.

The question thus presented is not a new one. It has been twice decided in the State of Connecticut, in the cases of *McLean et ux.* v. *Barnard*, 1 Root, 462, and Ford's case,

2 Root, 232. Those cases were presented on appeals from the probate court, and the wills were approved, but the reasons were not stated.

The question is differently presented here in an action at law, in which it is contended, that the will is wholly inoperative. It may be so treated, if the judge of probate, who approved and allowed it, had not jurisdiction of it.

By the statutes in force at the time, the judges of probate in their respective counties were authorized to take the probate of wills of persons deceased, who were resident in the same county with the judge, at the time of their decease, unless he was interested as heir, legatee, creditor, or debtor, to an amount exceeding one hundred dollars, or within the degree of kindred, by which he might possibly be an heir to the estate of the deceased person. Stat. 1821, c. 51, § 1, 2; Stat. 1822, c. 198. The residence of the testator at the time of his decease was in the county of Lincoln, in which Nathaniel Groton was the judge of probate. There is no proof, that the judge was in any manner interested, or that he could possibly be an heir to the estate. It was clearly a matter within his jurisdiction to decide upon the probate of the will, unless the mere fact, that he had attested it, as one of the subscribing witnesses, deprived him of that jurisdiction. The executors and devisees, as well as the heirs at law, were entitled to have the effect of such an attestation determined by some competent tribunal. In no other county could the probate court entertain jurisdiction, for the deceased had no residence or domicile in any other county; and the judge of probate in the county of his domicile was not so situated as to give any other judge of probate jurisdiction. This court has only an appellate jurisdiction in such cases. Admitting the entire incompatibility of his position to testify as a witness and to receive and act upon that testimony as a judge, that would not deprive him of the jurisdiction, which the law imposed, and which his office required him to exercise. It would only require him to decide, whether he could legally testify, and whether the will could be proved, either with or without his testimony; in other words,

to decide upon the effect of his own act in attesting the will, while he held that office. It is undesirable, that a judge should be so situated as to be required to decide upon the legal effect of his former acts; but judges are not very unfrequently, in the discharge of their official duties, compelled to do so. A person may become an attesting witness to a will and afterward be appointed judge of probate in the county, where that testator resided at the time of his death, and thus it may become his duty to decide, whether the will can be proved by the testimony of the other two witnesses, and what shall be the effect of his former act of attestation. The jurisdiction in such case could not be doubted. This case differs from the one supposed, in the fact, that the attesting witness held the office of judge at the time of such attestation, and it therefore raises a question of more delicacy and difficulty; but the jurisdiction, or the obligation to decide it, cannot be affected by its greater difficulty or more important influence. Any error, which might be supposed to arise out of the former act and the bias occasioned by it, could be corrected by an appeal to the supreme court of probate. A case might be presented in a court of common law involving a similar embarrassment. A deed, bond, or other instrument may have been attested solely by the judge presiding at the trial of a cause, in which it becomes material to prove its execution. No one would conclude, that he had not jurisdiction of the cause, merely because he could not try it, and also testify as a witness in it. The conclusion is unavoidable, that the mere fact, that a judge cannot testify in a cause, in which his testimony may be essential to enable a party to prevail, cannot deprive him of its jurisdiction. Admitting then that judge Groton could not testify as a witness, when the will was presented before him for probate; and assuming for the present, that he was not a competent witness to the will, he would not thereby be deprived of his jurisdiction of the case. Nor could he be excused from taking cognizance of it. Coming to such conclusions, he must have decided, that the will was not duly executed. But however he might have decid-

ed the questions presented, the rights of all parties could have been preserved and secured by an appeal.

If judge Groton had jurisdiction of the probate of this will, the question next arises respecting the effect of its exercise. The original jurisdiction for the probate of wills is by statute vested exclusively in the courts of probate. The courts of common law have no jurisdiction, or right to determine, whether a will has been legally executed or not. If a will be presented to them as a muniment of title, which has not been proved and allowed by a probate court, it cannot be received and proved, nor its validity be admitted. If it has been approved and allowed by a probate court, having jurisdiction, its validity cannot be called in question by the court of common law. The adjudication of the court of probate, not vacated by an appeal, is final and conclusive upon all persons. Whether the court of probate decided any questions necessarily arising and involved in its adjudication correctly or incorrectly, can never be made a matter of inquiry and decision in a common law court, to affect that adjudication. Such have been the settled doctrines for a long time in this and in several of the other United States. *Dublin* v. *Chadbourne*, 16 Mass. R. 433; *Laughton* v. *Atkins*, 1 Pick. 535. The court of probate must necessarily have decided in this case upon the competency of the witnesses to the will; and that decision must be conclusive, as decided in the case of *Dublin* v. *Chadbourne*.

This case might therefore be decided without the expression of any opinion, whether Nathaniel Groton was a competent witness to the will. As the question may, perhaps, be presented in another form, and as the parties may be better satisfied, and are very desirous that the question should be finally determined, it has been thought best to express an opinion upon it.

The objection made to his competency is, that he could not be a witness to prove the will, and at the same time a judge to decide upon its legal execution. The competency of an attesting witness is not to be determined upon the state of facts existing at the time, when the will is presented for probate, but upon those existing at the time of the attestation. The inca-

pacity of the witness to testify, when the will is presented for probate, is no certain or satisfactory proof of his incompetency at the time of attestation. At the time of the attestation it was a matter of contingency and of uncertainty whether Mr. Groton would be incapable of testifying before the competent tribunal, when the will was presented for probate. The term of office, for which he was appointed, might have terminated before the decease of the testator. The domicile of the testator at the time of his decease might have been in another county or state. So if the testator had survived Mr. Groton, the present objection could not have been made. The incapacity of the witness to testify was not, at the time of attestation, a general incapacity existing in all places and before all tribunals alike. He might have testified in any other county or state, and before this court as the appellate tribunal, in relation to the execution of the will. His incapacity to testify was limited to the single contingency, that he should continue to be the judge of probate in the county in which the testator should have been domiciled at the time of his death. That which renders a person incompetent as a witness to testify in a particular case, is something, with which he is connected, or to which he is attached, rendering him at the same time alike incompetent under all circumstances not removing it, and before all tribunals administering the same law. There was an incapacity to testify, when the will was presented before the witness to be acted upon by him as judge; and so there would have been, if it had been attested by him before he was appointed to that office. There was nothing, so far as this objection extends, essentially and necessarily illegal or defective in the attestation and execution of the will at the time, for it might, under different circumstances, and before different tribunals, have been established by the testimony of all the attesting witnesses. When it was presented for probate, if the judge had decided, that he was an incompetent witness, merely because he could not testify in his own court, and that the will was not duly executed; and the same question had been presented to the supreme court of probate by an appeal, the objection, that one

of the witnesses could not testify on account of his official position, could not have been made. Nor could it have been, if presented on an appeal from a decision of the judge of probate, that the will might be legally proved by the two other attesting witnesses, as in cases, where one of the witnesses has since the attestation become incompetent or insane. The objection does not reach beyond the incapacity of the witness to testify, when the will was presented for probate before himself; and if the heirs at law had opposed its probate in that court, and it had been presented for probate, in the appellate court, by an appeal from a decision, either favorable or unfavorable to them, Mr. Groton must have been regarded as a competent witness, and the will must have been approved and allowed. If Mr. Groton, as the record exhibited, shows, presented his own testimony in his own court and decided upon it, instead of concluding, that he could not legally testify there, and that the will might therefore be proved by the testimony of the two other witnesses, should their testimony prove the necessary facts, it is not perceived, that the heirs at law have been injured by their neglect to contest the probate of the will at the proper time and place. The rule of law, which requires, that the testimony of the three subscribing witnesses to a will should be introduced to prove it, has its exceptions. If it be impossible upon legal principles to present the testimony of one of them, the will may be proved without it. *Chase* v. *Lincoln*, 3 Mass. R. 236. *Sears* v. *Dillingham*, 12 Mass. R. 358. *Brown* v. *Wood*, 17 Mass. R. 68.

If the will must be considered as legally proved and operative, the demandants claim to recover by virtue of its provisions, on the ground that the tenant and Henry Tallman have forfeited all title derived from it, by having violated the provisions contained in the twentieth clause. It is in these words. "The bequests, devises and gifts, I have made to my two sons James and Henry, are made to them on condition and expressly, that they nor either of them, at any time become bondsmen or sureties for any person or persons whatever after my decease; and in case they, or either of them, should do so,

they shall in such case forfeit all bequests, legacies, and devises given them in this my will." The demandants offered to introduce testimony to prove the alleged violation, but it was not received.

The premises demanded were, by the seventh clause of the original will, devised to the tenant during his natural life. The remainder was devised to others. The devise to the tenant was revoked by the second clause of the codicil, and the premises were thereby devised to Henry Tallman in trust for the tenant during his life. The legal estate became thus vested in Henry Tallman, without his having any beneficial interest in it. What would be the effect upon that life estate of a violation by Henry Tallman only of the provisions of the twentieth clause in the will? Could it have been the intention of the testator that the rights of the *cestui que trust*, supposing him to be blameless, should be destroyed by any prohibited act of the trustee? If so, he must have intended to punish the obedient for the transgressions of the disobedient. The clause admits of a reasonable and fair construction without coming to such a conclusion. By all bequests, legacies and devises *given to them*, the testator, doubtless, intended all such, as were given for their own benefit, and not such as were entrusted to them for the benefit of others.

Any other construction would be at variance with the general rule of law, that the power of the trustee over the legal estate exists only for the benefit of the *cestui que trust*, and no act of the trustee can prejudice or narrow his title. Cruise's Dig. tit. 12, c. 4, § 6 and 8. *Philips* v. *Brydges*, 3 Ves. 127. *Selby* v. *Alston*, *idem*, 341. To this general rule there are certain exceptions not affecting this case, and not necessary to be considered here. 2 Fonb. Eq. c. 7, § 1, note (a). 1 Mad. Ch. Pr. 363. The legal estate for life, which became vested in the trustee, will remain therefore unaffected by any act of forfeiture, which may have been committed by him.

What can be the effect of any prohibited act, which might cause a forfeiture of his rights, committed by the tenant and *cestui que trust*, upon the legal title vested in another? Sure-

ly not to destroy the legal title, over which it was the design of the testator to deprive him of all power by devising it to another.

A forfeiture by the tenant of his rights under the will might affect his right to occupy the premises, or to receive the income or profits; but such rights are not in controversy in this action.

It is the legal title only, which is here litigated; and the demandants, to recover that, must rest upon the strength of their own title, and not upon the weakness of the legal right of the tenant to the occupation of the premises. Upon the facts reported in this case, they can establish no title to them, either upon the ground, that they were the undevised estate of the testator, or upon the ground, that although devised, the title of the devisee had been forfeited.

If a forfeiture could have been established, there would have been other difficulties, not necessary to be considered, which might have prevented a recovery by the wife, claiming as an heir at law.

Nonsuit confirmed.

MARY FULLERTON *versus* OAKES RUNDLETT.

Where a note then payable, having thereon a blank indorsement by the payee, was received of him by the holder, with the understanding, of which the indorser was perfectly conusant, that demand on the maker and notice to the indorser were not intended to form a condition upon which alone the latter should become liable, — *it was held*, that demand and notice were thereby waived by the indorser.

Evidence of the declarations of the indorser as to the contract, prior to the indorsement of the note and in reference to it, tending to show the terms upon which the note was received, and especially when connected with subsequent conduct and declarations having the same tendency, is admissible.

THE suit was brought against the defendant, as indorser of a note, made by Cyrus Chapman to him, dated January 12, 1844, for $414, payable on demand with interest.

After all the evidence had been introduced, the parties agreed, that if the Court should be of opinion, that the evidence was sufficient in law to sustain the plaintiff's action, the defendant was to be defaulted; and if not, the plaintiff was to become nonsuit.

The defendant, at the trial, objected to the admission of any testimony respecting conversations about the note, unless at the time of making the contract.

The facts considered by the Court to be proved, appear in the opinion of the Court.

Ruggles, for the plaintiff, contended, that the plaintiff was entitled to recover against the defendant as indorser. The conversation before and after the indorsement show a waiver of demand and notice.

The defendant is also liable as guarantor. The blank indorsement may be filled up in any way to carry the intention of the parties into effect. 24 Maine R. 177; 3 Mass. R. 274; 11 Mass. R. 436; 9 Mass. R. 314; 4 Pick. 385.

Rundlett, for the defendant, said that the defendant, by his blank indorsement, rendered himself only conditionally liable, on due demand and notice. Neither demand was made, nor notice given. Nor have they been waived. It is admitted, that by the decisions a waiver may be proved by parol. But it is contended, that when an indorser is discharged by laches of the holder, a subsequent promise of the indorser to pay the note, will not operate as a waiver, unless made with a knowledge of the facts and circumstances which operate to exonerate him. 1 Cowen, 397; 5 Johns. R. 248 and 375; 8 Johns. R. 299; 12 Johns. R. 423; 12 Mass. R. 52. There is a material distinction between these cases and the case of *Fuller* v. *McDonald*, 8 Greenl. 213, and several other cases in this State and Massachusetts, in this, that in the latter class of cases the promises were made at the time of the indorsement, to waive his legal rights, and not after he was discharged by the neglect of the other party, as in the present case. The testimony was here examined, and it was insisted, that no new consideration was even pretended; that it was manifest, that

the defendant did not know, that he was not liable by law; and that no waiver was proved. *May* v. *Coffin*, 4 Mass. R. 341.

The conversation on the tenth of January, before the day on which the indorsement was made, ought not to be admitted for any purpose. It could have no proper influence upon the contract entered into at a subsequent day, when the indorsement in blank was made. But this conversation, if admissible, did not amount to a contract of any kind, and no action could have been supported in consequence of it by either party against the other. If a contract could have been inferred from it, it was but a conditional one, to pay, if Chapman did not. The plaintiff delayed to collect of Chapman for nine months, when he could have paid, and until he died insolvent. This discharged the defendant from any liability. *Lord* v. *Chadbourne*, 8 Maine R. 198.

The opinion of the Court was by

WHITMAN C. J. — It does not seem to be reasonable to doubt, that the note in question was made, and intended to be, in pursuance of the previous agreement, testified to by the witness, Charles Cargill. The defendant, on the 10th of January, 1844, called upon the witness, and accompanied him to the plaintiff's house, his object being to obtain a loan of money ; and proposed to her to obtain a note signed by one Chapman, for the amount wanted, and to become absolutely bound with him for the repayment of the amount to be loaned. The plaintiff then, in the presence of the defendant, applied to the witness to ascertain, if that would be sufficient security, and, on being informed that it would, she assented to the proposition ; and thereupon the defendant left, saying he should procure the note soon. In two days afterwards he procured the note in suit, and delivered it to her, with his name in blank upon it. The defendant must have seen, that the plaintiff understood, from the advice she had received in his presence, that the defendant was to be absolutely holden for its payment. The note was made payable on demand ; yet he requested she should give the maker time

in which to pay it, assigning as a reason, that he had further demands against him ; meaning, no doubt, that to press him for payment immediately would diminish his ability to pay any more than the amount of the note : from all which he must have known that the plaintiff understood, that she was not to take the usual steps to charge him as an indorser, merely, of a negotiable piece of paper : and his subsequent conduct was in accordance with such a supposition ; for on being applied to, after the death of Chapman, and the known insolvency of his estate, and when he knew that he had not been notified of any demand and refusal of the maker to make payment, he recognized his liability by remarking that, whether liable or not, he would pay whatever Chapman's estate should fail to pay.

We can have no doubt that the evidence of the contract, previous to the making of the note, and in reference to it, was regularly admissible as tending to show the terms upon which the note was received, and especially when connected with the subsequent conduct and declarations of the defendant. On the whole, when all the evidence is considered together, we think the conclusion is irresistable, that the note was received by the plaintiff with the understanding, of which the defendant was perfectly conusant, that demand on the maker, and notice to defendant of non-payment, were not intended to form a condition upon which alone the latter should become liable.

Defendant defaulted.

Simon Handley *versus* Moses Call.

On the trial of a special action on the case against the defendant, for a conspiracy between him and a deputy sheriff to defraud the plaintiff, by means of making a false return upon a writ in the defendant's favor, one who was injured equally with the plaintiff by the fraud, if it existed, is a competent witness.

But on such trial, evidence that the defendant had applied to another deputy, to do a similar act in a different suit, is inadmissible.

A motion for a new trial, because the verdict was against the evidence, is grantable in some measure at discretion; and when the Court, upon an examination of the case, is satisfied, that injustice has not been done by the verdict, a new trial should not, ordinarily, be granted.

The admission of illegal evidence does not, in every case of this character, entitle the party against whom it was admitted, and against whom the verdict was rendered, to a new trial. But if it be reasonable to believe, that the jury could have been unduly influenced by the wrongfully admitted testimony, or if it be doubtful whether they would otherwise have determined as they have done, a new trial should be granted.

The following is a copy of the case, on the exceptions and motion for new trial, because the verdict was against the evidence.

"This was an action on the case charging defendant with conspiring with one Joel How, Jr. a deputy sheriff, and procuring said How to make a false return of an attachment of certain real estate. The writ was dated July 5, 1845.

"Plaintiff called certain witnesses who testified as follows: —

"*Joel How, Jr.* I was deputy sheriff in March, 1841. Moses Call showed me a writ — I signed the returns he asked me to. I did not look at it — It was on the 6th of March — He gave me the writ next morning after the 6th. I told him it looked too bad. He took it back and made two, and told me I had a right to sign them. — After he had destroyed that in the fire, he made two writs, wanted me to make the returns in my handwriting. This was on the 7th — dates were 3d and 4th. *(Quest. by the Court.)* I wrote the returns at the request of Dr. Call. I or my father brought the returns to the Register's within 4 days after. There were 3 days between the making the returns and the record. I put the returns into the mail —

did'nt have the writs after that. I put the returns into the mail in 4 days after the 7th. I put them into the postoffice in time — don't know whether they got here or no.

"I went to Harrington's corner on the 5th. That is the way I fix the date. Call told me if any body asked me any questions to say nothing about it. If 'twas settled, he'd pay me and keep it dark — said if there was any trouble Burgess would be next sheriff and he should have the appointment for the Mills and the Bridge. — I told him people suspected wrong had been done — hinted something about money, I told him I did not want it — said Green would go out and Burgess come in — that he would stick to me as long as he had a dollar. This was within the 5 days. — I did see the return, the first one, when I signed it — Call said I could date the two writs same as the first.— This was the first business I did as deputy sheriff.— Don't know that Handly paid any thing to relieve the attachment.

"*Cross Examined.* — *Quest.* How do you know the date of the writs? *Ans.* I put them on my docket — do'nt learn the date from my docket — I dated returns — I did'nt keep docket at that time — I know they were dated 3d and 4th, because it gave me trouble. — It is matter of recollection as to dates. — Have no particular thing to go by. — There was the Harrington affair. — 5th of March. — Was at Harrington's. — Attached some goods in store for Myrick — between sun down and 12 at night. I did'nt make the return on Call's writ, I only saw the outside. — It was on the 6th I signed it. — It was the 7th that I had it. — Harrington came down on the 6th and said he did'nt believe I had a writ — that he believed it was a fraudulent transaction. *Quest.* What did he say was a fraudulent transaction? *Ans.* Dating the writs on the 3d and 4th. This talk was the next day after I was at Harrington's corner on the 5th. Harrington said it was fraudulent because dated on the 3d and 4th. I did not say much to him — I had 'nt the writs then — I had not told any one I had a writ against Harrington in favor of Call. I know it was the 7th I

signed the writs because it was about the time they were going on record.

" I married plaintiff's neice about two years since — I first told Handley of this in the fall of 1845, never told any one before — think I had some conversation with one or two others. *Quest.* Have you a bond of indemnity from Handly? *Ans.* Handley and I never had any conversation about bond — do 'nt know that I ever said any one was a fool for saying any thing about bond — might and might not. *Quest.* Have you not reason to believe that there is a bond of indemnity to protect you in this matter? *Ans.* I should guess it was as likely there was as was not. There is no bond in my possession. I did make affidavit of this. I talked some with Hussey — it was he who took down my statement in writing in 1845 — what I would swear to — I think it likely he took it down — I believe he did — I did 'nt tell the whole — did 'nt mean to at the time.

" *Quest.* Did you not know it was wrong to make a false return? *Ans.* I did 'nt know it was wrong when I signed the first return. *Quest.* When did you find it out? *Ans.* I found it out a day or day and a half afterwards. — I have seen copies of the returns from the Registry — have not ascertained the dates from them — I knew them before — shown me at first trial — think I was shown copies at Wiscasset by either Hussey or Abbot. — I think I saw Harrington every day from the 5th to the 9th — he did not say any thing about this to me but once and this was on the 6th March. — He then said he thought there were notes bought by Call, and put after the writs were made and put in them after the conveyance of his property to Myrick and others. — Don't know how many notes were in the first writ — did'nt see the inside, only the outside. He made the two writs on the 7th instead of the one first made. *Quest.* Why did he make two writs instead of one? I told him the first writ looked too bad. *Quest.* Did that make it necessary to make two instead of one? *Ans.* He could'nt get all the notes into one, plain. *Quest.* What made the first writ look bad? *Ans.* It was interlined. *Quest.* How was it interlined? *Ans.* By putting in more notes — that is what I call inter-

lining. *Quest.* How many notes were in the first writ? *Ans.* I can't tell — did not see the inside — I did'nt make or sign any return till after I went to Harrington's corner. I told him (Call) I regretted the course he was taking.

"The plaintiff here gave in evidence copies of the return of attachments from the Register's office — which are made part of the case without copying.

"*Asa Hutchins* — Lived at Damariscotta bridge — was deputy sheriff on 6th March — Dr. Call came in and threw down a writ on my table and wanted me to minute an attachment on it as of the 5th. I don't know against whom it was. Objected to, and admitted by the Court. I declined doing it. He urged me and I made a minute on the writ. — But I was not qualified — told him so, but he said that would make no odds — and I did make a minute on the writ with a pencil. I went up same day and got qualified — can't say whether I did or did not renew the minute on same writ afterwards. Am not on good terms with defendant — have not been on friendly terms with him for a number of years.

"*Israel L. Kinney*, testified that he paid $400 to defendant, the amount of a note he gave defendant. Did not recollect whether the note was running to defendant or to W. P. Harrington. It was for 60 or 90 days. It was paid for W. P. Harrington.

Witness held a note against W. P. Harrington for about $318 and interest — sold it to defendant in 1841 — thinks he heard Harrington's failure the next morning after selling the note to defendant. He further testified that Harrington came to him and said if he could get $400 he could pay Call — and wanted to get witness to make a note of that amount. — He did so and soon after John Glidden came and gave witness his note for same amount. Did not know whether he gave his note to Harrington or to defendant — had no conversation with or in the presence of defendant respecting the object or purpose of that note. — What he understood about it, as testified in direct examination, was from Harrington. Did not hear any thing from defendant, as to how he came by the note, or what

for. — When he sold the note he held against Harrington to defendant, he took defendant's note for it which was dated at the time he gave him H's note. — Don't know but defendant paid him part money. On being shown the note for $331,87, dated March 4, 1841, canceled — witness said that was the note, as he thought, defendant gave him, as above mentioned — that the note had been paid and taken up — did not recollect defendant's telling him at the time of his letting defendant have that note, that he had brought one suit against Harrington and should commence another on that very day, on the other notes — but thinks he did say to defendant, that he did'nt care how soon he sued it (the note he let him have). Sometime before, think I did hear Harrington say to defendant that he had used him better than any one else, in reference to the notes he held against him.

" *John Glidden* testified, that he gave J. L. Kinney a note for $400 — Myrick signed note with witness to Medomak bank — that witness raised the money to relieve the land from attachment — I wrote to Myrick to sign the note. The note to bank has been renewed. Handly has paid me the $400 I paid to Kinney on the note to him.

" *Cross examined.* — Do'nt recollect whether any one else signed note to Kinney with me. The note to the bank was signed by Harrington. It was a joint and several note. *Quest.* Was it not Harrington's note? Think Myrick had the money raised on that note, but don't know — think plaintiff did not have the money. *Quest.* Was not Harrington the principal on said note to bank? *Ans.* It was a joint and several note. *Quest.* Was it not for Harrington that you and Myrick signed the note to bank? *Ans.* It was joint and several — don't know whether or not it was for Harrington. *Quest.* Was not Harrington's name first on the note? *Ans.* Rather think it was — believe it was. *Quest.* Do you know of plaintiff paying any thing whatever to defendant? *Ans.* I don't know that he did — otherwise than he has paid me the amount of the note I gave Kinney.

" Myrick, myself, Deac. Day and Handly signed a note as

sureties for Harrington to Thomas Burton for some $2000. — It was for Harrington's use — he had the money — he was principal in the note. The deed of the land to Handly was to secure the payment of that note — that was the understanding — to clear the attachments and take up all. — Handly had the land to secure the Burton note — Handly agrees to pay the Burton note as far as the estate thus conveyed by Harrington will go.— We, the sureties on that note, will have to contribute the residue. (Defendant's counsel here objects that the witness is clearly interested). And releases are thereupon made and exchanged between Handly and the witness. (Objection is still made to the witness as interested, but overruled by the court.) The witness is called again in the afternoon and asked by plaintiff's counsel, if he wished to alter any part of his testimony and replies that he does not.

"On the part of the defendant the following witnesses were called.

"*Ezra B. French.* — Home at Dam'a Bridge — temporary residence now at Augusta. — In 1841 was acquainted with Joel How, Jr. — He used to be every day in my office, was on friendly and confidential terms as lawyer and deputy sheriff. — Had several conversations with him in March, 1841, about the alleged ante-dating of writs, *Call* v. *Harrington*, in all which he gave the charge the most explicit denial. — He told me that Dr. Call said he wished to secure himself without injuring Harrington and wished him to say nothing of his having any writs. — And that was the reason he did'nt tell them any thing about them — he said he had the writs from Dr. Call before he went to Harrington's corner to serve Myrick's writ. As often as he, How, spoke with me about it, which was quite a number of times, he assured me there was no ante-dating — that the services were made when they were dated. He made those assurances in strong language. He told me that Dr. Call asked him, when he gave him the writs, if he had any thing against Harrington, and he told him he had not, for he had not. One day he came over to my office, from Hussey & Coffin's office, and appeared very much excited — said that they had

been accusing him of making false returns on Call's writs — expressed and appeared to feel great indignation at being so accused — and was always very indignant at such a charge being made.

"Sometime afterwards, and just before April Court, he came in one day and said he understood they had written to the high sheriff to get him removed — and wished me, when I went over to Court, to see the high sheriff and state the facts to him. — And he related them to me as he had before.

"Witness saw Harrington in the village early in the morning after the failure — lived 3 or 4 miles off.

"There has been a serious quarrel for some years between the defendant and his friends and John Glidden, Handly and their friends — growing out of the affairs of the old Damariscotta Bank, as he understood.

"*Wales Hubbard* — testified that on a former trial of this action, before the District Court last Feb. Term, he was employed by defendant to take down the testimony of the witnesses that he might preserve their testimony. — Was not counsel in the cause — did take down their testimony truly, and among others he took down in writing the testimony of Joel How, Jr. who was a witness in that trial — that he had been accustomed to take testimony as delivered, and thought he could take down testimony as delivered with much accuracy. That said How testified *as follows*, (which he is enabled to state from the minutes he had in his hand, taken down by him,) viz: —

"In March, 1841, I was deputy sheriff. — 5th March (I suppose.) — Can't tell whether 4th or 5th. — No means of telling which — it was the day I went to Harrington's corner. — I have no doubt it was the 5th. — Dr. Call asked me to sign a return on a writ. — It was the first writ I had served. — I signed the return. — Something like six hours after, Hussey called for me to go to Harrington's corner. I next saw the writ the next day after I went to Harrington's corner. — I had the writ one or two hours in my possession; Call then took it. I saw the writ again on the next day — there was more writing in the writ than before. — I told him (Call) it looked too bad to go

into court. — I did object to it — and he took it. I did see it again within the 4 days; *then* he shew me two writs — it was at Call's office. I did make the return on the two writs. — Call gave as a reason he could not *get the declaration in one* — said there was no difference whether I made return on two or one — the old one destroyed by Call — at the time the two writs were shown to me Call told me I could transfer from one to the other. I have an impression from the conversation that he got some of the notes after the writs were made — can't state the conversation word for word. — Call said sometime after, he got the notes and interlined. — Said they could'nt hurt me for it — it was within the 4 days, he told me so. — I told him I was afraid to do it — he said I had a right to transfer the first on to the two writs.

"I gave the two writs to Dr. Call. I made the return and sent them to Wiscasset to register. — Can't say whether I made any other attachments that month, *Call* v. *Harrington*, — ** — the sum sued for; date of writ, &c. in the return, same as the writs — (Witness asked if he had conversation with Call about it afterwards,) yes; after the return — the time of the barratry case, I told him, if they asked me such and such questions I should have to answer them. He said I had no right to, and he should stop me.

"One time after, about Dec. Mr. Green wrote me considerable sharp letter to clear up the charges against me — Call said that Burgess would be Sheriff and there should be no other Deputy but me at the Mills, or at the Bridge — this was Dec. or January, or abouts. I told him what I had done, it would be a hard thing for me to get clear of the charges. ——— *Cross examined* ——*** (what charges?) I think it likely I was speaking of the writs, (but don't you know?) to the best of my knowledge, I was.

"It was on the 5th — it might have been the 4th — I made return on the first writ. I did sign the return — did 'nt see the inside till afterwards; it was returnable next Court; I did read the declaration — if I had 'nt read the writ, how could I have made the return? Did 'nt see the inside ———, but on the

6th had first writ in my possession some hours — can't recollect all the notes — John M'Dugal note I do recollect. The two writs I made return on — at the time did 'nt read them but did afterwards within the four days — don 't know that I have seen them since, only the copies — Col. Hussey had the copies, (when?) don 't know — within, say, six months from now ($\frac{1}{2}$ 6 months?) it strikes me about three weeks ago, (how do you know they were copies?) they look like the returns I made — did read the copies of the writs — part of them — read the returns. The returns went the first mail after I made them — they were delayed at Damariscotta mills. I caused the returns to be made by my father. — I employed my father to write them for me — did make the returns on the two writs within the four days.

"What sort of return did you make? Real estate, I think, — am not willing to say on oath I returned real estate. After the 4 days did you make any other return on the two writs? I did not. Did not make any other return on the two writs then — wrote them myself — Dr. Call did not make the return for me on the two writs.

"1st writ, attachment of real estate,— did, I think — not sure, read the writ. What did you do with writ? Don't know — don't know that I shew it to any one. Don't know what the Dr. took it back for — don't recollect whether or not any thing was said, what taken back for — gave it back to him about his office — can't say whether he called for it or I gave it to him— don't recollect any thing that was said at the time — after register of attachments gave the two writs to Dr. Call — don't know but that I took them to Topsham for him — can't say whether I did or did not see them after I gave them to Dr. Call — might, might not.

"Dr. Call did not tell me he had put any more notes in the writs. Didn't say he had not put more in. Did take the oath of office as deputy sheriff [asked as to false return, &c. and Court interfered to protect, and told witness he was not obliged to criminate himself, but he would be allowed to state voluntarily. — Ruggles, I won't insist.]

"(Witness asked if there is any bond given by plaintiff or any

one to indemnify him?) I have got no bond of indemnity — don't know that I ever saw one. Did you understand that a bond was made to protect you? Don't know — have no recollection of ever seeing one. Thinks he has not been informed there was such a bond. Has no recollection of saying any one was a damned fool for telling there was such a bond. — Thinks Capt. Handly would indemnify him — did marry plaintiff's niece — my business is now clerk in a store — my brother's clerk — have heard that Hanly Glidden gave notes for the goods — heard my brother say something about it. — When did you first acknowledge you made a false return? Within a year. Since you married plaintiff's niece? Yes. What inducement to disclose it? I thought it might as well be out as in.

"Never did before state it under oath — did furnish Hussey a written statement — about last July — never before told any one — I made the statement voluntarily — there was no particular inducement to tell the story held out to me — thought they would indemnify me — they *have* told me they would indemnify me.

"*Direct resumed.*—Witness is shown copy of record of returns from register — these are the copies I saw in Col. Hussey's office that I spoke of.

"*Thomas J. Merrill.* — Had a conversation with How about the charge of ante-dating said returns — he said the charge was utterly false — that the returns were right — said his uncle Harrington threatened him—did not know why his uncle should blame him for serving Call's writs — he might as well do it as any other deputy.

"*Edward Bartlett*, was riding from Damariscotta to Whitefield in company with How, who asked him if he had heard that he had not done his business right for Call, in the service of those writs — I told him I had. — He said it was not true — that the business was all done right.

"*Henry P. Cotton* — had talked with How about the returns of those writs, *Call* v. *Harrington* — he told me every thing was fair in regard to those attachments — said he was not obliged to tell them what business he did for other folks.

"*John R. Coffin* — testified that Asa Hutchins was in his office one day and Dr. Call came in and said something to him about what Hutchins had reported about his requesting to ante-date a writ.— *Quest.* Did or did not Dr. Call demand of him to know if he had circulated any such report? *Ans.* Don't recollect particularly what was said — some hard talk — have no doubt that Dr. Call in that conversation denied having asked Hutchins to ante-date any return — don't recollect Hutchins saying to him that he ever did — Hutchins equivocated.

"*Deacon Day* — testified that he signed a note to Thomas Burton for $2000, as surety for Harrington, with John Glidden, Myrick and Handly — also sureties — that 1st Oct. 1843, he was called upon by the other sureties to pay his quarter part of the note — that he did then pay his one fourth part — the parties to the note were present. — They said I must settle up my one fourth part — and another note was given for the balance due, which I signed with the other sureties, that note has not been paid to my knowledge.

"*Cross Examined.*— Previous to my paying part of the note, Burton wanted some money on the note and we gave him a note for $500 to get that amount from the Bank. — Burton had to pay or did pay that note to the Bank and that was brought into the settlement when I paid one fourth as above stated.

"*Joel How* — testified that he had been deputy sheriff for some 20 years — that he made the returns on the writs shown to him at the request of his son, Joel How, Jr.— a short time before the Court to which they were returnable — that the upper returns on each writ were in the handwriting of his son.— That he also made the return of the attachment at his request, to be filed in the register's office.— That at the great fire at Damariscotta Bridge — the building in which Dr. Call kept his office and papers, was burnt and many of its contents. Some of the Dr's papers were rescued.

"The writs above referred to in How's evidence, being writs *Call* v. *Harrington*, were produced in evidence and are made part of the case without copying.

"The jury on this evidence gave a verdict for plaintiff of $1061,84.

"Defendant's counsel excepts to the ruling of the Court admitting said John Glidden to testify, and prays this exception may be allowed and signed.

"John Ruggles, defendant's attorney."

"The foregoing is believed to be a true statement of the evidence as exhibited in the course of the trial of the above case.

"And the foregoing exception having been duly taken and reduced to writing and presented to me in open Court, and before the adjournment thereof without day, and being found according to the truth, is allowed.

"EZEKIEL WHITMAN, the Justice presiding, &c."

Immediately after the return of the verdict, there was a motion made by the defendant to set it aside, because it was rendered against the evidence, against the weight of the evidence, and against law. Afterwards, there was another motion made to set aside the verdict on account of newly discovered evidence.

The facts, on the motion on account of newly discovered evidence, sufficiently appear in the opinion of the Court.

The whole case, on the exceptions and on the motions for a new trial, after May Term, 1847, was fully and ably argued in writing by

Ruggles, for the defendant; — and by

Wells and *Groton*, for the plaintiff.

The arguments, however, are too extended for publication.

The opinion of the Court, after a continuance for advisement, was drawn up by

WHITMAN C. J. — The exception to the admission of the witness, Glidden, is not sustainable. This is a special action on the case for a conspiracy, between the defendant, and one Joel How, jr. to defraud the plaintiff. Nothing more is recoverable than the amount of the injury, which the plaintiff personally and individually has sustained. No one, unless by special agreement, could have a right to share with him in any

portion of the damages he may recover. If the suit were for a trespass done to a chattel owned by the plaintiff and another, jointly, he could recover only for the amount of his own individual injury. Of course the other, no more than any one else, could have, without a special agreement for the purpose, any interest in what he might recover. It is not even suggested that Glidden had made any such agreement with the plaintiff. He therefore, could have had no interest in the event of this suit, and the exceptions must be overruled.

But the defendant has filed a motion for a new trial, alleging that the verdict, which was for the plaintiff, was returned against evidence, the weight of evidence and against law. The motion is at common law, and is grantable in some measure at discretion. 3 Blac. Com. 390. When the justice presiding at the trial, or the Court, upon an examination of the case, is satisfied that injustice has not been done by the verdict, a new trial should not, ordinarily, be granted. *Boyden* v. *Morse,* 5 Mass. R. 365; *Train* v. *Collins,* 2 Pick. 145; *Roberts* v. *Carr,* 1 Taunt. 495; *Pluncket* v. *Kingsland,* Bro. P. C. 404; *Falconburg* v. *Pearce,* Amb. 210.

The verdict in this case cannot be said to have been rendered wholly against evidence; for a witness, Joel How, jr. produced by the plaintiff, the co-conspiritor named in his writ, testified to all the material facts requisite to sustain the action. If the witness were perfectly credible, and there were no evidence inconsistent with that given by him, the verdict should not be disturbed. And so, if the witness were impeached, and yet was corroborated by other evidence, so that the jury should not have hesitated to believe the existence of the facts as detailed by him, no new trial should be granted.

But it is contended that the witness has placed himself in an attitude, that should have rendered his testimony of very little weight, and that it is without corroboration. It appears that he was the one accused by the plaintiff in his writ and declaration, as a co-conspirator with the defendant in the perpetration of the fraud. He was, moreover, a deputy sheriff, under oath to act faithfully as such; yet he now testifies, that he lent

himself to the defendant to aid him in a most nefarious attempt; and actually made two false returns of attachments, as having been made several days before they were in fact made. These returns were made as long ago as March, 1841; and, that they were false, was kept a secret by him till the fall of 1845. And it appears that, in the mean time, he had made the most emphatic declarations that the returns were true on several occasions. And at the trial of this cause in the District Court, according to the testimony of Wales Hubbard, he gave as a reason for now coming forward with the disclosure of his malconduct simply that it was because he thought "it might as well be out as in". At the former trial Mr. Hubbard also states, that he swore that this was the first business he ever did as a deputy sheriff; and that it was on the sixth of March; that about six hours afterwards Hussey handed him writs against the same debtor, against whom the defendant's writs were issued, of which he made service between sundown and twelve o'clock at night of that day; and the returns were made as of the fifth of March. At the trial in this Court he testified, that the first writ was handed him by the defendant on the sixth of March, on which he made a return as of the fourth of that month; and that it was destroyed, and two new ones made and handed to him by the defendant on the seventh, on which he returned attachments as having been made on the third and fourth of that month. There are some other discrepancies between his statements on the former trial, as stated by Mr. Hubbard, and the one in this Court. And there are some particulars in which his testimony here can scarcely be reconciled, the one part with the other. Before he made the disclosures of his turpitude it appears he had married a neice of the plaintiff's. Under these circumstances it is insisted, that the testimony of this witness should not have been credited. But his credibility was matter for the jury; and they would seem to have believed him. We might not, and it is not improbable that we should not have been satisfied to find the facts relied upon to be sufficiently established by such a witness, if uncorroborated by other evidence.

But it is contended for the plaintiff, that the testimony of the witness was corroborated, first, by the testimony of Israel L. Kinney. He testified, that he sold the defendant one of the notes described in the defendant's writ, served by How, and that he thought he must have sold it on the fifth of March, which would be a day after the attachment, as returned by How; and this, it was supposed would show that the attachment was antedated, as testified by How. But Kinney testified that the defendant gave him a note for the amount on the same day he sold the note to him; and on being by the defendant shown a note canceled, he said he believed that was the one the defendant gave him in exchange; and that appeared to have borne date the fourth, and of course rendered it presumable that he must have been mistaken, as to his having sold his note to defendant on any other day; and hence his testimony failed to corroborate that of How.

The next piece of evidence relied upon in corroboration of that given by How was obtained from Asa Hutchins, which, though objected to by the defendant, was admitted. It was, that the defendant, on the sixth of the same March, procured him to note an attachment on a writ as of the fifth of that month, though he, the witness, was not then qualified as a deputy sheriff; but was then about being qualified; that the defendant said to him, that it would make no difference. Whether he afterwards extended, and perfected his return, he could not remember. He did not recollect in whose favor or against whom the writ was. Of course could not say it was one of those served by How. This testimony, if properly admissible, may have been viewed by the jury as tending to fortify the presumption that How testified correctly. If such can be believed to have been its effect, and if it was improperly admitted, the admission of it may form a good cause for granting a new trial; for the verdict would be rendered without being warranted by law. It is true, however, that the admission of illegal evidence does not, in every case, entitle a party against whom it is admitted, and against whom the verdict may be rendered, to a new trial. *Malin* v. *Rose*, 12 Wend.

258; *Crary* v. *Sprague, ib.* 41; *Kelly* v. *Merrill*, 14 Maine R. 228; *Polleys* v. *Ocean Ins. Co. ibid.* 141. But if it be reasonable to believe, that the jury could have been unduly influenced by the wrongfully admitted testimony, or if it be doubtful whether they would otherwise have decided as they may have done, a new trial should be granted. *Ellis* v. *Short*, 21 Pick. 142; *Wilkins* v. *Paine*, 4 D. & E. 468. In the case at bar we can by no means be sure, that the jury were not influenced by the supposed illegal testimony, and if it should not have been admitted, we should be bound to grant a new trial.

We must then proceed to consider whether it was legally admissible. There are instances in which it has been found necessary to admit the proof of acts, similar to those directly in question; but it is apprehended, that this has been done only where it might become indispensable to do so, in order to show a guilty knowledge or intention; as in the case of an indictment for passing counterfeit money or bank bills. An attempt to pass the same, or similar ones, in other instances, under suspicious circumstances, has been often admitted in order to show that the culprit must have known of the spuriousness of those for the passing of which he stood indicted. And the same has been done in cases of goods obtained with an intention to defraud the vendor, by way of showing the intention of the vendee in making the purchase. In the case at bar there was no need of proof to show, that one procuring an officer to make a false return, must have had a guilty knowledge, and a criminal intent. The cases are few, and arising out of the peculiar necessity of the case, in which it can be allowable to show, that a person accused of committing an offence, has committed other offences of a similar kind, in order to his conviction of the offence charged. And on the whole, it must be admitted, that the case before us is not of a description allowing of such proof.

The propriety of granting new trials is very aptly elucidated in Black. Com. p. 390, where it is said, that, "in the hurry of a trial, the ablest judge may mistake the law, and misdirect

the jury. He may not be able so to state and range the evidence as to lay it clearly before them; nor to take off the impression, which may have been made on their minds by learned and experienced advocates." And "under these circumstances the most intelligent and best intentioned men may bring in a verdict which they themselves, upon cool deliberation, would wish to reverse."

A motion has been also made in this case for a new trial, on account of newly discovered evidence; and the proof taken to support it has been very voluminous; but much of it, and indeed a very large proportion of it, is without use. The indictment of the defendant for the same cause, relied upon by the plaintiff, and the acquittal of the defendant thereof, is wholly inadmissible; as nothing of the kind, unless by the consent of the plaintiff, could be used in evidence in the trial of this action. And the additional statements of the witness, How, proved to have been made on occasions, other than those proved at the trial, are but cumulative evidence, which is never considered as authorizing the granting of new trials.

But the evidence does present one ground, if there were no other, upon which it would be clearly reasonable, that we should suffer the cause again to be laid before a jury. It must now be taken to be a fact, susceptible of proof, that the plaintiff, before the commencement of this suit, became bound to indemnify his witness, Joel How, Jr., against harm for testifying to the facts of the alleged conspiracy, in which he himself was the principal actor. But for this, it is reasonable to believe that no such testimony could have been obtained from him. There is nothing in the case that should be deemed indicative, that the disclosure by the witness, originated from any qualms of conscience on his part. On the contrary, when inquired of why he made the disclosure he replied, merely, that he thought it might as well be out as in. In such case the jury would have a right to infer, that the witness had been operated upon by considerations, other than those connected with a simple regard for the truth. And such a presumption might gain strength, and become fortified by other circumstances and considerations.

It cannot be predicated of the witness, that he was under any very powerful moral restraint. It may well be feared that an inconsiderable temptation would induce him to accommodate himself to the wishes and designs of any one, having a nefarious purpose to accomplish. It seems to be made manifest by the testimony of Hussey and Hilton, that the plaintiff has been, in no inconsiderable degree, hostile to the defendant. The witness, before he made his disclosure against the defendant, had married the plaintiff's niece; and had become connected in a store which afforded him his means of support, he himself being destitute of property; and the plaintiff had lent his aid in upholding the business in the store, by becoming surety for the stock employed in it. All these considerations could, and perhaps well might, raise doubts in the minds of jurors whether the inducement to the giving of the bond was strictly in accordance with a design merely to elicit nothing but the truth. The defendant at the former trials appears to have attempted, without success, to prove the existence of such a bond. It may now, therefore, be regarded as newly discovered evidence; and taken in connection with all the other evidence, showing the conduct and pliability of the disposition of the witness, and the temptation he may have been under to accommodate the plaintiff, and the hostility of the latter to the defendant, we cannot doubt, that the existence of such a bond might well have a very material effect upon the minds of jurors in deciding the case, depending almost, if not quite wholly, on the testimony of this witness for its decision in favor of the plaintiff.

New trial granted.

GEORGE W. PHILBROOK *versus* SIMON HANDLEY.

On the trial of an action on the case, brought by a creditor, under the provisions of Rev. Stat. c. 148, § 49, against a person for aiding the debtor in the fraudulent concealment or transfer of his property, to prevent it from being attached or seized on execution, such debtor is a competent witness for the plaintiff.

THIS was an action on the case, against the defendant for aiding one Alexander Barstow to secrete and secure certain personal property, with a view to defeat and delay his creditors.

After the introduction of other evidence the plaintiff called Barstow as a witness. He was objected to, as the report of the trial before WHITMAN C. J. states, on the ground of interest, but no evidence of his interest was offered, except that he was the debtor in the plaintiff's execution against him, which the recovery by the plaintiff might be held to satisfy partially or wholly. And with a view to reserve the question for the consideration of the whole Court, the presiding Judge rejected the witness. A nonsuit was ordered, to be set aside, and the cause sent to a jury for trial, if in the opinion of the Court Barstow was a competent witness.

Ruggles, for the plaintiff, contended that Barstow was a competent witness. The objection is, that he was the debtor of the plaintiff, and that if the plaintiff recovers against Handley, whatever is paid by him on that judgment will go to pay Barstow's debt to Philbrook. But if Handley pays Barstow's debt, Barstow will be liable to account to Handley for so much as he pays; and thus Barstow's interest is balanced. Barstow could not say, after procuring Handley to aid him in an act which rendered Handley liable to pay the debt of Barstow, that the act was unlawful or fraudulent.

The statute authorizing this action, is not a penal statute. A statute providing a penalty for doing an act is held to be prohibitory of the act, and the act thereby becomes unlawful, and no action will lie between the parties for indemnity, or contribution. As this statute is not a penal one, and therefore not prohibitory, Handley could recover of Barstow whatever sum he was bound to pay of Barstow's honest debts.

That the sum recovered in such action on this statute goes in payment of the debt due to the creditor, results from the construction given to the statute by this Court. To carry out that construction in harmony with its interest, it would be necessary to allow the defendant to have an action against the debtor for paying his debt. Unless the debtor could be a witness for the plaintiff, the statute would be but a dead letter, for in nearly all the cases, an action like the present one, could not be maintained without him. The legislature, therefore, in passing the law, must have understood, that the debtor was a competent witness.

But if Barstow had an interest, he was admissible from the necessity of the case. From the very nature of the transaction, no other person would be likely to know all the facts; and a recovery could not ordinarily be expected without his testimony. The feelings of the witness would be generally adverse to the plaintiff, and in favor of the party aiding him; and there could be no danger in his being admitted as a witness for the plaintiff. 2 Stark. Ev. 753; 1 Greenl. Ev. § 460.

Wells, for the defendant, said this was an action for assisting the proposed witness in concealing his property from his creditors, under Rev. Stat. c. 148, § 49. This is seeking to recover the debt of the proposed witness from the defendant.

The payment of the debt by the defendant operates as an extinguishment of his claim against the witness. *Quimby* v. *Carter*, 20 Maine R. 218. The debt of the witness is paid and gone, and he has a direct interest to have the plaintiff recover.

If it should be said, that it is the satisfaction of the judgment, and not the judgment alone, which extinguishes the debt, and if it be so, still the interest is direct to have the plaintiff recover. It is enabling him to take the first step to obtain satisfaction, and without it, satisfaction could not be had. The case of *Paine* v. *Hussey*, 17 Maine R. 274, is in principle directly in point. The interest of the proposed witness in the present case is no more contingent than in that.

It is said, that the interest of Barstow is balanced, because,

if the defendant pays the debt to the plaintiff, that payment will enable him to recover back the same sum of the witness. The ground of recovery in the present action is, that the witness and defendant have violated a law of the State. The parties are equally in fault, and the payment by the defendant, would not enable him to recover against the witness.

The opinion of the Court was drawn up by

SHEPLEY J. — The only question presented in this case is, whether Alexander Barstow was a competent witness for the plaintiff. Having recovered a judgment against Barstow, upon which an execution had issued, and a return had been made upon it of *nulla bona* by an officer, the plaintiff commenced an action upon the case, against the defendant for knowingly aiding and assisting Barstow in the fraudulent concealment or transfer of certain personal property, to secure the same from creditors and prevent its attachment or seizure upon execution. The action is founded upon the forty-ninth section of the stat. c. 148, which provides, that a person so conducting shall be liable to any creditor for double the amount of the property, not exceeding double the amount of the creditor's debt. Barstow was called as a witness, to prove, that the defendant knowingly aided him in such a fraudulent concealment or transfer of property; and for the purpose of presenting the question for deliberate consideration, the witness was excluded, and a nonsuit was ordered.

The same question has since been presented in the action of *Aiken* v. *Kilburn*, pending in the county of Franklin.

In an action on a statute containing similar provisions it was decided, that recovery and satisfaction of the judgment against one thus aiding a debtor would operate *pro tanto* to extinguish the original debt. The thirty-fourth section of the statute, c. 148, provides, that such shall be the effect of the satisfaction of a judgment obtained against one, who has aided a debtor to conceal or dispose of property disclosed by him as a poor debtor.

If Barstow should be admitted to testify in this case, and

should thereby enable the plaintiff to recover a judgment against the defendant, and that judgment should be satisfied, he would be benefitted thereby to the extent, to which the plaintiff's judgment against him would be extinguished. For the defendant could in such case have no legal claim to recover from Barstow, the amount paid to the plaintiff, they being in that transaction, each of them a *particeps fraudis*. But Barstow may not be benefitted by a judgment recovered by the plaintiff against the defendant. For the plaintiff's right to collect his debt of him, will remain unimpaired, until he has obtained satisfaction of the defendant, which he may never do, although there be no particular reason to believe, that he will not do it. The question to be decided then is this, whether one who is liable to pay a debt, may, by his testimony as a witness, cause another who would on payment of it have no claim upon him, to become liable to pay the same debt.

The rule is admitted to be well established, that a witness so situated is competent to testify in actions of tort. One co-trespasser is a competent witness to establish the plaintiff's right to recover damages of another co-trespasser. *Morris* v. *Daubigny*, 5 J. B. Moore, 319. And yet a satisfaction of the judgment thus recovered, will operate to relieve the witness from his liability to make compensation for the same injury. The recovery of a judgment against a person other than the present debtor, without satisfaction of it, is but an additional security for the debt or claim, except in actions of trespass or trover for goods, in which the judgment operates as a transfer of the property to the defendant. *Broome* v. *Wooton*, Yel. 67, note 1, by Metcalf; *Drake* v. *Mitchell*, 3 East, 251; *Campbell* v. *Phelps*, 1 Pick. 62.

It is quite clear, that a witness so situated may testify, either in an action of tort or of contract, under a strong bias and expectation of benefit to be derived from his testimony; and equally clear, that he can have no certain interest in the event of the suit; for he may never be relieved or benefitted in any way by enabling the plaintiff to recover judgment. As the rule of evidence requires, that the witness should have a cer-

tain and not a contingent interest in the event of the suit to be excluded on the ground of interest, it would seem, that he might, upon principle, be considered competent; and the credibility of his testimony be submitted to the jury. While, however, there does not appear to be any difference of opinion or any conflict in the decided cases, that a witness so situated is competent to testify as a witness for the plaintiff, in actions *ex delicto*, there is found to be a very serious and obstinate one respecting his competency in actions *ex contractu*. The question was presented in an action *ex contractu* before the Supreme Court of the United States, in the year 1831, and the report states, that the Court being divided in opinion respecting it, came to no conclusion. *Winship* v. *The Bank of the United States*, 5 Peters, 529. It was presented before the court in Massachusetts during the following year, and that court decided, that the witness was competent. *Eastman* v. *Winship*, 14 Pick. 44. It was presented before the court in New York in the year 1839, and that court came to the conclusion, that the witness was incompetent. *Collins* v. *Ellis*, 21 Wend. 397.

Mr. Justice Cowen supposed, that he might have noticed and examined, in an opinion drawn by him in that case, all the decided cases bearing upon the question; and yet the case of *Eastman* v. *Winship*, does not appear to have been noticed.

In the present case the action is in form *ex delicto*, and according to the decided cases, the witness should be considered competent. And yet he is not presented as a witness usually is, when held to be competent in actions *ex delicto*, who being himself a wrongdoer, and as such liable to the plaintiff, testifies that another person is also equally liable. For although the defendant and the proposed witness were joint perpetrators of the alleged fraud, the statute does not make the debtor liable therefor to the creditor, in the same manner as it does the defendant who aided him.

The case of *Paine* v. *Hussey*, 17 Maine R. 274, cited in the argument, differed essentially from this case. The witness

excluded in that case was "bound to pay the execution" to be issued on the judgment to be recovered in that suit; and was therefore directly and certainly interested in the event of the suit. The indorser of a writ, when called as a witness for the plaintiff, has also a direct and certain interest in the event of the suit. Being liable to pay costs to the defendant, if he prevails and does not collect them of the plaintiff, if he enables the plaintiff by his testimony to recover, he is certainly and forever discharged from that liability. That liability was indeed contingent; but there is an important difference between an absolute discharge from a contingent liability, and a contingency, whether the witness will or not derive any benefit from the event of the suit.

Although the position of the witness in this case was such, that it might justly have a strong influence to impair the credibility of his testimony, he does not appear to have had such a certain interest in the event of the suit as would exclude him.

Nonsuit taken off, and the action to stand for trial.

WILLIAM PATTEN & *ux. versus* SAMUEL H. FULLERTON.

Where an attorney, being a practising attorney at law, in the transaction of business, takes a negotiable note to his principal, and it is suffered to remain in the possession of the attorney for many years, the law presumes, that he is entrusted with authority to receive payment of it.

And if the consideration of the note to the principal was property sold, belonging to an infant to whom he was guardian, the power of the attorney to receive payment of the note would not be changed, when the principal ceased to be guardian.

And were the principal, an unmarried female at the time the note was made, and she is afterwards married, the authority of her attorney to receive the money on the note would thereby be revoked, unless such authority were continued with the assent of the husband. With such assent the authority of the attorney would remain unchanged.

Payment, made before a note has become payable, to the duly authorized agent of the holder, has the same effect, as if made to the holder personally.

As a general position, payments made on such note to the attorney in specific articles instead of money, would not be a good payment, and binding upon the principal. But if one of several payments in specific articles to the attorney, be received by the principal, and the note is still suffered to remain in the possession of the attorney, and no objection is made either to the attorney or to the debtor, such payments would go in discharge of the note in the same way, as if they had been made in money.

THIS case came before the Court upon the following exceptions to the ruling of WHITMAN C. J. presiding at the trial.

Assumpsit on a note of hand of which the following is a copy: —

"$1455. "Bath, Nov. 25, 1834.

"For value received I promise Eliza S. Smith, to pay her or order fourteen hundred and fifty-five dollars in four years from date, with interest semi-annually from the second day of October last. "S. H. Fullerton."

"Witness, Henry Tallman."

The general issue was pleaded, with a written offer by the defendant to be defaulted for the sum of $924. The offer was not accepted, and the cause went to the jury on the issue. The writ was dated May 5, 1846.

The plaintiff, to prove the issue on his part, offered the note in evidence. The following writings were on the back of said note.

"Received the interest on the within to Nov. 25, 1835." "Nov. 25, 1835. Received on the within, four hundred eighty-seven dollars and thirty cents." "Received interest on the within to Nov. 26, 1836." "Nov. 25, 1836. Received on the within, sixty-seven dollars and seventy cents." "Nov. 27, 1838. Fifty dollars received on the within." "This note good for seven hundred and seven dollars and sixty-eight cents, Sept. 4, 1841, and no more."

It was proved and admitted, that the body of the note and all the indorsements were in the handwriting of Henry Tallman.

The plaintiffs, with a view to show that the indorsements and writings were made without authority, and ought not to be deducted from said note, then offered to prove, and it was

proved, and admitted, that the wife of William Patten, one of the plaintiffs, was the wife of Horatio Smith, who died in 1833, leaving real and personal estate, and three children, Ellen T. C. Smith, William H. Smith and Eliza S. Smith, all minors under the age of fourteen. That the said Eliza S. Patten, on the 19th of August, 1834, then the widow of said Horatio Smith, was duly appointed the guardian of said minor children, and gave bond as the law required.

On the first of Nov. 1833, Henry Tallman was appointed administrator on the estate of said Horatio Smith.

On the petition of said guardian, at a probate court, held Aug. 19, 1834, she was duly authorized to sell the real estate of her wards, described in her said petition.

The plaintiffs also offered a copy of the bond required by law.

Pursuant to said license of Court, the said guardian sold the land on the 19th of Aug. 1834, described in the deed, from said Eliza S. Smith, now Eliza S. Patten, to the defendant, of that date. They also offered in evidence the mortgage deed from the defendant to the said Eliza S. Smith, now one of the plaintiffs, dated Nov. 25, 1834, and recorded Dec. 9, 1834.

It was proved and admitted, that the said Eliza S. Smith, the guardian and mother of said minors, one of the plaintiffs, was married to the said William Patten on the 8th of Sept. 1835. The note declared on and the mortgage given to secure the same, were made as the consideration for the sale of said land to the defendant.

In transacting the business, and making sale of said land to the defendant, and taking the security, Henry Tallman acted as attorney for said guardian, and was the person who drew the deeds and wrote the note declared on.

It was proved and admitted, that Benjamin F. Tallman is the guardian of one of said minors, W. H. Smith, and that Ellen T. C. Smith is now the wife of W. H. Sturtevant, and that the present suit is brought for the benefit of said children, heirs of Horatio Smith. Said B. F. Tallman was appointed guardian Feb. 19, 1845, and said Sturtevant, was appointed guardian of Eliza S. Smith, Jan. 16, 1846. It was proved

and admitted, that the note and mortgage was in the hands of Henry Tallman from the time they were executed, till May first, 1846.

Henry Tallman was called as a witness, by defendant, and though objected to by the plaintiffs on the ground of interest, was admitted and testified, that in transacting the business of the sale of the land under the license of Court to the defendant, he acted as counsel for the guardian, drew the note and deeds, both the deed to the defendant and the mortgage; the note and mortgage were left in his hands as a deposit by the said guardian, where they remained till May, 1846; that all the payments made on said note were made to him; that for one payment he received a yoke of oxen, which he sent to Mrs. Patten; that he credited her for the money received of Fullerton on his book; that he had not taken Mrs. Patten's receipt for any money received of Fullerton, though he believed he had, for a legacy, left her by her father. — He has paid her some money, which is charged on his book. — Have told her I was ready to settle with her, and is ready; — that he never called on Capt. Patten, the plaintiff, to settle, nor has he had any conversation on the subject with him; that as administrator on Horatio Smith's estate he has not paid or settled with her for five hundred dollars, an allowance made to her by the judge from the estate of Horatio Smith; that Capt. Patten, the plaintiff, has never demanded a settlement; — that he never had any written power of attorney from Mrs. Patten; — and had no authority from her to receive payments on said notes, other than from what was derived from his having the notes deposited in his hands, and that a portion of what he received from Fullerton, was paid in lumber, boards and timber for his own use.

Henry Tallman, on the preliminary examination testified, that he had given to the defendant no bond of indemnity, but had promised to save him harmless from the claims against him by reason of the payments made to him on said notes.

On this evidence the plaintiffs' counsel contended, that the fact that the note and mortgage being taken as the consider-

ation for the property of the minors sold to the defendant by license of court, and to be put at interest for their benefit, and left in the hands of said Henry Tallman for safe keeping, he could not have had and did not have any authority to receive payment on said note.

Second. That if he had such authority from Mrs. Smith, while guardian, her marriage with Patten, put an end to her guardianship, and was, by operation of law, a revocation of all authority to Henry Tallman to receive payment on said note from the defendant. And as the said Tallman testified that he had not been authorized by her husband, the plaintiff, that he had no right or authority to receive payments from the defendant on said note, as he did receive them; and that the defendant paid the money to Henry Tallman in his own wrong, and could not operate as payments *pro tanto* of said note.

And that the possession of said note, as a deposit for safe keeping only, could not operate as an authority to Henry Tallman to receive payment on said notes — and especially as to all of said payments which were made by Fullerton and received by Henry Tallman, before the note became payable by the terms of said note, and requested the Judge so to direct the jury.

The Judge directed the jury, that the possession of the note by Henry Tallman was of itself sufficient authority to justify the defendant in paying the money, as he did, to Henry Tallman, and must operate as payment of the note to the amount of the indorsements; and that the possession of the note, under the circumstances, might be regarded by the defendant as evidencing sufficient authority in Henry Tallman to receive the money. And directed the jury, as matter of law, that they might so find.

The jury returned a verdict in conformity to said instruction.

To which ruling, in admitting the said Henry Tallman to testify as a witness, and to which instruction of the Judge to the jury, the plaintiff's counsel excepted.

The arguments were in writing, by

S. and *W. P. Fessenden*, for the plaintiffs, — and by

Groton, for the defendant.

The points made by the counsel for the plaintiffs are stated in the opinion of the Court. They cited Story on Agency, § 481; Story on Promissory Notes, § 373, 375, 376; Pothier de mandat. n. 103; 8 Wheat. 174; Bayley on Bills, 330; 13 East, 332; Chitty on Bills, 433; 4 B. & Ald. 210: 4 C. & P. 499; 5 Rand. 639; 1 Pick. 347; 5 Pick. 113; 13 Mass. R. 320; 14 S. & R. 307; 1 Desaus. 469; 1 Hill, 484; 1 Porter, 212; 3 Stew. 23.

For the defendant, among other remarks, it was said: —

That although the consideration for this note was real estate of minors, yet the note was to Mrs. Smith, the guardian, and not to the wards. If she had received money, she might have loaned it to the defendant, and have taken the note to herself. The wards are protected by her probate bond. By the statute 1844, c. 117, the note remains her property still, notwithstanding her second marriage.

The testimony in the case was examined, and it was contended that under the circumstances, H. Tallman had authority to receive the payments made upon the note.

If it had been intended, that H. Tallman should no longer remain the agent of Mrs. Smith after her marriage with her present husband, the defendant should have been notified of it, or a payment to the agent would be good. Story on Notes, § 386.

The reception of the oxen was a ratification of the acts of the agent in receiving payment in specific articles instead of money.

The opinion of the Court was drawn up by

Shepley J. — This suit is upon a promissory note, made by the defendant on November 25, 1834, and payable to the female plaintiff, then a *feme sole*, or her order, in four years from date, with interest semi-annually from the second day of October preceding. When it was produced at the trial, there

appeared to be several indorsements made upon it by Henry Tallman, of sums received for interest and in part payment of the principal. The plaintiffs contended, that those indorsements had been made without authority, and that they should not be allowed to diminish the amount, which they would otherwise be entitled to recover.

To establish this position, they introduced testimony, showing that the female plaintiff, as the guardian of her children by a former husband, obtained license, sold and conveyed certain real estate to the defendant for their benefit. And that she received the note now in suit, and payable to herself, and secured by a mortgage of the same estate in payment. The whole business was done by Mr. Tallman, acting as her attorney; and the note and mortgage, as he states, were left by her in his possession as a deposit; where they remained till May, 1846. The payments indorsed were made to him, while they thus remained in his possession, and without any other authority from her. She was married to her present husband on September 8, 1835.

The jury were authorized by the instructions, to find that the payments so made and indorsed, were binding upon the plaintiffs. The counsel for the plaintiffs contend, that the instructions were erroneous; and they insist: —

1. That the note and mortgage were left with Mr. Tallman, as a depositary, without authority to receive payment.

The rights of these parties cannot be determined by the arrangement made by the promisee and her attorney; but they must depend upon the evidence of authority presented to the defendant, authorizing him to make payments to the attorney. Lord Chancellor Cowper, in the case of *Whitlock* v. *Waltham*, 1 Salk. 157, held, that a scrivener, who put out money and was entrusted with the custody of the bond, might receive payment, "for being entrusted with the security itself, it shall be presumed, he is entrusted with a power over it, and with a power to receive the principal and interest." This doctrine is approved and restated in the modern treatises on agency. Story says, in section 104, "So if an agent takes a bond for

his principal and is allowed to retain possession of it, it is presumed, that he possesses an incidental authority to receive the money, which is due on it. And generally the possession of a negotiable instrument is deemed sufficient *prima facie* evidence of the title of the possessor to receive payment of it." The presumption of authority would be much strengthened in this case, because the note and mortgage were allowed to remain in the possession of the attorney for a very long time; and because it was a part of his known business to collect debts for others.

2. That any authority, which the attorney had before, ceased when she ceased to be the guardian of her children, by the provisions of the statute, c. 51, § 54, by the marriage to her present husband.

The note having been made payable to herself, and not in her capacity as guardian, did not become their property. She would continue to be the legal owner of the note and to have the power to control and collect it, after she ceased to be their guardian. As her own power over it would not be diminished, that of her attorney could not thereby be affected.

3. That the authority of her attorney was revoked by her intermarriage with her present husband. Such would be the effect, if there were not other facts authorizing the inference, that it was continued with the assent of the husband.

He doubtless knew, that his wife had minor children by a former husband; and he might reasonably be expected to know something respecting the means, by which they were to be supported. Although Mr. Tallman testifies, that there was no conversation between the husband and himself respecting the note, he states, that he received a yoke of oxen of the defendant in part payment of it, which were received by Mrs. Patten, and that he credited to her on his book the money received of the defendant on the notes, and paid some of it to her, and charged it to her on his book. If the husband could be supposed to be ignorant, that Mr. Tallman had such a note in his possession, and that his wife had received of him money paid upon it, it cannot be believed that he could be ignorant,

that his wife had received a yoke of oxen from that source. As his wife would be accountable to her children for the amount of the note, his interest would not be promoted by the collection of it, and he could have no motive to interfere and prevent its being retained and collected by her attorney. This may account for his permitting it to remain in his hands for more than ten years after the marriage. Indeed, he does not even now appear to have interested himself in the matter further than to permit this suit to be brought at the suggestion of the present husband of one, and the guardians of the other children of his wife. Under such circumstances, can he be permitted to deny, that the oxen received by his wife constituted a good payment on that note; and to dispute the authority of the attorney, who received them for her, and to call upon the defendant to pay their value again, when they became his property as soon, as they were received by his wife? If this be not possible, what is the position of the defendant with respect to the other payments made to the same person? The interest payable on his note before the principal became payable was paid to the person, with whom he had transacted all the business, and in whose possession it continued to remain. No one had disputed that person's authority to receive it, or had called upon him for it. He had delivered him a yoke of oxen in part payment of the principal, and they had been received by the owner or promisee of the note. Would he not under such circumstances be fully authorized to conclude, that he might safely make other payments to the same person so long as he continued to retain the note? And if the cash or other payments towards the principal were made before the oxen were delivered, would not the reception of them by the principal confirm and justify all prior payments made to the same agent? After a lapse of time, from five to ten years, without any objection being made to the validity of the payments, and under such circumstances, a legal presumption arises, that the former attorney of the wife continued to act as such, respecting that note and mortgage, by the consent of the husband. And there is nothing in the case tending to rebut such a presumption.

4. With respect to the payments made, it is contended, that "the defendant would be liable to repay those made before said note became due, said payments having been made immaturely and illegally, and therefore in the defendant's own wrong."

The authorities cited to establish this position show, that if a bill or note be paid before maturity, without being delivered up or canceled, and it be negotiated before maturity; or be paid to an agent, whose authority is revoked before maturity, such payments will not be good, and the person making them may be required to pay them again. Although such payments are not binding upon other parties, yet, as "between the real and *bona fide* holder and the maker, the payment, whenever made and however made, will be a conclusive discharge of the note." Story on Notes, § 384. Payment made before maturity to the duly authorized agent of the holder, has the same effect as if made to the holder.

5. Henry Tallman testified "that a portion of what he received from Fullerton was paid in lumber, boards, and timber, for his own use." What portion, or when such payment was made, does not appear, the amount thus paid and indorsed upon the note, it is insisted, would not be a good payment and binding upon the principal, if received by a duly authorized agent for the collector of the note. This as a general position is doubtless correct. The authorities, however, do not show, that such a payment would not under any circumstances be binding upon the principal, or that it would not under the circumstances presented in this case. The principal within a reasonable time might repudiate such a payment, and require payment to be made again in money. If such payment may be supposed to have been the last payment made in this case, nearly five years would have elapsed, before the defendant could have been informed of any objection made to it. And at that time the plaintiffs making the objection, are presented in this position. They had admitted a former payment made by the defendant to the same attorney in specific articles, to be a good payment, by receiving the property to their own use. To another payment subsequently made to the attorney in spe-

cific articles, after so long a time, they make this objection, and insist, that the defendant shall pay the amount again in money. If the lumber was first delivered, and the oxen at a subsequent time, they would be presented as making such a call upon the defendant, after he had been authorized by the lapse of a longer time, and by a subsequent reception of specific articles in payment, to conclude, that the former one, made in like manner, was satisfactory.

It does not appear, that the defendant was informed that the lumber, any more than the oxen, was received by the attorney to be appropriated to his own use. If he had received money he might have appropriated it in the same way. If any person were to bear a loss occasioned by his inability to pay, reason and authority under such circumstances would both decide, that those, who had sanctioned a payment made in specific articles in one instance, and who had also been guilty of such laches in calling upon their agent as well as debtor, should bear it. Happily for all, no such loss is anticipated in this case.

Exceptions overruled.

NATHANIEL GROTON, *Judge of Probate, versus* HENRY TALLMAN.

An action upon a probate bond against an administrator, brought by the heirs at law for their own benefit, in the name of the judge of probate, where there is no allegation in the writ that special leave for bringing the suit was given by the judge, cannot be maintained, under Rev. Stat. c. 113, without proof of a decree ascertaining the amount due to such heirs.

But an action on such bond may be maintained in the name of the judge of probate by heirs at law, for the general benefit of the estate, in certain cases, such as where the administrator returns no inventory, or settles no account, or refuses to appear when cited by the probate court to settle an account, if it be alleged in the writ and proved, that it was "commenced by the express authority of the judge of probate."

The judge of probate cannot, however, it would seem, maintain a suit upon such bond in his own name alone, and on his own mere motion; but can only authorize the bringing of a suit, in cases where his consent is necessary.

THIS was an action of debt upon a probate bond, made by

the defendant as administrator of the estate of Horatio Smith, deceased, dated November 1, 1833. The writ is dated May 28, 1846. The defendant is required to answer unto "Nathaniel Groton of, &c. Judge of Probate of Wills, in and for said county of Lincoln, in whose name this suit is brought, for and in behalf of William H. Sturtevant of, &c., and Ellen C. T. Sturtevant, wife of said William, as she is a daughter and heir of Horatio Smith, late of said Richmond, deceased, in her right, and who sues and prosecutes this suit in the name of said judge." Then follow the names of several others, minors, suing by their guardians, alleging themselves to be heirs of Horatio Smith, deceased, and making the same allegations as Sturtevant and wife. Then follows a declaration upon the bond, with this conclusion, "Yet the said Henry Tallman, though requested, has never paid said sum or any part thereof, but neglects and refuses to pay the same. To the damage of the said plaintiff, as he saith, the sum of," &c. On Feb. 19, 1834, the defendant returned an inventory of the estate, but did not file his first account of administration until Feb. 23, 1846, upon which notice was ordered, and the account was settled on May 16, 1846. Sturtevant and the guardian of one of the minor heirs, but not all for whose benefit the suit is brought, presented a petition to the judge of probate for the county, praying that the defendant might be cited to settle an account, "and failing to do so, that license may be granted, to commence and prosecute a suit upon his bond." The judge of probate passed a decree, of which a copy follows: —

"Lincoln, ss. At a Probate Court held at Bath on the 18th day of February, 1846, Henry Tallman, Esq. being duly cited agreeably to the prayer of the within petition, — and being called, does not appear. — Whereupon, on motion of petitioners, ordered, that they have liberty to commence a suit on his administration bond. Nathaniel Groton, Judge."

The case came before the Court upon a statement of facts, presenting several questions other than that upon which the decision was founded. It was agreed, that a nonsuit or de-

fault should be entered to carry into effect the decision of the Court.

The counsel for the plaintiffs moved for liberty to amend their declaration.

At the May Term, 1847, it was agreed by the parties that the case should be argued in writing. Written arguments were afterwards furnished to the Court by

Fessenden, Deblois & Fessenden — and *W. P. Fessenden*, for the plaintiffs: — and by

Tallman, pro se.

For the plaintiffs, on the only point considered by the court, it was contended, that every prerequisite for maintaining the suit appeared in the case. It is brought on the bond by the express permission of the judge of probate. It does not appear, it is true, that the shares of the several parties named as heirs to the estate have been ascertained by a judgment or decree, or that any demand has been made therefor on the administrator. This could not be for the reason that the defendant refuses to account.

The stat. c. 113, evidently contemplates two classes of cases. 1. Where parties interested may bring a suit on the probate bond without the permission of the judge of probate. — 2. Where such suit may be brought with his permission.

In the first class of cases it provides certain things, viz: — The party bringing the suit shall allege his own name, &c. § 6; otherwise the writ shall abate. But then it must be pleaded in abatement, that there is no such allegation, and that the suit is brought without authority of the judge. That is not done here. *Coffin* v. *Jones*, 5 Pick. 62. Again, such party shall be personally liable for costs, § 7. And must have his claim ascertained and make a demand, § 10, 11, 12. And in such cases execution issues for a certain amount, (§ 14,) to be levied in a certain way, § 15.

But in the second class of cases, different provision is made. If the suit is brought by permission of the judge of probate, the suit will not abate, although no such allegations are made, and no such facts appear, § 7, proviso. This proviso in terms

applies to all the provisions of § 5, 6, 7. Still, it must be evident, that suits may as well be commenced by a person interested, and whose claim has been reduced to a certainty by judgment or decree, with as without the consent of the judge of probate. In the former case, where the consent of the judge has been obtained, and where the claim has been judicially ascertained, and a demand made, it is manifestly proper that the interest should be stated, in order that judgment should be rendered and execution issue without further proceedings. It is quite as proper as where the consent has not been obtained, and the suit is matter of right, as it would be in similar cases.

It may be doubted, then, whether the proviso in § 7 was intended entirely to do away with the statement of the interest, &c. in cases where the consent of the judge was obtained. But it is very clear, be this as it may, that there are cases where the consent of the judge must be obtained in order to support the suit. Because taking the 5th & 6th in connexion with the 10th, 11th, and 12th sections, it is manifest that to support a suit brought under § 5, certain things must appear. If they do not appear, the consent becomes essential. But can it be that no suit will lie for a breach of the probate bond, until the amount of a claim or a share is ascertained by a judgment or decree? This cannot be so, for cases may arise where by the act or neglect of the administrator, this is impossible, as by his refusal to account. For such a case the statute provides. Protected by the consent of the judge, a suit may be brought. In such a case, the party for whose benefit the suit is brought need not prove that his claim has been ascertained, or that he has demanded payment. And if the breach exist certain consequences follow, as provided in § 16, 17, 18. Judgment is to be entered for the penalty in all cases, § 13.

Whenever it shall appear for whose use, and that such person's claim has been ascertained, &c. certain proceedings are to be had as in § 14, 15. In other cases proceedings are to be had as in § 16, 17, 18.

Whether, therefore, in the case at bar, it was absolutely ne-

cessary or not, under the proviso in the seventh section, to allege for whose benefit the suit was brought, that allegation is, at the worst, but mere surplusage, which cannot vitiate. The case is sustained by proof of the consent of the judge. Without that permission, the allegation would be necessary, and certain things must be shown. With it the allegation of interest can do no harm. And judgment must be had for the penalty, with such subsequent proceedings as are pointed out for such a case.

This permission of the judge distinguishes this case from those of *Coffin* v. *Jones*, and *Barton J.* v. *White*. That was a material point in both those cases, as will be perceived on examination.

It is presumed, that if necessary, and the allegation of parties' names should be considered improper, the Court would give leave to amend by striking out the superfluous matter.

It was said in behalf of the defendant:—

This is an action upon a probate bond and is presented to the Court upon an agreed statement of facts.

And the question to be decided is, whether upon this statement, the law will allow the plaintiffs to maintain this action. The plaintiffs rely merely on the most stringent principles of the strictest law. They therefore cannot complain, if these legal principles forbid their recovery in this case.

In the defence of this action the defendant contends, that it cannot be maintained for several reasons.

1. The plaintiffs in interest have no legal right to bring a suit in this manner.

The action is brought as is alleged in the writ, for the benefit of the persons therein named, and not under the direction of the judge of probate for the benefit of the estate. But an action cannot be brought for the benefit of the "next of kin," or indeed any other person, without proving a demand on the administrator, before action brought; and in case of persons entitled to distributive share of personal estate of deceased persons, a decree also of distribution must first be made by the judge of probate. Rev. Stat. chap. 113, § 10,

11 and 12. And so was the law before the Revised Statutes. This action, then, being brought by the guardians for the benefit of their wards, can in no event be maintained. *Coffin, Judge*, v. *Jones*, 5 Pick. 61 ; *Barton J.* v. *White*, 21 Pick. 58.

Again — supposing this action could be maintained, would it be pretended that any execution could be issued for the plaintiffs in interest ? I apprehend not. But the whole effect would be to require the administrator to account for the amount recovered, in the final settlement of the estate, as assets. Rev. Stat. c. 113, sect. 19.

But this cannot be done, where the suit is brought for the benefit of any particular individuals. *Coffin* v. *Jones*, before cited. And no execution could issue thereon, as the property of any individual. This action must be sustained, if at all, for the benefit of the guardians, for such is the declaration, such is their petition, and such the supposed order of the court. The statute of 1821 made it necessary, in all suits brought in name of judge of probate, to indorse on the writ the name of the plaintiff or his attorney, and also the name of the person for whose particular use the suit was brought; c. 51, sect. 70. The Rev. Stat. c. 113, sect. 5, permits any person interested in any probate bond to bring a suit on it without any application to the judge of probate, and in that case the writ shall allege in whose behalf it is brought; but these provisions are not applicable to suits commenced by authority of the judge ; sect. 7. In the first case the parties interested recover for their own benefit, and in the 2d the judge recovers as trustee. This, however, it would seem, can only be done, where it is so sued for, where such is the object of the action. In the one case, the party is seeking his own benefit, and in the other the judge is protecting the estate.

I apprehend, therefore, that the language of reason as well as the books is, that the judge of probate cannot have execution as trustee for the benefit of the estate, where the suit is brought for individual benefit.

The opinion of the court was drawn up by

WHITMAN C. J.—This is an action of debt against the defendant, on a bond given by him as administrator of the estate of Horatio Smith, deceased. The action purports to be for the benefit of certain individuals, alleged to be the heirs to that estate; and no allegation is inserted, that it was instituted by the express authorization of the judge of probate. We must, therefore, regard it as having been brought under and with reference to the Rev. Stat. c. 113, § 5, 6, and 7, authorizing heirs and others to commence suits on such bonds, without special leave for the purpose from the judge of probate. Hence it is insisted, in defence, that the action cannot be maintained, without proof that there has been a decree of distribution, as provided in § 12 of the same statute. The plaintiffs in reply, insist, that they were expressly authorized to institute the suit by the judge of probate; and that in such case they are not bound to show a compliance with the requirements in § 12. And if the action had been professedly commenced, and had so appeared in the declaration, by the "express authority" of the judge of probate, as mentioned in the proviso at the conclusion of § 7 of said statute, and the proof had corresponded with the allegation, we are far from entertaining a doubt, that a compliance with the provisions of said § 12 would have been necessary to the maintainance of the action. That actions, on administrators' bonds, will lie in cases other than those depending on § 5, 6, 7, 10, 11 and 12, is entirely evident. This the proviso, before alluded to in § 7, renders undeniable. That proviso is in these words, "provided that this, and the two preceding sections, shall not be construed as applicable to suits on such bonds, when commenced by the *express authority* of the judge of probate." It is no where said in the statute, that the judge may commence such actions of his own mere motion. But the proviso shows, that they are to be commenced by his express authorization, except in the cases specified in the above named sections. That there are cases in which it may often become necessary to institute suits by the express authority of the judge of probate, is unquestionable. If an administrator

returns no inventory, or settles no account at the probate office, or refuses to appear when cited by the probate court, to settle an account, an action upon his bond should be ordered to be instituted, to recover for the benefit of all concerned in the estate, as provided in § 16, of said statute. And it is very clear that a recovery for the full value of whatever personal property of the deceased has come to his (the administrator's) hands, without any discount or allowance for charges of administration or debts paid, when an administrator, upon citation for the purpose has refused or neglected to account upon oath, as provided in § 16, must be for the benefit of the estate. No individual can be allowed so to recover for his sole benefit. That some or all of those interested in the estate may so recover for the general benefit, for the purpose of having the same administered upon as belonging to the estate, and constituting part or the whole of the general assets, provided it be done by the express authority of the judge of probate, can scarcely be questioned. It would seem that the authorization to put the bond in suit, must be of some or all of those interested; for the idea that he is, of his own mere motion, to commence the suit, upon being by himself expressly authorized so to do, is a solecism too gross to be imputed to the Legislature. If he were to commence the suit he would be a party, and answerable for costs to the defendant, if the latter should prevail; and, moreover, must be expected to make all the advances for the expenses for evidence and counsel fees in carrying on the suit. To these it was never intended that he should be subjected. The action, therefore, except in the cases contemplated in § 5, 6, and 7, and 10, 11 and 12, must be by persons, who will undertake to carry forward the suit, and be responsible for costs, in case of failure; and by the express authority of the judge of probate; and this authorization should appear in the process; otherwise it could not be known that the proceeding was not to be had under the said 5, 6, 7, 10, 11 and 12th sections of the statute which would constitute an entire different cause of action. In the latter case a specific sum would be sought to be recovered for the

benefit of the plaintiff; whereas in the former, general damages would be the object of the suit, and for the benefit of all, indiscriminately, who might be interested in the estate.

These views are believed to be consonant to those to be met with in *Robbins, judge,* v. *Hayward,* 16 Mass. R. 524; *Coffin, judge,* v. *Jones,* 5 Pick. 61, and *Barton, judge,* v. *White,* 21 *ib.* 58. It must be admitted, however, that there are decisions not easily reconciled with those. In *Coney, judge,* v. *Williams & al.* 9 Mass. R. 114, the reporter's abstract, showing his understanding of the import of that decision is, that, "where the administrator of an insolvent estate unduly neglects to settle the account of his administration, &c. an action lies on the administration bond for the benefit of a creditor, besides the remedy against the proper estate of the administrator." The late Chief Justice Mellen, in delivering the opinion of the Court, in *Dickinson, judge,* v. *Bean & al.* 2 Fairf. 50, understands that case to decide, "that the official negligence of the administrator (in case of an estate represented insolvent) to comply with the provisions of the act of 1794, § 5, by settling their accounts, within the six months prescribed, was considered as dispensing with the necessity of a demand," which *he says* was not proved in that case to have been made. And he considered the re-enactment in our State, after separation, of the same provision, which was in force when that decision was made, and eight years after it, shew an adoption of the principle of that decision. In *Barton, judge,* v. *White,* 21 Pick. 58, Mr. Chief Justice Shaw, in delivering the opinion of the Court, lays down the law to be, that a party plaintiff, in such case without dividend ascertained, and a demand of the amount awarded, cannot recover. And yet he held that the case of *Coney, judge,* v. *Williams,* was not inconsistent with his decision; and says in that case, "a judgment at common law had been recovered by the creditor against the estate, and the amount *ineffectually demanded* of the administrator, before the commencement of the action." He seems further to have understood that case as distinguishable from, and not inconsistent with the decision he was then delivering, because that

case, he says, was decided upon the ground that the plaintiff had obtained a judgment at law, and that the defendant could not set up in defence his negligence in not having settled an account, so as to enable the judge of probate to make a decree of distribution. He does not seem to have adverted to the express enactment, that, before a creditor can support such an action, he must produce the decree of distribution, and that it would be his folly to institute such an action before he was certain he could do so. Yet the case then before him was one of neglect on the part of the administrator to settle his account, the estate being represented insolvent, whereby the creditor, by the negligence of the administrator, had been prevented from placing himself in a condition to recover. And it is difficult to perceive, why such negligence should not have been equally available to the plaintiff in the one case as in the other. Evidently Mr. Chief Justice Mellen was not, in *Dickinson* v. *Bean & al.* impressed with any such distinction. That case and *Barton* v. *White*, do not seem to be distinguishable in principle from each other; yet the two distinguished Chief Justices, and their associates, seem to have come to conclusions diametrically opposite. The decision in *Dickinson, judge,* v. *Bean & al.* is considered by the Court in this State as supported decisively by that of *Coney, judge,* v. *Williams & al.*

The statute law in this State is now in substance precisely what it was when *Dickinson, judge,* against *Bean & al.* was decided. It was then comprised in two acts. It is now comprised in one; and the re-enactment took place a number of years after the decision in *Dickinson* v. *Bean & al.* and upon the principle noticed by Mr. Chief Justice Mellen, it might be argued, that the construction put upon the statutes in that case, was confirmed by the re-enactment. But the language of the Rev. Stat. c. 113, is too plain to admit of any doubt; and it certainly negatives any conclusion, that, however negligent the administrator may have been, any action can be maintained against him on his bond till the prerequisites prescribed have been complied with. In this case the distributive shares of the heirs have not been ascertained and decreed. The law at

this time as settled in Massachusetts undoubtedly is, that such an action cannot be maintained. The late decisions there are to that effect, as appears by the three cases first above cited. The statutes in this State and in that are understood, in reference to this matter, to be entirely similar.

It may be remarked, however, that in Massachusetts, till after the separation of this State from that, instead of inserting the names of those for whose benefit a suit might be brought on an administration bond, it was required that an indorsement to the same effect should be made upon the writ, as will be perceived in the case of *Coffin, judge,* v. *Jones;* but that is a difference which can in nowise affect the merits of the case.

It has been suggested by the plaintiffs in argument, that leave might be granted to amend, so as to make the action the same as if commenced professedly by the *express authority* of the judge of probate. But in effect this would introduce a new party as plaintiff, and a new and different cause of action; and make a different ground of defence applicable, as before suggested. Such an amendment could be granted only upon terms; and not without an opportunity to the adverse party to be heard upon a motion for that purpose, if at all.

Plaintiffs nonsuit.

WILLIAM H. STURTEVANT & *al. versus* HENRY TALLMAN.

Under Rev. Stat. c. 105, "any person, aggrieved by any order, sentence, decree or denial of a judge of probate, may appeal therefrom to the supreme court of probate," although he was not a party to the proceedings before the probate court.

The court of probate can only be deprived of its jurisdiction for the settlement of the accounts of an administrator by some process or course of proceeding, which would legally remove the settlement to another tribunal. And its jurisdiction remains, although the administrator had before been cited to settle his accounts, had neglected to do so, and leave had been granted to the persons interested to commence a suit upon his bond, if no suit be commenced.

Where the decree of the probate court appealed from embraces only the settlement and allowance of a second account of administration, and there is no reference to the first account, or to any item in it, unless by crediting the balance found due on settlement; the supreme court of probate cannot, on such appeal, re-examine and adjust the first account.

But the administrator may be required on the settlement of a second account to charge himself with any proper items, not contained in the first account; and he may be called upon to correct any errors found in the first account. But when this is not done, nor refused to be done in the probate court, it cannot be required to be done on the appeal.

APPEAL from a decree of the judge of probate.

The appellee, Henry Tallman, presented his second account as administrator of the estate of Horatio Smith, deceased, to the judge of probate for allowance. The judge of probate made the following decree relative thereto.

"Lincoln, ss. At a probate court holden at Wiscasset on the 18th day of May, 1846, personally appeared Henry Tallman, the administrator aforesaid, and made oath to the truth of the foregoing account, and the same having been examined is hereby allowed and accepted, due notice of the settlement of the same having been given agreeably to order of court; decreed and ordered that the balance, being $106,66, be distributed and paid as follows." Here followed the distribution of that sum among the heirs, and then the signature of the judge of probate. There was nothing in the records and no evidence to show, that any of the heirs appeared in the probate court at the time of the settlement of that account.

On the 26th day of said May, William H. Sturtevant for his wife, one of the heirs of Horatio Smith, deceased, and as guardian for others, and B. F. Tallman, as guardian for others, claimed an appeal from the decree of the judge of probate, and filed a bond, and on June 1, 1846, filed their reasons for the appeal. The first reason was: —

"Because the said Henry Tallman, having been cited to render an account of said administration, on the 18th of February, 1846, and having at said time neglected to appear and render an account, or to show cause why he should not, and leave having been granted by the judge of probate aforesaid to

bring an action on the administration bond, it was too late, and the judge erred in allowing the said Henry Tallman to render an account, and in acting thereon and allowing the same.

"Second. Because the said account and the items thereof are unjust, and ought not to have been paid by the said Henry Tallman, and ought not to be allowed, in the following particulars." Here followed a large number of objections to the allowance of items in the account for different reasons. Objection was made to the allowance of items in the first as well as in the second account.

This case was argued in writing, after the May Term, 1847, by

Fessenden, Deblois & Fessenden and *W. P. Fessenden*, for the appellants — and by

Tallman, for the appellee.

For the appellants it was said, that the first point was — that after the refusal of Henry Tallman, administrator, to render an account, having been duly and legally cited to do so by the judge of probate, and the decree, on his default, that the plaintiffs have liberty to commence an action on the bond, all further jurisdiction of the judge of probate in the premises was at an end, and therefore the account, called the second account of Henry Tallman as administrator of Horatio Smith, was *coram non judice*; and the decree of the judge was therefore simply void — void for want of jurisdiction. *Boston* v. *Boylston*, 4 Mass. R. 318; *Nelson J.* v. *Jaques*, 1 Greenl. 139; 3 Metcalf, 109; 9 Mass. R. 337.

The first account is settled wrongfully; and we say that the settlement of a final account opens the other account for the correction of any errors, the whole accounts settled, in law, making one account. We are prepared to show gross error if not fraud in the first account. *Saxton* v. *Chamberlain*, 6 Pick. 422. In the present case the charge for commissions on disbursements opens prior accounts, and omissions or wrongful charges may be corrected. *Stetson* v. *Bass*, 9 Pick. 27; *Stearns* v. *Stearns*, 1 Pick. 157; *Baylies* v. *Davis, ib.* 206;

Boynton v. *Dyer*, 18 Pick. 1; *Davis* v. *Cowdin*, 20 Pick. 510; *Longley* v. *Hall*, 11 Pick. 120; *Smith* v. *Dutton*, 16 Maine R. 308.

It was also contended, that various items in the first as well as in the second account were improperly allowed by the judge of probate.

Tallman, *pro se*, contended that the appeal should be dismissed, for the reason that there was no appearance by or in behalf of the appellants before the probate court at the time of the settlement of this account. The statute says, any person "aggrieved," may appeal, but it is apprehended that after seasonable notice, in such case, if parties neglect to attend the Court, and suffer judgment against them by default, it is too late for them to say, they are aggrieved by the decree of the Court. They do in fact, so far as they are able, assent to the decree of the Court, and "*volenti non fit injuria.*" It seems against the policy of the law, for parties to neglect and refuse to attend to the settlement of their accounts in the probate court, and then afterwards appeal to the Supreme Judicial Court of Probate. It causes unnecessary delay, increased expense and useless trouble. Such a course is improper, and ought not to be sanctioned by this Court in practice.

There was no request or petition to the judge of probate to review the former accounts. This alone furnishes a sufficient answer to the claim to re-examine the first account. But an appeal from the decision of the judge of probate as to the settlement of one account, does not open it to any other account settled at a former and different time. The cases cited for the appellants, at the farthest, go merely to show, that manifest errors, such as errors in computation, or charging the same item twice, or crediting it when it should manifestly have been charged. But the propriety of the decision of the judge in allowing or disallowing a charge in a former account cannot be reviewed. He commented on the cases cited, and replied to the objections urged against the particular items in the accounts.

The opinion of the Court was drawn up by

SHEPLEY J. — This is an appeal taken by the children and heirs at law of Horatio Smith, deceased, from a decree of the judge of probate for this county, allowing the second account of the respondent as administrator on their father's estate.

The respondent contends, that the appeal should not be sustained, because the appellants were not represented and did not make any objection to the allowance of his account before the court of probate, where it was settled after due notice had been given.

The statute, c. 105, § 25, provides, that "any person aggrieved by any order, sentence, decree or denial of a judge of probate may appeal therefrom" within a certain prescribed time. In the thirtieth section it is provided, "if any person aggrieved by any act of the judge of probate, shall from any accident, mistake, defect of notice or otherwise, without default on his part, have omitted to claim or to prosecute his appeal according to the foregoing provisions," he may apply to this Court and obtain leave to enter an appeal. There is no provision made by statute to enable this Court to allow a person aggrieved to enter an appeal, when he was prevented from appearing before the probate court by any mistake, accident, or defect of notice. If the construction of the statute now insisted upon were to be admitted, a person thus prevented from appearing before the probate court, might be without remedy.

By the twenty-ninth section it is provided, that any person beyond sea or out of the United States, having no sufficient attorney within the State, at the time of such proceeding, for which he might claim an appeal, shall have thirty days after his return or constitution of such attorney, to claim his appeal. This provision is not consistent with the proposed construction. There is nothing to restrict the operation of the twenty-fifth section to those only who have become parties to a controversy before the court of probate. The language used is essentially the same, which has for a long time regulated such appeals in the State of Massachusetts and in this State; and

its construction has not been such as to prevent any person aggrieved from claiming an appeal, although he was not a party to the proceeding before the court of probate. *Boynton* v. *Dyer*, 18 Pick. 1.

The counsel for the appellants contend, that the judge of probate had ceased to have jurisdiction of the settlement of the accounts of the respondent, as administrator of that estate, before the decree was made. If this were so, there would seem to be little occasion for an appeal. It is alleged, that he had at that time no jurisdiction, because the administrator had before been cited to settle his accounts; that he had neglected to do so; that leave had been granted to the appellants to commence a suit upon his bond, and that such a suit has since been commenced. It appears, from a decree of the probate court, made on February 18, 1846, that the respondent had been cited to appear and settle his accounts, that he had neglected to do so; and that leave was then granted to commence a suit upon his bond.

On the twenty-third day of the same month the respondent appears to have presented his second and final account. Notice was ordered upon it, and it was acted upon and the decree allowing it was made on May 18, 1846. From that decree this appeal was claimed on the twenty-sixth day of the same month. The suit upon the bond was not commenced until the twenty-eighth day of the same month. When the account was presented, acted upon and allowed by the judge of probate, there was no suit pending upon the bond of the administrator. Although the judge of probate had granted leave to commence a suit, he could not know, that one would be commenced. The court of probate could only be deprived of its jurisdiction for the settlement of the estate by some process or course of proceeding, which would legally remove the settlement to another tribunal. When such a suit had been commenced on the bond as would require, if the plaintiff prevailed, that the estate and the accounts of the administrator should be settled in a manner different from that prescribed for the probate court, the power of that court to settle the accounts accord-

ing to its course of proceeding would be suspended, because it would be in conflict with the power and proceedings of a higher tribunal. There being no such suit or proceedings then pending, there was no legal objection to the exercise of jurisdiction by the judge of probate.

The ineffectual attempt made to commence a suit on May 5, 1846, cannot affect the rights of the parties ; and these remarks have been made as if no such writ had been sued out. It does not appear, that the suit, if it could have been sustained, was of such a character as to have deprived the probate court of its jurisdiction.

The appellants claim to have the first account of the administrator, rendered and settled in the year 1836, now re-examined and adjusted.

By the statute an appeal to this Court is to be made from some order, sentence, decree, or denial, and nothing can be presented in the appellate court by such appeal, which is not embraced in such order, sentence, decree or denial. That such was the intention of the legislature is apparent from the provisions contained in sections 32 and 33. By the former "all further proceedings, in pursuance of the order, sentence, decree or denial appealed from" are suspended until a decision has been made upon the appeal. The action of the judge of probate upon matters not embraced therein is not suspended. By the latter section this Court is authorized to reverse or affirm in whole or in part, the sentence or act appealed from, and to "pass such decree thereon, as the judge of probate ought to have passed." To insist that this Court by virtue of an appeal is to act upon matters not embraced in the act or decree of the probate court appealed from, is to claim for it an original and not an appellate jurisdiction to that extent.

The decree appealed from in this case embraced only the settlement and allowance of the second account. There is in that account no reference to any item contained in the first account. The only reference made to it is made by the administrator, by charging himself with the balance against him stated in the first account settled May 16, 1836. The mere credit of

that balance did not present the items of that first account before the judge of probate, to be acted upon by him in the settlement of the second account.

The administrator might have been required by the judge of probate on the settlement of the second account, to charge himself with any proper items not contained in the first account; and he might have been called upon to correct any errors found in the first account. But no such requirements appear to have been made. No such items were therefore embraced in the decree, from which this appeal was made; and no such items can be presented in this Court on the appeal.

The items objected to in the second account may or may not be justly allowed. This may depend upon proof not now before this Court. The appeal is sustained, and any proof respecting the items objected to in the second account, may be made before an auditor or before the Court at some convenient season.

DAVIS HATCH *versus* EDMUND C. ALLEN *& al.*

To enable the Court to decide an action upon an agreed statement of facts, the statement must appear to have been made in a case legally before the Court for its decision. The parties cannot by their agreement present a case to the Court for its decision in a manner not authorized by law.

When an action comes into this Court by an appeal from a district court, if the latter court had not jurisdiction of the action, this Court can obtain none by virtue of the appeal, and the action will be dismissed.

The title to real estate cannot be considered as concerned or brought in question, in the sense intended by Rev. Stat. c. 116, § 1 and 3, when it is not put in issue by the pleadings or brief statement, and cannot be affected by the judgment.

In an action of assumpsit to recover compensation for the use of certain real estate, brought before a justice of the peace or municipal court, if the defendant pleads the general issue, and files a brief statement, in which he denies, that the plaintiff had any title to the premises, and alleges that he occupied under one who had title, such brief statement does not, under the statute, authorize the removal of the action to the district court, to be there tried and determined, without any trial or judgment by the justice of the peace or municipal court.

NOTE. — By an act of the Legislature, approved July 22, 1848, it is made the duty of the Reporter of Decisions of the Supreme Judicial Court,

Hatch *v.* Allen.

THIS was an action of assumpsit, originally brought before the municipal court of Bath. The first count in the declaration was on an account annexed to the writ, containing this item only: —

"To rent of the portion of the house formerly owned by William Pettengill, for the year 1842, set off to me on execution, $18,63." There was a second count, for money had and received; and a third, for use and occupation of the land set off to him on execution, against H. G. Allen. The defendants were Edmund C. Allen and Sarah H. Pettengill.

Before the Bath municipal court, the general issue was pleaded, and joined, and a brief statement, of which a copy follows, was filed by the defendants.

"And for brief statement the said defendants say, that in the levy and return on said execution there is no title set forth or proved in said Hatch, whereby to enable him to sustain an action of assumpsit for rent against them, and that said title is not in said Hatch; that the defendants have always, since the death of the said William Pettengill, up to and beyond the time for which said Hatch has sued them, for the recovery of the rent sued for, by him, been the tenants of the premises under said Pettengill. And, they further say, that said levy is void for uncertainty. She, said Sarah H. Pettengill, further says, that

to "make true and authentic reports of all their decisions," "*together with the points made by counsel in argument, and the authorities cited.*" This would seem to require a report of all the points made by counsel, however numerous, even if the decision of the Court should be confined to the consideration of but one, finding that to be decisive of the whole case.

In requiring the points made by counsel, and the authorities cited, to be given, it cannot be supposed, that it was intended that counsel should appear to be chargeable with the absurdity of making points wholly foreign to the case. It would, therefore, seem of necessity to follow, that such facts must be given, as may show the pertinency of the points made by counsel to the case.

It is to conform to this enactment of the Legislature, that the Reporter has, in the present case departed from the practice heretofore generally adopted by him, to limit his statements of the facts and notices of the arguments to such merely, as had some relation to the questions considered by the Court in the opinions given.

she is widow of said William Pettengill, and held the same, as tenant in dower, and so cannot be held to answer in this case.

"And thereupon the matter was removed to the district court."

While the action was pending in the district court, the parties agreed upon this statement of facts.

"This action was originally brought before the municipal court of the town of Bath, to recover rent of the defendants and came up here by appeal.

"The writ is dated July 20th, 1844. The writ has an account annexed, money count and a count for use and occupation. The writ is to be copied and made a part of the case, also the pleadings.

"Before the municipal court, the general issue was joined, and the defendants put in a brief statement claiming title in themselves, (which is to be copied) and thereupon the matter was removed to this Court. The recognizance and other papers that came up from the municipal court can be referred to, but need not be copied.

"The plaintiff claims title to the premises occupied by defendants by virtue of a set-off made on an execution issued upon a judgment recovered at the April Term, Dist. Court, Mid. Dist. 1840, in favor of the plaintiff and against one Horatio G. Allen. The execution dated May 15th, 1840. Upon which execution the right of said Horatio G. Allen to the premises in question was set off June 5th 1840, as will appear by the appraisers' and officer's returns on said execution. The execution and appraisers' and officer's returns, and all other matters appearing on the same, are to be copied and made a part of the case.

"A copy of the appointment of appraisers on the estate of William Pettengill, late of Bath, to set off to Sarah H. Pettengill, the widow of William, one third part of such estate, is to be referred to as a part of this case, but need not be copied, also the return of such appraisers, dated Nov. 8th, 1842, assigning said Sarah dower, and the acceptance of the same by the

judge of probate on the 27th of Feb. 1843, may be referred to as a part of this case, but need not be copied. The commission to the appraisers was issued by the judge of probate for Lincoln county on the 17th of August, 1842.

"It is also agreed between the parties that William Pettengill died intestate, before May, 1840; that Horatio G. Allen, the judgment debtor in the execution before referred to, married before the death of said William, one of his daughters, who is still living, and said Allen is still living; that the real estate described in the return on said execution, *Hatch* v. *H. G. Allen*, was a part of the estate of William Pettengill, and that he was seized and possessed of the same in *fee simple*, at the time of his decease, and was in the use and occupation of the same.

"That the defendants occupied said premises, set off as per the return in said execution, as described in the account annexed, and declarations in said writ, and that the sum charged in said account, and sued for in said writ, is correct, if the plaintiff is entitled to recover any thing by virtue of any title he may have derived in the premises, by virtue of the levy aforesaid; the previous rent having been paid up by the defendants to the plaintiff, up to the time charged in said accounts, but not including the rent sued for in this action.

"It is also admitted that there were other children at the time of the decease of William Pettengill, besides the wife of H. G. Allen, and that the right of said H. G. Allen, as husband to his wife, daughter of said William, was set off to Hatch, the plaintiff in this suit; and that this suit is brought to recover a fair compensation for the use and occupation by the defendants of that portion of the premises said to have been set off as aforesaid to the plaintiff, on the execution against said Horatio G. Allen, and that Sarah H. Pettengill, one of the defendants, is the widow of William Pettengill, deceased, and she is still living.

"If the Court should be of opinion that the plaintiff is entitled to recover upon this statement of facts, then the defendant is to be defaulted, if otherwise, then the plaintiff is to be nonsuit.

"Sawyer and Sewall, for plaintiff,

"Nathaniel Groton, for defendants."

Copy of the appraisers' and officer's return, in making the levy, omitting the description of the premises.

"Lincoln, ss. — June 5, 1840. Personally appeared John Smith, John Staniford and Jeremiah Ellsworth, and made oath that they would faithfully and impartially appraise such real estate as should be shown them to satisfy this execution, together with all fees. Before me,

"Henry Tallman, Justice of the Peace."

"Lincoln, ss. — June 5, 1840. We the subscribers, freeholders of the county of Lincoln, having been duly chosen and sworn, faithfully and impartially to appraise such real estate of the within named Horatio G. Allen, jr. as should be shown to us by the within named Davis Hatch, the creditor, to satisfy the within execution, with all fees, and having viewed the following real estate, viz., a lot of land and the buildings thereon, situate in Bath, in said county, which has been shown to us by the within named Davis Hatch, as the real estate of the said Horatio G. Allen, jr. in fee simple, viz. — in right of his wife who is an heir at law of the estate of William Pettengill of said Bath, deceased, and as said estate cannot be divided and set out by metes and bounds to satisfy the within execution and fees, we do appraise the rents thereof, at the rate of eighteen dollars and sixty-three cents per annum, for the purpose of extending the said execution thereon.

"Dated at Bath, this the fifth day of June, A. D. 1840.

"John Smith,
"John Staniford,
"J. Ellsworth."

"Lincoln, ss. — June 5, 1840. Received seizin of the aforesaid rents of the said real estate, by the hands of Reuben Small, deputy sheriff. "Davis Hatch."

"Lincoln, ss. — June 5, 1840. By virtue of this execution I have caused to be chosen three disinterested and discreet freeholders of said county of Lincoln, one of whom, to wit, John Staniford, by the within named Davis Hatch, the creditor, another, to wit, Jeremiah Ellsworth was chosen by myself, and the third, John Smith, was chosen by the within named

Horatio G. Allen, jr. the debtor, who was duly notified by me, and the said freeholders, having been sworn faithfully and impartially to appraise such real estate of said debtor as should be shown to them to satisfy this execution with all fees. And the above described real estate having been so shown to them by the said creditor, and it appearing that the same could not be divided, and set out by metes and bounds to satisfy the said execution, I caused the said freeholders to appraise the rents thereof, which were accordingly appraised by them at the rate of eighteen dollars and sixty-three cents per annum. And I have this day levied the within execution on the same rents, and delivered seizin thereof to the said creditor, to hold and enjoy the said rents henceforth, to him, the said creditor, and his assigns, according to the statute in this case made and provided, until the said execution, amounting to the sum of one hundred and twelve dollars and thirty-eight cents, and the fees and charges, amounting to the sum of ———, and all other legal charges, shall be thereof fully levied and satisfied. And having received the charges and fees of the levy aforesaid, of the said creditor, I return this execution fully satisfied.

"Fees. $12,96. "R. Small, Dept. Sheriff."

The case came from the district court to this Court by appeal.

This case was argued in writing as follows.

B. F. Sawyer, for the plaintiff.

This action is brought to recover rent for certain premises occupied by defendants in Bath, in 1842. The title to which the plaintiff acquired, by virtue of a set-off on a certain execution against H. G. Allen.

At the trial before the municipal court in Bath, the general issue was pleaded and joined, and the defendants put in a brief statement, alleging title in themselves, though not very accurately drawn, all defects in same have been waived by the agreed statement of facts, admitting such plea to have been properly put in, and to be sufficient, so that the Court might not be troubled on that point.

The case resolves itself into two single propositions. — The defendants admit the occupancy of the premises, by them, at the time of the set-off, of H. G. Allen's interest to the plaintiff, in June, 1840, and during the time sued for in said writ. That the sum charged in the account annexed to said writ, is correct if the plaintiff is entitled to recover any thing by virtue of the set-off and levy aforesaid; the defendants contending that the levy is void for uncertainty, and so defective that no title passed to the plaintiff by virtue of said levy.

The plaintiff says, that said levy is not void, but that H. G. Allen's interest did pass by virtue of said levy. The whole rents and profits of the whole estate, described in the appraisers' return were not set off to the plaintiff, only a portion, to wit, the rents and profits of that portion of the estate in which H. G. Allen had an interest, in right of his wife. But, whether it did or did not pass, it is wholly immaterial, for it is too late for the defendants to contest plaintiff's title; they have admitted title by occupying said premises as tenants under the plaintiff. The papers in the case clearly show the relation of landlord and tenant.

It is admitted that the defendants occupied the premises at the time of the levy in 1840, and ever since, and that they have paid the rent of same, to the plaintiff for the years of 1840, 1841. We therefore say, that the case presents this question for the consideration of the Court, to wit, can the defendants, who by the payment of rent for about two years previous to the accumulation of the rent now sued for, have acknowledged the possession, title and right of the plaintiff in the premises, and themselves to be the tenants of the plaintiff, standing by their own acts, in the relation of tenants at will of the plaintiff, now be permitted, when called upon by the plaintiff to pay the rent of 1842, to turn round, and contest his title, without showing or pretending to show, the termination of such relation created by their own acts; we apprehend that such is not the law, and cite, *Bonny* v. *Chapman*, 5 Pick. 124; *Codman* v. *Jenkins*, 14 Mass. R. 93; *Bigelow* v. *Jones*, 10 Pick. 161.

Whatever might have been the rights of the defendants before the payment of rents, by reason of any defect or uncertainty in the levy aforesaid, (none appearing, as we say,) that the payment of rent for the years 1840 and 1841, will operate as a waiver of such defence in the present action, for by their voluntary act they are now estopped from denying or contesting the right and title of the plaintiff, and this action is therefore properly brought. The defendants were conusant of all the facts, in reference to the origin of plaintiff's title, and being so possessed of all the facts, paid the rent that had previously accrued during the years of 1840 and 1841, for the defendants admit, by the agreed statement of facts in the case, the right of the plaintiff to recover, and that the sum charged is correct, provided the plaintiff acquired any title, by virtue of said set-off. The account shows the charge to be for rent of 1842, and the defendants cannot allege that the plaintiff, by their refusal to pay further rent, was disseized. *Sacket* v. *Wheaton*, 17 Pick. 103; *Boston* v. *Binney*, 11 Pick. 1.

Groton, for the defendants.

This is an action of assumpsit to recover rent of the defendants, for occupying that portion of the house formerly owned by William Pettengill set off on execution.

Now can Hatch recover on the state of facts and matters inferable from the case? It is agreed, that the whole estate belonged to William Pettengill, that he died intestate, left Sarah Pettengill his widow and several children, who were his heirs; that the plaintiff, after the death of William Pettengill, brought an action against H. G. Allen, who married one of the daughters of William Pettengill, and attached the right said Allen had in said Pettengill's estate, by descent to Allen's wife. The case also shows, that Sarah Pettengill, one of the defendants, was lawfully in possession of the premises as tenant in dower, and so had a right to occupy, as her dower therein, set out afterwards in same premises. How did the estate stand, when Hatch levied his execution, and what title did he obtain by the levy? Supposing the levy good, it is not pretended,

Hatch obtained a greater or different right to the premises of William Pettengill, than had the daughter, the wife of H. G. Allen, Hatch's execution debtor; then Hatch, by the levy, June 5, 1840, became a tenant in common of William Pettengill's real estate, with the widow, Sarah Pettengill, and the other children of William Pettengill; this was soon after the death of William Pettengill, and as the levy of the execution shows. Could H. G. Allen and his wife have maintained an action against these defendants for rent, had there been no levy or supposed title in Hatch, and the estate remained undivided and in common with the widow, Sarah Pettengill, and the other heirs, if not needed to pay the debts of intestate? It is clear and settled beyond question, that Allen and his wife, had the estate remained in them, could not have sustained an action for rent against Sarah Pettengill and E. C. Allen; and if so, neither can Hatch, who cannot have a better or different title, than could Sarah Allen and her husband, H. G. Allen, from whom Hatch derives what title he has to the premises. As the question of title is here contested by the defendants, as by brief statement will appear, this action cannot be maintained. *Miller* v. *Miller*, 7 Pick. 133; and this case admitting the common tenancy. Again it is urged, that the defendants had previously paid rent. This is immaterial, as they might have so done, through a mistake of their rights or to quiet Hatch; at any event, it is sufficient in this case, that no attornment or direct promise on the part of defendants was made to Hatch. The second main objection, and fatal to the plaintiff's recovery in this action is, that the plaintiff has derived no title to the premises for the occupancy of which this action is brought. And first. The appraisers of the estate of H. G. Allen and wife, have, by their return, viewed the whole estate and that of all the heirs and the widow of William Pettengill, the ancestor; they further certify "that the same cannot be divided" for the reason that it was a common estate; they then appraise "the rents thereof," that is, the whole estate, "at $18,63, per annum, for the purpose of extending Hatch's execution thereon." This is the exact sum demanded in the plaintiff's writ, so that

this action is brought to recover the whole of the annual income, that is, the right of the widow's dower and all the income belonging to the other heirs. Now let us take a view of the levy of the officer, which is made part of the case, and creates the plaintiff's title (if any) and his right to recover in this action. The return shows, that the same, as appraised, was an estate that could not be divided and set out by metes and bounds, and which is an estate in common. The officer then returns, that he caused the freeholders to appraise the rents and profits thereof, "which were accordingly appraised by them at the rate of eighteen dollars $\frac{63}{100}$ per annum. And I have this day levied the within execution on the same rents, and have delivered seizin thereof to the said creditor, to hold and enjoy said rents henceforth to the said creditor according to the statute in this case made and provided, until the said execution, amounting to the sum of one hundred and twelve dollars, and the fees and charges amounting to the sum of ———, and all other legal charges shall be thereof fully levied and satisfied, &c." Now this return is void for three reasons.

First. The estate of Horatio G. Allen and wife is not levied on, but the whole estate.

Second. It is void because at the time of the levy there were no rents of said estate, and the acknowledgment on the part of the plaintiff, on the 5th of June, 1840, that he had received seizin of the aforesaid rents of the said real estate, that is, the whole estate by the hands of Reuben Small, the officer, is impossible. Now, this shows that there was no entry by Hatch on the premises, or attornment by the defend ants, and that there were no rents of said real estate in existence, at that time, so that Hatch received no livery or legal seizin of said estate, to render his levy effectual, or enable him to sustain this action, and so took nothing by his levy. The levy is void, for uncertainty, and not on the estate of Allen and wife. So Hatch had no title or right to any part of Wm. Pettengill's estate. If he had, the case shows he was a tenant in common with the widow and heirs of Wm. Pettengill, and

so cannot maintain an action of assumpsit on an implied legal promise to pay, on the part of the defendants.

To the latter point I refer to 2d of Pick. *Cutting and wife* v. *Rockwood*, page 443. It seems unnecessary to urge the argument further.

The opinion of the Court was drawn up by

SHEPLEY J. — This is an action of assumpsit brought before the municipal court for the town of Bath, to recover compensation for the use and occupation of certain premises described. The general issue was pleaded and joined. The defendants filed a brief statement, in which they denied, that the plaintiff had any title to the premises, and alleged that they were the tenants of another person deceased, and that one of the defendants, being the widow of that deceased person, had occupied the same as tenant in dower. The case was removed to the district court, without any trial or judgment, because it was considered, that the title to real estate was brought in question.

In the district court the counsel agreed upon a statement of facts. It is now contended, that any previous irregularities or defects in these proceedings must be considered as thereby waived or cured.

To enable the Court to decide upon it, the agreed statement must appear to have been made in a case legally before the Court for its decision. The parties cannot, by their agreement, present a case to the Court for its decision in a manner not authorized by law.

It therefore becomes necessary to inquire, whether this case has come into this Court legally, and according to the provisions of the statutes regulating the jurisdictions of our legal tribunals. It is presented in this Court by an appeal from a judgment of the district court; but if that court had not cognizance of the action, this Court can obtain none by virtue of that appeal.

The statute, c. 116, § 1, gives the exclusive jurisdiction to justices of the peace of all civil actions, "wherein the debt or damages demanded do not exceed twenty dollars; excepting

real actions, actions of trespass on real estate, actions for the disturbance of a right of way or any other easement, and all other actions, where the title to real estate according to the pleadings or the brief statement filed in the case by either party, may be in question." The last clause only can have any application to this and cases of the like kind. Provision is made in the third section for the removal of the actions excepted by that clause, and they are described as actions, in which "the title to real estate is concerned or brought in question." The municipal judge had in this case, the jurisdiction of a justice of the peace.

If the true construction of the statute be such as to allow all civil actions legally commenced before a justice of the peace to be removed without any trial, in which the title to real estate may be brought in question only in a collateral manner, it may include many actions, which, according to the former statute provisions, could not have been removed. In an action of trespass, for an assault and battery, the defendant, by a brief statement, may allege that it was committed in defence of his own freehold estate. In an action of trespass *quare clausum,* the defendant may in like manner deny the title and possession of the plaintiff, without alleging any title to be in himself or any other person. In actions of trespass, or of trover, or of replevin, the title to personal property may depend upon the title to real estate. In all actions brought to recover compensation for the use of real estate, the defendant by a brief statement may deny, that the plaintiff has any title without alleging the title to be in any other person. In all such cases the title is introduced in a collateral manner, and is used only as testimony to prove or disprove the issue. It is not put in issue by the parties. There can be no direct finding upon it. It cannot be affected by the judgment. Another and different matter is put in issue, and the judgment can only be upon it.

In the present case the only matter put in issue, is the right of the plaintiff to recover compensation for the use of the estate. That alone can be decided. He may or may not be entitled to recover, whether he have or have not any legal title to

the premises, for the use of which the compensation is claimed. The defence proposed to be presented by the brief statement might as well have been presented without it under the general issue. The effect of the brief statement was only to indicate the testimony intended to be introduced, and the defence intended to be relied upon. The title to real estate cannot be considered as concerned or brought in question in the sense intended by the statute, when it is not put in issue by the pleadings or brief statement, and cannot be affected by the judgment.

Action dismissed.

MOSES CALL *versus* EZEKIEL W. BARKER *& al.*

In a suit upon a poor debtor's bond, since the stat. 1842, c. 31, was in force, if the condition has not been performed, the damages are to be assessed by the Court, and not by the jury.

If the debtor, on his examination, discloses that he has a note against another, and adds, — "it is, however, of little or no value, and I hereby offer to assign the same to the creditor, if he deems it to be of any value," the creditor is under no obligations to accept the note on those terms. The debtor is not made the judge of its value; others are to be selected or appointed to determine it according to the provisions of the statute.

If there be no agreement between the creditor and the debtor to have the value of a demand, disclosed by the debtor, applied in discharge of the debt, the demand should be disposed of according to the provisions of the stat. c. 148, § 29.

If the creditor, or his attorney, does not lead the debtor or the justices into any illegal course of proceeding, but merely sits in silence, and allows them to proceed in their own course, the rights of the creditor cannot be considered as thereby waived or forfeited.

The justices are not authorized by the statute, c. 148, § 31, to make out a certificate of discharge of the debtor, until the property disclosed by him, being choses in action, has been disposed of or secured, as provided in the two preceding sections. And if the oath be administered without such disposal, it can furnish no defence; and the plaintiff is entitled to have his damages assessed according to the provisions of stat. c. 148, § 39.

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

Debt on a poor debtor's bond. It was admitted at the trial, that Barker, the debtor, duly cited the creditor before two justices of the peace and quorum, before whom he made a disclosure in writing; and that the oath prescribed in the statute was administered to the debtor by the justices.

The disclosure of the debtor was introduced in evidence by the plaintiff, in which the sixth interrogatory and the answer thereto were as follows: —

"Please state what demands of any nature, notes or accounts, you now have against any person, or in which you have any interest?

"*Answer.* I know of none, except a note against Daniel L. Pickard of about $30, the same being now in an attorney's hands for collection in Boston. It is however of little or no value, and I hereby offer to assign the same to the creditor, if he deems it to be of any value."

The defendant called witnesses to prove, that the note was in their opinion worthless. To this the plaintiff objected. The plaintiff proved an assignment of the note afterwards to another person.

The plaintiff's counsel requested the Judge to instruct the jury, that the justices were not authorized to administer the oath until the demand against Pickard had been assigned, or until the debtor had chosen an appraiser to ascertain the value of the demand disclosed. And further, that the oath was illegally taken and wholly inoperative.

The counsel for the defendants claimed to have the damages assessed by a jury under Rev. Stat. c. 115, § 78.

It was admitted that the counsel for the creditor was present at the examination and disclosure, but it did not appear that he intimated that he considered said note of any value, or that he had any desire that it should be assigned to the creditor; nor did it appear, that there was any objection made to the administering of the oath, or "that there was any disagreement between the debtor and creditor, as to the value of the note, or as to its application," although it did appear by the excep-

tions, that testimony was introduced on each side, in relation to its value, or no value.

"The Judge ruled, that the condition of the bond was broken, and submitted the question of damages to the jury."

The jury returned a verdict, that the bond declared upon was the deed of the defendants, and that the condition thereof was broken, but they further found, that the plaintiff sustained no damage by means of said breach.

The plaintiff filed exceptions to the rulings and proceedings.

The case was agreed to be argued in writing, at the May Term, 1847, and arguments were afterwards furnished to the Court.

W. Hubbard, for the plaintiff, contended, that inasmuch as the court below has decided, there has been a breach of the condition of the bond, and as this decision was not excepted against by the defendants, the non-performance of the condition of the bond is not an open question on the present bill of exceptions. But if the opinion of the Court should otherwise incline, the plaintiff insists, that the case at bar is identical with that of *Harding* v. *Butler*, 21 Maine R. 193; or, if distinguished from that case by any material circumstance, it is only so, by the offer of the debtor to assign the demand disclosed. Is that a distinction? Is the case varied by such an offer?

To entitle the debtor's proposal to the merit of an *offer* it should have been so, absolutely, in its terms, and without any condition or qualification whatever. This is not so. The debtor hereby offers to assign the demand disclosed to the creditor, *if he deems it to be of any value.* A creditor placed in such a position is under no obligation to "intimate" his opinion of the value of any property disclosed. He may, if he elect so to do, remain silent, and by so doing, his rights will be neither compromitted, nor, in the least degree, impaired. Nay, he may be forced to silence, by the fact, that he never before has heard of the person against whom the disclosed demand may be, and consequently knows nothing of his property or ability. Suppose the debtor disclose notes purporting to be the issue of a bank of some distant State, or some corpora-

tion like the old Mississippi Shipping Company, of the genuineness of which the creditor may well doubt, and of the solvency of the company, be entirely ignorant, how can the creditor, without information, form an opinion of the value of such property? It may be worth, cent. per cent. and even a premium; it may be of the least nominal value. The statute has prescribed the mode, in which the value is to be ascertained. It nowhere makes it the duty of the creditor to perform the appraisers' duty; or to counsel them in making their appraisement. The very reason of the law, allowing the creditor thirty days, to elect to receive the property, at the appraised value, is, to give him an opportunity to inform himself of the correctness of the appraisers' estimate.

The question is simply this: — is *offering* to do any act which the law positively requires to be performed, *doing it?* It cannot be denied, if the offer to assign to the creditor had not been added to the debtor's disclosure of the demand, that the defendants now "must be regarded in the same position as if he [the debtor] had not attempted to take the oath." Such is the concluding remark of this Court, in *Harding* v. *Butler*, before cited. The appraisal or assignment of the demand is of consequence, an indispensable prerequisite to the taking of the oath, so that it will be legal and operative. And is an essential and an indispensable act performed *by an offer?* and that a conditional offer? But suppose the debtor in this case had disclosed no demand, but had merely offered in his disclosure to take the oath *if the creditor deemed it to be of any advantage to him*, would it aught avail the defendant to come into Court and say, true, the debtor did not take the oath, but he offered to take it, if the creditor "desired it"; but the creditor was perfectly mute; and "never even intimated that he had any desire" he should do so, "or that he deemed it to be of any value" or advantage to him that the debtor should take the oath? If the debtor could, *by an offer*, do an act indispensable to the legally doing of another act, why could he not, as effectually perform the second act, by a like offer? If there be a distinction, in what consists the difference?

But again: suppose the debtor had done all he offered to do, (without his proviso) and had actually made and tendered an assignment of the demand to the creditor, would even that avail the defendants any thing? The requirements of the statute had not then been complied with, unless there had been an agreement between the debtor and the creditor that the same should be applied in discharge of his debt in whole or in part, and it is not pretended, that there was any such agreement. The language of the statute is plain and express. Rev. Stat. c. 148, § 29.

To what damages is plaintiff entitled? — The damages should have been assessed *by the Court*, pursuant to § 39, c. 148. And as the question was submitted to the jury, the instructions requested by the plaintiff should have been given. *Harding* v. *Butler*, before cited.

The defendants were not entitled to the benefit of § 78, c. 115. This has been settled in the case of *Barnard* v. *Bryant*, 21 Maine R. 208; in which case the Court decide that it was not the intention of the legislature, to render nugatory the provision of § 39, c. 148.

H. Ingalls, for the defendants.

The principal defendant has performed one of the conditions named in the bond. Within six months from the date of the same, the debtor had legally taken the oath prescribed in the Rev. Stat. c. 148, § 28. This appears by the bill of exceptions, which says, "the debtor *duly* cited the creditor," &c. The debtor, prior to a breach of any of the conditions of the bond, had done every thing, which by law he was bound to perform. The plaintiff alleges, that a note was disclosed in the examination of the debtor, which was not assigned to the creditor, and, therefore, that there was a breach of the condition of the bond. It is true the debtor disclosed a note, but he swears that he considered it of "little or no value," and he offered to assign it to the creditor, if he considered it of any value. There is no intimation that the creditor, who was present by his attorney at the examination, considered the note of any value, or had any desire that the same should be assigned

to him. A jury have passed upon it, and have found it worthless. There is not a particle of evidence in the case to show that this note had any value whatever, but on the contrary, the case finds that it was worthless. This note, having no value, the debtor was not bound to assign. It was not property, and he was no more bound to assign it, than he was bound to assign a thousand other worthless articles, which might be enumerated as in the possession, or under the control of every man. It was a piece of worthless paper, so regarded by the debtor, and by the creditor, it is fair to be presumed, and by the jury. Is a poor debtor bound to assign an account, barred by the statute of limitations upon which payment has been refused, or an account of six and a quarter cents against a worthless individual? Is he obliged to make over or disclose an umbrella or a pocket book? Shall the sureties on a bond be obliged to pay the whole debt because the debtor does not assign a worthless piece of paper, whether written upon or otherwise? "*De minimis lex non curat.*"

But if the creditor, notwithstanding its worthlessness, had a right to have the note assigned, still he might waive that right. From the case, it is evident the creditor did waive such right. The debtor offered to assign the note, if the creditor considered it of any value. There was no intimation on the part of the creditor, that he considered it of any value, or that he had any desire to have the same assigned or appraised, nor did he object to the administering of the oath to the debtor, though present by his attorney, at the examination. The defendants contend that the note being worthless, and he having made the offer of it to the creditor without any consideration, and the offer not being accepted, and there being no objection to his taking the oath, that the creditor waived any right he might have had to have the note assigned, and that in taking the oath, he, the debtor, did all he was bound by law to do. It is now too late for the creditor to object to the legality of the oath. It was his duty to object to the granting of the certificate by the justices till the note had "been duly secured." Rev. Stat. c. 148, § 31. The objection should have been made

to the justices, and failing to make known his objection to them, and thereby inducing the debtor to believe and suppose that the creditor would not accept the note, though freely offered, he cannot now be allowed to come in and spring a trap upon the debtor and oblige his sureties to pay the debt.

It is not necessary to choose appraisers, only in case "the creditor and debtor cannot agree to apply" "the demands disclosed" "in part or in full discharge of the debt." Here there was no disagreement between the creditor and debtor. The debtor was perfectly willing to assign the note without any consideration whatever, and the creditor had only to intimate that he wished for the note, and it would have been made over to him.

But if the above views should be adjudged incorrect by the Court, still the case was rightly put to the jury, and the rulings of the Judge in that particular were proper. The case finds that "prior to a breach of the conditions of the same bond, the principal in such bond" (the defendant) "had been allowed" "by two justices of the peace and quorum" "to take, and had taken, before such justices, the poor debtor's oath, after notice of the intentions of such debtor to disclose the state of his affairs and take such oath, issued by a justice of the peace upon the application," "signed by the debtor himself and served upon the creditor named in the bond," in which case the defendant has "a right to have such action" (an action upon the bond) "tried by a jury, who shall find and assess the damages, if any, the plaintiff has sustained." Rev. Stat. c. 115, § 78. This case is within the letter and spirit of the statute, and is one of those cases of involuntary error or mistake, (if error or mistake there be) for which the legislature intended to furnish a remedy. It is distinguished from the case of *Harding* v. *Butler*, cited by the plaintiffs, by the very material circumstance, that in the latter case there was no claim or demand to have the damages assessed by a jury. The question at issue, in this case, in *Harding* v. *Butler*, was not raised at all. It was not the duty of the Court to order a jury unless one was demanded by the defendant. Besides, in the latter

case, it is to be presumed, nothing appearing to the contrary, that the notes were of full value, and they were probably greater in amount than the debt sued for, and, if so, a jury would have assessed precisely the same damages as were given on default. If there has been any failure to fulfil the condition of the bond, it was an involuntary omission, with no intention of depriving the creditor of any advantage, or of saving any thing to the debtor. The debtor considered the note of no value and had no wish to retain it.

No other act, or omission, or informality is complained of except the non-assignment of the note. The statute before referred to, chap. 115, § 78, affords relief in case the debtor has been allowed to take the oath upon an illegal citation. *Neil* v. *Ford*, 21 Maine R. 440. Also in case where the oath would have been legal if the justices had been both of the quorum, instead of *quorum unus*. *Daggett* v. *Bartlett & al.* 22 Maine R. 227 ; *Rider* v. *Thompson*, 23 *ib.* 244. *A fortiori*, relief would be afforded in this case, coming equally within the letter of the statute, when all the proceedings were regular and valid, except the non-assignment of a note, which the case finds to be utterly worthless. But even if it had been valuable, still it was for a jury to ascertain its value.

The opinion of the Court was delivered at the May Term, 1848, as drawn up by

Shepley J. — This is another of those numerous suits upon bonds made by poor debtors to procure their release from an arrest on execution. There appears in many of the cases a strange propensity to neglect or disregard the plainest provisions of the statute.

It appears by the bill of exceptions in this case, that the Court correctly considered, that the defendants had failed to prove a performance of the conditions. Yet the Court permitted them to introduce proof and to have the damages assessed by a jury. This, it would seem, must have been done inadvertently, and without noticing, that the statute, c. 115, § 78, had been amended by the act passed on March 18, 1842, c.

31, § 9. That amendment was noticed by this Court in the case of *Burbank* v. *Berry*, 22 Maine R. 483; and it was determined that it conferred upon the Court again the power to assess the damages, upon the forfeiture of such a bond. This was again repeated in the case of *Fales* v. *Dow*, 24, Maine R. 211. The whole testimony introduced respecting the value of the note, will thereby be excluded as having been incorrectly received.

The creditor was under no obligation to accept the promissory note disclosed upon the terms offered in the disclosure. They would have imposed upon him obligations differing from those imposed by the statute, on acceptance of the note under its provisions. By its provisions he would have become on the acceptance of it, the purchaser for a sum certain. By accepting it, under the offer made, he would not, but must have accounted for the amount collected, although the collection might have occasioned trouble and expense. Taking under the provisions of the statute as a purchaser, he might have compromised and discharged the debt upon payment of a part. Had he accepted it under the offer made in the disclosure, he could not have done so safely without the consent of the person, from whom he had received it.

The disclosure does not shew, that the note was not of any value. The debtor is not made the judge of its value; others are to be selected or appointed to determine it according to the provisions of the statute.

There is no proof of any agreement made between the creditor and the debtor, to have the value of the note applied in discharge of the debt, nor of any appraisement of it. It should have been disposed of according to the provisions of the statute, c. 148, § 29.

If the creditor or his attorney does not lead the debtor or the justices into any illegal course of proceeding, but merely sits in silence and allows them to pursue their own course, the rights of the creditor cannot be considered as thereby waived or forfeited.

The justices are not authorized by the statute, c. 148, § 31, to make out a certificate for the discharge of the debtor, until the property disclosed by him has been disposed of or secured as provided in the two preceding sections. The plaintiff appears to be entitled to prevail and to have his damages assessed according to the provisions of c. 148, § 39. But this Court can now only sustain the exceptions and grant a new trial.

Exceptions sustained.

SAMUEL HUFF *versus* SALATHIEL NICKERSON.

If a conveyance of an interest in land be made in the common form of a quitclaim deed, containing this stipulation, —"provided said grantee shall pay said grantor or his assigns, twenty-two dollars annually from this date on demand"— until the happening of a certain event; and the grantee holds under the deed, but fails to make the annual payments when demanded; the grantor may sustain an action of assumpsit against the grantee, to recover the money.

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

"Lincoln, ss. District Court, Middle District, Feb. Term, 1847.

"This is an action of assumpsit on an account annexed to the writ, which account was for "*rent due*" to the plaintiff, $72,09, also a count for use and occupation. The writ is dated, April 6, 1845.

"One William Cunningham occupied the land, being the same on which the defendant lives, in Belfast, in the county of Waldo, for more than 20 years, and until the time of his death in July, 1831. Twelve or fourteen years before his death a marriage was solemnized between said Cunningham and Elizabeth Huff, who lived together as man and wife, till his death; and she continued to reside in the house on the premises, for more than a year after. After said marriage and before the death of said Cunningham, said William gave the land to his son Benjamin, who agreed to maintain him, and who, after his father's death, sold the same to this defendant.

"Said Elizabeth Cunningham, the widow, by her deed of release and quitclaim, of July 18, 1832, conveyed to the plaintiff, her son by a former husband, "all her right, title and interest in and to all the lands, tenements, and hereditaments which were belonging to the said William Cunningham, my late husband, at any time during the coverture between him and me, the said Elizabeth, situated in Belfast or elsewhere, and also all manner of action or actions, writ or writs of dower whatever, so that neither I, the said Elizabeth, nor any other person for me, or in my name, or writ of action of dower, or any right or title of dower of or in the said lands, tenements and hereditaments, or any part thereof, at any time hereafter shall or may have, claim or prosecute against the said Samuel Huff, his heirs or assigns.

"It is further agreed, that the plaintiff could prove by parol evidence, (the defendant protesting against its admissibility,) and the same if legally admissible, is to be regarded as a part of the statement of facts agreed upon, for the purpose of this trial, that on the 17th Sept. 1832, at the house on the premises, in which the widow was then living, a trade was made between the plaintiff and defendant, concerning said Huff's interest in the land in question. The defendant said he did not wish the dower set off, but preferred to pay a yearly price while the widow should live, which course being agreed to, the defendant agreed to pay the plaintiff $22, a year, during the widow's lifetime, and the plaintiff then gave a deed in the form of a release and quitclaim, with a condition, bearing date, Sept. 17, 1832, purporting to convey "all his right, title and interest in and to a parcel of land situate in Belfast aforesaid, and being lands formerly possessed by Major William Cunningham, of said Belfast, deceased, and being all lands now claimed by said Nickerson under said William Cunningham or said William Cunningham's assigns. *Provided*, said Nickerson shall pay said Huff or his assigns, twenty-two dollars annually, from this date, on demand by said Huff or his assigns at said Nickerson's dwellinghouse in said Belfast. Said Nickerson is to pay said twenty-two dollars annually as aforesaid, during the

natural life of Elizabeth Cunningham, relict of said William Cunningham.

"The above mentioned deed was executed and delivered by the plaintiff to the defendant at the house on the premises. After delivering the deed, plaintiff asked of defendant some writing for his $22 annually. Defendant said it was unnecessary, and then called witnesses, that he would pay said $22 a year. That it was for rent of the same land; that plaintiff in the conversation claimed nothing in the land but his mother's right of dower; that the defendant assented to that claim and acknowledged the right of dower; and that no other right or title in Huff was talked of.

"The witnesses to the agreement, as before mentioned, were called on after the giving of the deed, but at the same interview. The acknowledgment was taken afterwards at a store.

"In the spring of 1839, the defendant inquired about the widow's health; said he wished he had bought the right of dower outright, instead of paying an annual sum during her life, instead of paying for the use so long by the year; and that he had not expected her to live so long.

"In the early part of the year 1844, the plaintiff went to the house on said premises, the defendant then living in said house, and demanded of the defendant the rent due; plaintiff asked defendant if he denied paying it, who replied that he did not; defendant wanted plaintiff to make him an offer of a sum outright for the dower and what was then due. Defendant asked plaintiff what he would take for what was then due and what was to come and have no more trouble. The demand was for three years rent which plaintiff claimed to be the amount due. When defendant said he did not deny paying it, as above stated, he added that he had paid enough, and then inquired what the plaintiff would take for what was due and what was to come.

"The payment for 1840, of $22, was made at the end of that year; the parties then called it "rent."

"The rent of a third of said premises was worth for 1841, 1842 and 1843, $30 a year.

"Upon the foregoing statement of facts and just and legal inferences from the same, the parties agree, that if the plaintiff be entitled to recover, the defendant is to be defaulted and judgment rendered for such sum as the Court shall adjudge to be due; otherwise plaintiff is to become nonsuit, reserving the right of appeal.

"The prevailing party to be entitled to costs."

Ruggles and *Ingalls*, for the plaintiff, said that the objection to the plaintiff's recovery was purely technical, going only to the form of the action, and not to the merits. And the Court will sustain the action, if it can be done without doing violence to settled principles of law.

The defendant occupied the thirds by permission and consent of the plaintiff, and the twenty-two dollars annually may properly be called rent. The use was secured to the defendant by a writing in the form of a release, and this release or grant may be construed to mean any species of contract or conveyance, which will best effectuate the intention of the parties. *Marshall* v. *Field*, 6 Mass. R. 24; *Pray* v. *Pierce*, 7 Mass. R. 381; *Litchfield* v. *Cudworth*, 15 Pick. 23.

In the construction of a deed the Court will take into consideration the circumstances attending the transaction, and the state of the thing granted at the time, to ascertain the intent of the parties. *Adams* v. *Frothingham*, 3 Mass. R. 352. A sale on condition to pay for use is a lease. 22 Pick. 535.

The consideration named in the deed is but twenty-five dollars, and the release may be regarded as a sale coupled with a contract or condition to pay twenty-two dollars annually, and if not paid the release to be void. The further consideration may be shown by parol, and that further consideration may be an agreement to pay the stipulated rent, and the defendant shall be bound. Shep. Touch. 266; Gilbert's Law of Covenants, 26; 2 Modern, 80.

But whether the instrument be more properly, in its form, a conveyance or lease, is immaterial. The defendant contracted to pay a yearly rent of twenty-two dollars for the use of the

thirds during the life of the widow. The plaintiff demanded the rent, the defendant acknowledged it to be due, and it not being paid, this action is brought to recover it; and the Court need not go beyond this, to sustain the suit against a technical defence.

The defendant cannot object to the plaintiff's title, or want of title. This action does not depend upon the validity of the plaintiff's title to the estate, but on contract between the parties, express or implied. *Codman* v. *Jenkins*, 14 Mass. R. 96; 13 Mass. R. 481.

Nor is the agreement or promise to pay rent, within the statute of frauds. *Wilkinson* v. *Scott*, 17 Mass. R. 249; *Dillingham* v. *Runnells*, 4 Mass. R. 400; *Sherburne* v. *Fuller*, 5 Mass. R. 133. Nor is it so, on account of its not being payable within the year. The widow might have died within the year. 1 Salk. 280; 3 Burr. 1278; 22 Pick. 97; 18 Pick. 569; 19 Pick. 364.

The statute itself secures rent, *eo nomine*, to the widow after demand. It gives "one third of the rents." And in certain cases dower may be assigned in rents and profits. Rev. Stat. c. 144, § 7 and 9.

H. C. Lowell, for the defendant, argued in support of these propositions, and replied to the argument of the counsel for the plaintiff.

This action of assumpsit cannot be maintained: —

1. Because there is no relation of landlord and tenant, between the plaintiff and defendant, and there is no contract to pay rent.

2. Because the conveyance of September, 1832, cannot be regarded as a lease without violence to legal principles, inasmuch as the right of a widow to have dower assigned is not such an estate as can be the subject of a lease.

3. Because here is an express stipulation by deed, which relates to this subject matter, and is still in force, and in such case assumpsit cannot be maintained.

4. And because of such stipulation by deed any previous colloquium between the parties, or oral testimony of their de-

clarations, as to the true intent and construction of the deed, will be rejected.

5. Because the neglect to deny the plaintiff's claim for rent or money, or a promise to pay it, even, like the promise of a judgment debtor to pay the debt, would be merely a recognition of the provisions stipulated in the higher security, and could furnish no ground for an action of assumpsit.

6. Because, to sustain this form of action, would be practically to deny to the defendant an opportunity to set up those defences, which the terms of his deed legally secured to him. The widow has no dower, and the plaintiff no estate.

7. Because the stipulation in the deed is not the defendant's agreement to pay the money, but the proviso and condition on which he consented to take the conveyance. He may comply with the terms of the proviso or not. If not, the estate will be defeated, and the grantor may enter upon it.

8. And because the action cannot be sustained without disregarding the best evidence, and exposing the parties to all the mischiefs of fraud and perjury, and against which it is the duty of the courts to guard.

He cited 1 Chitty's Pl. (8 Am. Ed. 1840) 103, 104, and authorities cited, to show that assumpsit cannot be supported when there has been an express stipulation under seal, which relates to the same subject matter and is still in force.

That the parol evidence objected to in the statement should not be admitted. 1 Greenl. Ev. § 275, 281, 282; 1 W. Black. 1249; 11 Mass. R. 27; 4 Bro. Ch. 519; 1 Mass. R. 69; 10 Mass. R. 462; 8 Mass. R. 146.

That the estate was not the subject of a lease or claim for rent. 1 Hilld. Abr. 881; *Croade* v. *Ingraham*, 13 Pick. 33; 1 Shep. Touch. 267; 5 Greenl. 481.

That there is no ground for saying, that stat. c. 144, § 7 and 9, gives a claim for rent in such case. 3 Pick. 475; 5 Pick. 146.

To show that his fifth proposition was tenable, and well founded in law. *Codman* v. *Jenkins*, 14 Mass. R. 95; *Hawkes* v. *Young*, 6 N. H. R. 300; *Andrews* v. *Mont-*

gomery, 19 Johns. R. 162; *Wood* v. *Edwards*, *ib.* 205; *Kimball* v. *Tucker*, 10 Mass. R. 193; *Bowes* v. *French*, 2 Fairf. 182; *Wheelock* v. *Freeman*, 13 Pick. 165; *Hatch* v. *Crawford*, 2 Porter, 54; *Miller* v. *Watson*, 5 Cowen, 195, and 7 Cowen, 39; *Young* v. *Preston*, 4 Cranch, 239.

That this was a conveyance upon condition subsequent; that the estate was subject to be defeated by the non-performance or breach of the condition; and that the only remedy for the grantor was by re-entry for such breach. 4 Kent, (4 Ed.) 122 to 133; 2 Cruise's Dig. ch. 1; 1 Hilld. Abr. 257, 265; 2 Metc. 184; 5 Pick. 528; 7 Greenl. 225; 2 Story's Eq. § 1315, 1316; Rev. St. c. 145, § 14 to 18; c. 125, § 1, 6, 9, 10, 11; c. 96, § 10.

The opinion of the Court was drawn up by

WHITMAN C. J.—The plaintiff conveyed to the defendant, by deed of release and quitclaim, bearing date Sept. 17, 1832, all his right, title and interest in and to a parcel of land, situated in Belfast; being the same formerly possessed by Major William Cunningham, formerly of Belfast, deceased, and being all the lands then claimed by the defendant, under said deceased. The deed of the plaintiff, however, contains a proviso, that the defendant shall pay the plaintiff or his assigns twenty-two dollars annually, from the date of the deed, on demand, by the plaintiff or his assigns, at said Nickerson's dwelling-house in said Belfast. This proviso is then followed by this clause, "said Nickerson is to pay said twenty-two dollars annually, as aforesaid, during the natural life of Elizabeth Cunningham, relict of the said William Cunningham." This annuity was regularly paid until 1840, and inclusive of that year. In 1844, the annuity from 1840 then being in arrear, the plaintiff made the proper demand, as seems to be admitted, of the annuity for the three years then remaining unpaid. The defendant did not then comply with the demand; and the plaintiff afterward brought this action to recover the amount claimed.

The defendant now contends, that he is not liable, if at all,

in an action of assumpsit; and this is the question we are called upon to decide. In settling it we have very little occasion for going into an argument to establish the plaintiff's right to recover; and we cannot regret that such is the case, when the equity of the case is manifestly with him. We find authorities directly in point, which clearly show that the defendant must be held to be liable in assumpsit. The first in *Goodwin & al.* v. *Gilbert & al.* 9 Mass. R. 510. The language of the Court in that case was, "we are all satisfied that, as a general rule, where land is conveyed by deed, and the grantee enters under the deed, certain duties being reserved to be performed, as no action lies against the grantee on the deed, the grantor may maintain assumpsit for the non-performance of the duties reserved." And the Court remark, in the same case, that where the law raises the promise it is not within the statute of frauds. The defendant here has enjoyed the benefit of the conveyance, which was an extinguishment of a right of dower of the widow of William Cunningham, in an estate conveyed to the defendant by him in his lifetime; and which she had assigned to her son, the plaintiff. This right the defendant had enjoyed ever since he took his deed from the plaintiff; and by virtue thereof, she being still alive.

The case of *Rogers* v. *the Eagle Fire Co. of N. Y.* 9 Wend. 611, is also an authority in point. Mr. Justice Nelson, in delivering the opinion of the Court in that case, after citing with approbation the case of *Goodwin* v. *Gilbert*, and 1 Bacon, 178, note, and cases there cited, says, it cannot be controverted, that assumpsit lies for rent reserved on a deed poll, "upon the principle, that whoever takes an estate under a deed, ought, in reason and equity, to be obliged to take it under the terms expressed in the deed."

The case of *Croade* v. *Ingraham*, cited for the defendant, is distinguishable from the case at bar. There the stipulated annuity was sought to be recovered of the assignee of the estate; and the Court very properly held that it was not recoverable; that it was not a liability that accompanied the title to the land. The Court there held the contract good as between

the original parties. Here the claim is against the original contractor, and in favor of the original bargainee.

Defendant defaulted.

BENJAMIN L. WHITE *versus* JAMES RIGGS *& al.*

A judge of probate has no power to hold a court for the hearing of a particular case at any other time or place, than those fixed by law, or under the provisions of Rev. Stat. c. 105, § 8; and any decree passed in such case will be void.

If one of several persons equally interested should appear at the hearing of such case before the judge of probate, the others not all appearing, and he, alone, should appeal from the decree of the judge, made therein, to the Supreme Court of Probate; still as the probate court had no jurisdiction of the matter, the appeal will be dismissed.

THIS was an appeal from a decree of the judge of probate for the county of Lincoln, approving an instrument as the last will of Benjamin Riggs, deceased. Benjamin L. White, only, appealed from that decree, seasonably filed his bond, and the following reasons of appeal.

"*First Reason.* — That said Benjamin Riggs, when he made the supposed last will and testament, from the decree approving which, the appeal is claimed, was not of sound mind and not of capacity to make any will.

"*Second Reason.* — That said instrument was never published by said Riggs, nor declared by him to be his last will and testament.

"*Third Reason.* — That said instrument purporting to be a will, is unintelligible and therefore no will."

The appeal was entered in this Court, and the appellant here pleaded, among other pleas, "that due notice of the time and place, for the probate of the will before the judge of probate, was not given.

The following is a copy of the decree from which the appeal was taken.

"STATE OF MAINE.

"[L. s.] Lincoln, ss. Whereas the Instrument hereto an-

nexed, has been presented to me as the last will and testament of Benjamin Riggs, late of Georgetown, by James Riggs, Moses Riggs and B. F. Riggs, the executors therein named, and due notice thereof, and of the time and place appointed by me, for taking the probate of the same, has been given to the heirs of said deceased, and to all persons interested therein, pursuant to the order of Court; and whereas it is proved to me by the testimony of Allen Clary, Jr. and Mary D. Mitchell, formerly Mary D. Meader, two of the subscribing witnesses to the same, and no one objecting, that the said instrument was signed, sealed and published by the said Benjamin Riggs, as his last will and testament, and that at the time of executing the same the said Benjamin Riggs was of sound mind; and it further appearing to me, that the same was attested in his presence by three credible witnesses, whose names are thereunto subscribed; I do, therefore, by virtue of the power and authority given to me, in and by the laws of the State aforesaid, hereby approve and allow the said instrument as the last will and testament of said deceased, and order the same to be recorded.

"Given under my hand and seal official, at the court of probate, holden at Georgetown, on the 20th day of January, in the year of our Lord, one thousand eight hundred and forty-six."

"Nathaniel Groton, Judge."

The parties agreed to the following statement of the facts in relation to the subject matter of that plea.

"The said White alleges, that no notice was published by the probate court for a hearing in relation to the will; that Benjamin Riggs' will was presented to the probate court holden at Wiscasset, on the 12th of January, 1846, and that said court was adjourned to be held at the house occupied by said Benjamin Riggs, deceased, in his lifetime, on the 20th of said January, in Georgetown, when and where the probate court was held for the probate of said will; that some of the heirs were present at said hearing and some not, that some of them took notice of the time and place appointed, and some had no notice.

"No public notice was given of the holding of a probate

court in Georgetown, and which was not a place where probate courts were ever held.

"Written notice was given to all the parties interested in Benjamin Rigg's will, of the adjournment of the probate court to be held on the 20th of January, 1846, at Georgetown, except George W. White of Charlestown, Mass., and Eliza S. Drummond, then in France;— and the following persons were present, viz.— Jacob W. Sweat, *Benjamin L. White, the present appellant*, John White jr., E. D. White, Mary Drummond, Sarah Ann White, John White, for himself and two minor children, James and William White, Alice R. Delano, Moses Riggs, James Riggs, Benjamin F. Riggs, Sarah Riggs. Moses White of Boothbay, was not present, but had written notice. The above, including George W. White and Eliza S. Drummond, embrace a list of all the heirs or of those persons that represent the interest of all parties. And notice of said adjournment was posted up in two public places in Georgetown.

"The appellees, James Riggs *& al.*, executors, say the appeal was properly entered, and whatever may have been the proceedings in the probate court, the present appellant has lost no rights.

Wells and *Randall*, for White, contended that there was no legal probate court holden at the time when the alleged will is said to have been approved. There can be no legal probate court holden by the mere adjournment of a court to a time and place, other than one previously appointed and notified publicly according to the provisions of the statute.

Evans and *B. F. Sawyer*, for the executors, contended that the court was legally appointed at the house of the deceased in Georgetown. But whether it was strictly according to law or not, the appellant was there and made no objection. His reasons of appeal, too, do not complain of any wrong in that respect. They admit the jurisdiction of the judge of probate in the premises.

At a subsequent day in the same term, the opinion of the court was given orally by

SHEPLEY J.— It was said that the case found, that no public notice was given of the holding of a probate court at

Georgetown, and that was not a place where probate courts were to be holden according to the provisions of the statute.

The court could have no jurisdiction of the question there, and it is not pretended that the will was approved at any other place.

The decree is not in the usual form, and does not on its face show that the court was legally holden; and if it did, it was competent for the parties, as they have done, to agree upon the facts of the case, which show that the court had no jurisdiction.

The acts of the defendant in appearing before the probate judge at Georgetown, and entering an appeal to this Court, could not give the court jurisdiction.

As the supposed decree was void, because the probate court had no jurisdiction, the appeal must be dismissed.

WILLIAM FOSSETT *& al. versus* JOHN BEARCE.

By the act of March 4, 1826, "to regulate the Alewive Fishery in Bristol," the fish committee chosen by the town, are to decide and determine whether the sluice ways in dams across the rivers and streams in that town, for the passage of fish, are good and convenient; and so long as they act within the sphere of their duty, they are not liable as trespassers; no one has the right to oppose them in the performance of their duties; and their judgment and decision is conclusive, unless they are guilty of corruption, or palpably mistake their duties, even although, in the opinion of others, their decision was erroneous, and their proceedings unreasonably hard against the owners of such dams.

DEBT by the plaintiffs, as a fish committee of the town of Bristol, to recover the penalty provided in the seventh section of an act to regulate the alewive fishery in Bristol, passed March 4, 1826. The penalty was alleged to have been incurred by the acts of the defendant on May 10, 1845.

At the trial before REDINGTON, DISTRICT J. the plaintiffs proved, that they were chosen and sworn as a fish committee of the town of Bristol; that they notified the defendant, that he had no sufficient fish way in his dam; that the defendant

neglected and refused to open one ; that they proceeded upon the land of the defendant, for the purpose of opening a sufficient fish way through his dam, and were proceeding to do it ; and that the defendant resisted them in opening the dam for that purpose.

" It was proved, that when defendant built his dam and mill, in 1836, he erected locks on the inshore side of his mill, for the passage of fish. There was much testimony on both sides, as to the character and sufficiency of these locks ; the fitness of their locality ; the mode in which fish pass up locks ; the difficulty of their exit from the locks into the pond ; how many passed up these locks in former years, and in some of the last years ; what alterations had been made in the locks ; how they might be improved in their structure ; how fish locks were made in other streams ; and with what success ; and concerning the habits of fish.

" Also evidence where, in the judgment of experienced men, the passage way ought to be made ; some thinking that the locks were entirely unfit and useless, others thinking more favorably of them ; some thinking no repair or alteration could have made them a sufficient passage way ; others thinking they might be made sufficient with some alterations ; while others considered that there could be no sufficient passage way except at the bottom of the stream.

" No regulations, such as are named in the first section of the act, had ever been made in writing.

" Redington, the District Judge, presiding at the trial, among other things, instructed the jury, that the trust reposed in the fish committee was to be exercised reasonably, with a regard to the rights of all persons concerned in the result of their proceedings ; that, in protecting the fishery, they could not rightfully disregard the interest of the mill owners ; that the fishery had a priority, but only to the extent of having good and sufficient sluice ways, for the passage of fish ; that beyond what is necessary for the securing and appropriating that superiority, the committee cannot impair the mill owners' possessions ; that, therefore, it is the right of the mill owner to elect

where the passage way should be made, provided it can there be made a good and sufficient one, without incurring unnecessary or unreasonable delay or expense. What constitutes a good and sufficient sluice way is a question of fact, not of law. In deciding that question, the jury, among other things, may take into consideration, what was the meaning of the Legislature. Before the passing of this act, it appeared in the evidence, that locks had been made for the passage of fish at the Knox dam and at the Damariscotta falls. The jury might consider whether the Legislature had heard of those locks. And whether they thought that locks upon that plan, would answer at the Bristol dam. That a reasonable construction must be given to the terms, "good and sufficient sluice ways." That the law could not determine whether they should be formed by locks or by openings in the dam to the bed of the stream. That a sluice way may be any opening in a dam by which a current of water is let off, whether at the bed or at the surface of a stream. That the jury should take into view, among other things, the size and rapidity of the river, and the quantity of fish therein.

"The judge was requested by plaintiffs, to instruct the jury, that by the statute, the fish committee are constituted the judges of what are good and sufficient sluice or passage ways for the passage of alewives; and that, if on the 10th of May, 1845, there was not, in the opinion of the fish committee, a good and sufficient passage way, or sluice for alewives, through the defendant's dam, then the fish committee had a right to open a good and sufficient sluice way for the passage of fish through the same, even if in the opinion of others the defendant's fish ways were sufficient.

"The judge did not give that instruction, but did instruct the jury, that the opinion and proceedings of the committee must be presumed to have been right, unless that presumption be repelled by proof. That if the proof here overcame that presumption, and satisfied the jury that the opinion of the committee was erroneous, and their proceedings unreasonably hard against the defendant, in attempting to open the passage way at

the flume, then his acts of resisting the committee in that attempt would not make him liable in this action.

"The judge further instructed the jury that if the committee knew that defendant preferred to have the passage made where his fish way was, because less injurious to him than at the waste-way flume, and if it could have been made there without unnecessary or unreasonable expense or delay, he would be justified in resisting their putting it at the place of said flume, but that the burden of proving these facts was on the defendant.

"Whilst giving the charge the judge was requested by defendant's counsel to instruct the jury that the action could not be maintained, because the committee had never, in writing, adopted any "*regulations*," such as the defendant's counsel insisted that the first section of the act requires. The judge expressed doubt whether such regulations were not pre-requisite, especially as the regulations, which might be adopted by the committee, seem subject to be restricted or limited by vote of the town; and it might be difficult for the town to act upon unwritten regulations. But, on considering the matter, he declined to give that instruction, because it might deprive the parties of the opportunity of having the facts settled by the jury, after so long a trial had been held for that purpose, and the defendant could avail himself of the omission so to charge, if the verdict should be against him, upon the other facts in the case.

"The verdict was for defendant. The judge propounded to the jury some questions in writing, which, with the answers are to be copied and made a part of the case.

"To the foregoing instructions and opinions and rulings, and omissions to rule as the plaintiffs requested, the plaintiffs except,

"By E. Smith and M. H. Smith, their attorneys."

"The foregoing exceptions are allowed prior to the final adjournment of the Court, the same being reduced to writing and presented for allowance and found to be correct.

"Asa Redington, Presiding Judge."

Questions to the jury and answers returned. — "1. Was the sluice way, which Bearce had prepared, good and sufficient for the passage of alewives.

"*Ans.* It was not.

"2. Taking into view the size of the stream and the quantity of fish expected to run there, if Bearce's sluice way was not good and sufficient, either on account of the shoalness of the water at the foot of it; or on account of the bottom being made of wood; or on account of the darkness; or on account of the distance between the boxes; or on account of the narrowing of the sluice way at its upper portion; or on account of the depth of water over the gate; or on account of the erections in the pond above the gate; or on any other account, could it have been made good and sufficient by repairing or altering it without unreasonable delay or expense?

"*Ans.* It could.

"3. Was it understood by the fish committee that Bearce wished the fish way to be at the place of his fish way, and that it would be more injurious to him to have it put elsewhere?

"*Ans.* It was.

"4. Taking into view the rights of the town and also the rights of the mill owners, was it the duty of the fish committee in the fair and faithful exercise of their trust, to have the fish way at the place where Bearce had prepared for it; or was it their duty to open a fish way to the bed of the river, between Bearce's and Hanly's mills?

"*Ans.* It was their duty to have the fish way where Bearce had made it.

"5. When the committee hoisted Bearce's gate on 10th of May, was it, or was it not, their purpose unnecessarily to oppress and injure him?

"*Ans.* ———— (None given.)

"6. In order to give due protection to Bearce's rights, and also to rights of the town and of the public, was it, or was it not, reasonable that the committee should cut a passage way through the dam down to the bed of the stream?

"*Ans.* It was not reasonable."

E. and *M. H. Smith* argued for the plaintiffs, contending that the rulings and instructions of the District Judge were erroneous in many particulars, among which were: —

The instructions were clearly erroneous, inasmuch as by the course adopted by the Judge, the judgment and opinion of the fish committee, in the discharge of their duties, might be overruled by the opinion of any other persons. By the instructions to the jury, the defendant was to be justified in resisting the committee in the discharge of their duty, if he could bring others to testify, that in their opinion the committee erred in judgment. It was not the opinion and judgment of the tribunal, provided by the act, which was to stand, but the opinion of others, if the course permitted by the Judge at the trial was justifiable.

The instructions and rulings of the Judge at the trial, gave the defendant the right to select the place where the sluice way should be made, and took it from the committee.

The Judge not only submitted to the jury the right to determine the construction to be given to the law, but expressly informed them, that they were at liberty to disregard the common meaning of the language used, and might consider that the legislature intended that certain old sluice ways should be the standard to govern the committees, which were not named or alluded to in the act.

The counsel contended, that these decisions and rulings were in direct opposition to the plainest principles of law, and wholly opposed to the language, spirit and object of the act.

They also made various other objections to the course pursued by the Judge at the trial.

Ruggles, in his argument for the defendant, said that the fish acts though public, were not general laws. They are diverse in their terms and local in their application. Each act is to be construed by itself, and its construction cannot be controlled by other acts applicable to other localities. These acts are to be construed with reference to the description and character of the stream where the fishery is established and regulated; the amount of fish likely to run in the river; and the

number and description of mills and machinery with which the acts may come in competition. Mills and the right of flowage are protected by law for the public good. Mills are as important to the public as alewives. It is necessary therefore to a right understanding of these local acts, regulating fisheries, that the peculiarities of the stream; the number and importance of the mills; how they will be affected by this or that description of fish way; to what extent they may be allowed to interfere with the mills, without sacrificing more of the public advantage by their destruction, on the one hand, than could possibly be acquired by means of the fishery on the other, should be considered. The Legislature is presumed to have these matters in view, in framing their acts; and it is no less true, that tc the just construction of these acts, it is as necessary, that the courts should have the same facts before them.

The counsel for the defendant, contended, that the whole of the proceedings at the trial in the district court, were justifiable and legal. He cited and commented upon the cases, *Wales* v. *Stetson*, 2 Mass. R. 146; *Richards* v. *Daggett*, 4 Mass. R. 537; *Commonwealth* v. *Kimball*, 4 Mass. R. 370; *Stoughton* v. *Baker*, 4 Mass. R. 528; *Briggs* v. *Murdock*, 13 Pick. 305, contending that the case last named ought not to be considered as conflicting with the others cited, or as inconsistent with the rulings and instructions of the District Judge in the present case.

The opinion of the Court was drawn up by

Tenney J. — This is an action by the plaintiffs, as a fish committee of the town of Bristol, against the defendant, for an alleged resistance and opposition to them in the performance of their duties, in an attempt to open a sluice way through his dam for the passage of Alewives. The sluice way, which the defendant had previously prepared, was not good and sufficient. The plaintiffs introduced evidence of a notice to the defendant to make a passage way; and that on his failing to comply with the requirement, proceeded to prepare one themselves, and therein they were resisted and opposed by him.

The statute, under which this action is brought, provides that the town of Bristol shall choose a committee, not exceeding five nor less than three in number, whose duty it shall be to cause to be kept open in any river or stream passing through said town, at all places where dams are or may be erected, for the passage of Alewives, good and sufficient sluice ways for the passage of said fish through the same; and said sluice ways shall be under such regulations as the committee may deem proper for the interest and benefit of the town, subject to such restrictions and limitations as the town may by their votes impose. And the committee shall be sworn to the faithful discharge of the duties required of them by law. Special laws of 1826, § 1.

By the 7th section of the same statute, the committee shall in no respect be considered as trespassers, in passing over the lands of individuals, in any part of said town, in the execution of the duties of their office; and any person resisting or opposing said committee, or either of them, in the performance of their duties aforesaid, shall forfeit and pay a sum not less than ten dollars, nor more than twenty dollars.

The committee are entrusted by the act with a duty, which they are not at liberty to omit. The passage ways, which they are to cause to be opened, are to be *good and sufficient*, for the purpose intended. The whole subject is intrusted to their judgment and discretion, excepting where the town by a corporate vote restrict or limit their exercise. It is for them to determine, whether the sluice ways are good and sufficient. The statute does not contemplate that the question of their goodness and sufficiency shall be settled by any other. So long as they are acting within the sphere of their duty as a committee, or members thereof, they are protected from all liability as trespassers, in passing over the lands of individuals. No one has any right to oppose them in the performance of their duties. The judgment of others, in reference to what is intrusted to them, is not to be substituted for that of the committee. Although it may be thought they may have erred in the exercise of their judgment and have acted indiscreetly in

the discharge of their trust, it does not follow, therefore, that their acts are to be treated as trespasses or unauthorized, unless they are guilty of corruption, or palpably mistake their duties. If the jury were satisfied, that the opinion of the committee was erroneous, and their proceedings unreasonably hard against the defendant in attempting to open the passage way, such alone was not sufficient to exclude them from protection of the statute, under which they professed to act, and excuse the defendant in resisting them. The case not having been submitted to the jury according to this principle, the

Exceptions are sustained.

JOSEPH HEWETT *versus* EPHRAIM BOWLEY *& al.*

Where this and several other suits were referred to the same referees by separate rules of reference, without including any other matter, in all which the plaintiff was a party, but one of the defendants was not a party in any but this; and the referees met and heard all the cases at the same time, and the parties agreed, that the testimony of the numerous witnesses might be considered as applicable to each suit; and the referees, in making their separate reports, included their own charges for services in all the suits and all the other expenses of the references in their report as costs of this suit, and no part thereof in either of the other suits; *it was holden*, that the referees had exceeded their authority in including expenses incurred in other suits, and that the report, therefore, could not be accepted; but that although the referees erred in judgment, yet as it did not appear that they were influenced by any improper motives, the report should be re-committed, under the authority given by the statute 1845, c. 168.

AT the May Term in this county, 1847, the counsel for the respective parties agreed to argue this case in writing. The following opinion of the court was read at the May Term, 1848, by SHEPLEY J. When the opinion was sent to the Reporter, he was informed, that the reason for the want of any other papers, was — that the copies of the case, with the extended written arguments of the counsel, were sent with an opinion, as first drawn by him, to the other Judges for their examination; and that the same had been mislaid, and could

not be found. This opinion was then prepared by the same Judge from his original rough draft of the opinion first prepared.

Ruggles and *Lowell*, for the plaintiff.

E. Smith, for the defendants.

SHEPLEY J. — A report made by referees, was presented to the district court, which was refused acceptance, and the case is presented on exceptions. It appears that the plaintiff and Isaac Caswell, one of the defendants, each claimed to be the owner of a tract of land in the town of Hope. Caswell claimed to be the owner by a deed of conveyance made to him by the other defendant, Bowley, containing covenants of warranty. He had commenced two suits, one against the plaintiff and the other against the plaintiff and other persons, to recover damages for trespasses alleged to have been committed on that tract of land. The plaintiff had also commenced two suits against Caswell, to recover damages for trespasses alleged to have been committed by him on the same tract of land. He had also filed a bill in equity in relation to the same controversy. These suits were pending in the county of Waldo and were referred there to the same referees. The suit, in which the report was presented and its acceptance refused, was an action of trespass *de bonis asportatis*, to recover damages for wood cut and carried away from the same tract of land, and which had been referred to the same referees. Each action had been referred by a separate rule of reference without including any other matter. The referees met to consider and decide upon the rights of the parties in all the suits at the same time; and the parties agreed that the testimony of the numerous witnesses might be considered as applicable to each suit. Bowley, one of these defendants, was not a party, either as plaintiff or defendant, in any other suit, than that, in which this report was made.

The referees included compensation for their services in all the suits, and the incidental expenses incurred in all of them, and the fees of all the witnesses, who testified in relation to

the title to the tract of land, in their report made in this suit.

It is insisted in defence, that they thereby exceeded their authority. While this is denied on the part of the plaintiff, it is contended, that it was done by the agreement of the counsel of the respective parties. The referees were examined in the district court and their testimony respecting their proceedings is presented.

Samuel G. Adams, one of them, says he "should think as much as five or six days in all was appropriated to No. 1 and 2." "In actions No. 1 and 2 the witnesses were about forty." These were some of the other suits.

It is said, that the whole amount, charged by the referees for their services in all the suits, might be properly included in their report made in this suit, because this suit was under consideration, during the whole time of their session. By the reference of this action only, the referees would not be authorized to include in their award any damages or costs, which did not appertain to it. They might, with as much right and propriety, include in their award damages which arose in another suit, as costs, which accrued in another suit. The Court must, upon the facts presented, come to the conclusion, that the referees charged for their services in five other suits in this suit, and included the amount so charged in their award made in this suit, for no compensation for their services appears to have been charged and included in their reports made in those suits, while compensation for the whole time of their session, was included in their report made in this suit. It is insisted, that this was done by the agreement of the counsel. The testimony presented as coming from the referees does not exhibit any language used by the counsel authorizing such a conclusion. The referees say, that they understood from what was said, that they were authorized to do so, but parties cannot and should not be bound by their understanding without proof, that something was said, which would properly authorize them to conclude, that such an agreement had been made. Again it is said, that Bowley, as the grantor of Caswell with cove-

nants of warranty, was active and interested in the defence of the suits against him, and that all the expenses incurred in those suits might therefore be justly included in the report made in the suit in which he was a party. But the referees were not clothed with any authority, to decide upon his liability to his grantee, on those covenants. His liability on those covenants would not constitute any proper ground of charge against him in any of the suits.

The reports in those suits, in which no compensation for the services of the referees was charged, have been accepted; and it is urged, that the plaintiff must suffer loss, if their compensation for services rendered in all the suits be not recovered in this suit. The powers granted to the referees by the rule of reference in this suit, cannot be enlarged by their omission to include in their reports in other suits expenses incurred in them.

The plaintiff cannot justly complain, if he should suffer loss, for the acceptance of the reports, made in the other suits was urged by him under circumstances, in which it was clearly perceived, that their whole compensation might not be legally recoverable in this suit.

While the referees erred in judgment and exceeded their authority, by including in their report expenses incurred in other suits, it is not perceived, that they were influenced by any improper motives.

The Court has, by the act, approved on April 7, 1845, c. 168, a discretionary power to reject, accept, or re-commit, the report, and while the exceptions are overruled, the report is re-committed.

JAMES H. MCLELLAN *& al. versus* ANDREW T. NELSON.

The stat. 1844, c. 117, "to secure to married women their rights in property," is prospective merely. The interest, therefore, which the husband acquired in the real estate of the wife, by a marriage prior to that act, is not affected by it.

Where the officer's return of a levy on land, states, that all three of the appraisers were duly selected and sworn, and "were all present, and viewed the premises, and made their several estimates of the value," and that two of them signed the certificate, "the other declining to sign the same," it is not necessary, that it should state the cause of the refusal of such appraiser to affix his signature.

THE parties agreed upon a statement of facts.

The question presented to the Court is, whether upon this statement of facts, the defendant, at the time of the attachment and levy, had such an interest in the demanded premises as could be levied upon and set off to the plaintiffs, so as to give them the right to the rents and profits of the demanded premises. The Court were authorized to enter a nonsuit or default.

From the statement it appeared, that the wife of the defendant was seized in fee of the demanded premises, and being thus seized was married to the defendant prior to eighteen hundred and thirty, and is still alive.

On July 25, 1846, after the passage of the stat. 1844, c. 117, the demandants levied upon two years rents and profits which the defendant had in the premises, on the ground that he had a life estate therein. The officer certified, that three appraisers were selected and sworn, and were "all present and viewed the premises and made their several estimates of the value," and that two of them only signed the return, the other "declining to sign the same."

Tallman and *Richardson*, for the demandant, said that on the marriage the tenant became the owner of a life estate in the premises, and that the statute of 1844, c. 117, could not deprive him of it. It would be but taking property from him and giving it to another without compensation.

The statute is prospective in its terms, and applies only to the case of marriages afterwards. The first section provides,

that "any married woman may become seized," &c. And the second section, the only one exempting the estate of the wife from liability for debts of the husband, confines it to after marriages. It says, "hereafter, when any woman possessed of property, real or personal, shall marry," &c.

Groton and *Sawyer*, for the tenant, contended that the demandants acquired no title whatever, by the levy upon the premises.

The stat. 1844, c. 117, exempts the property of the wife, whether real or personal, from being taken to pay the debts of the husband. Such, it was argued, was the design and object of the Legislature; and such should be the construction given to it.

This statute affected the remedy only, and therefore the Legislature had power to pass it. It merely took away the right of the creditor to satisfy his execution, from this description of property. And this may be done by the Legislature. 15 Maine R. 134; 18 Maine R. 109; Story's Com. on Con. § 712; 4 Greenl. 154; 6 Wend. 526.

In construing a statute the intention of the makers is to govern, although such construction may seem contrary to the letter. Such interpretation is to be given as appears best calculated to advance its object, and carry out the intentions. And in doubtful cases, it is to be presumed that the Legislature intended the most reasonable and beneficial construction of their acts. 3 Cowen, 89; 2 Peters, 662; 15 Johns. R. 358; 1 Peters, 64; 12 Mass R. 393; 3 Ham. 198.

But two of the appraisers signed the appraisal, and no cause whatever is assigned by the officer for the omission. The appraisal, therefore, is a nullity. *Whitman* v. *Tyler*, 8 Mass. R. 284.

The opinion of the Court was drawn up by

Whitman C. J. — The statute of 1844, c. 117, is clearly prospective in its terms and obvious import. The first section provides, that "any married woman may become seized or possessed of any property," &c. The second section provides,

that, *hereafter*, when any woman possessed of property, real or personal, shall marry," &c. Mrs. Nelson was possessed of the estate in question in fee, before her intermarriage with the defendant, Andrew T. Nelson, which took place before the attachment and levy relied upon by the plaintiffs, and before the passage of the act above referred to; and their rights can in nowise be affected by it.

The return of the officer, who made the levy, in reference to matters in the line of his official duty, is conclusive between the creditor and debtor. He has returned in this instance, that the appraisers were sworn, after being duly appointed, and acted as such. The levy, therefore, was effectual to pass the estate, though one of the appraisers neglected to sign the certificate of appraisement. Rev. Stat. c. 94, § 9.

The levy was upon the rents and profits for the term of two years. Andrew T. Nelson, the debtor, by virtue of his intermarriage with Mrs. Nelson, became possessed of such an estate as would authorize such a levy. Statute last cited, § 14; and the levy passed such an estate as the debtor had in the premises, if not exceeding such an amount of interest, as provided in the same section. The debtor's right was that of a life estate, either for the term of the life of his wife, or of himself; and it matters not which.

Defendant defaulted.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF KENNEBEC,

ARGUED MAY TERM, 1847.

JOHN PLAISTED *versus* THE BOSTON AND KENNEBEC STEAM NAVIGATION COMPANY.

The owners of a steamboat, being a common carrier, are liable for a shipment on board of her, lost by means of a collision with another vessel at sea, and without fault imputable to either, there being no express stipulation of any kind, between the owner of the goods and the owners of the boat, that they should be exempted from the perils of the sea.

THIS case came before the Court on the following report of the trial before WHITMAN C. J.

This was an action of assumpsit against the defendants, as common carriers.

It was admitted by the defendants that the hides described in the plaintiff's declaration, were received on board the Steamboat New England, which was in the employment of the defendants and owned by them, as common carriers, to be carried from Boston to Gardiner, for an adequate compensation; the said hides were lost on the voyage, at night, on the 28th of May, 1838, in consequence of a collision with the schooner Curlew. The collision stove a hole in the steamboat, causing her to sink, and said hides and most of the cargo sunk with her.

If in the opinion of the Court, the defendants are liable, without proof of negligence on their part, then they are to be defaulted, and the damages are to be assessed by the Court; but if they are not liable without such proof of negligence, then the cause is to be submitted to a jury to determine whether there was any negligence on the part of the defendants.

Wells and *Danforth*, for the plaintiff, contended that, inasmuch as it was admitted that the goods were taken by the owners of the boat as common carriers, they were liable for their value. There are but two exceptions to be found to the liability of common carriers for the goods delivered to them,— the act of God and the acts of the public enemy. The collision of two boats does not come within the first, and it will not be pretended, that it does within the last. 8 Watts & S. 44; 1 McCord, 360; Story on Bailments, § 330, 331, 332; 2 Kent, 597 to 609; 2 Ld. Raym. 909; 1 T. R. 27; 5 T. R. 389; 1 Wils. 282; 3 Esp. N. P. Rep. 127; 6 Johns. R. 160, and 170; Abbott on Ship. 245; 11 Johns. R. 107; 10 Johns. R. 1; 2 Wend. 327; 6 Cowen, 266; 6 Wend. 335; Wright, 193; Marshall on Ins. 414; 3 Kent, 230.

Evans, for the defendants, contended that a loss of goods by a common carrier by sea, without fault, is a loss by perils of the sea. Story on Bailments, § 489; 2 Kent, 597. A collision is a peril of the sea. 3 Esp. R. 67; Abbott on Shipping, (last Ed.) 240 and 501, in the margin.

If there be no blame, a loss by collision is a loss by inevitable accident, and that comes within the class of cases of loss by the act of God. In such case common carriers are not liable. Story on Bailments, § 511, 512 and 514; 3 Kent, 231; *Hale* v. *Wash. Ins. Co.*, Law Rep. Sept. 1842.

And it makes no difference whether there is a bill of lading or not. 1 Con. R. 492; 12 Con. R. 410; 14 Peters, 99; Curtis' Rights and Duties of Seamen, 219.

The opinion of the Court was, after a continuance, drawn up by

WHITMAN C. J. — We are required to decide, whether the

owners of a steamboat, admitted to be a common carrier, are liable for a shipment on board of her, lost by means of a collision with another vessel at sea, and without fault imputable to either, there being no express stipulation of any kind, between the plaintiff and defendants, that they should be exempted from perils of the sea. Such a disaster must be admitted to be within the meaning of the terms *perils of the sea. Buller & al.* v. *Fisher & al.* 3 Esp. 67; Story on Bailments, § 511 and 512. And if these terms are synonymous with the terms *act of God*, in their technical sense, the case is clearly with the defendants; for they are not responsible, if the loss was in such technical sense, the act of God. And *Mr. Justice Colcock, in Blythe's ex'rs* v. *Marsh & al.* 1 McCord, 360, remarked, that inevitable accident and perils of the sea were convertible terms, so far as they relate to the responsibility of the carrier to the owner; and he is understood, by the counsel for the defendants, to use those terms as synonymous with the terms *act of God.* But it may be doubtful whether he so intended; for the case before him did not present the case of a common carrier; and he speaks only of a carrier, who was conveying a cargo from one port to another; and, so far as appears, was engaged for the voyage, under a bill of lading stipulating to carry the cargo and deliver it, the dangers of the seas being excepted. The decision was against the carrier upon the ground of negligence.

Story, in his work (§ above cited) does not undertake to decide, whether the terms, perils of the sea, and inevitable accident, and the acts of God, are synonymous; but says, if perils of the sea are to be so considered then the decisions upon the meaning of these words become important in a practical point of view; in all cases of maratime and water carriage. He, however, expresses a doubt whether the precise meaning of this phrase is very exactly settled. In 3 Kent's Com. 216, it is said, "perils by sea denote natural accidents, peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence; and again, on the same page, "it is a loss happening in spite of all human

effort and sagacity. And the same author, in vol. 2, p. 601, says, "the books abound with strong cases of recovery against common carriers, without any fault on their part; and we cannot but admire the steady and firm support, which the English courts of justice have uniformly and inflexibly given to the salutary rules of law on this subject, without bending to popular sympathies, or yielding to the hardships of particular cases. And, again, quoting L'd Holt, in *Coggs* v. *Barnard*, 2 L'd Raymond, 909, and other authors, he says, "this was a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs obliged them to trust these sorts of persons; and it was introduced to prevent the necessity of going into circumstances impossible to be unravelled. The law presumed against the common carrier, unless he could show it was done by public enemies, or such acts as could not happen by the intervention of man, as lightning and tempests." Mr. C. J. Best, in *Riley* v. *Horn*, 5 Bing. 217, says, "to give due security to property the law has added to that responsibility of a carrier, which arises immediately out of his contract to carry for a reward, namely, that of taking all reasonable care of it, *the responsibility of an insurer.* L'd Mansfield, in *Forward* v. *Pillard*, 1 Term R. 27, defines the act of God to mean "something in opposition to the act of man." Such remarks tend strongly to show, that the phrase *perils of the sea*, which are generally defined to be such accidents as ordinarily result from navigation upon that element, is not entirely coincident with what is, in many cases, understood by the act of God, excusing a common carrier from liability for losses of property under his management.

The destruction of a vessel by rats, the precaution of keeping a cat on board having been adopted, has been adjudged a peril of the sea; yet this could hardly be deemed a loss by the act of God; and could have no resemblance to lightning and tempests, so often named as instancing that which would exonerate a common carrier from loss. It is well settled, that a fire, not the effect of lightning, occurring at sea, is a peril of the sea. Marsh. Ins. c. 13, § 3. *Hale* v. *N. J. Steam N. Co.*

15 Conn. R. 539. Yet an accident so happening is not accounted an act of God, excusing a common carrier from responsibility. In the case of *Hahn* v. *Corbell*, 2 Bing. 205, the defendant, the carrier, was held answerable; and proof, that he was not guilty of negligence was rejected; and yet, there does not seem, in that case, to have been any good reason, why it should not have been deemed a case of inevitable accident, to a vessel navigated upon an arm of the sea, and therefore a peril of the sea, such as should have rendered an insurer against such perils, answerable for the loss. So also in the case of *Hodson* v. *Malcolm*, 5 Bos. and Pul. 336, which was an action upon a policy upon a ship, in which the loss appeared to have originated from the sudden impressment and carrying away of seamen, sent on shore to cast off a fastening made thereto, and before they could accomplish it, which occasioned her loss. This was held to be a peril of the sea; but such an act, it has been considered, would form no sufficient excuse for a common carrier. The loss originated from the act of man, and not from the act of God. *McArthur & al.* v. *Sears*, 21 Wend. 190.

In the case of *Smith* v. *Scott*, 4 Taunt. 125, presenting a case of collision between two vessels, it was held to be a loss from perils of the sea, although the plaintiff's ship was run down by the gross negligence on the part of the navigators of the other vessel. There can be no doubt that the owners of the lost ship, if she was of the class denominated common carriers, would have been answerable to the owners of property on board of her: for her loss was occasioned by the gross negligence of human agents, and not by any act of God, in the technical sense of that phrase. The language of the jurists before cited, who are certainly of very high repute, equal to any that this country or England has ever produced, is altogether inconsistent with any other meaning, than that common carriers are subjected, in the absence of stipulations to the contrary, to liabilities much beyond what falls to the lot of those who are not such. Those, who are of the latter class, are rendered responsible, under the law of bailments, for transporting

goods for hire, for the highest degree of diligence, such as every prudent man exercises in his own concerns. This would not be sufficient to exonerate a common carrier, in all cases, from liability. He is bound not only to the highest degree of care and diligence, but as an insurer against every peril, not arising from the act of God, as tempests, storms, lightning and extraordinary convulsions of the elements, or acts of a public enemy.

In the case of *McArthur & al.* v. *Sears*, before cited, these subjects are discussed by Mr. Justice Cowen, in delivering the opinion of the Court, and the authorities elaborately, though somewhat desultorily, reviewed. In that case the plaintiffs were allowed to prevail against the defendants, as common carriers, for the loss of a shipment, undertaken to be transported across lake Erie. The loss happened without the slightest fault imputable to the navigators, and was one for which insurers might have been responsible: but it occurred as the vessel on board of which the goods were, was attempting, in the night, to make a port of safety, but failed of accomplishing it, in consequence of not seeing lights, usually seen there, and mistaking a light, casually thereabouts, which the master did see, for one which he missed of seeing. This was clearly a peril of the sea; but did not occur from the act of God, but from human means. The case of *Amar* v. *Astor*, cited by the defendants, from the 6th of Cowen, 266, is explained, and, as generally understood, is shown, by the Judge, to be erroneous, as had before been done in the commentaries of other authors. The Judge, moreover, puts the case of a common carrier ship, sailing near a foreign coast, which, in the darkness of the night, might be lured ashore by false lights, put forth for that purpose. A disaster from thence arising would originate by the act of man, and still would be a peril of the sea, for which underwriters against those perils might be answerable; but, if the ship were a common carrier, would not excuse her owners from responsibility for the loss of goods on board of her. And the Judge, in view of the authorities examined by him, remarks, that it is no matter what degree of prudence may be

exercised by the carrier and his servants, although the delusion by which he is baffled, or the force by which he is overcome, may be irresistable, yet, if it be the result of human means, the carrier is responsible."

The accident in the case at bar, as presented, is no more referable to the act of God, than is every event that occurs under his providence; and the collision having had its origin from the agency of man, without any concussion from any extraordinary violence of the elements, it must, in the absence of any modification of the general rule by the previous agreement of the parties, be held that the defendants are liable for the loss of the goods shipped by the plaintiff, as set forth in his writ and declaration. *Defendants defaulted.*

ALEXANDER S. CHADWICK *versus* JAMES STARRETT *& ux.*

In an action against husband and wife to recover for goods sold to her before her marriage, where it appeared that the wife, while sole, on her petition duly filed, had been declared a bankrupt under the U. S. bankrupt act of 1841, and had presented a petition for her discharge, and then intermarried with the other defendant; and subsequently to the marriage a certificate of discharge, under a decree of the court, was issued to her in her maiden name; *it was holden*, that such certificate was available to her and to her husband as a defence to such suit.

In order to be enabled to offer evidence to impeach a certificate in bankruptcy on account of "some fraud or wilful concealment by him of his property," the "prior reasonable notice, specifying in writing such fraud or concealment", required by the bankrupt act, should be by replication to the defendant's plea, seasonably filed, or by written notice seasonably given, setting forth, in either case, *specifically*, the fraud and concealment, and wherein it consisted, as if it were a special declaration in an action of the case.

THIS was an action of assumpsit, to recover for goods sold and delivered to Nancy T. Hussey, while she was a *feme sole.* The sale and delivery were proved, at the trial before SHEPLEY J. It appeared that she was married to the other defendant, Starrett, on Nov. 15, 1843.

In defence, the copy of a certificate of discharge in bank-

ruptcy of Nancy T. Hussey was read, bearing date on Jan'y 31, 1844, and which recited, that her petition was filed June 21, 1842; that she was declared a bankrupt August 24, 1842; and petitioned for discharge Nov. 30, 1842. The plaintiff's counsel insisted, that the discharge was inoperative, because it was not obtained until after her intermarriage, and that it would not prevent the plaintiff from maintaining the action against the husband. The Court decided otherwise.

The plaintiff then claimed to impeach the certificate as obtained by fraud or wilful concealment, and offered to prove that it had been thus obtained; but the Court decided, that no such reasonable prior notice had been given as is required by the bankrupt act, to enable the plaintiff to make such proof, and that it could not be received.

Thereupon the plaintiff consented to become nonsuit, which is to be taken off and a new trial granted, if any of these rulings were erroneous.

The following is a copy of the notice filed by the plaintiff in the District Court on June 23, 1844: —

"District Court, Middle District, December Term, 1844, Kennebec county. — *Alexander S. Chadwick* v. *James Starrett & al.* The plaintiff intends to contest the certificate in bankruptcy of the said Nancy T. on the following grounds: —

"1. Because said Nancy T. fraudulently preferred certain creditors, and because said Nancy T. was guilty of fraud and a fraudulent and wilful concealment of her property and rights of property, contrary to the provisions of the act under which said certificate was obtained.

"2. Because the act under which said certificate was obtained is contrary to the provisions of the constitution of the United States.

"3. Because said Nancy intermarried with James Starrett, one of the defendants in said action, during the pendency of her petition in bankruptcy and before she had obtained said certificate.

"4. Because said Nancy T. has not conformed to the requisitions of the act under which said certificate was obtained.

"5. No discharge."

At June Term, 1845, of this Court, the plaintiff filed another notice, of which a copy follows: —

"S. J. Court, Kennebec Co. June Term, 1845. — *Alexander S. Chadwick, appellant,* v. *James Starrett & al.* The plaintiff in said action says, that the certificate in bankruptcy of Nancy T. Hussey ought not to avail the defendants in this action.

"1. Because said Nancy T. married the said James before her said certificate was obtained.

"2. Because said Nancy T. did not conform to the provisions of the law under which said certificate was obtained, in this, that she fraudulently and wilfully suppressed and did not inventory in her schedule B., in her petition to be declared a bankrupt, the following goods, chattels, money, articles and securities.

"(1) An interest in a house, or house and land in Clinton.

"(2) Sundry notes and demands due said Nancy T.

"(3) Beds and bedding.

"(4) Table linen, knives and forks, spoons, castor, chairs, rugs, candle sticks, lamps, fire set, window curtains, jewelry, spectacles, tables and stands, napkins."

Evans and *Whitmore*, for the plaintiff, contended that the ruling of the Judge at the trial was erroneous, and therefore that the nonsuit should be taken off.

1. The legal existence of the original debtor was merged on her marriage with Starrett, and the proceedings afterwards, in bankruptcy, in her own name, as a *feme sole*, were entirely void. 5 B. and Ald. 759.

2. But if the certificate had been legally obtained, it could not have availed the husband, as a defence to this suit. The husband became instantly liable, when the marriage took place, for the debts of the wife, and he must himself have obtained a certificate in bankruptcy, and have proved it to the Court, to have discharged him from that liability. 9 Wend. 238.

3. The ruling of the Judge, that prior legal notice had not been given was erroneous. It was filed one term before the

trial, and that was earlier than was necessary. Reasonable notice only is required. And it was sufficient as to form, for it is only necessary to say, that the plaintiff intends to impeach the certificate, and tell wherefore.

Wells, for the defendants, said that every thing was done necessary for a discharge in bankruptcy, before the marriage, and it merely awaited the action of the Court. The certificate of discharge is a mere recital of the prior proceedings, and is made evidence of them. But the discharge takes place by the prior acts. The certificate of discharge relates back to the time of the filing of the petition.

The marriage could not make the husband any further liable than his wife was. If he took the wife with the liability to pay her debts, he took her also with liability to be discharged from them.

The mere filing of the notice with the clerk, is no notice to the defendant, or to his counsel, and in fact we knew nothing of it, until produced at the trial. This cannot be such *seasonable notice*, as the bankrupt act requires.

Nor was either of the notices such in form or substance, as is required by the law. Neither of them contain any specification of the fraudulent acts relied upon to avoid the effect of the certificate. They are but mere general and indefinite charges of fraud; and the list of articles gives no more information, as to the fraudulent acts relied upon, than it would to have said, that she had in her possession certain personal property, which she did not put into the schedule, as her property. And there might actually have been articles which had belonged to her, and which were not of the least value whatever.

The opinion of the Court was drawn up by

WHITMAN C. J. — The plaintiff claims to recover for goods sold to the defendant, the wife, while sole. She intermarried with the defendant, Starrett, after she, by her maiden name, on her petition, had been declared a bankrupt, under the act of Congress of 1841; and after she had presented her petition

for a discharge; and before a decree had been obtained for that purpose. Subsequently to the marriage, a certificate of discharge was decreed and issued, according to her petition, in her maiden name, and this is now relied upon in defence.

The plaintiff insists, that the certificate so granted is null and void, and furthermore, that it was fraudulently obtained by means of a wilful concealment by her of her property or rights of property, and is, therefore, inoperative. The Court, at the trial, ruled that the certificate was not objectionable on account of its being issued to the wife, by her maiden name, and in pursuance of a decree passed after her intermarriage with Starrett; and as to the supposed fraudulent concealment of property, that no such prior reasonable notice had been given as is required by the act to authorize the plaintiff to introduce proof of the existence of it; and thereupon a non-suit was entered which is to be removed, and the action is to stand for trial, if the Court erred in either of those rulings.

The first question is, was the certificate of discharge, as issued, pleadable in bar of the action? Could she, after her intermarriage, as a *feme sole*, and by her maiden name, prosecute her petition, before presented, for a decree of discharge? And could a discharge issued to her in her maiden name, after her intermarriage, be available to her and her husband, as a defence against a suit for her debt incurred when sole? In reference to these inquiries we are without aid from precedents to be found in the books, bearing directly upon them. Generally we are well aware, that the marriage of a *feme sole* plaintiff, if regularly pleaded, abates her suit. If not pleaded, the suit may proceed to judgment in her name, and execution may issue thereon, as if she were sole. Comyn, Abatement, K. & H. 41. The decree of discharge was a judgment of Court. It was not, so far as appears, opposed by the creditors; yet we must presume it was preceded by regular proceedings for the purpose, and upon due notice given, and so that the creditors must be concluded as being privy to it. If such were not the case, they might, perhaps, avoid it by plea, as it is a general rule, that one not privy to a judgment, and having no

right to bring a writ of error, may so avoid it. Comyn, Error, D. But being, in cases like the one before us, constructively privies, it is not competent for them to avoid it in the manner proposed. Having been granted in the maiden name of the wife, it may be made, by proof of her identity, available to her and her husband in defence, in this case. If she had, while sole, being plaintiff in a civil action for damages, been allowed to proceed, and to recover judgment after marriage, we do not perceive why she might not afterwards be allowed to prosecute an action of debt thereon, conjointly with her husband, averring and proving her identity. If there be any objection to such a proceeding it must be merely technical, and have very little, if any, connection with the justice of the case. We are not aware of any precedent opposed to such a suit.

The other question presented, has not occurred in any adjudged case, precisely like the one before us, so far as we are informed. It must depend upon the construction to be put upon a provision to be found in § 4, of the statute before referred to, in these words, "and the same (the certificate of discharge) shall be conclusive evidence of itself in favor of such bankrupt, unless the same shall be impeached for some fraud or wilful concealment by him of his property," "on prior reasonable notice, specifying in writing such fraud or concealment." What is meant by prior reasonable notice, specifying the fraud or concealment? Doubtless a replication in the case before us, setting forth the fraud or concealment specifically, as if it were a special declaration therefor in an action of the case, if seasonably filed, would be reasonable prior notice; and a counter brief statement, under our statute, if the certificate were set up in defence in a brief statement, setting forth specifically the fraud and concealment, so that it could distinctly and clearly appear wherein the fraud and concealment consisted, if seasonably filed, would be a compliance with the requirement in the statute; and so, if instead of a counter brief statement, notice in writing were given, being equally specific, long enough before the trial came on, to enable the defendant to know wherein the fraud and concealment were

supposed to consist, so as to enable the defendant to come prepared to encounter the allegation, it would be all that the statute requires.

The plaintiff, in the court below, filed a counter brief statement, and gave notice, besides, in writing, and in this Court has filed an amended notice, and the question is, was either of them sufficiently specific? The counter brief statement contains some allegations, which have no connection with fraud or concealment. The second specification therein was doubtless supposed to contain the requisite description. It is, that the bankrupt, in her original petition and schedule B. therein, did not give an accurate inventory of her property, rights and credits of every name, kind and description, and of the location of each part and parcel thereof, as required by the act aforesaid. This cannot be regarded as such a specification as was intended by the law. It alleges, that she did not accompany her petition with an accurate inventory. This is done in general terms. No particular article is alleged to have been owned by her, and to have been by her wilfully concealed for the purpose of defrauding her creditors.

The other specifications, having reference to fraud, are to a similar amount. None of them describe the particular act wherein the fraud is supposed to have consisted; but merely make general allegations. One of them contains an averment that she "transferred certain securities," &c. without naming or describing, or attempting to describe any one of them. The notice filed in the court below is still more indefinite.

The notice filed in this Court states, that the bankrupt fraudulently and wilfully suppressed and did not inventory, in her schedule B., in her petition to be declared a bankrupt, an interest in a house, or house and land in Clinton; sundry notes and demands due said Nancy T., beds and bedding, table linen, knives and forks, spoons, castor, chairs, rugs, candlesticks, lamps, fire set, window curtains, jewelry, spectacles, tables and stands, napkins." As to rights to land, or land and house in Clinton, it might be very difficult for her to conjecture what was intended. There is nothing in the description to lead her

to suppose it to be one estate more than another, in that town; and as to the notes and demands, the remarks made in reference to the same allegation, in the brief statement, filed in the court below, apply here. As to the other articles the number of each is not stated, nor the value of any one or of all of them; nor is it alleged that they were articles owned by her, or ever in her possession; nor is any description given by which a single one, and much less all of them, could be identified. Such vague allegations would not, even in a declaration in an action of trover, and much less in an action of the case, be sufficient to put one upon his defence upon an accusation of fraud. Fraud is not to be presumed, but must be distinctly and particularly set forth, and be supported by corresponding proof. *Nonsuit confirmed.*

JOHN SMITH *versus* INHABITANTS OF READFIELD.

When money claimed as rightfully due, is paid voluntarily and with a full knowledge of the facts, it cannot be recovered back, if the party to whom it has been paid, may conscientiously retain it.

Where a person has paid the amount of taxes assessed upon him, he cannot recover it back, upon the ground that the assessment was illegally made, if there be no proof, that he was compelled to pay any portion thereof by duress of his person or seizure of his property, or that any part was paid under protest, and to avoid such arrest or seizure.

The mere fact that the taxes were paid to collectors, who had warrants for the collection, affords no satisfactory proof of payment by duress.

A person paying taxes illegally assessed upon him, cannot recover the amount of the town, without proof of payment to the treasurer of the town, or to some other legal officer or agent of the town, authorized to receive the money.

AT the trial before WHITMAN C. J. the parties, respectively, introduced their evidence, which was reported in full, and covered more than twenty pages; and they then agreed, that the cause should be taken from the jury; and that the Court should make such inferences from the evidence, as a jury might

do, and upon the whole case, enter such judgment as justice and law might require, upon nonsuit or default.

The view taken of the evidence by the Court, so far as the same was pertinent to the points decided, appears in the opinion of the Court.

The case was fully argued, on May 17, 1847, by

Wells and *Morrill*, for the plaintiff — and by

Evans and *H. W. Paine*, for the defendants.

The arguments were mainly in reference to points, which the Court did not find necessary to determine in making the decision.

For the defendants, it was objected, among other points made, that there was no evidence in the case, that the money had ever gone into the possession of the treasurer of the town. If then the plaintiff's counsel are right, in saying, that there were no legal officers of the town, they were but mere strangers, and the action cannot be supported against the town for any acts of theirs.

If the officers were legally chosen, then the payment was voluntary, and that is a waiver of any right to recover it back.

For the plaintiff, it was replied, that where taxes were illegally raised or assessed, and had been paid to the officers of the town, the law allowed the person paying it, to recover it back. The tax may be illegal, because the assessment and collection of it, were by persons assuming to be officers of the town, when in fact they were not so; but this does not prevent the recovery against the town. The statute has made the town liable and not the persons so acting in its behalf.

It is enough, that the plaintiff was called upon to pay the tax. He is not obliged to wait until his property is sold, in order to have the right to recover back an illegal tax after he has paid it.

The case was continued *nisi* for advisement, at May Term, 1847; and at the succeeding October Term, the opinion of the Court was delivered, drawn up as follows, by

Shepley J. — The plaintiff claims to recover the amount of

taxes assessed upon him in the town of Readfield, during the years 1842, 3, 4 and 5, and which have been paid by him to the collectors, and to the surveyors of highways. He proved, that the several sums assessed to be paid in money, had been paid to the persons acting as collectors of taxes. There is no proof, that he was compelled to pay any portion of them by duress of his person or property; or that any part was paid under protest and to avoid an arrest of his person or seizure of his property.

When money claimed as rightfully due is paid voluntarily, and with a full knowledge of the facts, it cannot be recovered back, if the party, to whom it has been paid, may conscientiously retain it. *Brisbane* v. *Dacres*, 5 Taunt. 144; *Preston* v. *Boston*, 12 Pick. 7. According to the latter case, one peremptorily called upon to pay an illegal tax, by virtue of a warrant issued to a collector of taxes, may give notice, that he pays it by duress and not voluntarily, and may recover it back.

The witnesses in this case, being the collectors, state only, that they collected the taxes by virtue of the warrants issued to them. Taxes are so collected even when paid to the collector without any special call made for them. The mere fact, that they were paid to collectors, who had warrants for their collection, affords no satisfactory proof of a payment by duress. *Amesbury W. & C. Manuf. Co.* v. *Amesbury*, 17 Mass. R. 461. To constitute payment by duress, in such a case, there should be proof of an arrest of the body, or of a seizure of the property; or proof authorizing the conclusion, that such an arrest or seizure could be avoided only by payment. There is no such proof in this case. There can be no doubt, that the plaintiff must be considered as paying with a full knowledge of the facts, for they were within his own actual knowledge, or exhibited by the public records. And as little doubt, that the town may conscientiously retain the proportion of taxes assessed upon one of its inhabitants to defray State, county, and town expenditures.

The proof is still more conclusive, that the payments made to surveyors of highways, of the amounts assessed, to be paid

in labor, were voluntary. It does not appear, that the surveyors had been authorized, according to the provisions of the statute, c. 25, § 78, to collect these taxes by warrants of distress. The plaintiff appears to have paid in part by procuring labor to be done on the highways; and the residue appears to have been paid by agreements with the surveyors to accept a part of the amount of the taxes paid in money in satisfaction of the whole. A compulsory payment is disproved, for the plaintiff could not be compelled to perform labor or to cause it to be performed; nor could he be compelled to make contracts and procure discharges in full by the payment in part of the sums assessed.

The plaintiff also insisted, that the collectors as well as the assessors and other officers of the town, were not legally chosen. The case states, that, "to prove that no assessors, or selectmen, or constables, or collectors, or other town officers, were duly chosen and legally sworn during the years aforesaid, the plaintiff introduced the records of the several annual town meetings for those years."

There is no proof, that any part of the money paid by the plaintiff to the collectors has ever been paid by them to the treasurer of the town. Without proof of payment to him, or to some other legal officer, or agent of the town, authorized to receive it, the plaintiff must fail for want of proof, that the town has received the money.

These objections being sufficient to prevent a recovery, it will not be necessary to consider the other questions presented.

Plaintiff nonsuit.

JEFFERSON B. LYON *versus* NATHANIEL H. WILLIAMSON *& al.*

The report of a case by a Judge of the District Court, "presenting the legal points for decision" of the Supreme Judicial Court, under stat. 1845, c. 172, must be drawn up with the consent of the parties thereto. The facts stated in the report become by agreement the facts upon which the case is to be decided, and no other facts can be disclosed to this Court. Even the writ and pleadings, unless made a part of the case, cannot be examined for the purpose of influencing the Court.

To enable the plaintiff to maintain an action upon a promissory note, made payable at a particular time and place, it is not necessary to aver and prove its presentment at the time and place named therein. If the maker was there, prepared to pay it, that is matter of defence to be pleaded and established by him.

Although the maker was at the place of payment, at the time named, prepared to make payment of the note, and the holder was not there to receive the money, yet if he subsequently demand payment there, and cannot obtain it, he may maintain an action against the maker to recover the amount.

The plea, when such defence is made, to be a good one, must state, that the maker was ready to pay the money at the time and place named; that he has ever since been ready there to pay the same; and that he brings the money into Court for the plaintiff. The facts alleged may be put in issue, and must then be established by proof, or the defence must fail.

THIS case came before the Court upon the following report of the Judge of the Middle District Court holden for the county of Kennebec.

"This is an action upon a promissory note, signed by Williamson, as principal, and Lovejoy, as surety, dated 4th September, 1844, payable to the plaintiff or order, for $27,85 at the house of Lovejoy, on the first day of July, 1845, with interest.

"This action was entered August Term, 1845. No demand of payment was made other than the bringing of this action.

"From the last day of June, to the 15th day of July, 1845, Lovejoy had silver money enough to pay this note constantly at his house, placed under the care of his wife, who was constantly at home during that time, and who was authorized and directed and ready to pay the note when presented.

"The money, (amount of principal and interest) was not

placed in the hands of the clerk until the sixth day of this (the third) Term of the Court.

"The plea was pleaded and issue joined on said sixth day of the term after the money was lodged with the clerk.

"The foregoing facts were pleaded. The following questions of law arose in the case: —

"The parties agree, that the Judge shall report them for the decision of the S. J. Court upon the stipulations hereafter named: —

"*Question* 1st. — Upon a note, payable at a specified day at the defendant's house, upon which no demand of payment was ever made. Is it a good defence, in an action against the maker, that at the pay day, he had silver money enough at his house, placed under the care of his wife, (who was at home all the pay day) and who was authorized and directed, and ready to have paid the note, if it had been presented.

"*Question* 2d. — If the above fact would not constitute a good defence, unless the money was brought into Court, would the defence be perfected by the defendants' bringing the money into Court upon the sixth day of the Third Term of the Court, and before plea pleaded and issue joined.

"If either of these questions is decided in the affirmative plaintiff agrees to become nonsuit, with judgment for defendants for costs; otherwise defendants agree to be defaulted with judgment for plaintiff for amount due on the note with costs.

"In pursuance of said agreement this report of the case is made by — "Asa Redington, Presiding Judge."

Bronson, for the plaintiff, said that it was not necessary that the plaintiff should prove a demand at the time and place, in order to maintain the suit. If the defendants were then and there ready to pay the note, it is for them to show it in defence. Story on Notes, § 28, and note; 6 Metc. 268.

It is not enough to have silver money there; it must be such money as is a legal tender, which does not appear.

The plea of tender must allege, that the money has been always ready, or it will be bad. And the money must be brought into Court at the first term, and must always remain

there. 17 Maine R. 49; 1 Barnes, 181; 2 Strange, 1220; 6 Bac. Abr. 464; 1 Strange, 638.

Vose, for the defendants, insisted that it was a complete and perfect defence to the action, that the money was ready at the time and place appointed in the note for the payment thereof.

The cases cited for the plaintiff are, where a tender has been made. Here was no tender, and none was necessary, but the money was ready at the time and place where it was the duty of the plaintiff to call for it. As no tender was necessary, it was enough to have the money in Court at the time of plea pleaded. As the money was ready at the time and place of payment, the suit cannot be maintained without a demand first made upon the defendants. 17 Mass. R. 389; 6 Metc. 261; Chitty on Con. 801.

The opinion of the Court was prepared by

Shepley J. — This case is presented upon a report of facts and of certain questions of law, made by the District Judge by virtue of the statute of 1845, c. 172. A certificate of the clerk of the courts has also been forwarded to the Court, stating certain facts respecting the disposition of the money said to be "placed in the hands of the clerk." The act requires, that the report of the case should be drawn up with the consent of the parties. This report states, that it was so drawn up. The parties thus assent to the facts contained in the report, and to those alone. They become by agreement the facts, upon which the case is to be decided; and no other facts can be considered by the Court. The writ and pleadings, unless made a part of the case, cannot be examined for the purpose of influencing the Court, without a departure from the facts, which are by agreement to be the basis of the judgment.

The facts reported are, that the suit was commenced upon a promissory note, made by the defendants on Sept. 4, 1844, payable at the house of the defendant, Lovejoy, on July 1, 1845. The action was entered August Term, 1845. No demand for payment was made before the commencement of

the suit. "From the last day of June to the fifteenth day of July, 1845, Lovejoy had silver money enough to pay this note constantly at his house, placed under the care of his wife, who was constantly at home during that time, and who was authorized and directed and ready to pay the note, when presented. The money (amount of principal and interest) was not placed in the hands of the clerk until the sixth day of this, the third, term of the Court. The plea was pleaded and issue joined on said sixth day of the term after the money was lodged with the clerk. The foregoing facts were pleaded." The plea, however, is not made a part of the case and a decision of the questions is not made to depend upon it. The date of the writ is not a fact in the case.

It is not necessary to aver and prove the presentment of a promissory note, at the time and place named therein to enable the plaintiff to maintain his action upon it. *Bacon* v. *Dyer*, 3 Fairf. 19; *Wallace* v. *McConnell*, 13 Peters, 136. If the maker was there prepared to pay it, that is matter in defence, to be pleaded and established by him. If the holder, subsequently to the day named, there demand payment, and do not obtain it, he may maintain an action against the maker, who was ready at the time and place named to make payment. Hence the defence is not perfected by proving such a readiness to pay it, and the first question must be answered in the negative.

The plea in such case, to be a good one, must state, that the maker was ready to pay the money at the time and place named, that he has ever since been ready there to pay the same, and that he brings the money into Court for the plaintiff. Opinions of the Judges in appendix to the case of *Rowe* v. *Young*, 2 Brod. and Bing. 180; *Carley* v. *Vance*, 17 Mass. R. 389. *Wallace* v. *McConnell*, 13 Peters, 136. No separate issue can properly be made or tried to ascertain, whether the money was brought into Court before plea pleaded. The plea containing an averment of readiness at all times subsequently to the day appointed, covers the whole space of time between that day and the time of filing it; and the fact thus

alleged may be put in issue, and must then be established by proof, or the defence must fail.

In this case the facts reported would not establish the truth of such a plea. The statement, that Lovejoy was ready to pay, extends only from the last day of June to the fifteenth day of July, in the year 1845. There is no proof of it from the last named day to the time, when the plea was filed in the month of April, 1846. Something more than the additional fact stated in the second question, was necessary to make the defence perfect; and that question must also be answered in the negative. *Defendants defaulted.*

JOSEPH BAKER *versus* JOHN A. HOLMES *& al.*

When the tribunal for taking the disclosure of a poor debtor, under the provisions of the statute, c. 148, composed of two justices of the peace and of the quorum, has been duly organized so as to acquire jurisdiction of the case, its judgment, contained in a certificate declaring that the debtor "hath caused the creditor to be notified according to law," is conclusive; and "evidence proposed with a view to control it, is not legally admissible."

It appears to have been the intention of the framers of the poor debtor act in the Revised Statutes, to submit the question of the legality and sufficiency of the notice to the creditor, to the decision of the justices, and to make their decision conclusive.

THE parties agreed to submit this action for the decision of the Court upon the following statement of facts.

This is an action on a poor debtor's bond in common form. On the 26th day of September, 1846, said Holmes disclosed at Portland before J. W. Munger, chosen by the debtor, and Charles Harding, chosen by R. A. Bird, deputy sheriff of Cumberland county. The creditor did not appear.

Said justices administered the oath, and gave the certificate, conformable to the provisions of the statute.

It is proveable, that the application and citation, being a usual printed blank which was served upon the creditor, and on which the disclosure was made, was filled up entirely (with

the exception of the signatures of the debtor and justice) by R. A. Bird, then and still a deputy sheriff of Cumberland county, duly qualified and acting as such ; and if such proof be legally admissible, which question is presented to the Court, then these facts are admitted.

The Court is to render such judgment by nonsuit, or default, as the law upon these facts will authorize.

Baker, pro se, among other objections to the validity of the certificate of discharge, insisted that the notice to the creditor was wholly void, having been filled out by a deputy sheriff of the county, contrary to the provisions of Rev. Stat. c. 104, § 38. The word process is broad enough to include this notice. Many parts of the statutes and several cases were cited to show, that this position was tenable.

Where the court has no jurisdiction, the certificate, however formal, is wholly void. 15 Maine R. 337 ; 18 Maine R. 120 and 340 ; 21 Maine R. 206 ; 23 Maine R. 26 and 144 ; 24 Maine R. 166 and 196.

A void notice can give the court no jurisdiction. It is not proposed to contradict the facts stated in the certificate, but to show, that the persons signing it had no jurisdiction of the matter, and no power to act.

Codman and *Fox,* for the defendants.

The opinion of the Court was by

SHEPLEY J. — The case is presented upon an agreed statement. The suit is upon a bond made by a debtor and his surety, according to the provisions of statute, c. 148, § 20. Two justices of the peace and of the quorum, one chosen by the debtor and the other by a deputy of the sheriff, in the absence of the creditor, examined the notification, took the disclosure of the debtor, administered to him the oath, and gave him a certificate in the form prescribed by the thirty-first section of the statute.

When the tribunal composed of the two justices appears to have been duly organized so as to acquire jurisdiction of the case, its judgment, contained in the certificate declaring, that

the debtor "hath caused the creditor to be notified according to law," is conclusive; and "evidence proposed with a view to control it, is not legally admissible." *Carey* v. *Osgood*, 18 Maine R. 152; *Colby* v. *Moody*, 19 Maine R. 111; *Cunningham* v. *Turner*, 20 Maine R. 436.

It is still insisted, that evidence may be admissible for the purpose of shewing, that the justices had no jurisdiction, to prove that a blank printed for a notice to the creditor, was filled out by a deputy of the sheriff. By the documents presented before them, they would appear to have jurisdiction. Those documents must have been regarded as valid by them until their validity was impaired or destroyed by extrinsic testimony. They could not hear such testimony without having jurisdiction over the case. If the testimony could be admitted, it might not therefore have such an effect as the argument supposes. But it appears to have been the intention of the framers of the revised, as well as of former statutes, *in pari materia*, to submit the question of the legality and sufficiency of the notice to the decision of the justices, and to make their decision conclusive. The statute, by such a construction, does not operate unjustly. For the creditor has an opportunity to make objections to the validity and sufficiency of the notice before the legally constituted tribunal. And there is little reason for a construction, that could allow him, when he appears in fact to have had notice, to omit to make his objections to its validity before the proper tribunal, and afterward to insist upon them, when it is too late for a surety, who may have been attentive, to cause a strict performance of his bond, to escape from the consequences of a forfeiture.

Plaintiff nonsuit.

Richard H. Vose *& al. versus* Joseph Bradstreet.

Where there are several particulars in the description of the premises in a deed, and it is found that two of these particulars wholly fail, and cannot apply to any thing; still the land intended to be conveyed, will pass by such deed, if there be enough in the other parts of the description to identify the land.

If two grantors make a joint deed of a certain tract of land, the land may pass by such deed, if owned by either of the grantors in severalty, when such can be seen to have been the intention of the parties.

Where a deed was made by W. L. W. and G. W. P. Jr., to V. & S. with this description of the premises,— "a lot of land, situate in said A. conveyed to us by G. W. P. by deed dated May 25, 1836, and recorded book 92, page 51,"— and where the deed recorded on the book and page named, was from G. W. P. Sen. to G. W. P. Jr., particularly describing a lot of land and bearing the date of May 25, 1835, and there was no other deed on record from G. W. P. Sen. to G. W. P. Jr., or to W. & P. and no deed recorded between any of those parties dated May 25, 1836;—*it was holden*, that the land described in the deed recorded on "book 92, page 51," passed by the deed of W. &. P. to V. & S.

This was a bill in equity in which Richard H. Vose and Watson F. Hallett claimed to redeem two distinct parcels of land, adjoining one to the other, in the town of Augusta, from a mortgage made by George W. Perkins, Sen. to Elizabeth Gardiner, and by her assigned to Joseph Bradstreet, the defendant, and was heard on bill, answer and proof.

The bill alleges, that E. Gardiner, on Oct. 9, 1830, conveyed a lot of land including the premises to G. W. Perkins, Sen. and at the same time received back from him a mortgage thereof, and on August 31, 1840, assigned it to Bradstreet; that on May 20, 1835, Perkins, Sen. conveyed a portion of said lot, described in the bill, to William L. Wheeler and George W. Perkins, Jr., describing it particularly by bounds; that on the 25th day of May said Perkins, Sen. conveyed another portion of said tract to George W. Perkins, Jr. describing it by bounds; that on November 18th, 1836, said Wheeler and Perkins conveyed all their right, title and interest in the two last named pieces of land to said Vose and Harlow Spaulding; that on Dec. 15, 1837, Spaulding conveyed his interest in the premises, to the plaintiff, Hallett; that on April 8, 1845, the

plaintiffs, in order to redeem the land, requested and demanded of said Bradstreet, in writing, an account of the amount due upon the mortgage, and of the rents and profits received, and of the money expended in repairs and improvements; and that said Bradstreet neglected and refused to render any such account.

Bradstreet, after admitting the truth of certain portions of the allegations in the bill, among other things, says, in his answer, that he denies that said Wheeler and Perkins, Jr., did, on said 18th day of November, 1836, or at any other time, convey to said Vose and Spaulding, their (said Wheeler and Perkins,) right, title and interest, in, and to, the parcel of land last described in said bill; and also that on July 16, 1839, Wheeler and Perkins, Jr. conveyed to the defendant their title to the first parcel of land, and that on Aug. 21, 1840, said Perkins, Jr. conveyed to him the interest he had in the parcel of land last described in said bill; that he did not then suppose, nor does he now, that the plaintiffs had any right in, or claim to, the last mentioned tract; that he was informed by said Wheeler and Perkins, that the deeds made by them to the plaintiffs were mortgage deeds, and were to become void on the payment and discharge of the liabilities mentioned therein; and that therefore, he had, in order to extinguish said mortgage, paid and extinguished all the debts and liabilities specified in said deeds. No question of law, appears to have been raised by reason of the testimony introduced, independent of that, in relation to the deeds. It appears from the schedule of exhibits, that the original deed to Vose and Spaulding was to be before the Court, but neither the original deed, nor any copy of that or any other deed in this case, came into the hands of the Reporter. It was stated in some of the papers to have been precisely similar to the deed mentioned in the case, *Freeman's Bank* v. *Vose*, 23 Maine R. 98.

The *testimony* in the case does not appear to be material, so far as it respects the questions of law in the case.

The whole case, law and fact, was argued in writing.

H. W. Paine argued for the defendant, and seems to have made the opening argument.

The plaintiffs claim to redeem two distinct parcels of land, lying side by side, in the town of Augusta, as appears by the description. They claim title to both parcels under a deed to said Vose and one Harlow Spaulding from William L. Wheeler and George W. Perkins, Jr. bearing date Nov. 18th, 1836. As to the second parcel described in the bill, the respondent in his answer denies that the plaintiffs ever had any title ; in other words, that this parcel was conveyed by said deed. This deed contains no description of either parcel, but refers to prior deeds on record for the boundaries. If this parcel was conveyed by this deed, it must have been by virtue of this clause. "Also a lot of land situate in said Augusta conveyed to us by George W. Perkins, by deed dated May 25th, 1836, and recorded, book 92, page 51." Now the copy of the deed which the plaintiffs put into the case as the deed to which reference is had, is a deed from George W. Perkins to *George W. Perkins, Jr.* bearing date May 25th, 1835, and purporting to be recorded, book 92, page 51. This deed purports to be a conveyance of the same parcel of land, as is the last described in the bill.

The deed does not answer to the reference. It is essentially a different deed. The parties are different, the dates are different. The deed introduced is a deed to George W. Perkins, Jr. The deed referred to, is a deed to us, Wheeler and Perkins. The former bears date 1835. The latter bears date 1836. The grantors undertake to convey what was conveyed to them by a certain deed, and it turns out, there was no such deed to them.

In *Worthington & al., Ex'rs*, v. *Hylyer*, 4 Mass. R. 196, Chief Justice Parsons lays down this rule of construction. When the description of the estate intended to be conveyed, includes several particulars, all of which are necessary to ascertain the estate intended, no estate will pass except such as will answer to every particular. As if A. conveys all the land in his occupation in Hallowell, no land will pass except what is in

Hallowell and also in his occupation. But when the description is sufficient to ascertain the estate, although the estate will not answer to some of the particulars of the description, still the estate so ascertained will pass.

Here several particulars of description are given. Can the Court determine which is essential — which ought to be rejected?

It is true that the deed from Perkins, Sen. to Perkins, Jr. is recorded, book 92, page 51, and had Wheeler and Perkins conveyed "a lot of land in said Augusta as described on page 51, book 92, which is the record of a deed from George W. Perkins to *us*, dated May 25, 1836," the case perhaps would have fallen within the scope of the second rule, as pronounced by Chief Justice Parsons. But the grantors undertake to convey all the lot which Perkins, Sen. conveyed to them by deed of such a date; and they refer to the record for a transcript of that deed; but no such transcript is there found. It is as if they had described a parcel of land by metes and bounds, and then added a reference to the record. Now suppose this had been the course adopted, and on reference to volume and page of the record, an entirely different parcel would be found described, would it be contended that the land described on the record, had passed?

But if under this clause of the deed, the parcel claimed would be held to have passed *as against the grantors,* it surely ought not as *against the respondent.* The deed was placed on the record, but it is not pretended that Bradstreet had any notice, except what the law infers from that fact.

Had the respondent, when he took his deed from Perkins, Jr., examined the records with a view to ascertain if he had a right to convey, he might have found in the deed of Wheeler and Perkins, the clause relied on by the plaintiffs, and on looking to the page of the record referred to, he would have found no such deed. But on the contrary a very different deed; a deed different in the whole description; different both as to dates and parties. He would naturally infer that the conveyance was of some other parcel of land. At all events he

would not be at all enlightened by the record. He would be left in as much uncertainty and doubt about the title as ever. To hold him bound by the notice furnished by the record, would be to defeat the very object of the record.

The remaining defence applies equally to both parcels claimed. The respondent affirms that the deed under which the plaintiffs claim, was intended to be a deed of mortgage, conditioned to secure the payment of certain debts which Wheeler and Perkins owed to certain creditors named therein — that the usual clause of defeasance was omitted, through accident or mistake, and that the debts which were to have been secured, have since been paid, and that he has become the owner of the equity. When the respondent's counsel drew his answer he had not seen the original deed; he had only seen a transcript from the record; and, supposing that to be a true and accurate copy of the original, he admitted by implication at least, that said deed purported to be absolute. But he supposes, notwithstanding that admission, if the Court should, on inspection of the deed, be satisfied that it is a deed of mortgage at law, and that the debts enumerated have been paid, the Court would not pass a decree in favor of the plaintiffs. Because it would be apparent that they had no equitable right or interest.

The counsel feels great confidence, that a court of law would, on inspection, hold the deed to be a mortgage, conditioned to secure the creditors named therein. The counsel is aware of the decision in *Freeman's Bank* v. *Vose*, 23 Maine R. 98, in which this deed was decided to be absolute and unconditional, but he has reason to believe that the *deed* was not before the Court. The decision seems to have been had upon an agreed statement which did not present the real question.

On inspection, it appears, that this deed was drawn on a printed mortgage blank in common form, the clause of defeasance, "then this deed shall be void, otherwise," &c. is printed, and though a pen would seem to have been drawn through it, is still as legible as any other part of the instrument.

Now these words are needed to give force and effect to the other language of the deed. *Without them* a large part of the

written as well as printed language is utterly nugatory and nonsensical. It has no force or effect whatever. *With them*, the deed is perfect, the whole language has a meaning. And nobody, who examines the instrument, can for a moment entertain a doubt, irrespective of all evidence *aliunde*, that all parties contemplated and intended a mortgage. To carry out this clear intention, to render the language of the deed operative, the Court are not called upon to supply words, not found in the deed, but merely to read words already there, — there when the deed was executed. The dash of the pen, whether accidental or by design — whether made before or after the signing and sealing, has not obliterated these words. Now if a court of law, will construe *or* to mean *and*, if they will substitute one word for the other, when such a construction is deemed necessary to effectuate the intent of the parties and the better accomplish the object of the conveyance,— if a court of law will construe a deed to be any species of conveyance necessary to carry into operation the intention of the parties, is it asking too much to call upon the Court to read the whole instrument before them, to give effect to a particular clause, when that clause is clearly, manifestly upon the very face of the instrument itself, essential to effectuate the intention of *both parties*, a clause, without which, much of the remaining language is mere verbiage? The Court surely would not hold that an accidental blot had removed any part of the deed, and what is there to distinguish this dash of the pen, from an accidental blot? That it was the merest accident does not admit of a doubt. The known reputation of the grantee (who was the scrivener) for integrity, precludes any other supposition. But it is not every grantee who is entrusted to draw a conveyance to himself, that can be so safely confided in. And if the doctrine be established that a partial obliteration of a clause of this character, effectually takes that clause from the deed, so that the deed stands as if it were never there, then a dishonest grantee has only to draw his pen through the words of condition, and render his deed absolute. And this he may do, either before or after the execution, and

that too, without the possibility of detection, in ninety-nine cases in a hundred.

The respondent's counsel submits with great confidence that the deed under consideration, is a deed of mortgage *at law*, and does not require the application of the reforming power of a court of equity to render it what the parties intended it should be.

But if the Court, on examination of the deed, should hold it absolute and unconditional as it stands, the respondent asks the Court to reform it, and make it what the parties intended, and what, but for accident or mistake on the part of the scrivener, it would have been. The Court, sitting as a court of equity, are empowered by section 10, chapter 96, Revised Statutes, to determine all cases of "fraud, trust, accident or mistake" when there is not a plain and adequate remedy at law.

Accident is defined by Judge Story, to embrace misfortunes, losses, acts, or omissions. Story's Equity Jurisprudence, vol. 1, page 94. Mistake is defined by the same author, to be some unintentional act, omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence. Equity Jurisprudence vol. 1, 121. In *Freeman's Bank* v. *Vose*, 23 Maine R. 98, the Chief Justice, in pronouncing the opinion of the Court, says, "that on a proper bill for the purpose being presented, if it appeared that a mortgage was actually intended, and that the omission to make it so, was from accident, the Court might reform it, if it were between the original parties to the deed."

But privies are as well entitled to the aid of the reforming power of the Court as parties, providing the equities are the same. Equity Jurisprudence vol. 1, p. 178.

Vose, one of the plaintiffs, is one of the grantees named in the deed, and it appears that Hallet, the other plaintiff, paid no consideration for the conveyance of Spaulding, but took his place because he was a director in the Freeman's Bank. He then, at best, succeeds only to the title of Spaulding; stands in his place and neither better nor worse. Spaulding was but a trustee, and so is Hallet. Bradstreet has taken the place of

Wheeler and Perkins, by deed from Wheeler and Perkins, bearing date July 16th, 1839, as to the first named parcel in the bill, and by deed from George W. Perkins, Jr. bearing date Aug. 21, 1840, as to the other parcel.

It was also contended, that it appeared by the evidence in the case, that all the debts had been paid, and all the liabilities extinguished.

Vose, pro se. The plaintiffs, by virtue of a deed from Wheeler and Perkins, dated Nov. 18, 1836, claim the right to redeem the premises described in their bill, from a mortgage of a prior date to one Elizabeth Gardiner, assigned to the respondent.

This claim, the respondent resists upon several grounds.

We propose to consider them in the order in which they are taken. The first objection applies to the second parcel described in the plaintiff's bill. It is admitted, that they have all the title which passed to Vose and Spaulding by the deed of Wheeler and Perkins of Nov. 18, 1836, but it is contended, that the second parcel did not pass by that deed. The clause in that deed, by virtue of which it is claimed to have passed, is as follows. "Also, a lot of land situate in said Augusta, conveyed to us by George W. Perkins, by deed dated May 25, 1836, and recorded, book 92, page 51." By a reference to the record, as admitted by the counsel for the respondent, book 92, page 51, the second parcel described in the plaintiff's bill, is found recorded, the date of the deed on record is 1835, instead of 1836, and it purports to be a conveyance from George W. Perkins to George W. Perkins, Jr., instead of a conveyance to Wheeler and Perkins. In order then, to carry out the intention of the grantors, it is necessary to reject the figures "1836," and the word "us." It will then read, "also, a lot of land situate in said Augusta, conveyed by George W. Perkins, by deed dated May 25, and recorded, book 92, page 51." We then turn to the record, and in the very book, upon the very page referred to, we find recorded, the second parcel claimed, and described in the plaintiffs' bill. And would

not the adoption of such a rule, be in exact accordance with the uniform decisions of our Courts?

We refer first, to the case cited by the respondent. In *Worthington & al.* v. *Hylyer & al.*, 4 Mass. R. 205, Parsons C. J. says, "But if the description be *sufficient* to *ascertain* the estate *intended* to be conveyed, although the estate will not agree to *some* of the *particulars* in the description, yet it shall pass by the conveyance, that the *intent* of the parties may be effected.

In the deed of Nov. 18, 1836, to Vose and Spaulding, there is no attempt to give a specific description of the premises conveyed. For each parcel, reference is made to the book, and page, upon the Registry, where the same may be found. The *intent* of the grantors is plain, to convey all their interest in the premises described in book 92, page 51. And shall that intent be defeated, because they supposed the deed dated in 1836, instead of 1835, or that the conveyance was to both, when in fact it was to one of them alone?

In the case of *Vose* v. *Handy*, 2 Greenleaf, 330, the Court say, "Where several particulars are named, descriptive of the premises conveyed, if some are *false* or *inconsistent*, and the *true* be sufficient of themselves, they will be retained, and the others rejected, in giving a construction to the deed." So in the case of *Wing* v. *Burgis*, 13 Maine Reports, 111, the Court, after affirming the decision in the case of *Vose* v. *Handy*, proceed to say: — "It is the object of the law, to *uphold* rather than to *defeat* conveyances, if the *subject matter* upon which they are to operate, can be ascertained by any fair intendment."

In the case of *Allen* v. *Bates & al.*, 6 Pick. 460, the only description was as follows. "A certain tract of land lying in South Hadley, with the buildings thereon standing, further reference had at the Register's office, book 51, page 257." Here no parties are named, and no date is given to the deed; the name of the town in which the premises are situated is given, with the book and page, where the same are recorded; precisely such a description as ours would be, if we reject the

date of the deed as false, and the parties to whom the conveyance is said to have been made.

But the Court held in this case, that the description in the deed was made sufficiently certain by reference.

So in the 22d Maine R. 321, *Marr* v. *Hobson & al.*, the name of the town in which the land was situated, and the date of the deed were given without naming the parties; then follow the words, "and recorded in the Cumberland Registry of deeds, book 135, page 292;" and such description was held to be sufficient, without naming the parties, to convey the land described in the deed, to which reference is thus made.

In the case of *Foss* v. *Crisp*, 20 Pick. 121, the language of the deed was this, "meaning and intending hereby to convey all the real estate which I derived under the deeds recorded in Suffolk registry of deeds, (citing several deeds by book and leaf only) to all which deeds reference is to be had," yet the Court held, that a parcel of land conveyed by a deed thus referred to, and no otherwise described in the deed, than by such reference, passed by the deed. The Court say, in reference to the parcels that were described, "if the grantor had not taken the trouble to describe particularly the metes and bounds of the six several parcels of land, but had referred to a record of the same estates, as containing a true description of the premises intended to be conveyed; *such* a conveyance would have been good, and the description contained in the records, would by *law*, be deemed to be *incorporated* and made a *part* of the conveyance. It is a question of *intent*, the reference is to be considered as included in the conveyance."

In the present case, incorporating in our deed, the premises described in book 92, page 51, rejecting the date and the word "us," we have the second parcel described in our bill.

Now the *intent* of the grantors, Wheeler and Perkins, in the deed of Nov. 18, 1836, is most manifest. They intended to convey all their real estate, whether held jointly or severally. Hence in another part of the same deed, the house, which was the sole property of Wheeler, is conveyed. That they could, by their joint deed, convey all their interest, whether joint or

several, is settled by the decision of our own Court. In the case of *Crafts* v. *Ford*, 21 Maine R. 417, the Court say, "a conveyance by two persons jointly of real estate, of which one only is the owner, would be effectual to pass the estate of the one owning it." So in Cruise's Digest, vol. 4, page 217, title, deed, "if several persons join in a deed, some of whom are capable of conveying, and others incapable, it shall enure and be construed as the deed of those only who are capable of conveying, *for* the *incapacity* of some of the parties, will not render it invalid, as to those who are capable." Therefore, although, by a reference to the record, it appears that the premises were conveyed, not to Wheeler and Perkins, but to George W. Perkins, Jr., and although the deed of Nov. 18, 1836, purports to be a conveyance from Wheeler and Perkins jointly, this would not prevent the interest of Perkins, Jr. from passing, although Wheeler had none.

But the counsel for the respondent contends, that if this conveyance should be construed to be good as against the grantors, it ought not so to be construed as against the respondent. He maintains, that by a reference to the records, he would not have been put upon his guard. One fact is oftentimes more valuable than a great deal of theory. By a reference to the trustee disclosure of the respondent, in the case of *G. C. Child* v. *Wheeler & Perkins and the respondent, trustee*, page 19, near the bottom, it will appear, that although he is pleased to denominate the conveyance of Nov. 18, 1836, to Vose and Spaulding, a mortgage, yet he expressly states, that the *two* parcels now described in the plaintiff's bill are thereby conveyed. His language is this. "These *two parcels*, were then subject to a mortgage, made by George W. Perkins aforesaid to his grantor, *and* to a *mortgage* to said Vose and Spaulding." So, that however difficult it may be now, in 1847, for the respondent, or his counsel to understand by a reference to the record, *what* was intended to be conveyed, he had no doubt from inspection in April, 1841, the time when his disclosure was made.

The respondent next contends, that the deed of Nov. 18,

1836, under which the plaintiffs claim, upon a fair construction by a court of *law*, would be regarded as a mortgage to secure certain debts therein named, that said debts have been paid, and consequently, the estate is vested in the respondent by virtue of his subsequent conveyances from Wheeler and Perkins.

Now, if this point were open to the respondent, and if his construction of the deed were correct, still, we contend, this would not and ought not to avail him, because it is most manifest from the evidence in this case, as we are prepared to show hereafter in the course of the argument, that all the debts named in this deed have not been paid, but that a considerable portion is still outstanding, for which, one of the plaintiffs at *least*, hereafter may be called to account.

But to this argument, we have several answers: — and first, the respondent in his answer *admits*, that the deed upon its face purports to be absolute. He is therefore, we contend, estopped to deny that fact, so far as the appearance and construction at *law*, of the deed, is concerned. It is a point not raised by the answer, and consequently, cannot now, in this case, be taken by the respondent. *Houghton* v. *Davis*, 23 Maine R. 28. But if open, the point has already been settled. A construction to this deed has been given by a court of *law*, and it has been decided to be upon its face, absolute, and unconditional, by this Court. *Freeman's Bank* v, *Vose*, 23 Maine R. 98. And further, the question did not come up incidentally, nor collaterally. It was the very question before the Court, the construction of this very deed. It would seem therefore, hardly respectful in the counsel for the plaintiffs to argue that question over again, as if the Court would have deliberately pronounced an opinion upon the character of an instrument, which they had never inspected, and with the contents of which they were not familiar.

But if the question be still open, to wit, the construction of this deed as a question of *law*, and the counsel for the respondent, is right in his construction, and sincere when he "submits with great confidence, that the deed under consideration

is a deed of mortgage at *law*, and does not require the application of the reforming power of a *court of equity* to render it what the parties intended it should be," and further, if, as he contends, all the debts named in the deed have been paid; *he* surely, ought not to object to the maintenance of this bill; for upon his construction, what would the plaintiffs gain by a decree in their favor? Simply this, after paying off the Gardiner mortgage, in existence prior to the date of their deed, and now justly due to the respondent as assignee; the respondent would only need to commence his action of ejectment against the plaintiffs, and construing the deed from Wheeler and Perkins of Nov. 18, 1836, as a mortgage, which had been canceled, claim again the premises by virtue of his subsequent conveyances from Wheeler and Perkins.

On this argument, surely, the respondent needs not the interference of a court of equity in his behalf. According to his view of the case, he has a plain and adequate remedy at law.

The counsel for the respondent proceeds to say, "that if the Court on examination of the deed, should hold it absolute and unconditional as it stands, he asks the Court to reform it, and make it what the parties intended, and what, but for accident or mistake on the part of the scrivener, it would have been," to wit, a mortgage, upon parol proof, the testimony of the grantors, Wheeler and Perkins.

Now, the plaintiffs respectfully submit, that if the proof offered be competent and unobjectionable, and if the facts contended for, were clearly proved, this is not the mode in which the deed could be reformed. A cross bill should have been filed against the plaintiffs, in which the mistake or accident should have been distinctly alleged, and clearly set forth, and to which all those individuals should have been made parties, who have received conveyances from the plaintiffs since their deed was pronounced to be absolute and unconditional.

In this way, the conscience of Vose, one of the plaintiffs, might, and should have been appealed to, as to the true intent

and meaning of the parties; and his oath, if believed, would have been equivalent to the testimony of two witnesses, who should have *agreed* in their statement; and further, the rights of all parties interested, would have been fully protected.

But if a cross bill is not deemed necessary by the Court; that the answer of the respondent, should at least, have contained a distinct allegation of accident or mistake, and a prayer to the Court that the deed might be reformed. But the Court, by reference to the answer of the respondent, will perceive, that it neither contains any such allegation or prayer. The only mode in which the subject is alluded to, is by way of recital, as of something related to him by others, the only prayer for a reform of the deed is to be found in the argument of the counsel alone. In 9 Cowen, 755, *Patterson* v. *Hull*, the Court say, "the correction of an instrument is a distinct head of equitable power, *never* exercised, but on a bill filed, praying the correction *directly*, or what is equivalent, where the parties *consent* to go into the inquiry. The mistake, or other ground of correction, *must* be *charged* in the *bill*, so that it may be answered, and an issue taken upon it; the deed will then, if the evidence warrant it, be reformed, and set right by the decree. But you cannot do this collaterally. It cannot be done without *allegata et probata*, upon the very point." And again, "this is the uniform, and I apprehend, the only course, where a defendant is entitled to some positive relief beyond what the scope of the complainants' suit will afford him." "In order that a court of chancery should exercise its moral jurisdiction, by which a mistake in the written agreement of the parties, shall be rectified, it is *essential* that such mistake should be alleged in the *bill* as the *ground* and *object* of the parol proof." 1 Har. & Johns. 24; American Chancery Digest, 22, 61. Such was the allegation in the bill in the case reported in the 20th vol. Maine Reports, 365, and in *Freeman's Bank* v. *Vose*, 23 Maine Reports, 98, the Court say, "that on a proper bill for the *purpose* being presented, if it appeared that a mortgage was actually intended, and that the omission to make it so, was from accident, the Court might

reform it, if it were between the original parties to the deed; but as the deed now stands, it must be regarded at law as having conveyed an absolute estate."

From the authorities quoted, it would seem, that in order to reform a deed on account of accident or mistake, either a bill should be filed alleging the fact, or else, the respondent in his answer should so allege, and pray that the deed may be reformed. In this case, neither mode has been adopted, and it is respectfully submitted, whether the rights of innocent *bona fide* purchasers, for a valuable consideration, can be put in jeopardy, by such a mode of proceeding.

It was then contended, in the argument, that if the Court should be of opinion, that the defendant might avail himself of this ground, and show by parol, that it was intended to have been a mortgage, still, that the evidence did not show such intention. And further, that if a mortgage, still, the condition had not been performed.

Lancaster also argued for the plaintiff.

The opinion of the Court was drawn up by

WHITMAN C. J. — The plaintiffs set forth, that in the year 1836, Messrs. Wheeler and Perkins conveyed to said Vose and one Spaulding, certain real estate, situate in Augusta in said county; and that Spaulding conveyed his portion thereof to the plaintiff, Hallet; and that, at the time the first named conveyance was made, there was an incumbrance, by way of mortgage, on said estate; and that the defendant has become the assignee thereof; and the plaintiffs claim to have a right to redeem the estate therefrom; and allege that they have taken the steps required by law to entitle them to do so. The defendant resists this claim upon two grounds: — first, that he was a subsequent *bona fide* purchaser of the same estate of Messrs. Wheeler and Perkins; and that the deed of those gentlemen to Vose and Spaulding was, as he avers, but a mortgage; and that the condition of it has been performed; and, secondly, that as it respects a portion of the premises, the deed of Messrs. Wheeler and Perkins to Vose and Spaulding, does not

so describe the same, as that it could pass to them. This last objection we will first consider.

The deed to Vose and Spaulding describes this portion of the premises as follows: — "also a lot of land, situate in said Augusta, conveyed to us by George W. Perkins by deed, dated May 25th, A. D. 1836, and recorded, book 92, page 51." The deed recorded on the page, and in the volume named, is found to have been from George W. Perkins, Sr., to George W. Perkins, Jr., the latter of whom, was one of the firm of Messrs. Wheeler and Perkins. But the deed, thus recorded, bears date May 25th, 1835, and does not purport to be to Wheeler and Perkins, as seems to have been supposed, in the deed, by them to Vose and Spaulding. But it is not pretended that there is any other deed on record from George W., Sr. to George W., Jr., nor is it pretended, that there is any other deed on record from the former to the latter, or to Wheeler and Perkins, except the one found on page 50, of volume 92, being of the other parcel conveyed, and so described. There is therefore no lot of land answering to that part of the description above quoted, and naming the grantee in the deed; nor is it pretended that there ever was any deed, named in the quotation, of the date of 1836. These two particulars, in the deed referred to, wholly fail; and cannot apply to any thing. Is there any other part of the description in the quotation which can identify the land intended to be conveyed? If there is, it may pass, as has often been held. A deed is found to have been recorded in the book and page named, from George W. Perkins, Sr., to George W. Perkins, Jr., of a lot of land; and land owned by either of the grantors severally, may pass by a deed made by them jointly, if such can be seen to have been the intention of the parties. It is not to be doubted, but that the grantors intended, by the description as quoted, to convey something; and as the book and page of the records are referred to, for a description of what was intended to be conveyed, and, as we there find a lot described, which one of the grantors owned, there is as little reason to doubt, that the intention was to convey that estate particularly, as the

residue of the description cannot be made to apply to any thing else. And such a conveyance, duly recorded, as this was, must be deemed to be notice to all subsequent grantees of the same estate, from the same grantors. This objection therefore, was not well founded.

As to whether the conveyance to Vose and Spaulding, is to be deemed a mortgage or not, it may not be necessary to inquire. If it were a mortgage, and any part of the supposed condition remains unperformed, the plaintiffs, as to their right to redeem from the mortgage held by the defendant, will be in the same predicament as if their conveyance should be deemed to be unconditional. If in equity we can consider it a mortgage, the condition, the performance of which would render it void, would be that the grantors should "pay all liabilities now due, or which may hereafter be due from them to the Freeman's Bank, upon paper indorsed by the said Vose, or any other individual; also any sum which now or hereafter may become due to the Augusta Bank, from the said Wheeler and Perkins; also any sum now due, or hereafter to become due, from them to the Granite Bank; also to Neguemkeag Bank; also any sum now due, or which hereafter may become due, to Joseph Eaton, of Winslow, and to S. Eaton." It is not averred in the defendant's answer, that the grantors ever performed such a condition; but it is averred by the defendant, that believing the deed, in equity, would be treated as a mortgage, "he had, at different times, and before the service of the plaintiffs' bill upon him, and before the demand made upon him by the plaintiffs, as set forth in their said bill, paid and extinguished all the debts and liabilities specified in said deed." And, as he had a subsequent deed of conveyance, from the same grantors, such a performance, if clearly established, and in conformity to the true intent of such supposed condition, might avail him in equity, if the deed should be treated as a mortgage. The burthen of proof would, however, rest upon him clearly to establish such grounds of defence. It is manifest, if the deed of Wheeler & Perkins is to be treated as a mortgage, they were so to perform the condition, that no detri-

ment should come to Vose or Spaulding from the liabilites to which they were subjected for and on account of the grantors, arising from the demands named in their deed. It is not averred by the defendant, that this was done, and the evidence shows that Vose has been put to much expense and trouble, by reason of his liabilities, consequent upon the non-performance of the supposed condition by the grantors, according to its spirit and meaning, and for which he has not been remunerated.

Again — it appears, that there is a certain debt due to the assignees of the Neguemkeag Bank, the security for which had been canceled, and given up to one Eaton by the plaintiff, Vose, as the attorney of that Bank, through misapprehension, and which was embraced in the terms of said supposed condition. There is also evidence tending to show, but concerning which we give no opinion, that another debt, within the terms of said supposed condition, yet due to an assignee or assignees of the Freeman's Bank, had also been canceled through mistake or misapprehension.

We cannot, therefore, consider it as made out by the defendant, that "he has, at different times, and before the service of the plaintiffs' bill upon him, as set forth in their bill, paid and extinguished all the debts and liabilities specified in said deed," according to the intent and import of said supposed condition. The plaintiffs, therefore, must be deemed to have a right to redeem the premises, and to hold the same, at least, until all equitable claims arising to the plaintiffs, or either of them, under the deed of Wheeler and Perkins to Vose and Spaulding, and the assignee of the latter, the said plaintiff, Hallet, shall have been discharged. This being accomplished, the defendant will be in a condition to bring his bill in equity, claiming to redeem the estate as holden in mortgage.

As this case now stands, unless the parties can agree on the amount to be paid to redeem the premises from the mortgage held by the defendant, a master will be appointed to ascertain the amount; after which a decree may be entered for redemption.

CHARLES F. WINGATE *versus* ORRIN LEEMAN *& al.*

The justices of the peace and of the quorum appointed to hear the disclosure of a debtor, and to administer to him the oath, if found entitled thereto under the provision of Rev. Stat. c. 148, have no authority by virtue of that appointment to act as appraisers of the property disclosed.

Where such justices certified in their record, that the debtor was "examined by us as to his property, and we were satisfied that he had no property, not exempted from attachment, save that he had two small notes of seven or eight dollars, both outlawed and of no value, and that he was clearly entitled to have the oath administered to him, and we therefore admitted him to the oath"— *it was holden* that the justices had no authority to administer the oath, and that the proceedings could not be considered as a performance of the condition of the bond.

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

"This was an action on a poor debtor's bond in common form, dated Oct. 10, 1844. The writ was dated May 23, 1845. The general issue was pleaded with a brief statement of performance.

"The execution of the bond was admitted, and the defendants then introduced the certificate of two justices of the peace and quorum in due form, which may be referred to. He then proposed to read, in evidence, a writing on the back of said certificate, signed by the same justices, in the following words: "Kennebec ss. Jan'y 11, 1845. We certify, that Joseph J. Eveleth one of the within named justices was selected by the debtor, and Elias Craig, the other, was appointed by Joseph Young, a constable of Augusta, who might legally serve the precept, on which said debtor was arrested, the within named creditor having neglected to select any justice.—And we further certify, that we both reside in the town of Augusta, in which town the disclosure is made."

"This writing was objected to by the plaintiff but admitted by the Court. The defendants then stopped, and the plaintiff introduced a copy of the record of said justices as follows: — "Kennebec ss. Jan'y 11, 1845. Before Joseph J. Eveleth, chosen by the debtor, and Elias Craig, chosen by an officer, who might have served the original writ, (the creditor declin-

ing to choose) two justices of the peace and quorum for the county of Kennebec, appeared Orrin Leeman, who had been arrested and given bond according to law, on an execution in favor of Charles F. Wingate of Augusta, to disclose the state of his property. Having examined the citation and officer's return thereon, and finding them correct and according to law, and that said creditor was duly notified; that the said Orrin Leeman was sworn to make true answers, and was then examined by us as to his property, and we were satisfied that he had no property, not exempted from attachment, save that he had two small notes of $7, & $8, both outlawed and of no value, and that he was clearly entitled to have the oath administered to him, and we therefore admitted him to the oath prescribed in the law for the relief of poor debtors, chap. 148, § 28, Rev. St. which was duly administered to him."

"The plaintiff also introduced the execution, on which the bond was taken, and the original citation, both of which are to be made a part of the case, and may be referred to, without being copied.

"The plaintiff then offered Joseph H. Williams as a witness. His testimony was objected to by the defendants, but the Court received it, to be admitted or rejected as should be deemed proper after hearing it.— He testified, that on the 11th Jan'y, 1845, he was present at the disclosure of Leeman in *Williams* v. *him* and in *Wingate* v. *him*. Leeman, Eveleth, Craig, Bradbury, Baker and himself were present at the place appointed. Eveleth swore Leeman to make true answers, and the witness, as counsel for the creditor in *Williams* v. *him*, examined him fully as to his property. He disclosed nothing except two notes of hand, which were not produced, which Leeman said were outlawed and good for nothing. When witness had no further questions to ask, Bradbury, who was counsel for the debtor, spoke about the other disclosure. Eveleth read the citation and examined the return. Baker, who, I supposed, appeared for the creditor in *Wingate* v. *Leeman*, did not ask any questions, but sat by and attended to the examination. Eveleth was about to administer the oath, and

was not certain that he had not administered it, when Bradbury asked who appointed the justices, the witness replied that he had not appointed any, and Baker said nothing or said he had not. Bradbury looked to see who might appoint, as the creditor's attorney declined, and then asked for a delay of the proceedings till he could send for an officer to appoint a justice, and it was granted. Mr. Baker and witness then left the office — thinks Eveleth left, knows Leeman left and went for an officer; when we left the office, it was 27 minutes past 11 o'clock, A. M. Bradbury's motion was for an adjournment for some specific time, — thinks till 2 o'clock, P. M. but is not certain, and in answer to Mr. Baker's question, if it was not half an hour, the witness said it might be; he was not certain.

"*Cross examined.* — He said he did not recollect that Bradbury asked Baker and himself to stop — does not think the time of adjournment asked for was so short as half an hour, but it might be — he was not requested to stop — nothing was said about a continuation of the disclosure — does not think Baker said any thing about appointment, only to answer Bradbury's question, that he did not appoint — does not know that the oath was administered at all, nor whether it was not — thought the disclosure amounted to nothing, as he had disclosed notes which were not produced for the creditors' benefit — thinks Leeman said the notes were outlawed and he considered them good for nothing — says he had examined the debtor fully.

"The Court then ruled that the testimony of Williams was not admissible and rejected it all, and instructed the jury, that the defence was made out, and that they should give their verdict for the defendant, and they did so.

"To all of the aforesaid rulings and instructions the plaintiff excepts and prays his exceptions may be allowed.

"By Joseph Baker, his att'y."

"The foregoing exceptions are hereby allowed, prior to the final adjournment of the Court, the same having been previously reduced to writing and presented for allowance and found to be correct. "Asa Redington, Presiding Judge."

J. Baker, for the plaintiff, said that the certificate of discharge furnished no defence, because notes were disclosed, and not appraised or produced. Rev. Stat. c. 145, § 29, 30; *Harding* v. *Butler*, 21 Maine R. 191. The statement of the debtor, that the notes were worthless, cannot be evidence of this fact. The law has provided the mode of determining that question.

The testimony of Williams tended to show, that the court had no jurisdiction, and was admissible. One justice had no right to adjourn without the other. *Bunker* v. *Hall*, 23 Maine R. 26; *Williams* v. *Burrill*, *ib.* 144; *Burnham* v. *Howe*, *ib.* 489; *Williams* v. *McDonald*, 18 Maine R. 120; *Granite Bank* v. *Treat*, *ib.* 340; *Hovey* v. *Hamilton*, 24 Maine R. 451.

Bradbury, for the defendants, contended that the defence was made out upon the face of the papers. They show, that the notes were outlawed and worthless. There was no necessity of proceeding to appraise what was of no value.

The testimony of Williams was rightly rejected. The plaintiff introduced the record, and he cannot contradict it by parol evidence. That record establishes the jurisdiction of the magistrates, having recited all the facts necessary to sustain it. Having introduced the record in evidence, and availed himself of the benefit of it, the plaintiff cannot impeach it, as a record.

But, if the testimony had been admitted, it would not have varied the case. The debtor could not select the other justice until the creditor had declined, and the selection was made as early as it could have been done, after the refusal of the creditor.

The opinion of the Court was drawn up by

Tenney J. — The debtor, who was the principal obligor in the bond in suit, made disclosure before two justices of the peace and the quorum, relative to his property, and they were satisfied, that he had no property not exempted from attach-

ment, "save that he had two notes of seven or eight dollars, both outlawed and of no value."

The Rev. Stat. c. 148, § 29, provides, that whenever from the disclosure of any debtor, &c., it shall appear that he possesses or has under his control any bank bills, notes, &c., or any property not exempted by statute from attachment, but which cannot be come at, to be attached, if the creditor and debtor cannot agree to apply the same in full or partial payment of the debt, the same shall be appraised by persons to be selected and qualified in the mode specified in the statute. The oath administered to a debtor, when notes of hand had been disclosed by him and the value of the same was not applied to the debt by an agreement of the creditor and debtor, or appraised by persons appointed for the purpose, was held, under a similar provision of the statute of 1839, chap. 412, sect. 2, not to be a fulfilment of the condition of the bond. In that case, however, the notes disclosed do not appear to have been regarded by the tribunal, which administered the oath to the debtor, as worthless, as they were in the case at bar. *Harding* v. *Butler & al.* 21 Maine R. 191.

The justices of the peace and quorum, appointed to hear the disclosure of a debtor, and to administer to him the oath, if found entitled thereto, have no authority by virtue of that appointment to act as appraisers of the property disclosed. Other persons are to be selected for that purpose, who are required to be under oath, when they perform the duty. Whether notes are barred by the statute of limitations, so that judgment cannot be recovered thereon, may depend upon evidence not apparent on their face. The debtor may have made a new promise, or a suit may have been brought before the statute could apply and still pending, upon them; and whether they are worthless or not, is a question, on which the creditor has a right to be heard before those clothed with authority to estimate their value. The judgment of the justices, who administered the oath, upon these matters was unauthorized, and could have no effect. The case is the same as if the notes were disclosed without any suggestion, that they were

not of full value, and falls within the principle of the case above referred to. *Exceptions sustained.*

THOMAS LONGLEY *& al. versus* RICHARD H. VOSE.

Where the record to be proved is a record of the Court before which the proof is to be made, the regular course is to make the proof by a production and inspection of the record.

Where it appears from the docket of the clerk of the Court, that a party with his surety entered into recognizance to prosecute an appeal from a judgment of a district court to the Supreme Judicial Court, and the clerk dies before the recognizance is extended upon the record, it is competent for a subsequent clerk, by direction of the Court, to complete the imperfect record of the deceased clerk. But the new clerk has no authority to do it without such direction.

The minutes, or short notes, of the clerk upon the docket must stand as the record, until a more extended and intelligible record can be made up therefrom.

A recognizance, taken in the district court, being a court of record, conditioned to enter and prosecute an appeal made to the Supreme Judicial Court, in a civil action, becomes a part of the record of the case in the district court; and an action of debt can be maintained thereon, as a record of the district court, on a failure to perform the condition.

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

"Debt on recognizance. Pleas, *nil debit* and *nul tiel record*, leave having been given to plead double.

"Plaintiffs read a certified copy of record marked A.

"Defendant suggested that there had been an alteration or addition to the record, and that said certified copy was not conformable to the record.

"Defendant introduced a volume of the records of the district court, and read the record of the case, closing with the words "from which judgment, the defendants appealed to the Supreme Judicial Court, next to be holden at Augusta, within and for the county of Kennebec, and entered into recognizance with sureties, as the law directs, to prosecute their said appeal with effect."

"Defendant also introduced a paper marked B. containing an extract from the record and a statement of what William M. Stratton, Esq. clerk of the Courts would state as a witness, if admissible.

"The writ, declaration, pleadings, the said certificate marked A., the said book of records and said paper marked B, may be referred to.

"The following questions arose upon the foregoing facts: —

"1. Had Mr. Stratton authority to extend the said recognizance marked A, in the form in which it now appears?

"2. Is Mr. Stratton's testimony admissible to show the facts, which he states?

"3. Is the difference between the extract from the record, and the said recognizance, introduced in the case in evidence, material, and if so, fatal to the action?

"4. Are the plaintiffs upon all the facts exhibited entitled to recover?

"The parties then agreed that said case should be reported by the District Judge for the decision of the S. J. Court, upon the stipulation, that if the plaintiffs upon the foregoing case, are entitled to recover, defendant is to be defaulted, with judgment for plaintiffs for such debt or damage as they are by law, entitled to recover with costs. Otherwise, plaintiffs to become nonsuit with judgment for defendant, for costs. Accordingly the case is hereby reported by

"Asa Redington, Presiding Judge of Dis. Court."

A.

"STATE OF MAINE.

"Kennebec, ss. At the district court for the middle district, begun and holden at Augusta, in and for said county, on the first Tuesday of August, A. D. 1840. Be it remembered, That before our Justice of said Court, personally appeared the Longley Stage Line Company, and Richard H. Vose of Augusta, county of Kennebec, Esq., and acknowledged themselves to be severally indebted to Thomas Longley and Benjamin Rackley, of Greene in said county of Kennebec, and Jairus Phillips of Turner, county of Oxford, in the respective sums following,

to wit: the said Longley Stage Line Company, as principal, in the sum of one hundred dollars, and the said Richard H. Vose, as surety, in the sum of one hundred dollars, each, to be levied on their goods or chattels, lands or tenements, and in want thereof upon their bodies (to the use of said Longley, Rackley & Phillips,) if default be made of the condition following: — The condition of the above written recognizance is such, that whereas, the said Thomas Longley, Rackley and Phillips, on the first day of January, A. D. 1840, sued out their writ of attachment, in due form of law against said Longley Stage Line Company, returnable to the district court for the middle district, then next to be holden at Augusta, in and for said county, on the first Tuesday of April, A. D. 1840, in a plea of the case, alleging their damages to be seventeen hundred dollars, and duly entered said action at said court, from which it was continued to this term, and now, in this term, the parties having appeared and filed a demurrer, reserving leave to waive the pleadings, and plead anew, in the Supreme Judicial Court. Whereupon it was adjudged by said court, that the defendants' plea was bad, that the plaintiffs recover against said defendants the sum of ——— dollars ——— cents damages, and costs of suit, taxed at ——— dollars and ——— cents. From which judgment said defendants appeal to the Supreme Judicial Court next to be holden at Augusta, in and for said county, on the first Tuesday of October next. Now if said defendants shall prosecute their said appeal with effect, and pay all such costs as may arise in said suit after said appeal, then this recognizance to be void. "J. A. Chandler, *Clerk.*"

"A true copy, as of record appears.

"Attest, Wm. M. Stratton, *Clerk.*"

B.

"Kennebec, ss. — D. C. M. D. Aug. Term, 1840.

"*Transcript from the Docket.*

"544. *Thomas Longley & als.* v. *Longley Stage Line Co.*

"*Wells.* *Edwd. Little — Vose & Lancaster.*

"10. Demurred plea bad—R. H. Vose recognizes in $100.

"Single cost to abide the result.

"Recorded vol. 3, page 155."

"*Extract from the Record.* —

"From which judgment the defendants appealed to the S. J. Court next to be holden at Augusta, within and for the county of Kennebec, and entered into recognizance with sureties as the law directs to prosecute their said appeal with effect.

"Mr. Stratton, the present clerk, states, that sometime before the date of the writ in this case (*Longley & als.* v. *Vose*,) the plaintiff's attorney, Samuel Wells, Esq. applied to him for a copy of the recognizance filed in the original suit, *Longley & als.* v. *The Longley Stage Line Co.* and that he accordingly took a recognizance blank and filled it up from the docket, and sent it to said Wells, and it is the same now filed in the case. It does not appear that any copy of said recognizance was ever filed in the S. J. Court, or that said recognizance was ever in any other manner extended by the present or any former clerk. — Said Stratton further states, that so far as he is acquainted with the practice in the clerk's office, it has not been usual to extend recognizances until called for by the party interested, and until recently the record of an appeal has always been made up as within stated.

"W. M. Stratton."

Wells, for the plaintiffs, contended, that the copy of the record, as now introduced, attested by the clerk, was evidence of the existence of such record; and that it was conclusive, and could not be contradicted.

But if the testimony of Mr. Stratton, the clerk, is admissible, it was proper for him to extend the minutes of the former clerk upon the record and certify it. It is not the practice to extend such minutes upon the records until called for. *Welch* v. *Chesley*, 22 Maine R. 398.

The minutes of the former clerk, however, are of themselves a sufficient record to enable the plaintiff to recover. The clerk states, that the recognizance was taken according to law, and such was the order of the court. An error in the judgment, as made up, in stating what the law was, cannot destroy the effect of the recognizance.

Lancaster, for the defendant, contended, that the action could not be maintained, because the record shows, that no such recognizance was taken as the law at that time required. Unless the recognizance is authorized by the statute, it is void. *Owen* v. *Daniels*, 21 Maine R. 180. Here the recognizance was to prosecute the appeal with effect, when the law required that it should have been to pay all costs that might arise after the appeal.

If the recognizance was not good under the statute, it cannot be good at common law. 21 Maine R. 184. But if good at common law, the condition was performed by entering the action in the Supreme Court. 2 Greenl. 115; Yelv. 59; Cro. Jac. 67.

If the question be as to the existence of a record of the same court, the trial is by an inspection of the record itself. 1 Stark. Ev. 151; 2 Wash. Rep. 215; 1 Inst. 260.

The declaration is not sufficient to enable the plaintiff to maintain the action, inasmuch as it does not allege, that the recognizance was returned to, and made a part of the records of the Supreme Judicial Court, to which the appeal was made. And the case finds, that it never was returned there. *Libby* v. *Main*, 2 Fairf. 344; *Dodge* v. *Kellock*, 1 Fairf. 266.

Wells, in reply, said, that the cases cited did not support the last position of the plaintiff. Those were where appeals had been taken from the judgment of a justice of the peace, which tribunal was not a court of record. It must be returned to the court appealed to, and there recorded, or it would not become a record. Here the recognizance was never returned to the S. J. Court, and the suit must be upon it, in this court, and there is where it should be and remain, to show that the action had legally gone out of that court.

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

SHEPLEY J. — The action is debt. The declaration is upon a recognizance as a record of the district court for the middle district. The defendant pleaded *nil debit* and *nul tiel record.*

The case is presented on a report made by the District Judge for the decision of certain legal questions arising there, and having reference to the competency, and to the effect, of the testimony there exhibited to prove the record referred to in the declaration.

It appears by a transcript from the docket of that court, made under an action in favor of the plaintiffs against the Longley Stage Line Company, that the defendant entered into recognizance to the plaintiffs as surety for the prosecution of an appeal by the defendants in that action, made from a judgment of that court, during its term in the month of August, 1840. The clerk of the courts deceased without having extended the recognizance. Nor was it found extended in the record of that action among the records of the proceedings of that court. Before the commencement of this action, the present clerk extended the recognizance and affixed to it the name of the deceased clerk, and transmitted an attested copy of it, as a copy of the record, to the attorney of the plaintiff. This copy was presented and received without objection, as proof of the existence of the record. The defendant presented the minutes of the clerk made upon the docket under that action; and the record of that action as made in the records of that court.

The counsel for the plaintiff contends, that such copy of the record, attested by the clerk, was conclusive evidence of the existence of the record; and that the testimony of the clerk, stating the manner of making the record was not admissible.

The record to be proved was a record of the court, before which the proof was to be made. In such case the regular course is to make the proof by a production and an inspection of the record itself. In this case, the court would not thereby be informed of the existence of any extended record of the recognizance. On the contrary, the genuineness of the paper purporting to be an attested copy of such a record, would be disproved, and its legal effect destroyed. That court might have directed the present clerk to complete the imperfect records of the deceased clerk, and the record thus made up,

might have been made valid without the use of the name of the former clerk in an unauthorized manner. But no such direction appears to have been sought or obtained.

The plaintiffs, to maintain their action, must depend upon the effect of the evidence arising out of the minutes of the deceased clerk, made upon the docket, and the reference to a recognizance contained in the record of the action. The minutes of a deceased justice of the peace, made upon his docket, have been regarded as substantially a record of his proceedings, and as satisfactory proof of a judgment rendered by him, in a civil action. *Baldwin* v. *Prouty*, 13 Johns. R. 430; *Davidson* v. *Slocomb*, 18 Pick. 464. Shaw C. J., in delivering the opinion of the Court in the case of *Pruden* v. *Alden*, 23 Pick. 184, says, "the Court are to take notice how the records of their own and of other Courts, are in fact made up. The clerk entrusted with the duty of keeping records must, of necessity, take down the doings of the Court, in short and brief notes; this he usually does in a minute book, called the docket, from which a full, extended and intelligible record, is afterward to be made up. But, until they can be made up, these short notes must stand as the record; and if in the mean time, through the death or sickness of the clerk or other casualty, they are lost, it must be deemed a loss of the records, and secondary proof may be offered of their contents." This doctrine, in its proper practical application, can do no injustice; for the clerk is subject to the control of the Court, in making up the record from the minutes taken by him; and the same Court, can as well be informed of the substance of the record by the minutes, as by the record made up from them by its direction. When proof of the existence of a record, is to be made before the same Court, that arising from the minutes of the clerk properly made, may be nearly, if not quite, as satisfactory, as that derived from an extended and completed record.

From the short minute of the clerk in this case, that the defendant "recognizes in $100," the Court, in which it was made, would be informed, that he had entered into such

a recognizance as the law then required, in the sum of $100, to be extended according to the usual form and course of proceeding in that court; and such a record would accordingly be considered as proved by the minute of the deceased clerk, until a more extended and perfect one could be made.

To such a conclusion, this objection is made by the defendant, that the record of the action states, that he entered into recognizance to prosecute the appeal "with effect;" and that such a recognizance would be at variance with one provided for, by the statute, c. 373, § 4, requiring, that it should be "to prosecute his appeal and to pay all such costs as may arise in any such suit after such appeal."

While the record of the action thus states, it further states, that he entered into recognizance "as the law directs." If the clerk misapprehended the law and erroneously made use of the word effect, such an error in the record of the action would not affect a record of the recognizance as proved by the minutes. The latter would be the true record of it, the former but a reference to it, stating, it may be, its contents in one particular, erroneously. In the case of *Thurston* v. *Slatford*, 1 Salk. 284, Holt C. J., speaking of a record, remarked, "if there be a mis-entry, it might be supplied and corrected by other evidence, for he should not be precluded by the mistake or negligence of the officer." By other evidence he doubtless intended such other evidence as might be legal and appropriate to the purpose.

A further objection is, that the recognizance was not, and was not alleged to have been, returned to, and entered of record in this Court.

Recognizances are of different descriptions, and they are entered into for different purposes. They are by our law entered into before courts of record and constitute a part of their proceedings to be recorded; and before justices of the same courts, acting ministerially by virtue of authority conferred upon them by statute for that purpose. They are entered into before justices of the peace, when there are proceedings between parties pending before them, and when there are no such pro-

ceedings. In criminal cases a recognizance may be entered into before a justice of the peace, conditioned to keep the peace, or to appear before some court, to answer to such matters as may be alleged against him, or to testify as a witness, or to enter and prosecute an appeal. They may also in such cases, be entered into before courts of record, conditioned to appear before the same court from day to day, or at a day fixed by an adjournment of the same term, or at the next term. If the recognizances last named are not matters of record in the courts, in which they are taken, they cannot become matters of record in any court. In civil proceedings, recognizances are entered into before justices of the peace, when they constitute a part of the proceedings before them, conditioned to enter and prosecute an appeal made to the district court; and when no such proceedings are before them, conditioned to enter and prosecute an appeal made from the district court to this Court. Rev. Stat. c. 97, § 14, as amended by the act of 1841, c. 171. They may be entered into before the district court, conditioned to enter and prosecute an appeal made to this Court.

Any attempt to show, that there is one general rule of law applicable alike to all these different kinds of recognizances, by which they are to be decided to have been all taken by a court or magistrate acting ministerially or otherwise, or to have been matters of record or not matters of record before the tribunal or magistrate taking them, must lead to an erroneous conclusion.

To avoid such a conclusion it is necessary to notice the different kinds or classes of recognizances, upon which some of the judicial decisions have been made.

In the case of *Bridge* v. *Ford*, reported, 4 Mass. R. 641, and 7 Mass. R. 209; and in the case of *Libby* v. *Main*, 2 Fairf. 344, the recognizances were taken by a justice of the peace, before whom a civil action was pending; and they were conditioned to enter and prosecute an appeal. The decision was, that the recognizances should appear to have been returned to and to have been entered of record in the appellate

court, to enable the party to maintain an action of debt upon them.

A recognizance is an obligation of record, to be proved by the record. It is not signed or sealed by the party entering into it. It is of a higher character than a specialty. Courts held by justices of the peace, not being courts of record, there could be no legal proof made of the recognizance as a record in those cases without the proof required. That this is the principle upon which those decisions were made, is apparent. PARSONS C. J. says, "this recognizance must be matter of record, and in debt upon it the defendant may plead *nul tiel record.* Whenever therefore a justice recognizes a party to appear at any court of record, it is his duty to transmit the recognizance to that court, that it may be entered of record." It is clearly implied to be his duty to do so, because it could be a matter of record only by such a course. He did not state or intimate, that a recognizance taken by a court of record must be transmitted to the appellate court, that it may become a matter of record. On the contrary, when speaking of the forms of declarations in actions of debt, he says "in all [such forms] the recognizance is alleged either to be taken by a court of record or to be delivered to the court and recorded." After the declaration had been amended by declaring upon the recognizance as taken before the justice and produced, and upon it as a record remaining with the justice, the court decided, that the action could only be supported by a declaration upon it, as a record of the court of common pleas; obviously because it could not become a matter of record before a court, which was not a court of record. The case of *Libby* v. *Main*, was but an affirmance of the same doctrine.

The recognizance in the case of *The People* v. *Van Eps*, 4 Wend. 387, does not appear to have been taken by a court of record or in any court. It was entered into before the first Judge of a county court, conditioned for the appearance of a person at the next court of oyer and terminer to answer to such matters as might be alleged against him. An action of debt was commenced upon it. Mr. Justice Sutherland, in the

opinion, says, "but the declaration appears to me to be defective in not averring, that the recognizance was ever filed or made a record of any court. It does not, strictly speaking, become a recognizance or debt of record, until it is filed or recorded in the court, in which it is returnable." This is a correct position, when applied, as in that case, to a recognizance taken by a Judge acting simply by virtue of power conferred by statute and not as a court of record.

The question presented in this case, is, whether a recognizance taken in the district court, being a court of record, conditioned to enter and prosecute an appeal made to this Court in a civil action, becomes a part of the record of the case in the district court.

By the act approved February 25, 1839, c. 373, in force when it was taken, it is provided, that "the party so appealing, before such appeal be allowed, shall recognize with sufficient surety or sureties to the adverse party." The Court must therefore act judicially in taking the recognizance, in deciding upon the sufficiency of the sureties, and in the allowance or disallowance of the appeal. And these acts must necessarily constitute a part of the record, by which alone it can be legally proved or judicially known, that the action has been legally transferred from that court to this Court. The paper called the recognizance, as it is drawn and certified by the clerk, recites the proceeding as an act of the parties, performed before the Court. This paper has in itself no validity, except as a transcript of the record; and it does not, except as such, constitute any legal proof, that a recognizance was taken. It is the Court, that takes the recognizance by a verbal declaration made by the party in language dictated by the Court, and spoken through its clerk, and to be recorded by its clerk. This record is the recognizance as entered of record.

According to the English practice, which constitutes the basis of ours, there does not appear to be any such separate paper, when a recognizance is entered into in open Court. When one is entered into, in the nature of bail before a magistrate or commissioner, a paper denominated a bail piece is

returned to the Court where the action is pending, to become a matter of record there. But when bail above is put in, that is, when it is entered in Court by a recognizance there taken, the act does not appear to be exhibited or verified by any separate paper. 2 Sellon's Pr. 138 to 143. Tidd's Pr., forms 94, 99, 101, 102. When a recognizance is taken before a commissioner and transmitted to the court, it is there extended at large upon the record, and it acquires validity as a record by being received and entered of record by the Court. 3 Bl. Com. Appendix, No. III. § 5.

In the case of the *Commonwealth* v. *McNeil*, 19 Pick. 127, the suit was *scire facias* upon a recognizance entered into in the police court, conditioned, that the principal should appear to answer before the municipal court; and it was transmitted to the latter court and entered of record there; and was estreated into the court of common pleas, in which the action was commenced. The first record of the recognizance transmitted from the police to the municipal court was defective. Upon a motion suggesting a diminution of the record, a more full and perfect record was transmitted from the former to the latter court. This course was approved by the Supreme Court, where it was treated as a record of the police court, in which it was taken. Shaw C. J. says, "had the justices from any source ascertained, that they had sent an imperfect record, they would have been at liberty within a reasonable time to have sent a more perfect one." Here is a recognizance entered into in the police court conditioned for the appearance of the party in another court, where it was entered of record, decided to be a record of the court, in which it was taken, and liable as such to be amended on suggestion of a diminution of the record. This could not be, if the police court acted ministerially and not judicially in taking it. There could be no record of it in the police court, if there be no record of a recognizance, until it be entered of record in the court where the principal is to appear or is to perform some act required by it.

In the case of *Vallance* v. *Sawyer*, 4 Greenl. 62, the suit was *scire facias* upon a recognizance, taken in the court of

common pleas, conditioned to enter and prosecute an appeal made to this Court, to which the recognizance was returned and entered of record; and in which the suit upon it, was commenced. In defence, it was insisted, that the suit should have been commenced in the court of common pleas. MELLEN C. J. says, "the usage has invariably been, to issue it from that Court, to which the appeal is made, for the prosecution of which, the recognizance is taken, and to which the same is properly returned; and where the final judgment is rendered, for the total or partial satisfaction of which, recourse is had to the sureties in the recognizance, there is the record of such judgment. The very language of the writ, "as to us appears of record," shows this. In addition to the reason of the thing, the authorities cited by the plaintiff's counsel, are decisive of the question. The decision was doubtless correct, that the suit might be maintained in this Court, founded upon the record there made. Neither the reasoning, nor the authorities cited, authorize a conclusion, that there was no record of the recognizance in the court of common pleas. The record made in one court, often becomes also a part of the record of another court, to which it is transmitted or removed. The case does not decide, that the recognizance did not constitute a part of the record in the court of common pleas, or that an action could not have been maintained upon it in that court.

It is said, that the recognizance should not only be transmitted to the appellate court, but the default should be there entered of record. When a party fails, in a case like the present, to enter his appeal, there can be no further entry in the appellate court, than a judgment, affirming that made in the lower court. In the case of *Bridge* v. *Ford*, 4 Mass. R. 643, PARSONS C. J. says, "in a recognizance to the party, it may not be necessary, that the breach of the condition be a matter of record, as it is, when the recognizance is to the Commonwealth, who can take only by record." But respecting this last position, the Court gave no opinion. In the case of the *People* v. *Van Eps*, Mr. Justice Sutherland says, "it ought also to have been averred, that the default of the

principal for not appearing, was entered of record, though this omission, would not of itself be fatal, as it is averred, that he was called and did not appear." No authority cited, or brought to the notice of the Court shows, that the breach of a recognizance, entered into, conditioned to prosecute an appeal made in a civil action, can be proved only by a default entered of record in the appellate court.

If the record declared upon in this case be proved to exist as a record of the Court, in which the recognizance was taken, it proves the other issue also, that the defendant was indebted to the plaintiffs. *Defendant to be defaulted.*

The following dissenting opinion was delivered by

WHITMAN C. J. This is an action of debt on a recognizance. It comes from the district court, with a report of the facts, and points of law thereupon raised, accompanied with an agreement by the parties, as, also, reported by the Judge, that, if the plaintiff, upon the case stated, is entitled to recover, the defendant is to be defaulted; otherwise that the plaintiff shall become nonsuit.

Nil debit and *non est factum* were pleaded, and issues thereon joined. No objection was taken by demurrer, as there might have been, to the plea of *nil debit*. But issue being joined thereon, it gave the defendant a right to avail himself of every matter in defence, which in general may be taken advantage of under such a plea; and the plaintiff might be called upon to prove every allegation in his declaration. Chitty on Pl. 478. The plaintiff, then, under the state of the pleadings, as well as under the agreement of the parties, might be expected to make out a perfect right to recover; and cannot be sheltered behind technical objections.

He must show, that the recognizance was matter of record in the district court; and that it was in conformity to law, together with a breach of its condition, as matter of record in that court, in not prosecuting the appeal, as conditioned in the recognizance, in this Court. Now, it is believed that such recognizances are never extended, as matter of record, in the

Court in which they are taken; but that the original recognizance is uniformly transmitted to the appellate Court, it being first merely noted in the conclusion of the judgment, and by way of showing that an appeal had been duly taken, that the appellant had recognized according to law, to prosecute his appeal. It is true, that, in Blackstone's Commentaries, it is said, that a recognizance is "an obligation of record, which a man enters into before some court of record, or *magistrate, duly authorized;*" and that this *being certified to*, or being taken by the officer of some court, is witnessed only by the record of that court. That is, if certified to some court, it is witnessed only by the record of that court. If taken in a court of record, conditioned for any thing to be done in that court, it, of course, becomes a record of that court, and is to be witnessed only by its records.

The taking of a recognizance, conditioned for the performance of some act in another court, whether taken by an officer of a court of record, or by a magistrate, or some person specially authorized to take it, is a mere ministerial act; and in either case is not a matter, properly, of record till returned to the proper court, where, only, if any default takes place, it can be noted, and made matter of record. Till then the recognizance is no otherwise to be regarded, than if it were a bail bond, which, in effect, it is, taken by a sheriff, which is no record till returned into court, and made the ground work of proceedings there.

Recognizances are not unfrequently taken out of Court, by persons specially authorized for the purpose, who keep no records. Certain justices of the *quorum* are authorized to take them, as are also the individual justices of the district courts, when any one stands committed for a bailable offence. Rev. Stat. c. 140, § 38. In such case no record is made by either of them. The justices are expected merely to transmit them to the proper court, where a default may take place. And so recognizances may be taken, even to prosecute an appeal from the district court, by a person specially appointed for the purpose, who would keep no record concerning it. Magistrates

and district courts often take recognizances of witnesses, conditioned for their appearance in this Court. No record is ever made, by either, of such an act, or any notice taken thereof on their records. They are simply taken and sent to the proper Court. There, only, are all recognizances, so transmitted, to be looked for; and there, only, can any default take place, and be noted and become matter of record.

Accordingly, in *Bridge* v. *Ford*, 4 Mass. R. 641, it was held, that, to maintain an action of debt on a recognizance to prosecute an appeal, from a judgment of a justice of the peace, it must appear that the recognizance had been returned to, and had been entered of record, in the appellate court. The same principle is affirmed in *Bridge* v. *Ford*, 7 Mass. R. 209; and again in *Libby* v. *Main & al.* 2 Fairf. 344. In either of those cases the averment might have been, with equal propriety as in this case, that the recognizance was a matter of record in the court appealed from; for justices are required by law (Rev. Stat. c. 116, § 19,) to keep a fair record of their proceedings; and, in case of appeal, the appellant (§ 11,) shall, at the appellate court, produce a "copy of the *record*." And their records in civil causes, cognizable by them, are treated as such, uniformly. Their veracity cannot be impeached, any more than those of other courts; and on a plea of *nul tiel record* the trial is by inspection of them as of other records.

Hence it is manifest that there can be no distinction, in reference to this question, between appeals from the courts of justices of the peace, and other courts; and the authorities abundantly show it.

In the case of *The People* v. *Van Eps*, 4 Wend. 387, the court, speaking of a recognizance, say, that "it ought also to have been averred, that the default of the principal, for not appearing, was entered of record." This could only be done, where the default took place. Again; in the same case, it is further remarked, "it does not, strictly speaking, become a recognizance, or a debt of record, until it is filed or recorded in the court in which it is returnable.

In *Vallance* v. *Sawyer*, 4 Greenl. 62, which was *scire facias*, commenced originally in this Court, upon a recognizance taken in the court of common pleas, to prosecute an appeal in this Court, to which the defendant demurred, because, as he alleged, this Court had not original cognizance of the matter, C. J. MELLEN remarked, in delivering the opinion of the Court, that "the usage has *invariably been* to issue it, (the *scire facias*,) from that court to which the appeal is made, for the prosecution of which the recognizance is taken," and to which the same is properly returned; and that "the very language of the writ, *as to us appears of record*, shows this." And in *Paul* v. *Nowell*, 6 Greenl. 233, the same Chief Justice, in delivering the opinion of the Court, says of a recognizance to prosecute an appeal from the court of common pleas to this Court, "it (not a copy of the record of it) has been returned to, and placed on the files of this Court; and nothing more is required by our statute respecting appeals."

In *Johnson* v. *Randall*, 7 Mass. R. 340, which was *scire facias* on a recognizance, the Court held, that the action could not be supported, as it did not appear, that *the recognizance* (not a copy of the record of it) had been returned to, and made a record of the court of common pleas, from whence the *scire facias* issued.

If the decision be in the case at bar, that the action can be supported, it will be the first instance of the kind on record. To support such an action, it must be averred, that a default had taken place. And how can that be made to appear? It cannot appear by any thing to be found in the district court, to the records which, alone, is any reference made. Must it not appear by a record of the appellate court, if at all? Yet nothing of the kind appears, or is pretended to exist.

The defendant, therefore, may well avail himself of the defence, that there is no such record in the district court, as is averred; for no record could be made there of any default upon a recognizance, like the one set forth; and may avail himself, moreover, of the defects relied upon, under the issue

of *nil debit*; and the case seems clearly with him under the agreement of the parties, as to the judgment to be rendered.

SOPHRONIA PARKER *versus* JOSEPH MARSTON, 2d.

If a promissory note be given and delivered by the payee to a third person, because the donee expects soon to die of the disorder then upon him, it is revocable at any time during the donor's life; and the same may be afterwards given to any other person.

Where the plaintiff claimed such note under a gift made by the donor two days before his death, and the defendant claimed the same under a gift from the same person, made seven days prior to his decease, the declarations of the donor, — made, as well as the gifts under which the parties claimed, during the sickness of which he died, prior to the time of the gift under which the defendant claimed, and within two months next before the death of the donor, — tending to show that his intention was to give this note to the plaintiff, and to give to the defendant other articles, were held to be inadmissible in evidence, on motion of the plaintiff.

EXCEPTIONS from the district court, REDINGTON J. presiding.

"This is an action of trover, for a promissory note, made by one David Parker and payable to one Betsey Parker. The verdict was for the plaintiff. The writ, together with certain questions propounded by the Court and answered by the jury, and also the note aforesaid, are to be copied and made a part of this case. The plaintiff claimed to hold the note by gift from Betsey Parker, made during the sickness which terminated in her death, and about two days before that event, for services, &c. rendered. The note was not indorsed by Betsey Parker. Betsey died March first, 1837.

"The defendant introduced testimony, tending to prove, that during her sickness, which was the consumption, and which had been long continued and of which she was then low, and seven days before her decease, Betsey gave the note aforesaid, to one Mary Ann Parker, a sister of the plaintiff, for her use and benefit, as a present, and delivered the same to her. And it was also proved, that Mary Ann Parker sold the note, a short time before this action was brought, to Thomas Parker;

and by him, it was sold to the defendant, upon whom a demand was made before this action was brought. The defendant contended, that if the jury believed this note to have been given seven days before the decease of Betsey to Mary Ann, as aforesaid, it was a gift *inter vivos* and irrevocable.

"The plaintiff introduced testimony tending to prove the note, to have been given as aforesaid, to the plaintiff, two days before her decease, and that the same was delivered by Betsey to the plaintiff, at the same time, Mary Ann knowing of this last gift to Sophronia and not objecting to the same.

"The plaintiff called witnesses to prove that, during the last sickness of Betsey, and in the months of January and February before her death, she declared several times, during said months, that her intention was to give the note to plaintiff, and to give Mary Ann other articles, which she named. To the introduction of which testimony, the defendant objected, and the Court ruled the testimony to be admissible.

"The plaintiff accordingly proved by witnesses, such declarations of Betsey Parker, made during her sickness, and made on several occasions, during the months of January and February before her decease, which took place from said disorder, on the first of March, succeeding.

"The Judge charged the jury, that if they believed, that Betsey Parker gave and delivered the note to Mary Ann Parker, seven days before her decease, and that the gift was made not because of her expecting soon to die, it was a gift irrevocable. But that if they found the gift made to Mary Ann, because the donor expected soon to die of the disorder then upon her, it was revocable by Betsey at any time during her life; and said Betsey, on regaining the possession of the note, might give or convey the same to Sophronia, or any one else.

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

No copy of the papers referred to in the exceptions, came into the hands of the Reporter.

Noyes, for the defendant.

But there is one question, if not two, upon the decision of

which the defendant expects the exceptions to be sustained and a new trial to be granted to him. And it is this: —

Was it admissible, in order to show a revocation of the gift of the note in controversy to Mary Ann Parker, and a subsequent gift to the plaintiff, to prove the declarations of the payee of the note as stated in the bill of exceptions, made a month or more before the gift alleged to have been made to the plaintiff, and before her decease, as to the disposition she intended to make of that note?

It will be seen, from the facts stated in the bill of exceptions, that the plaintiff contended and attempted to prove, that the note was given to her after it was given to Mary Ann, the gift to whom having been revoked, and that she had never parted with her title to it. It was incumbent upon the plaintiff to satisfy the jury of these facts in order to sustain her action. *The jury have found as a fact that there was a gift to Mary Ann*, of the note. There was much conflict of testimony respecting the gift to the plaintiff, and she found it necessary in the course of the trial, in order to satisfy the jury of the fact of the gift to her, to call in aid the declarations of Betsey Parker, above alluded to.

These are declarations of one, who, if she had been living, could have been a witness in the case. And the Court say, in *Carle* v. *White*, 9 Greenl. 104, "it is a sound principle, that the sayings and declarations of one, who is a competent witness in a cause, are not to be admitted in evidence to charge another, upon the ground that they are but hearsay evidence." "Hearsay evidence," says Professor Greenleaf, "denotes that kind of evidence, which does not derive its value solely from the credit to be given to the witness himself, but also in part on the veracity and competency of some other person." 1 Greenl. Ev. § 99.

The object of the plaintiff. in proving these declarations, was to show the *intentions* of Betsey to perform the act which she contended was performed many weeks after, to wit, the gift to her. The proof of the reality and existence of those intentions did not depend alone upon the veracity of the witness

upon the stand, but also upon the honesty and candor of Betsey herself. The evidence then comes clearly within the definition of hearsay evidence, and is inadmissible.

Nor can their admissibility be maintained on the ground of their being *res gestae.* The surrounding circumstances, or *res gestae,* may always be shown to the jury along with the *principal fact.* The principal points of attention are, whether the circumstances and declarations offered, were contemporaneous with the main fact under consideration, and whether they are so connected with it as to illustrate its character. 1 Greenl. Ev. § 108. How can these declarations be considered *res gestae,* and admissible as such. There was no act done at the time they were made, which they tended to give character to, or illustrate. The principal fact did not take place, until weeks after; and in the mean time the intentions of Betsey, seem to have changed, for the jury have found that she gave the note to Mary Ann, under whom the defendant claims, and who, for any thing that appears, held the note from the decease of Betsey until she sold it to Thomas Parker. Any declarations made by Betsey, when she passed the note by delivery to any one, would come within the principle laid down as above.

It is like the case of *Merrill* v. *Sawyer & al.* 5 Pick. 397, where the Court exclude the declarations offered, and say, "he was doing no act which indicated that he had attached and was keeping hay, and of course the declarations could not be considered a part of any act." These were the declarations of a party, made too, before any controversy had arisen, and because there was no *principal* act done at the time they were excluded. If the declarations of a party would, under such circumstances, be excluded, the declarations of a third person, it would seem, ought to share no better fate.

In the case of *Greene* v. *Harriman,* 14 Maine R. 32, the declarations of a third person, *who could not be procured as a witness,* were excluded, because they did not accompany any *principal act,* which could illustrate or give character to it.

The other question, which the case presents, is simply, whether

a *donatio causa mortis* is revocable during the life of the donor, if he does not recover of the disease then upon him, or escape the impending peril.

That question has not arisen in this State for decision, or in Massachusetts, though in the latter State, in the case, *Grover* v. *Grover*, 24 Pick. and in *Parish* v. *Stone*, 14 Pick. there are *dicta* of the Courts, which seem to be unfavorable to the views which the defendant entertains with respect to this question.

The Court, however, in the latter case say, "if he (the donor) recovers from the sickness or other cause of apprehended death, under which the donation is made, the gift is void."— Kent, in describing this species of transfer says, "it is essential that the donor make them in his last illness, or in contemplation and expectation of death; and if he recovers, the gift becomes void."

The transfer is supposed to be made, when a more formal mode of conveying it could not be effected. When the peril and the prospect of death were imminent, and if death ensues from the disease then upon the donor, or if he does not escape the peril, the gift is perfect. There is no revocation about it. The donor, by the delivery of the property, intends to indicate to whom his property shall go, if he does not recover, or in other words, he (the donor) intends to constitute the individual, to whom he passes the property, his heir as to that property. Justinian, Lib. 7. In *Jones* v. *Selby*, Prec. Chan. 304, it is expressly decided, that such gift cannot be revoked by the will of the grantor. A similar principle is recognized in the case of *Hambrooke* v. *Simmonds*, 3 Russ. 25.

Moor, for the plaintiff.

That the promissory note of a third person may be the subject of a donation "*causa mortis*" is no longer a matter of controversy. *Borneman* v. *Sidlinger*, 15 Maine R. 429; *Parish* v. *Stone*, 14 Pick. 198; *Grover* v. *Grover*, 24 Pick. 261. And the ruling of the Court, that such a gift is revoca-

ble is relied upon by the counsel for the defendant as one of the reasons why the verdict for the plaintiff should be set aside.

A brief examination of this point will satisfy the Court that upon principle, as well as authority, the ruling of the Court below was correct.

A donation "*causa mortis*" is a volutary gift without consideration, which must be accompanied by the delivery of the subject of the gift; and in case of the recovery of the donor it is void. In its effect it is a verbal bequest or unwritten will, and like a written will must be subject to the revocation of the donor whilst living. It bestows only an imperfect and inchoate right upon the donee until the death of the donor. It looks to the future and is to operate only at a future contingent time, subject always to the will of the donor until his death. And to hold that a gift *causa mortis* is irrevocable, is to abolish the chief distinction between that kind of gift, and a gift *inter vivos*. That such a gift is revocable is clearly laid down in 2 Kent, 444 & 445, where the civil law rule is examined and asserted to be the same. The cases of *Parish* v. *Stone*, 14 Pick. 204, and *Grover* v. *Grover*, 24 Pick. 265, are also in point. And so are ———— v. *Markham*, 7 Taunt. 230 and *Weston* v. *Hight*, 17 Maine R. 287.

But the facts of this case show, that there was not only a revocation, but a new gift also made by Betsey to Sophronia, in presence of Mary Ann, she knowing of the gift, and not objecting to it; and this gift was a gift *inter vivos* and for valuable considerations, and irrevocable.

The counsel for the defence also contends, that the Court erred in permitting the plaintiff to prove the declarations of Betsey Parker, evincing her intention to give this note to the plaintiff, made in January and February, before her decease, which occurred the first day of March following, — said declarations being made during her last sickness.

Were those declarations properly admitted?

It is believed, that both upon principle and authority, they were so. — The ground of objection, raised by counsel is, that

they were not a part of the "*res gestae*," being made so long before the gift; — and that the declarations of the donor, can only be admissible, when they accompany the act and are a part of the *res gestae*. This latter proposition is denied, as unsound. And the former seems to involve a question of fact, which the counsel has overlooked.

Were not those declarations a part of the *res gestae*?

A definition of this term is given by Mr. Greenleaf on Evidence, vol. 1, page 119, viz. "Declarations connected with the principal fact under investigation." The fact under consideration was, the gift of the note to Sophronia, either as a donation *causa mortis* or *inter vivos*.

What are the essential requisites to a donation *causa mortis*?

The donor should be in her last sickness, (which has a fatal termination,) she should, by word or deed, manifest an intent to give, and she should deliver the subject of the donation to the donee. The facts in this case show, that the donor was in her last sickness, and during it, she declared an intention of giving this note to Sophronia, and, the day before the termination of that sickness, she gave it to her. Can it be said that the declarations thus made, are not explanatory of the act of delivery, of the subject of the donation, and therefore a part of the *res gestae*? Other declarations made at the time of the gift, might qualify such declarations so made. Yet these are not the less admissible.

But it is contended that these declarations are admissible on other principles, and not merely as a part of the *res gestae*, but as independent testimony. In one American decision, at least, *McClewley* v. *Lockhart*, 1 Bailey's Reports, page 467, the Court hold, that a mere declaration by the alleged donor of the intention to give, and possession by the donee, authorize a jury to presume a gift.

The defendant claimed title to the note by gift from the same donor. To prove that gift, her declarations accompanying the alleged act of delivery were relied upon. To repel the force of this testimony, it was the right of the plaintiff, to show any act, fact, *or other declaration* of the donor tending

to show the contrary. And what fact would be more proper and pertinent in deciding this point than the declarations of the donor?

These declarations were admissible on the further ground, that they were from the party under whom the defendant, as well as the plaintiff, claimed title to the note, made when she was the owner of the note, and made before the right of either of the parties to this controversy attached.

They are like the declarations of a payee of a note, transferred after it is overdue, which are admissible in evidence in an action between the indorsee and maker. 15 Pick. 92, *Sylvester* v. *Copp.* So where a grant or sale is contested for fraud, the declarations of the grantor, are admissible. *Foster* v. *Hall*, 12 Pick. 89; *Davis* v. *Spooner*, 3 Pick. 284; *Hale* v. *Smith*, 6 Maine R. 416; *Dale* v. *Gower*, 24 Maine R. 563; *Shirley* v. *Todd*, 9 Maine R. 83; *Hatch* v. *Dennis*, 1 Fairf. 244; *Whittier* v. *Vose*, 16 Maine R. 403.

The above cases show that the declarations of the holder of a note, which is indorsed after its dishonor, may be received in evidence to show payments, or sustain a defence, when an action is brought in the name of an indorsee. For a much stronger reason should they be received in the case at bar.

In the cases referred to, the evidence goes to the life of the contract and tends to defeat it. In the case at bar, the evidence tends only to show who is entitled to the benefit of the contract, and not to discharge it.

The opinion of the Court was drawn up by

Tenney J. — The Judge instructed the jury, that if the note was given and delivered to Mary Ann Parker, because the donor expected soon to die of the disorder then upon her, it was revocable at any time during the donor's life, and the same could be afterwards given to the plaintiff, or to any other. This instruction was undoubtedly correct. It is laid down by elementary writers of the present day, that such gifts are inchoate, and are not perfected till the death of the donor; they are revocable by the donor during his life. "They are

properly gifts of personal property by a party, who is in peril of death, upon condition, that they shall presently belong to the donee, in case the donor shall die, and not otherwise. To give them effect, there must be a delivery of them by the donor, and they are subject to be defeated, by his subsequent personal revocation, or by his recovery or escape from the impending peril." Story's Eq. Jur. § 606; *Parish* v. *Stone*, 14 Pick. 198.

A promissory note, made by a third person, is a proper subject of such a gift. *Borneman* v. *Sidlinger*, 15 Maine R. 429, and 21 Maine R. 185.

It appears from the case, that the plaintiff relied upon a gift and delivery of the note to her two days before the death of the donor. The defendant introduced evidence of a gift to Mary Ann, seven days before the death, accompanied with delivery. The jury have found a gift to Mary Ann, at the time stated, *causa mortis*; and a revocation of that gift and a subsequent one to the plaintiff, *inter vivos*. The plaintiff was permitted to introduce the declarations of the donor, made during a space of two months preceding her death, to show her intention to give the note to the plaintiff. This was objected to, and it is now insisted that the evidence was inadmissible.

The ruling of the Judge upon this point is attempted to be sustained on several grounds. — 1. That as the defendant claimed title to the note under a previous gift, and relied upon the acts and declarations of the donor at the time, these previous declarations were competent to repel the force of those relied upon by the defendant. An intention on the part of the donor, at an earlier period of her sickness, to give the note to the plaintiff, imposed upon her no obligation to do so; she had a right to change that intention at any time, and for reasons satisfactory to herself alone; and in making the change she did no more than what is believed to be common in like circumstances. The declarations did not tend in the least, to show that she did not subsequently express different intentions;

different intentions at different times could be entertained without any inconsistency.

2. Again, it is contended, that these declarations are admissible on the ground, that they were made by the person, under whom both parties claim, while she was the owner of the note, and her situation is regarded similar to that of the payee of a note, transferred after its maturity, whose declarations are admissible, in an action between the indorsee and the maker, made while he was the owner; or to that of the vendor, in a sale of property alleged to be fraudulent, whose declarations are also competent. In both the cases put by way of illustration, the declarations are in the nature of the confession of facts, the existence of which at the time are supposed to be adverse to the interest of the party making them. In the case at bar the declarations cannot be so treated; the note was hers; she could dispose of it as she pleased, without being subject to the complaint of any one; no person had by virtue of those declarations, even an inchoate right or interest in it; the intention alone, to do one thing or another in reference to the note, however fully and clearly expressed, was entirely nugatory.

3. But the ground mostly relied upon for their admissibility is, that the declarations were a part of the *res gestae*, that they were connected with, and gave character to, the act of gift to the plaintiff. Surrounding circumstances may always be shown to a jury, with the principal fact, "and their admissibility is to be determined by the Judge, according to the degree of their relation to that fact and in the exercise of his sound discretion." "The principal points of attention are, whether the circumstances and declarations offered in proof, were cotemporaneous with the main fact under consideration, and whether they were so connected with it, as to illustrate its character." 1 Greenl. Ev. § 108. Declarations, to become a part of the *res gestae*, "must have been made at the time of the act done, which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the facts they were intended to explain, and so to harmonize

with them, as obviously to constitute one transaction." *Enos* v. *Tuttle*, 3 Conn. R. 250.

It is often a nice question to determine satisfactorily, what declarations do make a part of the *res gestae;* and how near in point of time they must be to the principal act, to render them a part of it. It may be, that statements are made anterior to the transaction, which are clearly connected therewith, and give it character; but something must be presented to show the connection; if not, declarations made a considerable time before, are inadmissible.

No question is made, that if nothing had taken place after the gift *causa mortis*, to Mary Ann, it would have been perfected in her by the death of the donor. But the plaintiff relied upon evidence of a revocation of that gift, and a subsequent one to her. By the last transaction, her title arises. The declarations of the donor, made in January and February, were accompanied with no act; and we have seen created no obligation on her part. All they show is, that the act two days before her death, was in harmony with the intention expressed long before; but that alone is not sufficient to make them a part of the act, which was performed at that time. There was evidence, which satisfied the jury, that when she gave the note to Mary Ann, which was between the time when the declarations were made, and that when the note is claimed to have been given to the plaintiff, the intention to make the gift to the latter was abandoned entirely; she could not have entertained those intentions, when she was actually making the gift of the same note to another. These declarations could not be evidence of a revocation of a gift which had not been made, and it is difficult to conceive how they could give character to the act, relied upon by the plaintiff as establishing her title, when they were severed from that act by a transaction, which clearly showed that those intentions had ceased to have any influence. *Exceptions sustained.*

James Foord *versus* Dudley L. Hains.

In an action of trespass against an officer, for taking a chattel on an execution, the creditor's attorney, who was directed by the creditor, if he thought it advisable, to cause the chattel to be taken, to satisfy the execution, and thereupon put it into the hands of the defendant, an officer, and directed him to take the chattel upon it, and informed him, that the creditor would indemnify him for so doing, is not thereby rendered an incompetent witness for the defendant on the ground of interest.

Nor has the attorney such interest, by reason of his lien for his bill of costs, as will render him incompetent, as a witness for the defendant — especially where it does not appear whether the bill of costs has or has not been paid.

Exceptions from the middle district court, Redington J. presiding.

Trespass for taking and carrying away a grey mare, the property of the plaintiff.

The plaintiff introduced one Robert Foord, to prove the taking and carrying away, and also that said grey mare was the property of the plaintiff, at the time of the taking, &c. by said Hains. The defence set up by the defendant's counsel was, that said Hains, as a deputy sheriff, had in his hands and possession, an execution in favor of one Elias Gove, against said Robert Foord, and took said mare on said execution as the property of said Robert Foord, whose property the defendant alleges she was.

"The defendant offered Asa Gile, one of said Gove's attorneys, as a witness, who was sworn in chief and commenced testifying, when he was interrupted by plaintiff's counsel, and questioned as to his interest in the final event of the suit. He stated that he was not aware, that he had any — he further stated, that a short time prior to the taking of said mare, said Gove called on him to secure or collect his said execution, against said Robert Foord, and mentioned said grey mare, and some hay, as the property of said Robert Foord, on which the execution might be levied, and wished him to ascertain the fact, and give the execution to an officer: — and in pursuance of said directions, he gave said execution to said Hains, the de-

fendant in this case, and directed him to take said grey mare — at the same time informing him, that said Gove had said he would save him harmless. Defendant's counsel then asked Gile, did you direct Hains to take the mare? Gile replied, "I did."

"Upon this statement, the Judge rejected the witness.

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

The case was argued in writing.

E. Fuller, for the defendant.

The witness ought clearly to have been admitted; he was merely the agent of Gove, and as such delivered the execution to the officer. The property to be levied on was designated and pointed out by Gove, and after making inquiry as requested, to satisfy himself as to the ownership of the property; in pursuance of his instructions, he, in behalf of his principal, directed the defendant to take the grey mare in question, and at the same time informed him that Gove would save him harmless, clearly implying that he did not intend to make himself liable. His answer to the question put by the plaintiff's counsel, is but a repetition of what the witness had before stated; and taken in connection with it as was clearly intended, implies nothing more or less than that the witness repeated to Hains, the defendant, the directions given by his principal, and at the same time informed him, that the principal would save him harmless. It cannot be supposed, by a fair construction of the language used by the witness, that he intended to make himself personally liable, or that he was so understood at the time by the officer, who it seems had confidence in the integrity and ability of Gove to save him harmless; and being satisfied of his wishes and directions he levied the execution accordingly. To admit any other construction would be a perversion of language not to be sanctioned in legal proceedings. The witness was attorney for Gove, in his suit against Robert Foord, and obtained the execution against him on which the property in question was taken. He made no promise to the officer to indemnify him, and common sense, as well as common law, negatives the idea of an implied promise. —

If therefore the witness acted merely as the agent or attorney of his principal, he is in no way personally liable to the officer; not interested, and ought to have been admitted. In support of which the following cases are referred to. — *Kimball* v. *Davis*, 19 Maine R. 310; *Phillips* v. *Bridge*, 11 Mass. R. 242; *Union Bank* v. *Knapp*, 3 Pick. 96; *Tappan* v. *Bailey*, 4 Metc. 529; *Van Ness* v. *Zerlume*, 3 Johnson's Cases, 82; *Stockham* v. *Jones*, 10 Johns. R. 21.

We are unable to discover any applicability of the authorities cited by the plaintiff's counsel to the case under consideration; and as to the defendant's not knowing, that Gile was the agent or attorney of Gove, would scarcely seem to merit a reply. Gile's name was on the back of the execution; and it was well known, that Gile acted only as the attorney.

H. W. Paine and *Bean*, for the plaintiff.

The law of the case is to be determined upon the facts appearing in the bill of exceptions. These facts are all found in the testimony of Gile, the witness excluded, upon his examination on the *voir dire*. He says "he gave the execution to the defendant and directed him to take said grey mare." But he does *not* say that he told the defendant, he was acting or speaking for Gove, the execution creditor. Nor does it appear that the defendant knew or had any reason to believe or suppose that Gile was the agent or attorney of Gove. The defendant might have proved, if such had been the fact, that he was informed of the capacity in which Gile acted, or he might have released him and thus have made him competent. As Gile did not disclose his agency, and as the defendant, for aught that appears, was otherwise uninformed that he acted in a representative capacity, it results from established principles, that Gile was responsible to the defendant: — was holden to see him harmless.

The execution, it is true, would have shown that Gove was the judgment creditor, but how was the defendant to know that Gile had no interest in the execution, or indeed that he was not the sole owner. As the case finds that he was one of

the attorneys, he had an interest and a lien to the extent of the costs. *Hastings* v. *Lovering*, 2 Pick. 214; *Stackpole* v. *Arnold*, 11 Mass. R. 27; *Arfridson* v. *Ladd*, 12 Mass. R. 173; *Gower* v. *Emery*, 18 Maine R. 79.

The defendant was the agent of Gile, and acted under his orders. But if it were true, that Gile acted as the agent of Gove, and that the defendant so understood it, still he was properly excluded as a witness. Gove directed Gile to ascertain "the fact" of ownership, and to give the execution to an officer. In other words, he was first to ascertain, that the property belonged to the execution debtor, and then to give out the execution. He was not to give out the execution till he had found that the debtor owned it. In that event only, had he authority to act. The jury have found that another man was at the time the owner. Gile therefore exceeded his authority, and is, therefore, responsible to the defendant.

Suppose judgment should go against Hains, and he should bring his action against Gile for indemnity, how could Gile, upon the testimony reported, successfully defend himself? He ordered the officer to seize this grey mare: — the officer obeyed the order: — in so doing he invaded the property of a third person: — and has been compelled to pay for it. Gile had it in his power to avoid responsibility, by saying, I am but the agent of Gove, he will save you harmless, but I cannot be holden: — he did not choose to exonerate himself. It does not therefore lie in his mouth to say, I made no such bargain.

The opinion of the Court was drawn up by

Whitman C. J. — The only question presented to the Court upon the bill of exceptions, is, whether Gile, offered as a witness by the defendant, was competent or not. The action is trespass *vi et armis de bonis asportatis.* The article in question was a horse. It had been seized on execution by the defendant, he being a deputy sheriff, as the property of one Robert Foord, one Gove being the creditor in the execution, and the witness being his attorney. The witness being sworn in chief, the plaintiff questioned him as to his interest in the

event of the suit; and he disclosed, that he was directed by the creditor, if he thought it advisable, to cause the horse to be seized on the execution; that he, thereupon, put the execution into the hands of the defendant, and directed him to seize the horse; and informed him that Gove would indemnify him for so doing. The Court below ruled that this shew him to be interested in the event of the suit, upon the ground, as we are given to understand from the argument of the plaintiff's counsel, that the witness would be responsible to the defendant, in case he should not prevail in this suit. But we think that no such responsibility rested upon him. By looking at the execution, the defendant must have seen, that the witness was not the creditor named in it; and, when told that Gove, the creditor, would indemnify him, he must have understood, if it were not otherwise known to him, that the witness was performing a mere agency. In such case there could be no liability on the part of the witness to indemnify the defendant.

But it is urged, that the witness was interested in the execution, he having a lien thereon for his costs, and therefore should be holden to indemnify the defendant. This was but a contingent interest, if it can be considered as amounting to any thing of the kind. It was such an interest as the defendant had no concern with. The witness' remedy for his costs was against the creditor, who was liable for them, whether the execution was collected or not. And besides; it does not appear that the witness' costs had not been paid by the creditor; and if not, whatever of interest he could, in any event have had, must have resulted from an inability to obtain payment from the creditor. When an interest, if any, is so remote and contingent, and especially, when it does not appear that an interest ever could be created in the witness, it could not be proper to exclude him. *Exceptions sustained.*

Hannah Given *versus* Henry Marr.

Where the holder of the equity of redemption, paid the amount secured by a mortgage of the land, and no intention of keeping the mortgage in force was disclosed at the time, and there was then no contract for the assignment thereof; and where, many years afterwards, the mortgagee made an assignment of the mortgage and of the notes secured by it, to the holder of the equity, so paying the notes; *it was holden*, that the mortgage was to be considered as discharged.

No statute is to be held retrospective, or in violation of any constitutional provisions, where it affects rights, unless such shall be the necessary construction.

If a law of the State, allowing divorces to be decreed for new causes, were clearly retrospective, affecting conveyances already made, such law would, as to such conveyances, be unconstitutional and void. The act of 1829, c. 440, permitting divorces to be decreed, for desertion, for the term of five years, without reasonable cause, is not retrospective.

The wife is not entitled to dower, during the life of her husband in lands of which he had been seized during the coverture, and had conveyed prior to the stat. of 1829, c. 440, although in 1842, she had obtained a divorce from her husband, on account of his wilful desertion of her, for the term of five years, without reasonable cause.

The parties agreed upon a statement of facts.

"This is an action of dower, and it is agreed, that the demandant was lawfully married to John Given, before 1819, and that the demand of dower was duly made on the 25th of January, 1845, as stated in plaintiff's writ, and that the facts, contained in the case of said Marr, against said Given, reported in the 23d vol. of Maine Reports, page 55, may be considered and used as evidence in this action by either party, so far as the same is legally admissible. And it is further agreed, that a divorce from the bonds of matrimony was granted and decreed by the said Court, at the May Term of the same, holden in said county, in 1842, in favor of said Hannah, and at her instance, from her husband, John Given, on account of his wilful desertion of her, for more than five years previous to her application for said divorce. The tenant held the premises by deed from Rufus Marr.

"If, in the opinion of the Court, upon said facts she is entitled to recover her dower in the premises described in her

writ, then commissioners are to be appointed to set off her dower and to assess her damages from such time as the Court shall decide, and she is to recover her costs. Otherwise she is to become nonsuit and the defendant is to recover his costs.

"If either party wishes to put in any further testimony it may be done by depositions taken according to law.

"Samuel Wells, attorney to plaintiff,

"Seth May, attorney to defendant.

Extract from the deed of Robert Brinley to Rufus Marr, dated August 28, 1841.

"Do hereby assign, transfer and make over to said Marr, all my right and interest, in and to a certain mortgage deed and to the notes therein described; and I do also hereby release all my right, title and interest in and to the premises described in said mortgage."

May, for the tenant, was called on to take the affirmative, and show a defence, and contended: —

In this case the tenant relies upon two grounds in his defence: —

1. The demandant is not dowable because her husband had only an instantaneous seizin. The deed to him and the mortgage back, were executed at the same time and were parts of the same transaction. That such a seizin gives no right of dower is well settled. *Holbrook* v. *Finney*, 4 Mass. R. 566.

But the question in this branch of the defence is, do the facts show that the seizin of John Given was only for an instant? This depends upon the fact whether the mortgage is still subsisting and uncanceled. If it be so, then the demandant is not dowable. We contend, that according to the well settled principles of law, that mortgage is to be regarded by the Court as unpaid and subsisting. It appears by the facts in this case, that Rufus Marr acquired a right in the equity of redemption on the 22d of May, 1823. In the same month he paid the amount of the mortgage to the attorney of Brinley, who made an entry of that fact upon the back of the execution which Brinley had obtained on his judgment for possession. At that time the mortgage was neither discharged nor assigned,

but Brinley, holding the legal estate, as we say, in trust for Rufus Marr, who had paid to him the amount of the mortgage, by his deed dated Aug. 8, 1841, sold and assigned the mortgage and the notes to said Rufus Marr, and quitclaimed to him all his interest in said estate. It is perfectly apparent that Marr did not intend to extinguish the mortgage, else why was it not discharged, and why were not the notes taken up and destroyed? At any rate it was not discharged, and is therefore a *subsisting legal estate*, and both the mortgage and the equity of redemption vested in the tenant by virtue of the deed of warranty from Rufus Marr to him.

In a recent case, *Pool* v. *Hathaway*, 22 Maine R. 85, the Court decided, that "where there is a conveyance by mortgage to one who had *previously* acquired a right in the equity of redemption, the rule is well established, that the mortgage will not be considered as extinguished when it is for the interest of the grantee to have it upheld, unless the intention of the parties to extinguish it is apparent."

Under such circumstances if it be for the interest of a party to uphold a mortgage, his interest to do so will be presumed and no merger will take place. *Hatch* v. *Kimball*, 2 Shepl. 9; *Freeman* v. *Paul*, 3 Greenl. 260; *Gibson* v. *Crehore*, 3 Pick. 475; *Thompson* v. *Chandler*, 7 Greenl. 377; *Campbell* v. *Knights*, 24 Maine R. 332.

2. The demandant is not dowable, because, at the time of the conveyance of the premises by her husband, no such cause of dower, as a divorce for five years wilful desertion, was known in the law. No statute recognized such desertion as a cause for divorce, until the stat. of 1829, c. 440, sect. 1.

It is true, that by the stat. c. 71, sect. 5, passed in 1821, as well as by the statute of Mass. of 1786, before the separation, it was enacted, that where a divorce was obtained for the *adultery* of the husband, "the wife should have her dower assigned her in the lands of the husband, in the same manner as if such husband was naturally dead." Up to 1829, a divorce obtained for any other cause, except the adultery of the husband, gave the wife no right of dower.

By the stat. of 1829, c. 440, sect. 1, and by subsequent statutes, and by the Rev. Stat. c. 89, sect. 2, the causes of divorce are greatly multiplied, and by these statutes, the right to dower, is made an incident to the divorce, for any of these causes except that of impotency. The 16th sect. of the Rev. Stat. expressly gives her the right of dower for any of the other causes mentioned in the 2d sect. "to be assigned to her in the same manner, as though her husband was dead," and by the Rev. Stat. c. 144, sect. 10, it is provided that "any woman who is divorced from her husband *for his fault*, may recover her dower in the manner before in the act provided, against her former husband or whoever shall be the tenant of the freehold."

These statutes show, that at the time of the conveyance from John Given to Rufus Marr, viz. on the 22d of May, 1823, wilful desertion of the wife for five years was not *a fault* of the husband, and such act at that time could not create in favor of the wife any incidental charge upon the land. What then were the rights of the demandant at that time? It is true she had an inchoate right of dower, and though contingent, such right has been held to be an actual incumbrance on the land. *Porter* v. *Noyes*, 2 Greenl. 22; *Shearer* v. *Ranger*, 22 Pick. 447; *Jones* v. *Gardner*, 10 Johns. 266.

She, then, had a right to dower, upon proof of her marriage, of seizin in her husband, during the coverture — and of his death. At common law, his *natural death* was a condition precedent to the right of dower. Coke Litt. 33, *b*, where it is said, "if they were divorced *a vinculo matrimonii* in the life of her husband, she loseth her dower." — See also Stearns on Real Actions, 285. She had also by statute, as it then was, a right to dower in case of a divorce for the cause of adultery committed by her husband, in the same manner as if he were dead. Such was the nature and the extent of her inchoate or contingent right, at the time of the conveyance by her husband. All this was seen by his grantee and understood — and to extend that right by the creation of new and unforeseen causes, not contemplated by the parties, at the time, is as manifestly

unjust, as it would be to give two thirds of the land as dower, instead of one. This incumbrance of dower — nor the causes upon the happening of which, the demandant may have it, can neither be enlarged or diminished without the consent of all parties who are concerned or to be affected by it.

The case of *Barber* v. *Root*, 10 Mass. R. 260, is not a question of dower after a divorce; but a question whether the divorced wife was entitled to be reinstated after the divorce, in her lands, held in her own right; and it was held, that at common law, a dissolution of the marriage, as well as the death of the husband, had that effect.

This brings us to the question, whether the Legislature has extended this incumbrance, by multiplying or creating new contingencies, upon the happening of which, the right of *this* demandant to dower in these premises is to attach? And in the second place, if the Legislature has done so, is such legislation binding upon the tenant? And —

1. — We say the Legislature has not done so, because the statutes of 1829, c. 440, sect. 2, and 1830, c. 456, sect. 1, and the Rev. Stat. c. 89, sect. 2 and 16, are to be considered as prospective in their operations, so far as regards the rights of the wife to dower in lands conveyed before the passage of those acts. Justice and the principles of common honesty require such a construction. *Brunswick* v. *Litchfield*, 2 Greenl. 28; *Hastings* v. *Lane & al.* 15 Maine R. 134; *Quackenbush* v. *Danks*, 1 Denio's R. 128.

But secondly — We say if the Legislature has done so, such legislation is not binding upon the tenant in this suit. To this point I cite the well considered opinion of this Court in the case of *Kennebec purchase* v. *Laboree & al.* 2 Greenl. 290, 291, 292, 294 and 295.

Wells argued for the demandant, contending that —

1. The husband of the demandant was seized of the premises during the coverture.

The mortgage to Brinley was extinguished, when the money secured by it was paid. No action could have been sustained afterwards by the mortgagee, and he could give no such right

to another person. One mode of discharging a mortgage provided by the statute is by quitclaim deed; and the deed in this case was no assignment of the mortgage, but a mere discharge. *Vose* v. *Handy*, 2 Greenl. 322.

2. By the divorce from her husband, the demandant became entitled to her dower in the premises, in the same manner, as if he had then been naturally dead. So far as it respects dower, the divorce operated as a civil death. The stat. 1829, c. 440, re-enacted in Rev. Stat. c. 144, § 10, provides, that "any woman, who is divorced from her husband, for his fault, may recover her dower, in the manner before provided, against her former husband, *or whoever shall be tenant of the freehold.*" The Legislature has the right to declare by law what a civil death is. The same thing had been done before, in declaring that the wife was entitled to dower, when a divorce had been decreed for adultery of the husband. The law does not give the right of dower, but merely removes the life estate in the husband, and permits the before existing right of dower to become perfected. It has long been the law, that other causes than the death of the husband may entitle the wife, to enforce her right of dower. Co. Lit. 133 (a); Cruise's Dig. Dower, § 27; 1 Black. Com. 132; *Davol* v. *Howland*, 14 Mass. R. 219; *West* v. *West*, 2 Mass. R. 223; Stearns on Real Actions, 285. In this case, the divorce was obtained by the wife, through the fault of the husband; and the language of the statute is express, that in such case, she shall be entitled to dower not only against the husband, but against whoever shall be tenant of the freehold.

Nor is there any ground for saying that the act is unconstitutional. This is merely a new remedy for a then existing right, which the Legislature has the power to give. *Thayer* v. *Seavey*, 2 Fairf. 284. The case of *Sewall* v. *Lee*, 9 Mass. R. 363, says that the Legislature has the power to annul the right of dower; and if so, why not have the right to hasten the time of enjoying it. It has been held, that the Legislature may legalize a marriage, before unlawful; and why not dissolve one? *Lewiston* v. *North Yarmouth*, 5 Greenl. 67. The

Legislature may say, what shall be sufficient evidence to support actions; and the present case is nothing more. They may pass acts regulating the general rights of the community, although they may incidentally affect, in some degree, private rights. *Foster* v. *Essex Bank*, 16 Mass. R. 245; *Potter J.* v. *Sturdivant*, 4 Greenl. 154; *Read* v. *Frankfort Bank*, 23 Maine R. 318; 7 Greenl. 481; *Oriental Bank* v. *Freese*, 18 Maine R. 109; *Savings Institution* v. *Makin*, 23 Maine R. 360; *Fales* v. *Wadsworth*, *ib.* 553. It is not perceived why this act is more unconstitutional, than one would be, which should make an offence capital, which was not so at the time of the conveyance, and in that manner hastening the time, when the widow would be entitled to assert her claim to dower.

The opinion of the Court was prepared by

TENNEY J. — The parties agree, that the demandant was legally married to John Given prior to the year 1819; that in May, 1842, she was divorced from the bonds of matrimony, for the cause of desertion of the husband, on her application; and that before the commencement of this action, a demand to have dower assigned in the premises was seasonably made. The farm in which dower is claimed, was "taken up and settled by one Hobbs, thirty-five years ago, and he sold his right to John Given for the sum of $300, who never paid it till he left the State in 1821; and his wife has lived there since that time till about the year 1840 or 1841. On January 2, 1819, he took a deed with covenants of warranty from Robert Brinley, of the premises, and at the same time gave to his grantor a mortgage of the land to secure the payment of the purchase money, which was $180. On May 22, 1823, he conveyed by quitclaim deed, to Rufus Marr, all the interest, which he had in the same; and afterwards the grantee paid the full amount due on the mortgage to Brinley, the farm being then worth about $800. On March 21, 1841, Rufus Marr conveyed to the tenant, with covenants of warranty. On August 8, 1841, the tenant having commenced a suit against the present de-

mandant to recover possession of the land, his attorney, without the payment of any consideration, obtained from Brinley, a release and an assignment to Rufus Marr, of all the interest, which Brinley had in the premises, which instrument was left with the attorney.

The questions presented for consideration are, — 1. Was the husband of the demandant seized during the coverture? If so, — 2. Is she entitled to dower by reason of the divorce? The counsel for the demandant insist, that both these questions must be answered in the affirmative.

"*As between the mortgagor and mortgagee*, the fee of the estate passes to the mortgagee, at the time of the execution of the deed; and the mortgagee may enter immediately, or maintain a writ of entry against the mortgagor." "But *as between the mortgagor and other persons*, he is considered as still having the *legal estate* in him, and the power of conveying the legal estate to a *third* person, subject to the incumbrance of the mortgage." *Blaney* v. *Bearce*, 2 Greenl. 132.

At the time John Given conveyed to Rufus Marr, the former was the owner of the fee in the land, subject only to the mortgage to Brinley; the grantee took all this right, on the delivery of the deed, and subsequently *discharged* the mortgage by payment of the entire sum, secured thereby. The facts of the case disclose no intention, to keep on foot the mortgage, but to acquire an absolute title in the land. There is no evidence of any contract, for an assignment of the mortgage. The release and assignment, executed almost twenty years afterwards, could in nowise change the relations of the parties. Brinley had then no interest whatever in the land, and the deed was inoperative for any purpose. It might have been otherwise, if the contract between Brinley and Marr, had been, that for the money paid, an assignment was to have been made. As between the husband of the demandant, and the tenant's grantor, the fee being in the former, it passed with the seizin, to his grantee; the tenant is estopped to deny it. *Kimball* v. *Kimball*, 2 Greenl. 226; *Hains* v. *Gardner & al.* 1 Fairf. 383.

2. The demandant claims to be entitled to judgment by the authority of the statute of 1829, chap. 440, and the same provisions re-enacted in the Rev. Stat. chap. 144, § 10, and the decree of divorce, against the husband for his desertion. It is denied by the tenant, that the Legislature has the power by passing an act, authorizing a divorce for a new cause, to give to the wife, who may be divorced by reason thereof for the fault of the husband, the right of dower in real estate conveyed before such act, by the husband. It is insisted that such legislation, would be in violation of the constitution of the State, being retrospective, and taking away vested rights. And it is also denied, that the Legislature has attempted to exercise such a power.

Such a statute could not be regarded as affecting a remedy in any manner. So far as it would have any operation upon a tenant of land, conveyed by the husband before the act, its effect would be upon the rights thereto, and nothing further. The mode by which the dower would be obtained, if its claimant was entitled thereto, would remain unchanged by such a statute. Would it take away or abridge any rights of the tenant, as without the law, they were secured to him by the constitution? And if the constitution would be violated, in which of its provisions is the injury done?

By article 1, sect. 1, of the constitution of Maine, "all men are born equally free and independent, and have certain natural, inherent, and inalienable rights, among which are those of enjoying and defending life and liberty, *acquiring, possessing and protecting* property." Of this section there has been a judicial construction in this State, where the Court say, "by the spirit and true intent, and meaning of this section, every citizen has the right of possessing and protecting property, according to the *standing laws* of the State, in force, *at the time of acquiring it, and during the time,* of his continuing to possess it." And again, "It cannot by a *mere act of the Legislature,* be taken from *one man* and vested in *another directly,* nor can it by the *retrospective operation* of laws, be indirectly transferred from one to another, or be subjected to the govern-

ment of principles in a court of justice, which must necessarily produce the same effect." *Proprietors Kennebec Purchase* v. *Laboree & als.* 2 Greenl. 275.

If a man should intermarry and obtain a title in fee to land, without any incumbrance, prior to the act of 1829, before referred to, and should convey the same with covenants of warranty, his wife being living, and not relinquishing her right of dower, according to decisions in this State, Massachusetts and New York, there would be a breach immediately, and an action could be maintained, and nominal damages recovered for such breach. *Porter* v. *Noyes,* 2 Greenl. 22; *Shearer* v. *Ranger,* 22 Pick. 447; *Jones* v. *Gardner,* 10 Johns. 266. If, from this covenant of warranty, the inchoate right of the wife to dower should be excepted, it would be otherwise; the covenant would be fully kept. Would there be a breach of that covenant, having the same exception after the act of 1829, supposing it to be prospective, in its terms? If it secured to the wife the right of dower, provided she should be divorced from her husband for his desertion, it would seem to be no breach, for if this right would be enlarged, according to the new causes, the exception would be enlarged to the same extent, by the same statute. But where the parties contracted as they did in the covenant and the exception to it, the grantee was entirely secure against every incumbrance, excepting the inchoate right of the wife, founded upon the causes of divorce and dower, under the law as it then was. In the contract, the parties are supposed to have made it, in reference to the law, then existing. If the new statute upon a fair construction of its terms, gave the right of dower in the land supposed, and at the same time created no breach of the covenant, it is manifest, that it increased the incumbrance, beyond the fair intent and meaning of the contract, and thereby impaired its obligation. This no law of a State can do. Const. U. S. art. 1, sect. 10, No. 1. The exception then being confined to the inchoate right of the wife, as it was, when the deed was given, the same cause which limits the exception, has the like effect upon the right of the wife to dower. If it were not so, the

right which vested in the grantee, when the deed was delivered, would be taken away by the supposed act of the Legislature, and no remedy provided upon the covenant, in his deed.

If the law of 1829, allowing divorces to be decreed, for desertion of either of the parties, for the space of five years, had been clearly retrospective as well as prospective, could it be a valid law, so as to give a party the right of divorce, when the desertion complained of, was wholly before the passage of the law? It needs no argument to show, that so far as it was retrospective, it could not. And if it should furnish no ground of divorce, by reason of its being retrospective as to the cause of divorce, could it have effect to give dower in land conveyed by the husband, before its enactment, and so as to the conveyance retroactive, upon a divorce for desertion, continued for five years after the law which would be prospective as to the cause of divorce?

The principle is not altered, by the provision that the right of dower shall be incidental to the decree of divorce, instead of its being the direct object of the statute, as we have already seen from the quotation from the case referred to, 2 Greenl. 275. If by statute, the basis of the right of dower, in land conveyed by the husband, during coverture, can be enlarged afterwards, it is not perceived, what barrier is interposed to a further extension; if dower can be had, as the consequence of a divorce for a new cause, a direct act, that she shall have dower in land, of which the husband was seized *before* as well as *during* the coverture, would violate no constitutional provision. And if causes, which can result in the assignment of dower can be increased, we see no reason why the quantity and duration of the estate therein, may not be enlarged also; or why the right of an interest in the premises, should be confined to the wife or the widow.

It is said, that the statute in question, is no more liable to this objection, than would one be, which should make certain crimes capital, that are not so, at present. In questions of dower, the Courts do not stop to inquire by what agency, the husband came by his death, not even, if it should be suggested,

that it was by the fault of the wife. If the husband were seized during the coverture, and is dead, the foundation of the right is established, although his death may be hastened by legislation or otherwise.

When the tenant's grantor took the deed from the demandant's husband in May, 1823, what were the rights conferred thereby under the laws then in force? An estate in fee incumbered by the outstanding mortgage, and the inchoate right of the wife to dower. The latter right could then be consummated only by the death of the husband, or by a divorce upon her application for his adultery. Upon the facts of the case, these were all the incumbrances which could exist by possibility. If the present law had been enacted before the husband's conveyance, in addition to the risks just mentioned, he would be exposed to the liability of assigning dower upon a divorce for additional causes. It follows therefore, that such a statute as the demandant's counsel insists, that the one he invokes, is, could have an effect upon the land in question, the tenant would not have the right of "possessing and protecting property," according to the standing laws of the State, in force at the time of his "acquiring" it, and during the term "of his continuing to possess it."

The power of the Legislature to make such a law as has been supposed has been examined, independent of the question whether the statute of 1829, and of the Rev. Stat. c. 144, sect. 10, was of such a character. This was done, because it was seriously argued by the counsel for the demandant, that the power was in the Legislature, and that such was the construction to be put upon the section; indeed, without both, the action could have no basis. The decision of that point would also furnish a rule for the interpretation of the language of the law, in one event, upon the inquiry, whether the law is in its terms, retrospective. *No statute is to be held retrospective, or in violation of any constitutional provision, when it affects rights, unless such shall be the necessary construction.* The language of the section is, "any woman, who is divorced from her husband, for his fault, may recover her

dower in the manner before provided, against her former husband, or whoever shall be the tenant of the freehold."

The section in its terms is general, not specifying what cases, or classes of cases shall come within, or be excluded from its operation. It is in itself sufficiently broad to embrace all cases, where a wife has obtained a divorce for the fault of the husband, if there is nothing in the laws of the State of equal or superior authority, manifesting a different intention in its authors.

That it was framed with reference to other provisions of law, in order to learn its meaning, most clearly appears; and by those other legal provisions, the meaning may be restricted. It could not have been intended, that the right of dower, in land conveyed by the husband, should attach to the wife, after her divorce, when she had barred that right, by signing the deed of conveyance, relinquishing it; this would amount to a repeal of other provisions enacted at the same time. She could not have dower in land, conveyed by the husband, before the coverture, as that would change one of the established principles touching the right of dower. Neither was it the object to give the right, to claim dower against the former husband, or the tenant of the freehold, at the election of the claimant; but clearly against the one of the two, who should be the tenant of the freehold at the time, when the right should be attempted to be enforced; for by other principles, the right could be made effectual, only against the one claiming the title in the land. Therefore in giving a construction to the section, so general in its language, we must look at it, in connection with other statutes, and the doctrines of the common law, applicable to the subject, — and also in connection with the constitution as the supreme law of the State. We are not to suppose, that the Legislature was at all unmindful of the restraints that this imposed, or was uninfluenced by them, unless the contrary is clearly manifest. There being nothing in the section itself, showing that they intended that it should apply to land, conveyed before the passage of the law, increasing the causes of divorce, excepting the general

terms, it cannot be understood, to have been intended for a purpose which would be unauthorized by the constitution.

By the agreement of the parties the demandant must become *Nonsuit.*

TICONIC BANK *versus* DAVID SMILEY.

Where the plaintiff by operation of law is compelled to pay a debt, which in equity and good conscience the defendant should have kept from being so claimed and paid, an action may be maintained to recover of the defendant the amount so paid.

If a note be indorsed, after it has become overdue, thus — "indorser not holden, D. S." the indorser is nevertheless, liable therefor, if a payment has been made upon the note, or a set-off can be claimed, when the note exhibits no indication of them, and the indorser leaves the indorsee in entire ignorance of any thing of the kind.

THE parties agreed upon a statement of facts.

This is an action of assumpsit. A copy of the note which is the subject matter of this suit is to be made a part of this case with the indorsement thereon.

In the fall of 1837, one Thomas Smiley took the said note of the defendant, and lodged it with the Ticonic Bank as collateral security for an execution, which the bank then held against him, the said Thomas Smiley. At this time the note was not indorsed. Within a few days afterwards the attorney of the bank called on David Smiley, (the defendant,) to indorse it, and told him that T. Smiley had left the note with him as collateral security for an execution in favor of the bank; the defendant then said he would do so; and also said he had no doubt the note was good, but that he would not be holden on it. — Whereupon the attorney of the bank told him to indorse it as he pleased, and he indorsed it as the note shows.

Thomas Smiley never paid any thing to the defendant for the note, neither did the bank pay defendant any thing for his indorsement.

If admissible, it is agreed that Thomas Smiley procured the

note for the purpose of getting an extension of payment on the execution aforesaid, which the bank then held against him as aforesaid. The bank gave Thomas Smiley an extension of the time of payment on said execution, on said note being left with them as collateral security, as aforesaid, and agreed to wait on him till said note should be collected.

Thomas Smiley borrowed the note of defendant, and at the time told him that he wished it to turn out to the plaintiffs as collateral security, and that they were pressing him for payment.

In 1842, D. Smiley called on T. Smiley and asked him when he could pay him the amount of the note or a part of it, but no part of it has been paid.

Thomas Smiley has obtained his discharge in bankruptcy, and put the amount of said note in his schedule as a debt due from him to D. Smiley. The note aforesaid was put in suit by the plaintiffs at the D. C. Aug. Term, 1840, and the said Homans appeared at that term and filed an account in set-off against D. Smiley, and defended the action. The action was afterwards referred by rule of said Court, without the knowledge or assent of D. Smiley. The referee notified the parties and heard them. D. Smiley was notified by the attorney of the bank, that an account in set-off was filed in said action, and was present at said hearing before the referee, as a witness. The referee allowed fifty-one dollars and eight cents of said account in set-off, and deducted the same out of the amount due on said note, and made his report accordingly in favor of the bank, for the balance over and above the amount so allowed in set-off, to the D. C. Dec. Term, 1842, and said report was accepted by said Court, and judgment thereon rendered for the amount of said award, and execution issued thereon.

It is to recover the amount thus allowed in set-off that this action is brought, and it is agreed that the Court shall enter such judgment in this case as the foregoing facts will warrant.

The following is a copy of the note: —

"$222,64. Vassalboro', Nov. 5, 1836.

"For value received of David Smiley I promise to pay him

or his order, two hundred twenty-two dollars and sixty-four cents on demand and interest. "Samuel Homans."

The indorsement was in these words: —

"Endorser not holden — David Smiley."

Noyes, for the plaintiffs, said that the effect of the indorsement of the defendant was to pass the legal property in the note to the plaintiffs. He did not intend to guaranty the ability of the signer to pay the note, but to pass the title to it, and to guaranty that it was a good note against the signer, if he was able to pay, for the apparent amount thereof. It was equivalent to representing or affirming, that if it could not be collected by reason of a set-off or payment by the signer, that the defendant would make it good to the bank. *Lobdell* v. *Baker*, 1 Metc. 193 and 3 Metc. 469.

The giving delay to Thomas Smiley on the execution, was a sufficient consideration for the transfer of the note.

This case is analogous to that class of cases where one man receives a counterfeit bank bill or a forged note, where the receiver may recover the amount. 6 Mass. R. 181; 5 Taunt. 488; 2 Johns. R. 455. The vendor of any article, if he is in possession of it, is always understood as warranting the title. 1 Metc. 547.

Both the bank and Thomas Smiley were ignorant that there was any set-off against the note, and the defendant did not inform them, that there was.

If the note was delivered by the defendant to Thomas Smiley without consideration, and as an accommodation note, he is equally liable, as to third persons, as if the full amount had been paid him. Chitty on Bills, 91; 12 Pick. 548.

As the indorsement was made without an express warranty, the defendant may not be liable by reason of the inability of the signer; but if there is any latent defect or secret taint which prevents recovering a judgment against the debtor, he is responsible in the same manner, as in the case of the sale of a specific article.

Lancaster, for the defendant, made these points: —

1. There can be no implied promise in this case, and it is

not pretended that there was an express one, because there was no privity between the bank and the defendant.

The note had become the property of the bank prior to the indorsement. The contract was between the plaintiffs and Thomas Smiley, and the indorsement was made as a mere matter of convenience. There was no contract whatever between the parties to this suit. It is denied that there was any implied promise whatever, but if any, it was to Thomas Smiley, and not to the bank. If there was a guaranty, and by suitable words, it was not transferrable to the bank. 21 Pick. 140; Chitty on Bills, 250; Story on Notes, § 484.

2. Even if a promise of any description can be implied it is without consideration, and therefore void. Nothing was paid for the note by Thomas Smiley to the defendant, and at the time of the indorsement, or afterwards, there was not only no consideration as to the defendant, but none whatever even as to Thomas Smiley. The plaintiffs do not show, that they agreed to give any indulgence to Thomas Smiley at the time of the indorsement. The defendant, too, was an entire stranger to any agreement between the bank and Thomas Smiley.

3. There is no liability whatever of the defendant under such an indorsement as this. *Rice* v. *Stearns*, 3 Mass. R. 225; *Parker* v. *Hanson*, 7 Mass. R. 470; 7 Cranch, 159; 7 Taunt. 163.

The opinion of the Court was drawn up by

WHITMAN C. J. — This being an action of assumpsit, to maintain it, there must be evidence of a promise, either express or implied. It is not pretended that there was any express promise. Was there an implied one? The defendant was the holder of a note of hand, made to him by one Homans, and lent it to Thomas Smiley, in order that he might pledge it to the plaintiffs, and thereby obtain delay of payment for a debt he owed them; and he having deposited it for that purpose, before it had been indorsed by the defendant, an agent of the plaintiffs called on him to indorse it; and he thereupon put upon the back of the note, "indorser not

holden, David Smiley;" at the same time remarking, he had no doubt the note was good; and he was then aware of the object of Thomas in putting the note into the hands of the plaintiffs. It appears that, at the same time, Homans had an account with the defendant, on which there was a balance of $51,80 due from the latter, which, as the note had then been due for a long time, it would be the right of the maker to have set off, as in payment of it, *pro tanto*, in whose ever hands it might be found; and this right he availed himself of when sued by the plaintiffs. This balance, it is insisted, under these circumstances, that the defendant must be considered as having impliedly promised to pay to the plaintiffs.

If the defendant is liable for the amount claimed upon the ground of an implied promise, it must be because he has received that amount for the plaintiffs, or because they have paid that amount for him. There is no other possible ground upon which such a promise can be raised. Now, has he received any sum of money for them? It does not appear that he had ever received any sum whatever, expressly in payment of the note. When, therefore, he received the balance due on the account he could not have received it for the plaintiffs. But, by the operation of law, the plaintiffs have been compelled, in effect, to pay a debt due from him. The note was transferred to the plaintiffs as being wholly due. Both parties must so have understood it; and so in fact it was; but the maker had a balance of an account against the defendant, constituting a debt due by the latter to the former. This, at the time the plaintiffs took the note, and when the defendant indorsed it, was unknown to them. If the defendant was aware of it, he did not acquaint them with the fact; and from his conduct we must presume it did not occur to him. The plaintiffs, not being apprised of any such claim in set-off, were entitled to find the note free from any such claim; but by operation of law were, nevertheless, compelled to pay a debt, which in equity and good conscience the defendant should have kept from being so claimed and paid. He therefore may be consid-

ered, as having in effect, requested, or, perhaps more properly, as having compelled the plaintiffs to pay the amount claimed.

The mode in which the defendant indorsed the note exonerates him, only, from being liable in the case of the avoidance or inability of the maker; and is no bar to a claim like the one here set up. Such indorsements are very common, and the extent of the meaning of them, is well understood and defined. It is never understood, in such cases, if payments have been made, or if set-offs can be claimed, when the note exhibits no indication of them, and the indorser leaves the indorsee in entire ignorance of any thing of the kind, that the indorser is free from responsibility.

Defendant defaulted.

JOSEPH WOOD *versus* SAMUEL NOYES.

It is not contemplated in the constitution or laws, that a party can save the expense of legal counsel and assistance, go on as it were blindfold, and if he becomes the victim of his own rashness and indiscretion, make that rashness and indiscretion the basis of a claim to be restored to his original condition in the suit, especially when he produces no evidence, that he suffered any loss on the merits.

THIS case came before the Court on the following exceptions, to the order of SHEPLEY J. presiding at the trial, accepting the report of certain commissioners.

"This was a complaint for flowing by means of a dam erected by defendants, originally filed in the district court. While the case was pending in that court, at December Term, 1843, said respondents were defaulted, under a supposed agreement, a copy of which is hereunto annexed, viz: "In the complaints, *Joseph Wood* v. *Horatio G. Kelly & al.*, and *Truxton Wood* v. *the same*, it is hereby agreed by and between the parties, that the defendants are to be defaulted, and Peleg Benson, Jr., Leavitt Lothrop and Royal Fogg, are to be appointed by the court, commissioners to appraise the damages, flowage, &c. Dec. 6, 1843." "Truxton Wood, for the complainants.

"Samuel Noyes, for the defendants."

"Signed by said Noyes, for himself and for said Kelly. A commission issued, to have the yearly damages appraised, &c. Said commissioners accepted the trust, and made their return, assessing the yearly damages and determining as to the portion of the year, which said dam should not be kept up, and what portion it might be. Said report of said commissioners was returned to said district court at August Term, 1844, and presented for acceptance. The said Kelly and Noyes, appeared at the same term, and opposed the acceptance of said report on the ground, that the agreement by virtue of which said default was made, was entered into, by mistake or misunderstanding on the part of said Noyes, and was unauthorized on the part of said Kelly, and moved said court, that said default should be taken off. The Judge of the district court, after fully hearing said parties, decided that the default should be taken off as respects said Kelly, but not as to said Noyes, and said Judge declined to accept said report as to said Noyes, the parties having agreed to demur the action, and the court being of the opinion, that the demurrer carried the whole case into this Court. Thereupon the parties in the district court, at the August Term, 1845, demurred the case to this Court, and the same was entered by said complainant at the present term. Said Kelly appeared and pleaded several pleas, or brief statements, in answer to said complaint, and the cause was opened to the jury, when the complainant, on the suggestion of the Court, discontinued said complaint as against said Kelly, he agreeing to take no costs, which was accordingly done, and entered of record; and moved the Court here, that said report of said commissioners should be accepted, as against said Noyes. Which motion was opposed by said Noyes, but the presiding Judge ordered said report to be accepted, and rendered judgment thereon. To which order and determination the counsel for said Noyes excepts; and here, in open Court, before the adjournment thereof, tenders his bill of exceptions according to the statute, in that case made and provided.

"F. Allen, counsel for said Noyes."

"These exceptions having been presented before the ad-

journment of the Court without day, and found to be correct, are allowed. "Ether Shepley."

There was a petition presented by R. H. Gardiner, alleging that he was the owner of the land on which the mills were, and praying that the default might be taken off, that his rights might be preserved. Noyes, also presented a petition, or motion in writing, to take off the default. These petitions were accompanied by affidavits to the truth of the statements contained therein.

F. Allen, for Noyes and Gardiner, after remarking that the counsel for the complainant had objected to the reception of the petition of the owner of the land, said that the right of petitioning in this State, was inherent in every member of the community, and was not to be drawn in question, the application being respectful in its terms, and ostensibly for a legitimate object. When a party has suffered in his rights by a judicial proceeding, he should have an opportunity of applying to an appellate judicial tribunal, for a redress of his wrongs; and more especially, when it relates to an action then pending in the appellate court.

He also contended, that there was sufficient cause shown, for taking off the default, and that the court had the power to do it in that stage of the proceedings.

A. Belcher and *Benson*, for the complainant, made these objections.

1. It is a mere question of discretion, which was fully heard on proof in the district court, and decided against the defendant, and this Court will not revise that decision. 3 Greenl. 216; 14 Maine R. 208.

2. If the defendant had a right to make the motion in this Court, it should have been made at the first term, and by omitting to do it, he has waived the right.

3. The Court will carry into effect the agreements of suitors, not make them. The default was entered in pursuance of a written agreement, clear and intelligible, and it should be enforced.

4. The affidavit of Mr. Gardiner is inadmissible, the complainant having had no notice, nor opportunity to cross examine. 7 Mass. R. 252. He is not, and cannot be, a party to the suit, and has no right to be heard, or appear therein. He is but in the situation of any other stranger, and the paper should not be received. Nor should the rights of the complainant be determined, without his being permitted to offer counter proof.

The opinion of the Court was drawn up by

TENNEY J. — The complainant claimed to have received injury by the acts of the respondents. They took legal measures to have an investigation and settlement of the matter in dispute. In pursuance of an agreement of Samuel Noyes and the complainant, a default was entered and a commission issued, which was duly returned, with a report of the commissioners. No suggestion is made, that the commissioners were under the influence of prejudice or partiality. Their report has been accepted, so far as it had reference to Noyes, another arrangement having been made between the complainant and the other respondent. No reason has been offered in support of the exceptions, which were taken to the order of acceptance.

We are bound to believe, that the respondent, who entered into the agreement to be defaulted, did not understand its full import. But he makes no charge against the other party's counsel, who acted in making the agreement, that they in any way practised upon his ignorance or inexperience, but expressly says, he imputes to them no fraud or unworthy motive. One term intervened, between that when the commission was ordered, and the one when it was returned, in the district court; and the intermediate term was probably prior to the hearing before the commissioners. There was an opportunity to make application for a correction of the error, without producing great expense or delay; but no attempt was made for the purpose, till the report was offered for acceptance in the district court, where there was a full hearing upon the motion

to remove the default, which motion was overruled. He certainly was not vigilant to guard his rights; common prudence would seem to have dictated, that he should have sought the advice of counsel, if not their assistance in Court, at an earlier day, when he did not understand the meaning of the simplest terms, used in legal proceedings.

"Right and justice shall be administered promptly and without delay." It is not contemplated in the constitution or laws, that a party can save the expense of legal counsel and assistance, go on as it were blindfold, and if he becomes the victim of his own rashness and indiscretion, make that rashness and indiscretion the basis of a claim, to be restored to his original condition in the suit, especially when he has produced no evidence, that he had a valid defence to the complaint.

No better reason exists for the restoration of the action, so that it can stand for trial on its merits, on account of the facts stated in the petition of Noyes' lessor. It does not appear, that his rights have been compromitted by the default which took place without his knowledge or consent; of this however, no opinion is given. But if he did trust the lessee with the disposal of his rights, he can claim no favor, which is denied to the latter. *Exceptions overruled, and petitions of Gardiner and Noyes dismissed.*

WILLIAM S. HASKELL *versus* EBENEZER SAWYER.

Where the plaintiff, "being about to set up a steam engine and planing machine to be connected therewith, agreed with the defendant, being a house carpenter, to take charge of and oversee the work, which was making drums, machinery and other geering necessary to connect the same, and to receive one dollar and fifty cents per day for his services; and where it was proved, that he so worked there, overseeing the work and directing until he pronounced the machinery to be in running order, and then left, — *it was holden*, that the defendant was not thereby bound by a special agreement to do the work in any manner; and that the defendant was entitled to be paid for his own labor.

EXCEPTIONS from the district court, REDINGTON J. presiding.

It seems that Haskell brought an action against Sawyer to recover damages for not performing certain work in a skilful and workmanlike manner, and that the defendant filed in set-off a claim for his labor. But no papers were furnished except a copy of the report of the referees and of the exceptions, which were in the following terms : —

"REPORT.

"The undersigned referees in the above case, having met the parties aforesaid, and heard the evidence and pleas by them offered, do award and determine — That the said Eben'r Sawyer shall pay to the said William S. Haskell the sum of one hundred and fifty dollars, with cost of reference taxed at thirty-one dollars and six cents, and legal costs of Court, with the following proviso : — That if upon the following statement of facts, the Court shall decide that said Sawyer is liable legally, under a special agreement to do the work hereafter mentioned, which it was proved was not done in a workmanlike and proper manner.

"It appeared in evidence that said Haskell, being about to set up a steam engine and a planing machine to be connected therewith, agreed with said Sawyer to take charge of and oversee the work, which was making drums, machinery and other geering necessary to connect the same, he, Sawyer, being a house carpenter, and to receive one dollar and fifty cents per day for his services. It was proved that he so worked there, overseeing the work and directing, until he pronounced the machinery to be in running order and then left.

"And this award is made upon the presumption that said Sawyer either has, or is to receive his pay for the number of days he worked for said Haskell.

"If the Court shall decide that said Sawyer is not legally liable under a special agreement to do the work aforesaid, then our award and determination is, that said Sawyer recover of said Haskell the costs of reference, taxed at twenty-nine dollars and ninety-eight cents, and his legal cost of court.

"November 24, 1846. "Alden Palmer,
"Joseph W. Patterson,
"Chas. Town."

This report was accepted by the District Judge; and the plaintiff filed the following exceptions, which were allowed and signed: —

"District Court, Middle District, Kennebec County, April Term, 1847. — *William S. Haskell* v. *Eben'r Sawyer.*

"This was an award of referees, in which the report was made in the alternative in favor of the plaintiff or defendant according to the decision of the Court, upon a question of law submitted in the report, which is to be referred to and made a part of the case.

"The law was ruled in favor of the defendant, and the report accordingly accepted.

"To which construction and ruling of the Court, the plaintiff excepts and prays that his exceptions may be allowed.

"By his att'y, R. H. Vose."

It had been agreed, that the case should be argued in writing; but —

Vose, for the plaintiff, submitted the case on his part without argument.

Lancaster, for the defendant, cited Black. Com. book 3d, c. 9, page 164, and thought the case too clearly in his favor to require argument.

The opinion of the Court was by

WHITMAN C. J. — This case comes before us, upon exceptions taken in the court below to the ruling of the District Judge, in accepting a report of referees, made in the alternative, referring the case to the Court for a decision upon a question of law, supposed to arise upon the facts as stated by them. They state that the defendant agreed to take charge of, and oversee the performance of certain work, to be done for the defendant, for which it was agreed that he should be paid wages at the rate of one dollar and fifty cents per day. They then, in substance, say if the Court shall decide, that the said Sawyer is not legally liable, "under a special agreement to do the work," the report is to be considered as in his favor. They further state, that the defendant "worked there, oversee-

ing the work and directing until he pronounced the machinery to be in running order." From this statement we are to understand, that the defendant was a mere day laborer; and that his labor was to consist in taking charge and oversight of certain work to be performed by others. He was not therefore bound by any "special agreement to do the work." The District Judge might well accept the report in his favor.

The exceptions are overruled; and the acceptance of the report in the court below affirmed.

ORRIN SMITH *versus* WILLIAM KELLEY.
WILLIAM KELLEY *versus* ORRIN SMITH.
SAME *versus* SAME.
SAME *versus* SAME.

The interest of a mortgagee of land cannot at law, pass to a third person, without an assignment, in some form, in writing, under seal, although the contract secured by the mortgage has been assigned by writing without seal.

If a mortgagor, or his assignee, would enable himself to maintain a bill in equity to redeem the premises from the mortgage by means of a tender of the amount due, he must make the tender to the mortgagee or person claiming under him, and not to an assignee of the contract secured by the mortgage.

A grantee of a part of mortgaged premises can redeem his interest, only by payment of the whole amount due on the mortgage.

The commencement and prosecution of an action upon a mortgage, amounts to a waiver of any prior entry to foreclose the same.

THE first named of these four cases was a bill in equity, brought by Smith against Kelley. The facts bearing on the questions decided in the equity suit are found in the opinion of the Court, and in the agreed statement in the other cases.

In the three last named actions, the parties agreed upon the following statement of facts.

The first of these actions was brought on the 24th of February, 1846, on a mortgage of an undivided half of about 30 acres of land, in Augusta, and was entered in the district

court, at the April term, and came up to this Court by demurrer.

To this action the defendant pleaded the general issue and filed a brief statement, claiming a tenancy in common with the plaintiff, of about five acres of the above named thirty, and denying any ouster of the plaintiff, of said five acres; and as to all the residue of the 30 acres, the defendant disclaimed any right, title, or interest therein, or any possession thereof.

The second of these actions was for the other undivided half of the same premises, by virtue of another mortgage of an undivided half, and commenced on the 20th day of March, 1846, to which the same plea and brief statement were filed as in the former action.

Said action was brought in the district court at the same term as the above, and took the same course into this Court.

The third action was commenced on the ——— day of September, 1846, for the whole of the premises, by virtue of both said mortgages, on the ground that the right of redemption had expired, and the title passed absolutely to the plaintiff, and was entered directly in this Court, at the present term. To which the defendant plead the general issue, and filed a brief statement, alleging a tenancy in common as to the five acres, the pendency of the two actions aforesaid, a tender of the full amount due on the mortgage, sued on the 20th of March, and also the pending of a bill in equity, filed by said Smith against said Kelley in this Court, commenced on the 29th of August, 1846, and duly served on said Kelley, and his appearance entered thereto Sept. 15, 1846, for the redemption of one undivided half of said premises.

Subsequently to the two mortgages, aforesaid the mortgagor conveyed the five acres aforesaid to the defendant by warranty deed, and he went into possession of the same, but never was in possession of the residue of said 30 acres.

On the 10th day of March, 1846, defendant tendered the full amount due on the mortgage of the earliest date, and the same sued on the 20th of March, viz: sixty-three dollars.

At that time the plaintiff held the only note described in

the said earliest mortgage on which any thing was due, by virtue of a written assignment on the back of said note, from the original mortgagee, and made some two years before; but from some cause or other, no actual assignment of the mortgage was made, till after the tender, but was made immediately after, without any new consideration.

The plaintiff is the assignee of the two mortgages aforesaid, each of an undivided half of the same premises, of different dates; both of which he commenced the foreclosure upon on the 16th day of September, 1843, and the three years of redemption expired September 16, 1846.

All the writs, pleadings, the mortgages, foreclosures, assignments, deeds, notes, and the bill in equity, may be referred to, without being copied, and any facts therein found, may be considered as part of the case.

Upon these facts the Court are to render such judgment in the several actions as the law requires.

J. Baker argued for Smith.

Any one having an interest in the premises may redeem a mortgage. 4 Kent, 162, 163; 2 Story's Eq. 291; 22 Pick. 401; 8 Metc. 45.

It was contended, that the party holding the equity might redeem one of the mortgages, without redeeming the other, although held by the same person. They were distinct transactions, and the mortgages were made at different times.

The tender was made at the right time and to the right person and was sufficient in amount. It was made to the attorney of Kelley, who had the note, and the only demand secured by the mortgage in his hands. The note was assigned to Smith before the tender, and the holder of the mortgage had no right to receive the money, nor had the payee of the note. 8 Pick. 490; 10 Pick. 157. The assignment of the security draws the mortgage to it. *Wilkins* v. *French*, 20 Maine R. 111; *Smith* v. *People's Bank*, 24 Maine R. 185; 2 Story's Eq. 285.

The attorney had the right to take the money, and when

taken, the mortgage would have been of no effect or validity. Rev. Stat. c. 125, § 10.

Besides, the mortgage was to have been assigned, when the note was; and equity considers what is agreed to be done, as done. *Gardiner* v. *Gerrish*, 23 Maine R. 46.

Vose, for Kelley, said that the bill could not be maintained, because Smith had not done what the statute requires shall be done before the mortgagor or his assignee can maintain a bill for redemption. He has not performed the condition, made a legal tender, or required an account to be rendered. It is not pretended that the first or the last has been done.

The tender relied upon by Smith was no legal tender. It should have been made "to the mortgagee, or person claiming under him," and not to the holder of the note secured by the mortgage. Rev. St. c. 125, § 17; 2 Greenl. 322; 15 Mass. R. 236.

But if a tender to the assignee of the note would have been good, still a tender to his attorney is wholly insufficient.

The mortgage was not assigned, for it could only be done by writing under seal. *Vose* v. *Handy*, 2 Greenl. 322; *Parsons* v. *Welles*, 17 Mass. R. 419.

The opinion of the Court was drawn up by

TENNEY J. — As between the mortgagor and mortgagee of land the legal estate is in the latter. By the law, as it is settled in this State and Massachusetts, the interest of the mortgagee cannot at law pass to a third person without an assignment in some form in writing under seal. *Parsons* v. *Welles & al.* 17 Mass. R. 419; *Vose* v. *Handy*, 2 Greenl. 322; *Prescott* v. *Ellingwood*, 23 Maine R. 345. Hence no person can be considered as claiming under the mortgagee, unless the claim is by virtue of a deed, notwithstanding the personal contract intended to be secured by the mortgage may be transferred by indorsement, or assignment and delivery.

If a mortgagor, or person claiming under a mortgagor, would lay the foundation for the maintenance of a bill in equity, for the redemption of mortgaged estate, by previous payment or

tender. Such payment or tender is required to be made to the mortgagee or person claiming under him. Statute, chap. 125, sect. 17.

The plaintiff in the equity suit at bar, upon the tenth day of March, 1846, made a tender of the full amount due upon the mortgage from which he seeks a decree for redemption, to the defendant's attorney, who had possession of the note, secured by the mortgage, which note was duly assigned, and requested that the note might be given up and the mortgage discharged. At the time of the tender, the defendant had no assignment of the mortgage, and the money tendered was not received in his behalf; and the note was not given up, or the mortgage discharged. This tender was insufficient to entitle him to a decree in his favor.

The tender of payment of the note, made long after its maturity, could not have the effect to discharge the mortgage. After the condition in the mortgage was broken, the mortgagee's title to the estate was perfect, subject to be defeated only by a process in equity, founded upon payment or tender of payment before foreclosure, as provided in our statute. *Maynard* v. *Hunt*, 5 Pick. 240.

In each of the two suits at law, brought upon the two mortgages given by Bragdon to Cook, the demandant claims to be entitled to a conditional judgment. The tenant disclaims any title or interest in the premises described, or possession thereof, excepting five acres, which is covered by his deed from Bragdon, and which is described in his brief statement; by the facts agreed, he has not been in possession of any portion of the residue, or made claim thereto. The demandant in these suits can have judgment against the tenant, in each, for an undivided half of the premises, as demanded, unless the money due, upon each mortgage, respectively be paid; because the part in the possession of the tenant is liable for all the money due upon the mortgages. *Taylor & al.* v. *Porter*, 7 Mass. R. 355.

The commencement and prosecution of the actions upon the two mortgages, is a waiver of the entry to foreclose, made

by the demandant on the 16th day of September, 1843. *Fay* v. *Valentine*, 5 Pick. 418; *Doe* v. *Palmer*, 16 East, 53; *Goodright* v. *Cardwent*, 6 T. R. 219. And the action commenced by the demandant in September, 1846, on the ground that there had been a foreclosure of the mortgages, cannot be maintained, being in effect for the same cause of action embraced in the proceedings.

Bill in equity dismissed with costs for defendant. — Judgment for the demandant in each of the suits upon the mortgages for seizin of one undivided half of the premises, unless the sum due upon each respectively be paid within two months.

In the other suit, the demandant nonsuit, costs for the tenant.

GEORGE HOYT, *Ex'r, versus* SAMUEL W. BRADLEY.

The conveyance of land, subject to a mortgage, made by a former owner on condition that certain personal services should be performed by the mortgagor, is a sufficient consideration for a note given for the purchase money.

Damages may be recovered, for non-performance of personal services, as well as for the neglect of performance of services to be performed by others.

To make a statement of what was contained, in a deed of conveyance, and express an opinion of its effect, furnishes no proof that the person so making them, knowingly made such representations, as would make him liable to an action.

THIS case came before the Court, on the following report of the presiding Judge.

"This was an action of assumpsit, on note, given to George Hoyt, deceased, signed by the defendant, dated Dec. 1, 1842, for $220 and interest, payable on demand and interest. The signature of the note is admitted.

"The defendant introduced the copy of a mortgage deed from Eli Hoyt, the son of George Hoyt, the payee of the note, dated March 25, 1840, to Nathaniel Allen, which was

acknowledged on the same day, and recorded Dec. 4, 1840, which is to be copied, and made part of the case. He also introduced a quitclaim deed from Eli Hoyt to Moses Gilman, dated the first day of April, A. D. 1841, and acknowledged the third day of the same month, of the same premises; and also a quitclaim deed from said Gilman to the defendant, of the same premises, dated Nov. 14, 1842, and acknowledged the same day.

"The defendant then introduced Moses Gilman, who was objected to by the plaintiff, and admitted by the Court, who said that the note in suit, was given in part consideration for the premises conveyed by him to the defendant, and was given to the plaintiff's testator, to take up a note of the same amount, which he, Gilman, had given for the land, to Eli Hoyt. After the witness had made the bargain, and the deed had been drawn, and he thinks, signed by him, he and Bradley went to the payee, George Hoyt, and asked him, if he would take the defendant's note and give up his, the witness', which he held against him; he replied, that he would. Bradley then asked Hoyt, how the writings were between Eli Hoyt and Allen. Hoyt said that the writings were made, so that Eli was to maintain Allen and his wife, or cause it to be done, and that Eli had a good right to convey, and so had he, Gilman, of course. Hoyt said he was present when the writings were made, and that it was made so at his suggestion. I then gave Bradley the deed and he executed the notes, one of which is the note in suit.

"The note taken up, was one given by me to Eli Hoyt, for the place. Hoyt, the payee, told me at the same time, that he had advised the defendant to buy the place, and that it would be a good chance for him. He said Bradley would hold the place, and Mr. Allen could not. Witness remained on the place till the last of March, 1843, when Bradley took possession and remained there about one month, and then left. Allen had previously brought an action against me for the land. The action was pending, when I sold to the defendant, and he was apprized of it. After the action was brought, I talked

with George Hoyt, the payee, who said he was present when the deed was made, and that Eli was to maintain Allen and his wife, or cause it to be done. I told Bradley what Hoyt said, and Bradley, at my request, went to see Hoyt, before the writings were made. Hoyt knew at the time that the action against me was pending. Allen recovered judgment against me, and turned me off. The judgment was recovered at August Term, 1843, I think. I employed H. W. Paine as counsel, who advised me to quit the place, as I had no defence to the action, and it was defaulted. On cross examination, witness stated that James Chapman did the writings between him and Bradley. Allen was living with me, at the time the action was brought, and lived with me about two years in the whole. Allen witnessed the deed from Eli Hoyt to me; he, the witness, said he then supposed Eli had a right to convey, but afterwards learned to the contrary. I don't recollect, whether the note given up, when the defendant's note was given, was payable to order or bearer; it was not quite due when taken up. The defendant introduced Timothy C. Bradley, who testified that a day or two before the defendant, his brother, closed the bargain with Gilman, he and the defendant, who was in search of a farm, were present with the intestate, and he asked the defendant why he did not buy Gilman out, as he thought it a good bargain. The defendant replied, he would, if Gilman had a good title; the payee, Hoyt, then said, there would be no difficulty about the title, he considered the title good; he said that at the time of the writings being made between Eli Hoyt and Allen, Eli requested him to be present, that when he got there, the writings were made out, he had them read over, and they were accordingly read; he told them they were not right, and that it should be put in, that Eli has to maintain them or cause it to done, and Chapman sat down and put it in. *Cross examined.* — Said, I told my brother, if he did not go and buy it, I should. Mr. Hoyt said, if they had traded, they could exchange notes, or there would be no difficulty. Mr. Hoyt did not say, that he read the deed, or heard it read, after Chapman sat down to put it in. George

Hoyt said he supposed it was in. I understood from him, that he knew the words were in. The judgment of Allen against Gilman and execution, and any papers connected with that suit, may be used by either party, but need not be copied. It is agreed, that the Court may draw the same inferences that a jury might, and enter such judgment, either by nonsuit or default, as in their opinion the law and evidence will justify."

"Ezekiel Whitman, the justice presiding, &c."

The only copy of papers refered to in the report, was of the mortgage deed. A copy of the condition thereof, follows.

"Provided nevertheless, and it is to be known, and understood, that if I, the said Eli Hoyt, my heirs, executors or administrators, shall well and properly provide for, maintain and support him, the said Nathaniel Allen and his wife, Betsey Allen, in health and sickness, during the term of both their natural lives, shall at all times furnish them with sufficient and suitable provisions, cooked and prepared, good and comfortable clothing, a convenient and comfortable room wherein is a fire place, and fuel cut and prepared for fire in the same; and when said Allen shall have become unable to bring fuel and make the fires necessary for his own and wife's comfort, the same shall be constantly done for them; and in sickness the said Nathaniel and Betsey are to have proper and humane attendance, nursing, medical aid and attendance if necessary, but not to call for any physician farther or beyond Farmington Falls, New Sharon village or Mount Vernon village; and the said Nathaniel and Betsey are at present to sit at my table with myself and family, and fare in all respects as well as we do, for both meat and drink; but if said Nathaniel and Betsey, or either of them, shall leave my house, and board elsewhere, I am in that case not to be holden for payment, nor to furnish them with supplies at any place except at my own house, so long as I keep house and provide for them as above mentioned; and whereas the said Allen has furnished a bed and bedding of their own, it is to be understood that what may remain of said bed and bedding at their decease is to be delivered to said Allen's children, but all additional bedclothes furnished by me,

are to be and remain my property. And it is further agreed and to be known, that the said Nathaniel Allen shall be under no obligation to labor for me, said Hoyt, unless he chooses so to do, and if he should so labor, he is to make no charge for it, it is to be free and with him optional, then the above deed to be void and of no effect."

J. Baker, for the plaintiff.

There are two grounds on which it will be contended the defence is established. 1st. Failure of consideration by failure of title. 2d. Fraudulent misrepresentations of the testator.

1st. Then let us inquire if there has been a total failure of title and consideration; for unless the failure is total, it is no defence to this action, as has been decided in *Wentworth* v. *Goodwin*, 21 Maine R. 150, and in *Severance & al.* v. *Whittier*, 24 Maine R. 120.

The title was originally in Eli Hoyt, for the mortgage says, he bought of True Hodgkins. He mortgaged it to N. Allen. The title did not all pass out of Eli by the mortgage. He was still owner of the equity of redemption — still owner of the freehold, so long as he continued to perform the conditions of the mortgage. 4 Kent's Com. 159, 160, 161; 1st Hilliard's Ab't, 276, 284; *Blaney* v. *Bearce*, 2 Maine R. 132. While, according to these authorities, Allen had only a chattel interest.

There was then sufficient interest in Eli, to constitute a good consideration for the note. The only ground then, upon which this branch of the defence can prevail, is, that such were the peculiar circumstances of this case, that Eli's deed would not *convey* this interest — that it was forever bound up in him — that the transactions between Eli and Allen operated as a perpetual covenant of inalienation.

Let us then examine this point. We answer to this —

1st. No such construction will be favored by the Court. It is against the policy of the law, which is to facilitate, not clog alienation. *Currier* v. *Earle*, 12 Maine R. 216; 4 Kent's Com. 129, 130, 131, 132; 1st Hilliard's Ab't, 250 and 251, sect. 20, 27; *Newton* v. *Reid*, 4 Simon's R. 141; 2 Story's

Eq. Juris. 539; 2 Blackstone's Com. 157; *Clinton* v. *Fly*, 10 Maine R. 292; *Ide* v. *Ide*, 5 Mass. R. 500; *Blackstone Bank* v. *Davis*, 21 Pick. 42; Cruise's Digest, tit. 13, c. 1, sect. 22, 38, 39; *Church* v. *Brown*, 15 Ves. 263.

2d. We deny that any such construction is to be given to these transactions. It can only be on the ground of "*personal trust.*" We deny that there is any such *trust.*

The mortgage itself declares that it may be fulfilled by Eli, his heirs, executors, or administrators, so that the parties did not contemplate a personal trust entirely. No relationship is shown — mere strangers. Not like *Clinton* v. *Fly*, 10 Maine R. 292. There the whole transaction existed in a single contract — the relation of parent and child existed, heirs, executors, or administrators not inserted, and the whole determined on the peculiar relation of the parties. But it is like *Currier* v. *Earle*, cited above.

3d. Even if the *contract* to support Allen, the duty, the obligation, is a personal trust and not assignable, still the mortgage, to secure the performance of that duty, is entirely a distinct and independent contract, and contains no element of personal trust. The duty to support, has nothing to do with the land — need not be performed on the land — he is to render it at his house, whereever that may be, and no where else. Nothing to prevent his moving from the farm or State, and yet so long as he keeps house, and furnishes the support, as agreed, the condition is unbroken. A mortgage is security to something else; collateral, necessarily implies something to be secured. The *contract* might be a *personal trust*, but the *mortgage* would not be. The land would not be bound down, nor Eli's right in it rendered inalienable.

4th. But even if the transaction does create a *personal trust*, and does reach the land, and deprive Eli of the right of alienation, in a certain contingency, we maintain that this restriction does not attach, till a breach of the condition, and an entry and ouster on that account, and that no total failure of consideration can be shown while the grantee is in possession; for Gilman, being in by purchase of the mortgagor, is not

liable to pay rent any more than the mortgagor. 4 Kent's Com. 125 to 128; *Frost* v. *Butler*, 7 Maine R. 225; 1st Hilliard's Ab't, 261, sect. 36, and 262, sect. 37 and 40; 2 Blackstone's Com. 155 and 156; Cruise's Dig. tit. 13, c. 2, sect. 37.

The fact that Allen brought an action for possession is no evidence of a breach.

By Rev. Stat. chap. 125, sect. 2d, an action may be brought before breach, and there is nothing in this case to show that this was for condition broken. 1st. The writ declares an absolute fee. — 2d. Unconditional judgment. — 3d. Nothing to show that the action was brought on this mortgage. *Coleman* v. *Packard*, 16 Mass. R. 39. Now the practice is, where action is brought for condition broken, to declare on the mortgage, and until Rev. Stat. the action could not be sustained without, but where the action was brought for possession merely before breach, to declare on general seizin. *Erskine* v. *Townsend*, 2 Mass. R. 493; *Swan* v. *Wiswell*, 15 Pick. 126; *Darling* v. *Chapman*, 14 Mass. R. 104. By Rev. Stat. c. 125, sect. 3, 7, 9, a *conditional* judgment must be rendered in all cases, when an action is brought for condition broken, and no possession gained by action, by sect. 3, can ever bar the right of redemption without a conditional judgment; and if it be not effectual for that purpose, it is not as an entry for forfeiture or condition broken.

But even if this action is evidence of *breach*, there is no evidence of any entry under the judgment.

5th. But even if all these grounds fail us, we still fall back on another, viz: that since the Rev. Stat. there is an equitable right, which will be protected by a court of equity, even in the hands of an assignee, after breach, but before final foreclosure. Rev. Stat. c. 96, sec. 10, and c. 125, sec. 15 and 16. This last provision (sec. 15,) is new, and was not in any of the old statutes.

By these statutes, the Court in equity, would have power to do justice between the parties; to decree, instead of the support, a compensation in money, either in a gross sum or in the shape of an annuity.

The contract required the expenditure of money, and required nothing that money would not procure, for no relationship or affection appears in the case, and a compensation will answer as well as a specific performance; and in all such cases equity will interfere to save a forfeiture. *Frost* v. *Butler*, 7 Maine R. 225; *Wilder* v. *Whittemore*, 15 Mass. R. 262; *Fiske* v. *Fiske*, 20 Pick. R. 499; 1 Story's Eq. 106, 110, 452; 2 Story's Eq. 545, 546; *Farwell* v. *Jacobs*, 4 Mass. R. 634; *Saunders* v. *Pope*, 12 Vesey's R. 282; *Davis* v. *West*, 12 Vesey's R. 475; *Skinner* v. *White*, 17 Johns. R. 357; Cruise's Dig. tit. 13, c. 2, sect. 29 to 37.

6th. Even if all right fails, both legal and equitable, we maintain that the defence must fail, because the actual possession, even without right, is a sufficient consideration — it is not a total failure. *Morgridge* v. *Jones*, 14 East's R. 484; *Freligh* v. *Platt*, 5 Conn. R. 494; *Gascoyne* v. *Smith*, 1 McLellan & Young's R. 338; *Greenleaf* v. *Cooke*, 2 Wheaton, 13; *Severance & al.* v. *Whittier*, 24 Maine R. 120.

But if this note is to be considered given for the land directly, we maintain there is sufficient consideration. Gilman had *actual* seizin and transmitted it to Bradley; and he still holds the deed of the land; has never offered to rescind the bargain, and even if Allen be in possession, Bradley is *substantially* receiving the rents and profits, for they go to diminish his liability to Allen "*pro tanto.*" If the rents and profits are sufficient for Allen's support, then is the mortgage fulfilled — no breach has taken place, and if Allen and wife so continue till their death, the *whole estate* will go to Bradley, and not to Allen's heirs. If the rents and profits are not sufficient for their support according to contract, then Allen's estate, or his legal representatives would have a legal claim against Bradley for the balance. How much the farm may be worth, more than the incumbrance, the Court cannot say, neither can it say it would be worth *nothing*.

The second ground of defence probably will be the false representations of Hoyt about the writings.

To this we answer: — 1. If there has been any such false

representations, as entitle this defendant to damages, they are not available in defence of this note, but must be sought by an action on the case, against the deceiver.

2. But we deny that any false representations were made.

3. But even if these statements were not all true, they were not fraudulently made; for they must be false and fraudulent, to constitute a defence. *Dennison* v. *Mutual Ins. Co.* 20 Maine R. 125; *Page* v. *Bent*, 2 Metc. R. 371; 1 Story's Eq. 101; 2 Kent's Com. 485 — 490; *McDonald* v. *Trafton*, 15 Maine R. 225; *Bean* v. *Herrick*, 12 Maine R. 262, and cases cited. *Shrewsby* v. *Blount*, 2 Manning & Granger, 475; *Starr* v. *Bennett*, 5 Hill's N. Y. R. 303.

Bronson argued for the defendant, contending:—

That the grantor had no assignable interest in the land described in the deed, for which the note in suit was given, and that therefore, it was without consideration. The duties to be performed were wholly of a personal character, to be performed by Eli Hoyt alone, or by his heirs, executors, or administrators. The conveyance operated as a forfeiture of the estate.

There can be no conditional judgment entered on account of the non-performance of the conditions of this mortgage. The performance was to have been made entirely by Hoyt, and as personal to him alone. The deed gave the defendant no benefit whatever.

The defendant was induced to make the purchase solely by means of the false and fraudulent representations of the payee of the note.

No benefit was derived by the defendant on account of his remaining in possession for a short time, for he was bound to pay the rent during that time to Allen. 5 N. H. Rep. 341.

The opinion of the Court was announced orally, at the same term of the argument, by

Shepley J. — After stating the facts, it was remarked in substance. 1. The counsel for the defendant contends, that nothing passed by Gilman's deed to him, and that the note,

therefore, is without consideration. But he took the estate subject only to the mortgage. If Allen and his wife had both deceased soon after the deed to the defendant, he would have held the land, subject only to the payment of damages for non-performance of the condition of the mortgage to Allen. There is no evidence, that the estate conveyed to the defendant is not a valuable one, although subject to Allen's mortgage.

It is also said, that there can be no conditional judgment for non-performance of duties of a personal character. But damages may be recovered for non-performance of personal services, as well as for services to be performed by others. It may prove, that the whole farm may be required for the support of Allen and wife; and on the other hand, it may or might have happened, that the purchase was a good speculation. The defendant took the estate subject to that contingency.

It is further contended, that the defendant was induced to make the purchase, by the misrepresentations of the payee of the note. It does not seem, however, that he did any thing more, than to give an account of what was contained in the deed of conveyance, and to express his opinion of its effect. This is no proof that he knowingly made such representations, as to make himself liable. The defendant knew, that there was a difficulty between Gilman and Allen, and that there was a suit pending. That should have put him on his guard, and was sufficient to warn him not to trust to opinions of such as were friendly to one side of the question.

The defendant must be defaulted.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF FRANKLIN,

ARGUED MAY TERM, 1847.

MEM. — WHITMAN C. J. did not attend at this term, and took no part in the decisions.

JESSE AIKEN *versus* WILLIAM KILBURNE.

In the trial of an action, brought by a creditor (under Rev. Stat. c. 148, § 49,) against a person, for aiding a debtor in the fraudulent concealment or transfer of his property, to defraud his creditors, the debtor is a competent witness for the plaintiff, so far as it respects his interest in the event of the suit.

Nor is the debtor incompetent to testify, in such case, because he had given an entirely different account of the transaction between himself and the defendant, under oath, in his petition to be declared a bankrupt; nor because he appeared to have been the principal actor in the fraudulent transfer of his property.

In such action the testimony of the debtor is competent evidence, to prove, that a promissory note or account produced, and purporting to be due from him, was in fact due.

Whether the communications of a client, to his attorney, shall, or shall not be regarded as matters of professional confidence, and therefore be excluded from being given in evidence, does not depend upon their importance or materiality in the prosecution or defence of the suit, but on the character of the communications.

Communications made by a client to his legal adviser, for the purpose of obtaining professional aid or advice, are not excluded on account of a privilege, which an attorney may waive, because it is a personal one, but on account of a privilege, attached to the communication, for the better ad-

ministration of justice, and which can only be separated from it, by the consent of the client.

It is not necessary, that the creditor should first have obtained judgment against his debtor, in order to maintain an action on the forty-ninth section of c. 148, of the Revised Statutes.

The statute does not require, that it should be made to appear, that the person, who knowingly aids a debtor in the fraudulent concealment or transfer of his property, should derive a benefit therefrom to make him liable to the action of the creditor.

While a mortgage of real estate, before foreclosure, may be regarded as a pledge, security for the payment of money, or chose in action, passing to the executor, and not to the heir, it is still a conditional conveyance of an estate, and the rules of law respecting fraudulent conveyances are applicable to it.

EXCEPTIONS from the district court, REDINGTON J. presiding. A copy follows: —

"This is an action of the case, upon the 49 sect. of 148 chap. of Revised Statutes, against the defendant for knowingly aiding one John Ball, a debtor of the plaintiff, in a fraudulent transfer of his property. The plaintiff alleges that the defendant received of Ball, five promissory notes, made by said Ball, to plaintiff, of one hundred dollars each, and also a mortgage of a lot of land, owned by said Ball, for the security of said notes. And that there was no consideration for said notes and mortgage. The writ may be referred to. It was proved that notes and a mortgage, corresponding with those described in the writ, were given by Ball to the defendant, dated 16th April, 1842. It also appeared, that Ball, on the 10th Dec. 1842, presented to the District Court of the United States, his petition, to be allowed the benefit of the bankrupt law, and was, on the 4th Sept. 1843, decreed to be a bankrupt, but he has never obtained a discharge. In his schedule A, a part of his said petition, he inserted among the debts due from him, five notes to Wm. Kilburne, $515, secured by mortgage. In schedule B. (of his assets,) he inserted the farm, "subject to mortgage, which I gave to Wm. Kilburne, to secure $550, and interest." These schedules had been sworn to. The plaintiff offered Ball as a witness. The defendant objected to his admission, because of his interest in the event of the suit; be-

cause of said bankruptcy, oath, and bankruptcy proceedings; and because by plaintiff's own showing, Ball was the principal in the transaction alleged to be fraudulent, or at least, was an accomplice in it. Ball was nevertheless admitted, and testified to the fraudulent proceedings, between himself and defendant. Ball's indebtedness to plaintiff appeared to be upon two promissory notes, and an account of $9,46. Ball was asked by the plaintiff, whether he owed plaintiff those notes and the account; defendant objected, that Ball could not be competent to prove that indebtedness. The objection was overruled, and Ball testified to said indebtedness. Defendant objected that actions upon said 49th sect. could be maintained only in cases where the plaintiff was a judgment creditor, and in cases where the debtor transferred for the purpose of taking the poor debtor's oath. This objection was also overruled. The defendant offered the deposition of John E. Stacy, Esq., a counselor at law, a part of which plaintiff objected to, as having been given in violation of professional confidence. The objection was sustained and that part only of said deposition was permitted to be read, which is below pencil mark.

"The transfer alleged to be fraudulent, though dated 16th was in fact made on the 19th of April, 1842, subsequent to an attachment made on the same 19th of April, by Oliver Otis, upon the same land. Ball was defaulted in said action, and Otis' administrator took judgment at the June Term of the Supreme Judicial Court, 1846, for $322,50 damages, and $77,99 costs, upon the execution issued on said judgment. The whole of the land mortgaged, as aforesaid to defendant, was appraised at $423,27, and set off to said administrator, on the 6th July, 1846. The Judge was requested by the defendant to rule, that the said proceedings in said Otis' action, and upon said execution, were a bar to this action; but the ruling was, that said proceedings did not constitute a bar to this action. The documentary evidence relating to said judgment and levy, as also the deposition of said Stacy, and the proceedings in bankruptcy and the said mortgage deed, may be referred to, without copying. The verdict of the jury, and their written answers

to certain questions, are to be copied as a part of this case. To the foregoing rulings and overrulings, decisions and opinions of the Judge, the defendant hereby excepts.

"By H. Belcher, and R. Goodenow, att'ys for defendant."

"The foregoing exceptions having been reduced to writing, and presented for allowance, and on examination found to be correct, are hereby allowed, prior to the adjournment of the court." "Asa Redington, Presiding Judge."

A copy of the verdict, and of the questions put to the jury, and of their answers, follows: —

"The jury find that the defendant is guilty in manner and form as the plaintiff has alleged.

"The jury find that the single amount of the debt due to the plaintiff at the time of the fraudulent transfer, was fifty-seven dollars and eighty-two cents.

"That the single value of the property fraudulently transferred, was one hundred dollars.

"They therefore assess damages for the plaintiff against the defendant at the sum of one hundred fifteen dollars and sixty-four cents. "John Rowell, Foreman."

In the action, *Jesse Aiken* v. *William Kilburne.*

Questions to be answered by the Jury.

"1. Did Kilburne knowingly aid John Ball, in a fraudulent transfer of his property to secure the same from creditors or to prevent the seizure of the same by attachment or levy on execution?

"*Answer.* The jury agree that he did aid and assist John Ball, in fraudulent transfer of his farm.

"2. If so, what was the value of the property, thus fraudulently transferred? What was the amount of the personal property so transferred, if any? And what was the value of the one third part of the real estate so transferred?

"*Answer.* As to personal property the jury agree, that there was not any. As to the farm they agree, that it is worth $300, or $\frac{1}{3}$ = $100.

"3. What was the amount of Ball's indebtedness to Aiken, at the time of the fraudulent transfer?

"*Answer.* $57,82. "John Rowell, Foreman."

"The jury further find, that Otis' attachment was prior to the making and delivering of the deed.

"John Rowell, Foreman."

"If the jury should find a verdict against the defendant, Kilburne, they will also find on what day the mortgage to Kilburne, was made, whether on the 16th or on the 19th of April, 1842. It is dated the 16th, but Ball testifies it was made on the 19th; which was the true day?

"*Answer.* The jury agree that it was made on the 19th.

"John Rowell, Foreman."

H. Belcher and *R. Goodenow* argued for the defendant, contending: —

1. Ball was improperly admitted as a witness for the plaintiff. He was incompetent for several reasons.

He was incompetent on account of his interest in the event of the suit. [The Court here informed the counsel, that this point had already been decided against the position taken, in a case in the county of Lincoln; and the counsel declined proceeding further on this ground.]

He was incompetent to testify, because he had given an entirely contrary account of the transaction, under oath, in the bankruptcy proceedings. He is as improper a person to be admitted to give testimony, as if he had been convicted of perjury.

He was incompetent to testify, because he was from his own showing, the principal, in the transaction alleged to be fraudulent. They argued, that the motives of policy which admitted a *particeps criminis* to testify in a criminal process did not apply in a civil action, and cited 1 Greenl. Ev. § 380.

Ball was improperly permitted to testify, that he owed a debt to the plaintiff. The introduction of the note, and the plaintiff's book and oath, would have been better evidence.

This action can be maintained only by a judgment creditor, and where the transfer was made by the debtor for the purpose of taking the poor debtor's oath. They examined the statute, and insisted that such was the true construction.

Stacy's deposition ought not to have been in any part reject-

ed. There would have been no violation of professional confidence, had the whole deposition been admitted. *Foster* v. *Hall*, 12 Pick. 98. What Ball said to Mr. Stacy, related entirely to the suit of *Otis* v. *Ball*, and where neither the plaintiff nor the defendant had any concern.

The District Judge erred in refusing to instruct the jury, "that the said proceedings in said Otis' action and upon said execution were a bar to this action," as requested by the counsel for the defendant. The attachment of the land prior to the conveyance to the defendant, and the levy of the execution thereupon, prevented the plaintiff from deriving any title to the land by that conveyance, or receiving any benefit whatever thereby. It did not and could not defraud creditors of Ball. It proved to be a mere void act, and no more defrauded the creditors of Ball, than if he had made a deed of land to which he had never a shadow of title. The value of the property fraudulently concealed is to be ascertained; and how can this be done where none was conveyed? No property was in fact concealed by this deed and these notes. The statute does not punish a man for an unsuccessful attempt to conceal property of a debtor.

The jury have found, that Ball made no fraudulent transfer of any personal property to the defendant. There was no transfer of real property. The only transfer of any thing, attempted to be made from Ball to the defendant, was by making a mortgage of the land; and this was personal property until foreclosure. It would go to the executor and not to the heirs. Before foreclosure, it is "a pledge" — "a chose in action" — "an accident." *Smith* v. *People's Bank*, 24 Maine R. 194. The interest which the defendant could have by the mortgage to him is at best but contingent, liable at any moment to be defeated by payment of the notes. No value could be fixed or estimated. The making of a mortgage deed by a debtor is not a *transfer of property* in the sense intended by the section of the statute upon which this action is brought.

May and *Sherburne* argued for the plaintiff.

Of the five questions presented by the bill of exceptions in

this case, the first is the most important for us, because if that is decided against us, we have no expectation that we can succeed in another trial.

The first question relates to the competency of John Ball as a witness. The defendant objects to the admission of his testimony on three grounds: —

1. Because of his interest in the event of the suit.

2. Because of his oath and proceedings in bankruptcy.

3. Because he was the principal, or at least an accomplice, in the fraudulent transaction.

Are any of these objections valid? — We contend not.

The first and principal objection to the competency of the witness, interest, has, it seems, already been decided in our favor.

As to the second ground of objection against the admission of Ball as a witness, we cite the case of *Burgess* v. *Bosworth*, 23 Maine R. 573, which is a case where the witness, being a party, had made oath directly the contrary of what she then stated, and the Court held her competent, and decided that such fact should be allowed only to affect her credibility.

As to the third objection to the competency of Ball, which is, that he is *particeps fraudis*, we cite *Moore* v. *Tracy*, 7 Wend. 229; *People* v. *Whipple*, 9 Cow. 707.

Public policy requires his admission, especially in a case like this; otherwise the statute will be to a great extent a dead letter.

2. But in the second place, the defendant, in his exceptions objects, that if Ball be a competent witness in the case, still, it was not competent to prove the fact of his indebtedness to the plaintiff by him.

We are unable to see any force in this objection, or to bring our minds to believe that our client is in danger of losing his verdict upon any such ground.

3. The third exception is, that the plaintiff was not a judgment creditor, and Ball did not transfer the property for the purpose of taking the poor debtor's oath, and the Judge refus-

ed to instruct the jury, or to rule that these things were necessary to the maintenance of the suit.

It is a sufficient answer to this objection, to refer to the stat. ch. 148, § 49.

The person who violates that section of the statute, is made answerable "to *any* creditor" who may sue, and it is a violation of that statute for any person to aid or assist "*any* debtor" in any fraudulent transfer of *his* proper property to secure the same from creditors, *or* to prevent the seizure of the same *by attachment* or levy on execution. Not one word about a judgment creditor, or the poor debtor's oath, in the whole section. And if the defendant wishes to interpolate that phraseology, he should apply to the Legislature rather than to this Court. *Quimby* v. *Carter*, 20 Maine R. 218.

4. The fourth exception relates to the rejection of a part of the deposition of Mr. Stacy, as having been given in violation of professional confidence.

That it was rightly rejected, the case of *Foster* v. *Hall*, 12 Pick. 89, a leading and full case upon the subject, is cited.

Whatever was rejected comes within the principle of that case, or was immaterial to the issue before the Court.

The rejection of a deposition, even if improperly rejected, will furnish no cause for granting a new trial, if the party offering it is not injured by its rejection. *Comstock* v. *Smith & al.* 23 Maine R. 202.

5. The fifth and last ground of exception is, that the Judge refused to rule, that the proceedings in the action of Oliver Otis, and upon the execution recovered in that case, were a bar to this action.

The facts show, that the property concealed or transferred was, upon the same day of its transfer, attached as the property of Ball, and afterward, on the 16th of July last, long after the date of the writ in this action, set off on execution to satisfy the demand on which it was attached.

Property fraudulently concealed or conveyed is always liable to be taken for the payment of existing debts; and the statute does not contemplate that the purchaser shall acquire an inde-

feasible title before he can be charged. The absolute success of the fraud is not essential to the maintenance of a suit like this. "Any person who shall knowingly aid or assist any debtor in the fraudulent *concealment* or transfer of his property, to secure the same from creditors," is made liable by the statute. It is not therefore necessary, that he should acquire any interest in the property concealed or transferred; nor need the transfer or conveyance be to the defendant in the suit. If any person knowingly aid or assist in such a transfer, even though to another, the liability of the statute will attach. The fact then, that the defendant failed to secure the property to himself cannot be held a good bar to this suit. The fact too that it was under attachment at the time of the transfer, if it were so, can make no difference in the case. The transfer being fraudulent, as the jury have found, the administrator of Otis had a perfect right, independent of the attachment, to levy on the land. The attachment, so far as it regards the claim of Otis, was only necessary to secure him against the seizure of other creditors, who might attach. It was therefore to the defendant no incumbrance upon the land additional to that which the fraud of the defendant in the very act of transfer had imposed. He has lost nothing by the attachment but only by his fraud.

But if that attachment were an incumbrance, he has his remedy upon the covenants in his deed, and even if he should fail to be charged in this action, he will recover upon those covenants all which it is necessary for him to pay to extinguish such incumbrance upon the land. Thus he will hold the property conveyed, make Ball extinguish every incumbrance which was upon it, and at the same time, notwithstanding the fraud, set the wholesome provisions of the statute at defiance. The attachment and proceedings of Otis should not therefore be held as a bar to this suit.

Again, at the time of the transfer, Otis' debt was only $250 or $260, and the land was estimated by the parties, as appears by the consideration of the deed, at $500, and under his deed the defendant takes possession, and the profits of the land

until July last. Then did he not acquire *some* property from Ball by virtue of the deed, and was not this property Ball's property within the meaning of the statute? Was not the right of taking the profits, of paying off Otis' debt and of holding the land of *some value;* and were not all these fraudulently transferred? If so, then the attachment and levy of Otis, though they might possibly lessen the damages, would be no bar to the suit.

Again, in an action like this, we contend, that the defendant is estopped by his deed from denying that the property described in the deed, was transferred.

The opinion of the Court was by

SHEPLEY J. — It has been decided in the recent case of *Philbrook* v. *Handly, ante* p. 53, that the debtor is a competent witness, so far as it respects his interest in the event of the suit, for the creditor, in a case like the present.

It is further insisted in this case, that the debtor, Ball, was incompetent, because he had given an entirely different account of the transaction between himself and the defendant, in his petition to be declared a bankrupt, under the sanction of an oath. In the course of judicial investigations, witnesses are found to testify differently, on different occasions and at different times. Sometimes because they have ascertained, that they had made a mistake in their former testimony. At other times they exhibit a disposition to suit their testimony to the exigencies of the case. And on other occasions they acknowledge, that they were induced to testify falsely at a former time. In no such case can the question of the competency of the witness to testify properly arise, for it cannot be judicially known, how far his testimony may conform to, or differ from his former testimony. If it could be known, so that the objection to his competency could be presented, it must be overruled, for it is the peculiar province of the jury in an action at law, to decide, whether the testimony of a witness should be entitled to any, and if so, to what credit under the circumstances,

in which it is presented to them. *Burgess* v. *Bosworth*, 23 Maine R. 573.

Nor can the objection to his competency on the ground, that he appeared to be the principal actor in the fraudulent transfer of his property, prevail. A *particeps criminis* is a competent witness in a prosecution for the crime, and a *particeps fraudis* in a civil action to recover for the injury occasioned by it. *Bean* v. *Bean*, 12 Mass. R. 20.

The next objection is, that Ball was permitted to testify, that two promissory notes and an account produced, were due from him to the plaintiff. The books of the plaintiff accompanied by his testimony respecting the original entries, would, it is said, have been better evidence to prove the account. But the testimony of one who is a party to, and solely interested in the event of the suit, corroborated by entries in his book, cannot be regarded as better evidence, than the testimony of one who must, in that particular testify directly against his own interest. If the witness be worthy of confidence, to be reposed in his veracity, there can be no more certain or better evidence, that a promissory note, or an account produced and purporting to be due from him, is in fact due.

Exception is taken to the exclusion of a part of the deposition of John E. Stacy, on the ground that the statements made by Ball to him, were privileged communications made by a client to his attorney. Mr. Stacy testifies, that they were made in a conversation between him and Ball respecting a suit, in which he had been previously retained, then pending in Court, in the name of Otis against Ball. Some portions of that conversation do not appear to have been material, or necessary to the defence presented in that suit. But whether they must be regarded as matters of professional confidence, and therefore privileged communications, does not depend upon their importance or materiality in the defence of that suit. If it did, the confidence so essential between client and attorney, would be greatly impaired, if not destroyed. For the client cannot be expected to be fully informed how far many matters communicated may be important or material. Nor can he

reasonably be expected to decide and to be governed by such considerations in making his disclosures, his object being, to communicate every thing in any way appertaining to the transaction, that his attorney may be liable to no surprise. The character in which those communications were made and received, and not their relevancy or materiality to the defence of that suit, must therefore decide, whether they should be regarded as privileged or not. Lord Brougham, in the case of *Greenough* v. *Gaskell*, 1 Mylne and Keene, 98, examines many of the decided cases, and comes to the conclusion, "that matters committed to attorneys, solicitors, and counsel, in their professional capacity, and which but for their employment as professional men, they would not have come to be possessed of," are not to be disclosed by them. Mr. Greenleaf in his treatise upon evidence, § 240, states the result of an examination to be, that "this protection extends to every communication, which the client makes to his legal adviser for the purpose of professional advice or aid upon the subject of his rights and liabilities." In a conversation somewhat desultory, as in this case, between client and attorney, it may not always be easy to determine the purpose, for which certain communications were made. When, however, they appear to have been made, while the parties were manifestly speaking and listening in that character, it is reasonable to conclude, that they were made for the ostensible purpose; and it would tend to impair the necessary confidence, if a different inference were drawn. The remarks of Ball, as related in the deposition of Stacy and excluded, appear to have been made in the character of a client speaking to his attorney as such; and according to the rules before stated, they were properly excluded. Such communications are not excluded on account of a privilege, which an attorney may waive because it is a personal one, but on account of a privilege attached to the communication for the better administration of justice, and which can only be separated from it, by the consent of the client.

It is further contended, that a judgment creditor only can maintain an action on the forty-ninth section of the statute, c.

148. Such a construction cannot be admitted; the language will not authorize it. It makes one liable for aiding "any debtor," not a judgment debtor only, in the fraudulent concealment or transfer of his property "to secure the same from creditors" without distinction of class; and to prevent the seizure of the same by attachment or levy on execution. The word attachment, on such a construction, would be inoperative in all those cases, in which the suit was not commenced upon a judgment already recovered. And the provision would be useless, when any other than a judgment creditor had been prevented from obtaining payment by reason of the assistance afforded to his debtor in making a fraudulent transfer of his property. There is no indication of such an intention in the enactment of that provision of the statute.

Another exception is taken to the refusal of the District Judge to instruct as requested upon the facts proved. It appeared in testimony, that Ball, without any consideration therefor, made five promissory notes of one hundred dollars each, payable to the defendant, and conveyed to him certain lands to secure the payment of them. The notes and mortgage were dated April 16, 1842, but were in fact made on the nineteenth day of the same month and subsequent to an attachment, made on that day, of the same premises on a writ in favor of Oliver Otis against Ball. Otis having deceased, the administrator on his estate recovered judgment in that suit, and on July 6, 1846, caused a levy to be made upon the premises conveyed in mortgage to the defendant. The presiding Judge was requested to instruct the jury, that such proceedings would be a bar to this action. This he refused to do. It is now contended, that no fraudulent concealment or transfer of the property of Ball, was exhibited in the proof of that transaction between him and the defendant; because the levy deprived Ball of all title to the mortgaged premises from the date of the attachment. The title to an estate attached remains in the owner subsequent to the attachment, and he may legally convey it subject to be defeated, should the plaintiff in such suit recover judgment and pursue such a course as would

give him a superior title. A debtor may therefore transfer an estate under attachment to secure it from further attachment or from seizure on execution; and one who knowingly aids him to do it violates the provisions of the statute. It is also said that the jury cannot ascertain, as they must do, the value of an estate transferred, when it appears to have been taken from the debtor, or his grantee, by virtue of a prior attachment. Our statute not only contemplates, that an estate may be of value while subject to an existing attachment, but that it may be also, after a levy has already been made upon it according to an appraised value. c. 94, § 43.

At the time of the trial the defendant appears, by his conveyance in mortgage, not only to have held the right to redeem the premises from the levy made by the administrator of Otis, but to have been entitled to call upon Ball, for a breach of the covenants of that deed.

The statute, however, does not require, that it should be made to appear, that the person who knowingly aids a debtor in the fraudulent concealment or transfer of his property, should derive a benefit therefrom to make him liable to the action of the creditor. All fraudulent transfers being void as against creditors, the person taking such a conveyance may be deprived of the property, so conveyed, by one creditor, after he has been compelled to pay the value of it to another creditor of the same debtor, whom he has knowingly aided in the transfer of it. He is made liable, not because he has received property from the debtor by a fraudulent transfer, but because he has knowingly aided a debtor in the commission of fraud with a design to injure his creditors. One, who thus aids a debtor to make a transfer to a third person, comes as fully within the provisions of the statute, as he would do, if such transfer had been made to himself. And one, who knowingly assists the debtor in the fraudulent concealment of his property, to prevent its being attached or seized on execution, is liable to the action of a creditor, although the debtor may never have parted with the legal title to the property.

The jury found, in answer to certain questions submitted to

them, that no personal property was transferred; and that finding, it is insisted, must include the mortgage made by Ball to the defendant, so that no judgment can consistently be entered against him. It might be a sufficient answer to this objection to say, that no such question is presented by this bill of exceptions. The jury have found a fraudulent transfer of property by that conveyance in mortgage, and whether they correctly designated the kind of property may not be very material. While a mortgage of real estate may before foreclosure be regarded as a pledge, security for the payment of money, or chose in action passing to the executor and not to the heir, it is still a conditional conveyance of an estate; and the rules of law respecting fraudulent conveyances are applicable to it. *Exceptions overruled.*

JOHN STEVENS *versus* ALEXANDER FASSETT, JR.

The certificate of a majority of the superintending school committee of the town, produced by the schoolmaster, to the agent employing him, is a valid certificate, under the provisions of Rev. Stat. c. 17, although that majority did not act together in the examination.

If one over twenty-one years of age, voluntarily attends a town school, and is received as a scholar by the instructor, he has the same rights and duties, and is under the same restrictions and liabilities, as if within the age of twenty-one years.

When a scholar in school hours, intrudes himself into the desk assigned to the instructor, and refuses to leave it, on the request of the master, such scholar may be lawfully removed by the master; and for that purpose he may immediately use such force, and call to his assistance such aid from any other person, as is necessary to accomplish the object, without the direction or knowledge of the superintending school committee.

Where a jury have been empannelled, in a criminal proceeding, and have rendered a verdict of acquittal, and judgment has been rendered thereon, although there was no evidence introduced against the accused, he cannot again be put on trial for the same offence.

And where the proceedings are upon a complaint and warrant, before a justice of the peace, in a matter where he has final jurisdiction, and where the accused has been arraigned, tried and discharged, as not guilty, and judgment has been entered thereon, he cannot again be put upon trial under another similar complaint and warrant, for the same offence.

In an action to recover damages for a malicious prosecution, the question of probable cause, upon established facts, is a question of law.

If a person with an honest wish to ascertain whether certain facts will authorize a criminal prosecution, and he lays all such facts, before one learned in the law, and solicits his deliberate opinion thereon, and the advice obtained is favorable to the prosecution, which is thereupon commenced, it will certainly go far, in the absence of other facts, to show probable cause, and to negative malice, in an action for malicious prosecution.

But if it appears, that such person withheld material facts, within his knowledge, or which in the exercise of common prudence he might have known, or if it appears, that he was influenced by passion, or a desire to injure the other party, and especially, if he received from another, learned in the law, whose counsel he sought, advice of a contrary character, upon the same question, the opinion which he invokes in his defence ought not to avail him; and it is well understood that it cannot be a protection.

EXCEPTIONS by the defendant from the district court, GOODENOW J. presiding.

The action was for a malicious prosecution.

The case will be sufficiently understood from the opinion in this Court, the ruling of the Judge in the district court, and requests for instruction by defendant's counsel.

The rulings of the District Judge, and the requests for instruction, by the counsel for the defendant, are thus stated in the exceptions.

"The Court instructed the jury, that it must appear to their satisfaction, that the prosecution complained of by the plaintiff in his writ, was malicious and without probable cause; that what was probable cause, was a mixed question of law and fact. It was for the jury to determine, whether the facts were proved and for the Court to say, whether they did or did not amount to probable cause; that in this case, if they found the facts as stated by the witnesses, together with what appeared from the record of the magistrate, in the opinion of the court, the prosecution of the defendant, against the plaintiff, and especially in the last one, before Justice Parker, was without probable cause, even taking all the facts, as true, stated by Calvin Fassett. That as it was a public town school, Calvin Fassett, being over twenty-one years of age, had legally no right to insist upon being a member of the school, but that if

he attended, and put himself under the instruction of the master, he was bound to obey all his reasonable commands, and was not at liberty in school, to set the master's authority at defiance. That he had no right to take and keep possession of the desk of the master, after having been requested or directed to leave it, and that the master had a right to use sufficient force to remove him from it, and for this purpose, might avail himself of the aid of the school agent, or any other person, to enable him to accomplish the object, and that he was not obliged to submit to an interruption of the school, until an examination could be had by the school committee, or until a prosecution could be commenced. And they would consider from the evidence, whether the plaintiff was not then in the school, aiding the master at his request. That the acquittals by the magistrates, were not *prima facie* evidence of a want of probable cause, but that it was incumbent on the plaintiff, to prove the facts affirmatively. That malice might be implied, from a proof of a want of probable cause, but that it might be repelled by other testimony, and that it was competent for the defendant to show that he acted under the advice of counsel, in order to repel the charge of having acted maliciously, if he made a full and fair communication of all the facts in the case, of which he had knowledge, and had the means of knowing, and the advice was given upon a careful examination of the case. In connection with the advice given to the defendant, by Mr. Webster, it would be proper for them to consider the previous advice, given by Mr. Stubbs, on the subject; the circumstances under which it was given; the reasonableness of it; the declaration of the defendant on his return, "as Mr. Stubbs read the law, he was satisfied his brother was in the wrong," and also his statement to Benjamin Allen, and John P. Allen, that he "should not have commenced the prosecution, if Stevens, had paid back the money, $2,50, which he, Calvin, paid at the office of Mr. Stubbs, and that he was fighting Stevens for Calvin, and that Calvin furnished him with money to do it; and that Calvin could earn money, to carry it as far as Stevens could." That a man would be considered legally, as

acting from malice, when he commenced a public prosecution, not from motives of public good, but with an intent to injure and oppress the individual prosecuted, and they were to judge from all the facts in the case, whether the prosecutions, or either of them, were or were not malicious. If upon the facts and the instructions of the court, they found them to have been instituted and carried on without probable cause. The court also instructed the jury, that a certificate signed by two of the superintending school committee, of a committee composed of only three persons, was a legal certificate; and that it need not be signed by the third person, or appear that he was present or notified of the examination of the master, by the others, or that the other two were present together, at the time of the examination, but that it was competent for one member of the committee, to examine and sign the certificate at one time and place, and the other to examine and sign it at another time and place.

At the close of the charge, the Judge was requested to give ten specific instructions, (marked A.) which he declined to do, in the language of the counsel presenting them, because he had already instructed the jury, upon all the points requested, and should consider the law as he had already stated it to them, wherein his instructions differed from those requested; and that the jury should so consider it, without his repeating to them, what he had already stated upon each point; and stated that the record of an acquittal by a magistrate, having jurisdiction of the case, unless fraudulently made, was a bar to another subsequent prosecution, for the same offence. That upon some of the points, his instructions had been directly different from those requested, and in relation to the others, he had given the instructions with qualifications as above stated.

"To all which instructions, denials of instructions, and directions to the jury, the defendant excepts, and in open Court and before the adjournment thereof without day, presents his exceptions in writing to the Court and prays they may be allowed. "By Webster & Currier, his Att'ys."

"The foregoing exceptions having been duly taken and pre-

sented to the Court, before the adjournment of the Court without day, and being conformable to the truth of the case, are allowed and signed.

"Daniel Goodenow, Just. Dist. Court, W. D."

A

"1. The Court is requested to instruct the jury that this action cannot be supported, unless the evidence be satisfactory that the defendant knew when he commenced the prosecution, complained of, that no ground existed for the prosecution.

"2. And also further, it cannot be maintained, unless the evidence be satisfactory, that he acted maliciously, in instituting the prosecution.

"3. And also, that if the defendant did not withhold any information from his counsel, with the intent to procure an opinion that might operate to shelter and protect him against a suit, but if he, being doubtful of his legal rights, consulted counsel learned in the law, with a view to ascertain them and afterwards pursue the course pointed out by the legal adviser, he is not liable to this action, notwithstanding his counsel may have mistaken the law.

"4. And also, that if Dexter Merrill was engaged in teaching a district school, and had all the certificates required by the law, and possessed all the requisite legal qualifications, and Calvin Fassett was disobedient in said school, yet he had no right to call in the district agent, or any other person, except the superintending school committee of said town, to assist in reducing said Calvin to obedience.

"5. And also, that if the certificate purporting to be signed by the superintending school committee of said town of Freeman, was obtained upon an examination had at a time, when some members of said committee were not present, which members of said committee were not notified of said examination, such certificate is not such a certificate as the law requires, and gave the said Merrill none of the rights which a teacher legally qualified possesses.

"6. That if a quorum of said committee were not present

at said examination, the certificate then obtained, is not a qualification sufficient to authorize said Merrill to teach school.

"7. That if Merrill was duly qualified, he had no authority to use force to subject Calvin to submission.

"8. That if Merrill had not the legal qualifications he had no right in the school, and no violation of his authority would authorize him to take any means to reduce a scholar to obedience or to maintain his authority in the same.

"9. That if the defendant stated to his counsel, all the facts, within his knowledge, although he may not have stated all the facts of the case, follows honestly the advice so given, this action cannot be maintained.

"10. That the acquittal of one arrested on one warrant, when there was no investigation of the merits on said warrant, is no bar to an arrest and examination on a second.

J. H. Webster, for the defendant, said that the instructions first complained of, were in substance these: — that if the jury found the facts as stated by the witnesses, the prosecution of the defendant against the plaintiff, was without probable cause.

He contended, that from the evidence, there could be no doubt that Stevens did make himself liable to prosecution under the provisions of Rev. Stat. c. 154, § 33, — that he did "unlawfully offer or attempt to strike, hit, or touch" Calvin Fassett, "in a wanton, wilful, angry, or insulting manner," or that the person of said Calvin was hit, struck, or touched, in at least a "slight degree." Same chap. § 34. See *Com.* v. *Clark*, 2 Metc. 23. The court settled both the law and the facts.

If the first prosecution was not a bar to the second, then the tenth request for instruction should have been given, and that actually given on the subject was erroneous. There is no distinction in principle, between pleading a record of a former judgment in bar, in a civil or in a criminal suit. Nothing but a trial on the merits, is a bar. Const. Maine, art. 1, § 8; 18 Johns. R. 201; 12 Pick. 496; 2 Mass. R. 172; 1 Pick. 371; 2 Mass. R. 111; 1 Pick. 371; 2 Pick. 20; 15 Pick. 276; 21 Pick. 250; 7 Pick. 177; 20 Pick. 356; 2 Stark. Evidence. 494.

The person employed to teach the school was not a schoolmaster, nor entitled to the benefits of one. To teach without the requisite qualifications, is made by statute, an indictable offence. To be considered duly qualified, the teacher must produce to the agent a certificate from the superintending committee. The certificate produced in this case was invalid, and no certificate whatever. It was signed but by two of the committee, and the third had no notice. Even the two who signed the certificate did not act together, or see each other. *Jackson* v. *Hampden*, 16 Maine R. 184; and same case, 20 Maine R. 37; 1 B. & P. 236; 5 Bin. 481; 9 S. & R. 94; 7 Cowen, 526; 2 Wend. 494; 2 Pick. 345. All his acts were unauthorized as a teacher, and he was not entitled to the privileges or the protection of one. Rev. Stat. c. 17, § 45.

But had he been a legal teacher, he had had no power to call in a stranger, and turn Calvin Fassett out of the school by force. The plaintiff could derive no authority from the requests of the teacher, and was subject to be punished for his violent and illegal acts. The statute has given to the superintending school committee the power, and it lies only with them, to determine such questions, and to remove or expel a scholar from the school. 3 Greenl. 450; Rev. Stat. c. 17, § 41.

The fact, that Calvin Fassett was over 21 years of age, cannot vary the case. There was no statute forbidding his attending school; and if the teacher suffered him to assume the rights of a scholar, he was entitled to all the benefits and privileges of a scholar. The teacher had no more authority over him, than over any other scholar, if as much.

The first and second requests for instruction should have been complied with. They are in the language of the Court, in the case, *Stone* v. *Swift*, 4 Pick. 389.

The ninth requested instruction should have been given. He who honestly and fairly takes the advice of counsel is justified in following it. *Wilder* v. *Holden*, 24 Pick. 8; 2 B. & Cr. 693; *Stone* v. *Swift*, 4 Pick. 389; 12 Pick. 324; 16 Pick. 453; 2 Stark. Ev. 499.

That the defendant acted under the advice of counsel,

should have been permitted to go to the jury to show probable cause, and not to repel malice only. *Wills* v. *Noyes*, 12 Pick. 324.

A conviction of the plaintiff, by a justice, having jurisdiction of the offence, is conclusive evidence of probable cause, although acquitted on an appeal. 15 Mass. R. 243; 1 Metc. 232.

R. Goodenow, for the plaintiff.

1. What is probable cause is a mixed question of law and fact, as stated by the Court. *Stone* v. *Crocker*, 24 Pick. 81; 5 Law Reporter, 232.

2. The facts proved do not show probable cause, even if taken as stated by Calvin Fassett.

For 1. It was a *town school.*

2. Calvin Fassett was more than 21 years old, and had no right to be in school but as a favor.

3. If there, he was bound to submit to the reasonable commands of the master. Calvin has no right, nor the plaintiff, to object to the qualifications of the teacher, as he was in the school on sufferance.

4. It was his duty to leave the desk when the master wanted it.

5. If he did not, the *master* had a right to remove him.

6. The master had a right to ask the aid of the agent, or any other person to aid him if necessary.

7. The jury have found, under the instructions of the Court, that Stevens, the plaintiff, aided at the request of the master.

It was reasonable that the master should have the desk to himself. It was reasonable, that the master should be obeyed.

Malice may be inferred from a want of probable cause. 2 Greenl. Ev. § 453, note 1, § 454 and 455. Although the inference may be repelled by other testimony. Mr. Webster's advice is designed to have that effect. How far the advice of counsel learned in the law, will negative malice, and establish probable cause, see 2 Greenl. Ev. § 459 and notes; *Stone* v. *Swift*, 4 Pick. 393; *Blunt* v. *Little*, 3 Mason 102.

The advice was hasty, not given on a full statement of facts by defendant, and not reasonable.

The second prosecution, was ill advised, did not wait to know how first was disposed of; it was a criminal suit, no costs paid by State, and in civil not so. Mr. Stubbs' advice, was *reasonable* and *sound.*

Qualification of master. Revised Statutes provides that certificate of a majority of the committee shall be sufficient. chap. 1, § 3, rule III; chap. 17, § 12, is different in this respect from statute of 1834, under which last, the decision of the Court, in 16 Maine R. *Jackson* v. *Hamden*, 184, was made.

The general practice since the Revised Statutes, has been to examine separately; and more convenient, especially in the country, where it is almost impossible to do otherwise; especially as teachers are selected at different times.

The rights of the schoolmaster in respect to government and discipline are analogous to *masters of vessels*, or *master and apprentices*, or *parent and child.* He may use force to remove an obstinate scholar from one seat, or out of the house. It is a power necessary to the welfare of the school; and without it the school might be interrupted. The right to expel is given to the superintending committee. There was here no attempt to expel, but to remove him from the desk.

If over twenty-one, he had no right, but by permission; and equally bound to obey, as a minor.

The second warrant, was for the same identical offence as the first. Mr. Stubbs had jurisdiction of the first. The offence alleged was cognizable before him. The record shows this. The acquittal in the first was pleaded in bar to the second, and no replication by the State, that the justice had not jurisdiction, or that the acquittal was for any defect or error in the complaint.

The plea of *autre fais acquit*, is founded on the principle, that no man shall be placed in peril of legal penalties more than once on the same accusation. 4 Blackstone's Com. 335; 1 Chitty's Crim. Law, 452 to 461.

The whole doctrine on this subject, is found in 2 Chitty's Blackstone, 271, note 8. The principle in criminal cases is this: — If the prisoner could have been legally convicted, on the first indictment or warrant, upon any evidence that might have been adduced, his acquittal on that indictment or warrant may be successfully pleaded to a second indictment. Chitty's Black. 2, 371, note 8.

Currier, for the defendant, replied.

The opinion of the Court, WHITMAN C. J. not taking any part in the decision, not having been present at the argument, was drawn up by

TENNEY J. — This was an action for a malicious prosecution on account of the defendant's having upon his own complaint, obtained two warrants against the plaintiff, for an assault and battery upon one Calvin Fassett. Dexter Merrill was teaching a school in the town of Freeman, Calvin Fassett, an inhabitant of the district, more than twenty-one years of age, came as a scholar, and was received by the teacher as such. He was permitted by the latter at a particular time to occupy the desk and seat appropriated for the instructor, but for no specified time. Afterwards, on being requested by the teacher to leave the desk, and having refused, the teacher obtained the aid of the plaintiff, who was the agent of the district, and upon the express refusal of Calvin to leave the desk, the plaintiff, with the assistance of the master, attempted by force to remove him, but the force though properly exerted for such a purpose, was ineffectual. Afterwards, on the same day, the defendant and the said Calvin, took the advice of a counselor at law, who informed them that in his opinion, the plaintiff had not violated the law, but that the other party to the difficulty was the aggressor, if any breach of the peace had occurred, and he advised him to return and submit to the direction of the instructor. Before they left the office of the counselor, the plaintiff and others came to take counsel upon the same matter, and claimed compensation for the trouble and expense incurred in obtaining legal advice, which was allowed and paid

by Calvin. The defendant said he was satisfied that Calvin was in the wrong. Afterwards the defendant sought the counsel of another counselor at law, who informed him upon a statement of the facts, that the plaintiff was liable to a prosecution according to the opinion, which had been given by a Judge of the district court; that he had no doubt of it; but gave no other advice; and subsequently a warrant was issued upon the complaint of the defendant for an alleged assault and battery, the plaintiff arrested thereon and brought before a magistrate, to whom the warrant was returned. Calvin was present, when the magistrate was calling the witnesses, but it does not appear, that any were examined. The plaintiff was arraigned upon the complaint, and tried, and after examination had, was adjudged not guilty, and discharged, and judgment duly entered. Afterwards, the defendant obtained the opinion of the counselor, whom he had last consulted previously, that it was legal to make a second warrant, and upon the inquiry of the defendant, whether it would be right, he was told repeatedly, that there could be no mistake about it; that the one whose opinion was last taken, made out the second complaint and warrant, that he examined no witness previous to making them, except the defendant, and that he did not know that the plaintiff had been arraigned on the first complaint and warrant. There was evidence not contradicted, that after the second discharge of the plaintiff, the defendant said he was fighting him for Calvin, without any cost to himself; that he should not have commenced it, if Calvin had received back the money which he had paid to the plaintiff.

It appeared, that the person in charge of the school at the time, was duly employed by the agent of the district, and that he produced before the commencement of the school, to the agent, a certificate in the legal form, signed by two of the superintending school committee of the town, the whole number consisting of three; that the two whose names were upon the certificate, examined the teacher separately, and it did not appear, that they conferred together upon the subject, or that the third was notified to be present with either or both the

others, when the examinations took place, or that he was ever called upon to make a separate examination.

The Court instructed the jury, that to entitle the plaintiff to recover, they must be satisfied that the prosecutions complained of were without probable cause and malicious; that if the facts were as testified even by Calvin, who was called by the defendant, taken in connexion with the record evidence, there was no probable cause; that Calvin Fassett had no right to attend school, but if he put himself under the master, he was bound to obey all his reasonable commands; was not at liberty to set at defiance the master's authority; had no right to occupy the desk after the master had requested him to leave it; that the master could rightfully use sufficient force, for the removal from the desk, and could avail himself of other aid; that he was not obliged to submit to an interruption of the school, till an examination could be made by the superintending committee, or till a prosecution could be instituted; that the certificate signed by two of the committee, met the requirement of the law, notwithstanding it was not signed by the third, or that he was not present or notified, when the examinations took place, or that the other two were not together at the examination, and that the record of an acquittal by a magistrate, having jurisdiction of the case, unless fraudulently made, was a bar to another subsequent prosecution for the same offence. Several requests for instructions to the jury were made and declined, excepting so far as they were embraced in the general instructions.

Dexter Merrill, the person who was employed by the agent, had a certificate, signed by two of the committee. The law provides, that "no person shall be employed as a schoolmaster, unless he shall produce to the agent employing him a certificate from the superintending school committee," &c. It is clearly implied, that such a certificate, with other evidence of qualification specified, is full authority to teach a town school and to exercise all the powers incident to the place.

By Rev. Stat. chap. 1, sect. 3, rule 3, "all words importing a joint authority to three or more public officers, or other per-

sons, shall be considered as giving authority to a majority of such officers or persons, unless it shall be otherwise expressly declared in the law, giving such authority." No law does so declare, in reference to the duties of superintending school committees, but a majority of such committees shall constitute a quorum. Rev. Stat. chap. 17, § 12. The certificate, having the names of a majority of the committee, is all that is required. The objection that the two, who signed it, did not act together in the examination, cannot avail, inasmuch as the master had fulfilled the demand of the law in the production of the certificate, signed by all that were necessary.

Another ground relied upon to sustain the exceptions taken to the instructions, is, that Calvin Fassett, being more than twenty-one years of age, was not legally a scholar, and therefore the instructor had no authority to reduce him to obedience; but if he was a disturber of the school, a remedy was provided in Rev. Stat. chap. 17, § 61, by a prosecution against him, and that this was the only remedy which was open to him. It cannot have been intended, that every one, who has no right to be in school as a pupil, can offer such disturbance as to entirely interrupt the business of the school, without being subject to restraint or removal, by the teacher. Must the course of instruction of the school, be entirely suspended, till there can be a criminal trial upon a prosecution, commenced against a person, having no right to attend school, but who insists upon being in the house, is continually making disturbance, abusing the pupils, and utterly refuses to submit to the wholesome rules established for its good order and government, when the teacher has the physical power, with the greatest ease, to remove him from the place, which he persists in occupying, or from the house itself? By the principle advocated by the defendant's counsel, the question must be answered in the affirmative, if the disturbance is inconsistent with the continuance of the school. The law clothes every person with the power to use force, sufficient to remove one who is an intruder upon his possessions, notwithstanding he may have a remedy by an action or a criminal prosecution, for the same

acts. The school house is in the charge and under the control of the authorized teacher, so far as is necessary for the performance of his duties, and the remedy given in the section referred to, to punish by criminal prosecution, disturbers, is comulative, and not intended to take away or abridge any of the rights before possessed.

The objection to the propriety of the teacher's employing the assistance of the agent, in causing the removal of Calvin Fassett from his desk, has no better foundation in law. The physical power of the master, is but an instrument to secure the rights of himself, the school and the town; and he had an equal right to make use of the strength of another, under his own direction, if discreetly exercised; for it was still an instrument only, which the exigency of the case demanded. If a contrary doctrine were to prevail, one law would be applied to the case of a teacher with little muscular power, and a very different law, when the instructor could single handed vindicate his rights.

Again, it is insisted, that if Calvin Fassett was to be considered as a scholar in the school, with a scholar's rights, that the force used by, and under the direction of the master, to compel obedience was unauthorized; that the government of town schools is limited to the mode provided in Rev. Stat. chap. 17, sect. 41, which is, that the superintending committee, shall "expel from any school, any obstinately disobedient scholar," &c., that the Legislature intended to interdict all right in a teacher, to use force in the government of a school. The right of the parent to keep the child in order and obedience, is secured by the common law. He may lawfully correct his child, being under age, in a reasonable manner, for this is for the benefit of his education. He may delegate also a part of his parental authority during his life, to the tutor or schoolmaster of his child, who is then *in loco parentis*, and has such portion of the power of the parent, committed to his charge, viz: that of restraint and correction, as may be necessary to answer the purpose for which he is employed. 1 Black. Com. 453, & 454; 1 Hale's P. C. 473 & 474. "The rights of

parents [over their children,] result from their duties. As they are bound to maintain and educate their children, the law has given them the right to such authority; and in support of that authority, a right to the exercise of such discipline as may be requisite for the discharge of their sacred trust." "The power allowed by law to the parent over the person of the child, may be delegated to a tutor or instructor, the better to accomplish the purposes of education." 2 Kent's Com. 169 & 170. Although the town school is instituted by authority of the statute, the children are to be considered as put in charge of the instructor for the same purpose, and he clothed with the same power, as when he is directly employed by the parents. The power of the parent to restrain and coerce obedience in children, cannot be doubted, and it has seldom or never been denied. The power delegated to the master, by the parent, must be accompanied for the time being, with the same right as incidental, or the object sought must fail of accomplishment.

The practice, which has generally prevailed in our town schools, since the first settlement of the country, has been in accordance with the law thus expressed, and resort has been had to personal chastisement, where milder means of restraint have been unavailing. If the statute had been intended to abrogate this practice, and to deny entirely the right of the master to employ such measures in the government and discipline of his school, we should expect some more explicit declaration of the intention, than is to be found in the language used. In fact, the very terms of the provision relied upon in support of the proposition made by the opening counsel for the defendant, imply the contrary. The committee are vested with the power to expel scholars only where they are *obstinately* disobedient, and scholars cannot be considered as coming within this category, where they have simply omitted to comply with the reasonable commands and kindly persuasions of instructors; for threats of bodily punishment would be in no wise proper, if they could not with propriety be executed. Does the statute then require, that all those who are not inclin-

ed to yield to such commands and persuasions, are to be subject to the jurisdiction of the superintending committee at all times, and that only; and all lose the benefit of the school, without regard to age or sex, whenever they cease to submit to the required regulations of the master? And are the committee to be called to set in judgment as often as such neglect shall occur? The mere presentation of facts, such as may be expected, shows the unreasonableness of the position.

If the teacher is authorized to inflict corporeal punishment for the purpose of securing obedience to his reasonable rules and commands, and thereby to render the school, what it is contemplated by the law that it shall be, it follows that he has the right to direct, how and when each pupil shall attend to his appropriate duties, and the manner in which they shall demean themselves, provided, that in all this, nothing unreasonable is demanded. It cannot be contended, that as the teacher has responsible duties to perform, he is not entitled to the reasonable means by which to perform them. He has a right to the house prepared by the district, and the seat in it assigned for his occupation. If a scholar should attempt to debar him from entering the former, or should occupy the latter, to the exclusion of the teacher, he would be a subject of punishment, and force sufficient at least to obtain their possession could be used, if there was an absolute refusal on the part of the usurper to surrender them.

But it is insisted, that if such is the authority of the teacher over one, who is in legal contemplation a scholar, that the same cannot apply to the case of one, who has no right to attend the school as a pupil. It is not necessary to settle the question, whether one living in the district, and not being between the ages of four and twenty-one years, can with propriety require the instructions of town schools. If such does present himself as a pupil, is received and instructed by the master, he cannot claim the privilege and receive it, and at the same time be subject to none of the duties incident to a scholar. If disobedient, he is not exempt from the liability to punishment, so long as he is treated as having the character, which

he assumes. He cannot plead his own voluntary act, and insist that it is illegal, as an excuse for creating disturbance, and escape consequences, which would attach to him either as a refractory, incorrigible scholar, or as one, who persists in interrupting the ordinary business of the school.

The principle, that a man shall not be put in jeopardy more than once for the same criminal act, applies to a defence based upon a former acquittal, as well as upon a former conviction. It must, however, be for the same offence, and the offender must be put in jeopardy, in order that such a defence should avail. One cannot be considered as put in jeopardy, where a trial was had before a Court, not having jurisdiction, where the indictment was insufficient, so that no judgment could be rendered thereon; nor where a trial has been broken off by some accident, so that there was no verdict, where the jury being unable to agree were discharged, and where the prosecuting officer has entered a *nolle prosequi*. *Commonwealth* v. *Roby*, 12 Pick. 496. But where a jury has been empanelled and have rendered a verdict of acquittal, and judgment has been entered thereon, though there has been no evidence adduced against the accused, he cannot again be put upon trial for the same offence. Where the proceedings are upon a complaint and warrant before a justice of the peace in a matter, where he has final jurisdiction, the prisoner has been arraigned, and tried, discharged as not guilty, and judgment entered, he cannot again be put upon trial under another similar complaint and warrant for the same offence. The record of acquittal by a magistrate, having jurisdiction, after an arraignment, trial, and judgment, was pleaded in the defence of the second prosecution, it is not contended that the record itself, failed to sustain the plea. The instruction of the Judge on this point was correct.

The Judge also instructed the jury, that the question of probable cause upon established facts, was a question of law, and he instructed them, that there was no probable cause for the prosecutions against the plaintiff by the procurement of the defendant. The jury must have found under proper instruc-

tions, that Calvin Fassett, while claiming to be a scholar, refused to surrender to the teacher the desk of the latter; and to remove him therefrom, the teacher employed the plaintiff, and less of the proper force was used than was necessary for the object. It is difficult to perceive how any reasonable man could suppose, this was an assault and battery upon the scholar, who thus was a disturber of the school without cause. It is however insisted, that he had the opinion of a counselor at law, that the acts of the plaintiff were in violation of law, and therefore that there was probable cause for the prosecutions. It is true, that if a person with an honest wish to ascertain whether certain facts will authorize a suit or a criminal prosecution, and he lays all such facts before one learned in the law, and solicits his deliberate opinion thereon, and the advice obtained is favorable to the suit or prosecution, which is thereupon commenced, it will certainly go far, in the absence of other facts, to show probable cause, and to negative malice. But if it appears, that he withheld material facts, within his knowledge, or which in the exercise of common prudence he might have known; or if it appears, that he was influenced by passion or a desire to injure the other party, and especially if he received from another, learned in the law, whose counsel he sought, advice of a contrary character upon the same question, the opinion, which he invokes in defence, ought not to avail him, and it is well understood that it cannot be a protection. In *Hewlett* v. *Churchley*, 5 Taunt. 277, the Court held substantially, that it would be a most pernicious practice, to introduce the principle, that a man by obtaining an opinion of counsel, may shelter his malice in all cases, by bringing an unfounded prosecution. This doctrine is sanctioned in *Blunt* v. *Little*, 3 Mason, 102. And it may not be improper to make the general remark, without intending by any means to apply it particularly to the case at bar, that where good moral character and citizenship are all the requirements for admission as counselors to our courts, that it would be very dangerous to practice upon the principle contended for, without qualification or exception.

It appears, that the defendant was advised by counsel of high respectability, that the plaintiff would be liable according to an opinion of a Judge of the district court, without advising him, that such was his own opinion of the law. And he was afterwards advised by the same, that the first prosecution was not a bar to the second; and upon a manifestation of anxiety in the defendant, to know whether the second prosecution would be right, he repeatedly told him that the first prosecution would not prevent success in the second.

Although the defendant was possessed of the opinion of a Judge of the Court, that a prosecution could be sustained, which certainly is very important, still, such opinion may have been, and probably was given in a case where the facts were very dissimilar from those presented to counsel, yet where that opinion was not adopted by the one consulted, and where it appeared that in the judgment of another professional gentleman, Calvin Fassett, and not the plaintiff, was the guilty party, if guilt attached to either, made known to the defendant, we cannot think that the Judge essentially erred in his instruction upon this point in reference to the first complaint. In the last, the opinion of counsel was limited to the operation of the first warrant upon the second, where he was not informed what had taken place upon the arrest of the plaintiff, and the return of the former warrant. If the defendant was really ignorant, that the plaintiff had been brought before a magistrate, arraigned, tried and acquitted, he was inexcusable for not knowing the result of the prosecution which he had instituted, when he could have known it in the exercise of ordinary prudence.

The refusal to give the instructions according to the requests specially presented to the Court is unexceptionable.

Exceptions overruled.

JOSIAH S. SWIFT *versus* LEONARD LUCE.

Courts of justice can give effect to Legislative enactments, only to the extent to which they may be made to operate, by a fair and liberal construction of the language used. It is not their province to supply defective enactments by an attempt to carry out fully the purposes, which may be supposed to have occasioned those enactments. This would be but an assumption by the judicial of the duties of the legislative department.

The statute of 1844, (c. 117,) entitled "An act to secure to married women their rights in property," has not so altered the common law, as to enable a *feme covert* to sell her personal property, without the assent of her husband.

TROVER for sundry articles of household furniture, &c., alleged to have been converted by the defendant to his own use. The writ was dated Nov. 24, 1845.

The parties agreed upon a statement of facts, from which it appeared, that E. N. Sprague, then a widow, before the thirty-first day of October, 1844, was the owner and possessor of the articles alleged in the declaration, to have been converted to the use of the defendant; that on that day, she intermarried with the defendant; that after the marriage, the articles were carried to the defendant's house, with her consent, and used in the family; that on August 17, 1845, she left the house of the defendant, without his consent, and went to reside with the plaintiff, who was the husband of her sister; that after her removal to the house of the plaintiff she made a bill of sale of the articles to him, and received his promissory note for their full value; that the plaintiff then went with the wife of the defendant to his house and there demanded the articles; that the defendant refused to give them up to the plaintiff, or permit him to take them, and ordered him to leave the house; and that the defendant has not in any way assented to the sale of the articles by his wife.

If the plaintiff was entitled to recover, a default was to be entered; and if not, a nonsuit.

The case was argued by

R. Goodenow, for the plaintiff — and by

H. and *H. Belcher*, for the defendant.

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

SHEPLEY J. — This is an action of trover brought to recover the value of certain articles of household furniture and of clothing. The title of the plaintiff is derived from a sale of them, alleged to have been made by the wife of the defendant. It is admitted to have been made by her without the consent or authority of her husband. Those articles were her property before she was married to the defendant, and that marriage took place since the act of March 22, 1844, c. 117, became operative. It is insisted by the counsel for the plaintiff, that the act, to have the effect intended, must receive such a construction, as will enable a *feme covert* to dispose of such property, as she might have done before her marriage. It was the intention of the Legislature, as the title of the act declares, to secure to married women their rights in property, and it should receive such a construction, as will make that intention effectual, so far as it can be done consistently with the established rules of law. But courts of justice can give effect to legislative enactments only to the extent, to which they may be made operative by a fair and liberal construction of the language used. It is not their province to supply defective enactments by an attempt to carry out fully the purposes, which may be supposed to have occasioned those enactments. This would be but an assumption by the judicial of the duties of the legislative department. It may often be quite uncertain, as it is in this instance, to what extent, and in what manner, if in any, it was designed, that they should be carried out.

The first section of the act provides, that a married woman may become seized or possessed of property real or personal in her own name, and as of her own property, if it does not come from her husband. It is not applicable to a case like the present.

The second section provides, that "hereafter when any woman possessed of property real or personal shall marry, such property shall continue to her notwithstanding her coverture, and she shall have, hold and possess the same, as her separate

property, exempt from any liability for the debts or contracts of the husband."

The counsel for the defendant contend, that the intention was to change the existing law, so far only as to continue to the wife after her marriage, the right to her former property, for the purpose of exempting it from attachment for the debts of her husband.

Such a construction would not give effect to the language of the first clause declaring, that such property shall continue to her notwithstanding her coverture. "Such property shall continue to her," was doubtless designed as a declaration, that the property which she possessed before marriage, should continue to be her property notwithstanding her coverture. The intention appears to have been to annul that rule of the common law, by which the husband by the marriage became the owner of the personal property of his wife, and entitled to receive the income of her real estate. And the latter clause of the section appears to have been designed to protect her property, by declaring it to be exempt from any liability for the debts and contracts of her husband. This construction is in accordance with the enactments of the third section, which in effect provides, that the wife shall continue to have the control of such property after her marriage, unless she releases the control of it to her husband.

There does not appear to have been any language used in the act with a design to remove the disabilities imposed by the common law upon a *feme covert*, and to enable her, contrary to its rules, to make sales and purchases of property. There is nothing in the act to indicate, whether it was or was not the intention of the legislature to allow a *feme covert* to sell, devise, lease, or otherwise make any disposition of her property, so as to deprive the husband during her life, or after her decease, of all benefit to be derived from it. There is no provision made, by which she can enforce her rights by an action at law, without the concurrence of her husband, for the purpose of protecting her property from injury, waste, or destruction, committed by her husband, or by any other person. The act

does not determine, whether the husband, should he survive the wife, shall be entitled to any right in her personal property or to her real estate during his life.

The common law regulating the rights and duties of husband and wife, must be regarded as operative so far, as it has not been changed by the provisions of the statute; and it has not been altered so as to enable a *feme covert* to sell her personal property. *Plaintiff nonsuit.*

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF SOMERSET,

ARGUED JUNE TERM, 1847.

FRANKLIN SMITH *& al. versus* CALVIN P. BODFISH.

In trespass *quare clausum*, where the plaintiff produces a deed from the county treasurer, purporting to convey the land for the payment of taxes assessed thereon, a mere stranger, without semblance of title, cannot object, under the general issue, that such treasurer had not observed the rules of law, in making the sale.

But if the defendant produces a *prima facie* title to the land, the plaintiff, to support his tax title, must show that the provisions of law, authorizing such sale, have been strictly complied with.

The county treasurer, in making sale of a township of unincorporated land, to pay the taxes assessed thereon, by the county commissioners, for the purpose of making a road through the same, cannot exempt any portion of the township, except the reserved public lots, from its liability for the tax, unless owned by individuals who have paid their proportions of the tax; and regularly it should appear, in order to authorize a sale of the residue, by the recitals in the deed, who had so paid previously to the sale, and the amount paid by each, and the quantity of land on which each payment had been made.

Where a deed of a township of land has been made, and there are excepted tracts therein amounting to half the whole township, it is incumbent on the grantee, claiming title to a particular lot under such deed, to show that such lot is not included in the excepted tracts.

IN this case the facts are stated in the opinion of the Court. The recital of the tax in the deed of the county treasurer,

was in these words. "The said county commissioners ordered among and in connexion with other assessed tracts, through which said road passed, that the sum of one cent and four mills per acre, be assessed upon the unreserved land, in township No. 3, 3d range, in said county, estimated to contain, exclusive of lands reserved for public uses, twenty-three thousand four hundred fourteen acres and five-eighths of an acre, amounting to the sum of nine hundred and twenty-three dollars; and whereas said order was duly certified," &c.

A copy of the *record of the certificate* to the county treasurer was among the papers in the case, which describes the tax on this township, thus: — "On township No. 3, 3d range, estimated to contain twenty-three thousand four hundred and fourteen acres and five-eighth acres, exclusive of lands reserved for public uses, a tax of eight cents and two mills on each acre, amounting to one thousand nine hundred and twenty dollars. $1920."

In the county treasurer's return of his doings, is this statement: — "And the assessment upon township No. 3, in the 3d range, remaining unpaid, except the following described quantities of land, viz: 223 acres owned by Moses Green, 126 acres owned by Gustavus A. Grant, 150 acres owned by Joseph Viles, 188 acres owned by George Viles, 8000 acres owned by Dennis Moore, 1000 acres owned by Samuel Wyman, 500 acres (being No. 7, 8 and 9, lots on north side of Dead River,) owned by Abraham Wing, 1500 acres owned by Daniel G. Witham, and 573 acres owned by Ephraim Heald and Luke Houghton, amounting in the whole to 12260 acres." "And on said 11th day of November, A. D. 1835, at said court house, the township No. 3, in 3d range, (with the exception of lands therein reserved for public uses, and the further exception of twelve thousand two hundred and sixty acres, owned by Moses Green and others above specified,) I sold at public vendue, to Rufus K. J. Porter, for the sum of nine hundred and thirty-five dollars and seventy-five cents," &c.

The description of the premises in the deed from the treasurer to Porter, was thus: — "I sold at public auction, the

whole of said township, (excepting the land reserved for public uses,) and further excepting 12262 acres, owned or claimed by the following persons, viz: Moses Green, Gustavus A. Grant, Joseph Viles, George Viles, Dennis Moore, Samuel Wyman, Abraham Wing, Daniel G. Witham, E. Heald and Luke Houghton, to Rufus K. J. Porter."

The whole township was described in the plaintiff's writ as their close.

Bronson and *H. A. Smith*, for the plaintiffs, said that the plaintiffs claimed the whole of township No. 3, 3d range, by virtue of a deed from the county treasurer, and that the taxes had all been paid, and the land redeemed, excepting lots 11, 12 and 13. Two townships were sold on the same day, and by mistake the description of the tax on the other township was inserted in each deed. The other papers, as they contended, were right.

They then referred to papers, which, as they said, proved that the road was legally laid out; that the tax was legally assessed; that the proceedings of the county treasurer were according to law; and that the mistake in the deed, was wholly immaterial; being corrected by the other papers.

But they contended, that it was wholly unnecessary to prove, that the road was legally laid out. Until the proceedings were reversed, they were to be considered good. The commissioners had jurisdiction of the subject matter, and their judgment is conclusive, until reversed, even if there were errors.

They also insisted, that the defendant was but a mere stranger, and without title, and was not in a situation to contest the regularity of the proceedings, or the validity of the deed of the county treasurer, for the plaintiffs were in under their deed from Porter, and that was enough against a stranger.

They cited, 12 Maine R. 235; 3 Maine R. 438; 2 Maine R. 51; 9 Pick. 51; Stat. 1821, c. 118, § 23 and 24.

Noyes, for the defendant, said that before the plaintiffs could recover, as they claimed under a tax title, and a sale to pay taxes imposed by the county commissioners to build a

road, they must show that the road was legally laid out, that this land was liable to be assessed to pay such tax, and the proceedings in imposing the tax, and the doings in making the sale, were in all respects according to law. *Philbrook* v. *Kennebec*, 17 Maine R. 195; *Brown* v. *Veazie*, 25 Maine R. 359.

A number of particulars were specified, wherein there was an omission to comply with the law, or a proceeding directly opposed to its provisions. Among them was the objection, that the treasurer advertised the whole township for sale, to pay the whole tax upon it, when he was authorized to advertise the portions thereof, on which the taxes remained unpaid, and to have sold such parts only.

There is nothing in these proceedings going to show, that the lots in controversy, or either of them were included in the land sold. There is nothing to prove, that they were not in the excepted land.

The opinion of the Court was drawn up by

WHITMAN C. J. — The plaintiffs allege, that the defendant broke and entered their close, being township No. 3, range 3, west of Kennebec river in Somerset, and there cut and carried away a certain quantity of timber; and have also inserted in their declaration a count in trespass, *de bonis asportatis*, for the timber so taken away. The defendant pleads the general issue, not guilty, in the first place, to both counts, and issue is joined thereon. He then pleads, specially, to the alleged trespass of breaking and entering the close, that the place, where the supposed trespass was committed, was in three several lots in said township, Nos. 11, 12 and 13; and that the soil and freehold in said lots, was in one Burke; and that by license and permission from him, he entered thereon, and cut and carried away certain timber therefrom; and that this is the trespass supposed, in the plaintiff's declaration, to have been committed. To this the plaintiffs reply, that the soil and freehold in the lots named, was in them, and conclude with a traverse. The defendant reaffirms the soil, &c., to be in said

Burke; and the plaintiffs join issue; thus leaving the affirmative, as to this issue, of proving the title in Burke, upon the defendant.

But no evidence is noted in the report of the Judge, of any cutting, &c., as alleged, except in so far as it may be contained in the admission of the defendant, in his plea in justification. In strictness, therefore, the defendant should prevail; for his admissions, in one plea, cannot be admitted in aid of the plaintiffs on an issue arising upon another, containing no such admission. *Harrington* v. *McMorris*, 5 Taunt. 228. And it is sufficient for the defendant if he can prevail on either issue.

But the parties would seem to have had in view the ascertainment of the title to the *locus in quo* as presented in reference to the issue upon the title; and the defendant might have raised the same question under the general issue. *Carr & al.* v. *Fletcher*, 2 Starkie, 71; *Rawson* v. *Morse*, 4 Pick. 127. We may therefore proceed to consider it.

As the general issue is pleaded and joined, the plaintiffs must be expected, in the first instance, to give some evidence of possession to entitle them to maintain trespass; and this they may be supposed to have done by the deeds of Joseph Philbrick, treasurer, &c., to R. K. J. Porter, dated Dec. 25th, 1835, of nearly one half of the township, and of Porter to themselves of a large portion of that conveyed by Philbrick to Porter. This might be sufficient, if the defendant shows no semblance of ownership, and exhibits himself as a mere trespasser upon the rights of some one. For it would not be admissible for him, under the general issue, to object that the plaintiffs, by their own showing, were but tenants in common with others; nor, if he had no right to enter upon the land, should he be allowed to object, that Philbrick, who professes to convey as treasurer of the county of Somerset, had not observed the rules of law in making the sale.

But the defendant is not in this predicament. He has exhibited evidence of title in Burke, under whom he entered, and cut and carried away the timber. He produces a deed

from one Dolbier to one Colby, dated April 8th, 1835, of the said three lots; and then a deed from Colby to Burke of the same lots dated Nov. 27th, 1840; thus making out a title in Burke, such as will give the defendant a right to call upon the plaintiffs to show that Philbrick's deed was operative, and so as to make their title effectual against the title introduced in the defence. The defendant was also permitted to show, at the trial, that township No. 2, range 1, was taxed by the State and county, for the years 1827, 1828 and 1829; and that the taxes were paid. What the payment of these taxes had to do with lots No. 11, 12 and 13 in township 3, range 3, is not perceived.

The deed relied upon by the plaintiffs, made by Philbrick as treasurer of the county of Somerset, contains a recital of his authority for making it. It sets forth, that a tax had been assessed on township 3, range 3, in the county of Somerset, by the county commissioners of that county, for the purpose of repairing a highway through that township, of one cent and four mills on each acre therein, not reserved for public uses, estimated to be twenty-three thousand four hundred and fourteen acres and five-eighths of an acre, amounting to nine hundred and twenty-three dollars; and that the same was duly certified to him for collection by the clerk of the courts for that county; and that on the eleventh day of November, 1835, after having duly advertised the said order, and time and place, appointed for the sale of said township No. 3, range 3, he sold the whole of the said township, excepting the land reserved therein for public uses, and also twelve thousand two hundred and sixty acres thereof, owned or claimed by certain individuals (naming them) to said Porter, he being the highest bidder therefor, for the sum of nine hundred thirty-five dollars and seventy-five cents.

Public officers, charged with the power of divesting individuals of their titles to real estate, in pursuance of provisions of law, made for the purpose, must, in their proceedings, be held to a strict compliance with such provisions. And when such officer, in making a deed of any such real estate, recites the

authority for so doing, as it is proper he should do; if his recital is proved to be untrue, and materially so, the conveyance must be held to be ineffectual and void, unless there be proof, *aliunde*, of authority to make it. On examining the record of the court of county commissioners, produced in support of the authority of Philbrick, to make the conveyance of the estate to Porter, it does not appear, that any such tax of one cent and four mills, per acre, amounting to nine hundred and twenty-three dollars, was imposed on the township in question. The tax appearing to have been imposed, according to the copy of the record produced, was eight cents and two mills per acre, amounting to nineteen hundred and twenty dollars. And instead of selling the whole of the township, excepting the reserved lands, by the deed it appears, that more than half of it, which belonged to, or was claimed by certain individuals, was exempted from paying any portion of the nine hundred and twenty-three dollars; and the residue was sold to pay the same. The treasurer could not exempt any portion of the township, except the reserved land, from its liability for the tax, unless owned by individuals, who had paid their proportions of the tax; and, regularly, it should appear, in order to authorize the sale of the residue, by the recitals in the deed, who had so paid previously to the sale, and the amount paid by each, and the quantity of land, on which each payment had been made. If, therefore, the tax intended to authorize the sale, was the nineteen hundred and twenty dollars, named in the record, and that sum had been reduced after the advertisement, and before the sale, by payments made by sundry part owners of the township, it should so have been set forth in the deed, or have been proved.

But, if this difficulty were surmounted, there is still another, arising under the general issue. It is, that, if the deed to Porter could be considered as operative, and the admission of the defendant, that he cut timber on lots No. 11, 12 and 13, as contained in his special plea, could be available to the plaintiffs, under the general issue, still it would not appear that those lots were any part of the land embraced in a deed from

Porter to the plaintiffs; for the defendant, even in his special plea, makes no admission, that those lots were any portion of the land to which the plaintiffs pretend to give evidence of title. In the first place, it should be observed, that the deed of Philbrick to Porter purported to convey less than one-half of the township; and the parcels excepted from the operation of that conveyance may, for aught that appears, have been held by the individuals named therein, in severalty; and those three lots may have been parts thereof. Again — the deed from Porter to the plaintiffs, excepts quite a number of parcels, which he had previously conveyed, out of what was comprised in the deed to him, amounting in the aggregate to nearly one-half thereof; and those previous conveyances may have been, and it would seem probable from the dimensions of them, of parcels in severalty. And if so, the three lots might be parts of those, so disposed of by Porter. So, that under the general issue, the defence might be deemed complete, even on this ground. *As the case is presented to us a nonsuit must be entered.*

JOHN LYFORD *versus* JOSEPH HOLWAY.

Where the principal debtor in a trustee process, had purchased land and given back to his grantor, a mortgage to secure his notes for the consideration, and then conveyed one half of the same, by deed of warranty, to the person summoned as trustee, and received the consideration therefor; and afterwards, the notes secured by the mortgage, remaining wholly unpaid, the principal debtor conveyed the other half of the land to the supposed trustee, who contracted with his grantor, as the consideration for this conveyance, to pay the notes secured by the mortgage, being then to the full amount of the value of the land, — but at the time of the service of the trustee process, no payment had been made, of any part of the notes secured by the mortgage, either by the supposed trustee or by the debtor; *it was holden*, that the supposed trustee must be discharged.

THIS was a *scire facias* against the defendant, as the trustee of Xenophon Holway. The only question was, whether the defendant ought to be charged as the trustee of Xenophon

Holway, on the disclosures of the present defendant, when summoned as trustee. In the district court, REDINGTON J. presiding, the defendant was charged as trustee, and the defendant excepted.

The exceptions state, that "all the preliminary legal measures have been taken by the plaintiff to charge said trustee, and the only question presented to the Court for their decision is, whether the trustee's disclosures show, that the trustee should be charged."

The answers were very long, and are omitted as the substance of the case appears in the opinion of the Court.

The arguments were in writing.

Merrick, for the defendant, contended that there was no ground whatever for charging the trustee. In the argument, he advanced these legal positions.

The law is supposed to be, that no one can be charged as trustee, unless there appears to be a clear admission of goods, effects or credits, not disputed or controverted by the supposed trustee, before he can be truly said to have them in deposit or trust. *Picket* v. *Swan*, 4 Mason, 460; *Rich* v. *Reed*, 22 Maine R. 28; *Page* v. *Smith*, 25 Maine R. 256.

To render a person liable to be charged as trustee of another, it is necessary that the latter have a cause of action against him, or that the former have personal chattels in his possession, belonging to the principal, capable of being seized and sold on execution *M. F. & M. Ins. Co.* v. *Weeks*, 7 Mass. R. 438; *Perry* v. *Coates*, 1 Pick. 537; *Owen* v. *Estes*, 5 Mass. R. 330.

The facts disclosed by this defendant, if given in evidence in an action by the principal against him, would be a perfect defence; and therefore he cannot be adjudged trustee. *Stackpole* v. *Newman*, 4 Mass. R. 85; *Kidd* v. *Shepherd*, *ib.* 238; *Howell* v. *Freeman*, 3 Mass. R. 121; *Locke* v. *Tippets*, 7 Mass. R. 129.

E. E. Brown, for the plaintiff, contended that the conveyance from Xenophon Holway to the defendant, was fraudulent

as to creditors, and that for that cause, the defendant ought to be charged as trustee.

In this case there was a sum of money put into the hands of the defendant, to be paid to Hinds, which he promised to appropriate for that purpose and failed to do. It is immaterial whether the cause of the indebtedness, or the consideration of such promise, was the conveyance of land by the promisee, to the defendant, or the transfer of personal chattels. The duty of paying the money in either case remains. As the defendant had neglected to pay over the money, the principal debtor could have recovered it back; and therefore the defendant should be charged on this ground. *Schillinger* v. *McCann*, 6 Greenl. 64; *Burbank* v. *Gould*, 15 Maine R. 118. The service of the trustee process is equivalent to a demand for the money.

If the supposed trustee admits property to be in his hands, he must be charged, unless he clearly discharges himself, which has not been done here.

The measure of damage in this case would be the injury sustained by the breach of the promise. This would be the amount put in his hands to pay Hinds, and still remaining, Hinds never having been paid.

The following were cited at the close of the argument as additional authorities to show, that the defendant ought to be charged. 2 Mylne & Keen, 492; 5 Mass. R. 385; 22 Maine R. 121; 14 East, 582; 7 Pick. 247; 5 N. H. Rep. 178; 9 Pick. 18.

The opinion of the Court was by

TENNEY J. — From the disclosures of the defendant, which are the only evidence in the case, it appears, that Xenophon Holway, the principal debtor in the original process, purchased of Ashur Hinds, a tract of land; paid at the time $100, and gave notes for $400, on interest, and a mortgage of the same land for their security. He conveyed to the defendant by deed with covenants of warranty one undivided half of this land, for the consideration of two hundred and fifty dollars, which

when paid was to be applied to the note and mortgage; the whole of the consideration was paid and some excess by the defendant to Xenophon, but only one hundred dollars went in payment of the notes to Hinds. Two or three years after the purchase by the defendant, nothing more having been received by Hinds, a settlement took place between the principal debtor and the supposed trustee, and the former gave to the latter a note for $427, being the amount then due to Hinds and a balance of accounts in favor of the defendant. At the same time Xenophon conveyed his interest in the remaining part of the land to the defendant, and took a bond for the reconveyance of the same, if the amount of the note of $427, should be paid within six years; and the defendant agreed by parol to pay to Hinds, the sum due to him. At the time of the service of the plaintiff's original writ nothing had been received by Hinds upon his notes, excepting the one hundred dollars, and no payment had been made on the note to the defendant; it had been agreed between Xenophon and the defendant, that the latter should allow the sum of $25 on his note, and in consideration thereof, the bond should be surrendered to him. This agreement was carried into effect after the service of the original writ; a settlement was made, and Xenophon gave a new note for the balance owed by him, after deducting the amount due to Hinds. Nothing has been paid by the defendant since he was served with the trustee process, and the land is of less value, than the amount due upon the notes and mortgage to Hinds.

Was the defendant properly charged as the trustee of the principal debtor? The last conveyance made to the defendant was in consideration of his agreement to pay to Hinds the balance due of the original purchase money. He contracted to pay this sum in discharge of the mortgage, and in no other manner; the principal debtor had no claim upon him for this sum, without first paying his own notes given for the land. By the disclosures, the defendant took the last deed, not for the purpose of obtaining directly thereby, any interest of value, for the sum due on the mortgage was greater than the worth

of the land; but as indemnity, if he should be compelled to pay the sum due to Hinds, in order to get a title to the land first purchased, for which he had made full payment to his grantor. If the sum, which he last agreed with Xenophon to pay to Hinds, should be diverted from that object, to benefit the creditors of Xenophon, he would still be obliged to pay a like sum, to discharge the mortgage, before the interest which he first purchased would be available. A failure to discharge the balance due to Hinds, would result in the forfeiture of his entire title.

It does not sufficiently appear from the disclosures, that the principal debtor and the defendant were guilty of a fraud, as is contended in behalf of the plaintiff, so that the defendant is liable as trustee. *Exceptions sustained. Trustee discharged, and his costs allowed.*

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PENOBSCOT,

ARGUED JUNE TERM, 1847.

JOSEPH M. WHITTIER *versus* ELLIOTT G. VAUGHAN.

By the stat. 1829, c. 431, "the estate, right, title and interest which any person has by virtue of a bond or contract in writing, to a conveyance of real estate upon condition to be by him performed," is liable to be attached and held after as well as before the condition has been performed, where no deed was given prior to the attachment.

In making sale of such interest on execution it is not necessary for the officer to return, that he had given a deed to the vendee under his sale. It is sufficient, that it appears he had done so by the production of the deed itself.

Amendments of his return of a sale of such estate, right, &c. on execution, may be made by an officer, by leave of court, no rights of third persons intervening, if before they were made the party, on looking at the return as it was, could not have misunderstood, that the proceedings by the officer had been substantially what the amended return shows them to have been.

No precise form of words is necessary in a notice to account, &c. It is enough if it be such, that it cannot mislead the party, or leave him in any doubt of the object of it.

BILL in equity. The plaintiff alleges, that in March, 1838, the defendant was the owner of a lot of land in Elliotsville, and on the third day of that month gave one James True a bond, conditioned to convey the same to True, his heirs or as-

signs, "provided that said True should clear and discharge from an attachment made by J. P. B. a certain lot of land in Bangor, which had been by him conveyed to said Vaughan, and should not permit any attachment upon the same to become effective," and "clear the same from all incumbrances;" that on the 16th of March, 1839, Whittier, the plaintiff, attached True's right to the lot under the bond and his right to a conveyance of the same; recovered judgment against True in May, 1840, took out his execution, and caused the same right to be sold on the execution in August, 1840; and that the plaintiff became the purchaser and received a deed from the officer. The plaintiff alleges, that before the filing of the bill, the condition of the bond had been fully performed; that Vaughan was fully notified of the plaintiff's attachment prior to April 24, 1839; that afterwards, on that day, Vaughan conveyed the lot to Proctor; that Proctor re-conveyed the same to Vaughan; and that Vaughan had been requested to give a deed to the plaintiff, and had refused.

The defendant, in his answer, denied any knowledge that the plaintiff "had any title and interest in said bond, or in or to the estate aforesaid, of such a nature as to interfere with or in any manner to abridge or control or modify this respondent's right to make a conveyance according to the condition of said bond"; that the condition of the bond was fully performed; that supposing he was under the necessity of conveying the lot to True, he did convey to his assignee, Knowles, who conveyed to Proctor and Proctor to Vaughan. "And the respondent says, that long before the complainant's execution was taken out, the right and interest of said True by virtue of the said bond, had ceased to exist, and the bond had been taken up, and the conveyance of the land made in pursuance of the condition thereof. And he further says, that at the time said notice was given him by the complainant, there was no sum of money or amount due, or condition remaining to be performed from or by said True;" and that there was no legal sale of any right to the said bond on the complainant's execution.

The officer, by leave of court, amended his return in several particulars. As originally made, it read at the beginning, after the date — "In obedience to this writ of execution I have taken all the right and equity of redemption." This was amended by striking out the words —"*and equity of redemption,*" and inserting in their place the words — *title and interest by virtue of a bond from Elliott G. Vaughan, to him, said True.*" As it was originally, the return said that he advertised — "to be sold on the 18th day of August, then next, at one of the clock in the afternoon, and the said real estate," &c. An amendment was made by inserting between the words "*afternoon*" and "*and*" the words — "*at the inn of E. R. Favor, in Dover, in said county.*" Some less material amendments were made.

There was evidence tending to prove, that Vaughan had notice of the attachment before any conveyance made by him.

This case was very fully argued in writing. The arguments are too extended for publication.

H. Warren, for the plaintiff, contended that actual notice to Vaughan of the attachment was proved by the evidence. And that no notice of it was necessary to be proved, other than the recording required in all cases of attachments of real estate, and which existed in this case. The obligor had the same notice by the record, which a purchaser has of attachments.

The attachment, by the statute, immediately divests the obligee of the right to take a conveyance, and a deed made to him after the attachment cannot convey a valid title against the attaching creditor. Nor has the obligor any power to destroy the right given by the statute, by making a conveyance. It would be like canceling a bond, which has been held not to be sufficient to destroy the right acquired by the creditor. *Jameson* v. *Head*, 14 Maine R. 34.

The course taken by the creditor in selling the right of the debtor, although the obligor had given a deed after the attachment and after notice of it, cannot destroy the rights of the attaching creditor. *Aiken* v. *Meder*, 15 Maine R. 157.

The statute makes the debtor's right to have real estate con-

veyed to him by virtue of a bond, attachable at any time before the conveyance is made. If it were not so, the debtor might protect his property from attachment for any length of time by merely refusing to take a deed.

The return of the officer, as originally made, was sufficient. If there was any defect, it was merely the omission of the place where the sale was made. The other parts of the return show the place, and that is enough.

But the amendments, by permission of Court, remove all doubts as to the sufficiency of the return. They were fully authorized by the authorities. *Spear* v. *Sturdivant*, 14 Maine R. 263; *Fairfield* v. *Paine*, 23 Maine R. 498.

The production of the deed itself, with the record of it, was the best evidence, that the deed had been made and delivered.

J. B. Hill, for the defendant, said that attachments did not exist at common law, and could be effectual only when authorized by statute. 17 Mass R. 196.

He then gave a history of the legislation in relation to attachments. Referred to the Province laws of 1647, 1696, 1712, 1759; Mass. stat. of 1784 and of 1799; and the Maine stat. of 1821, c. 60, and of 1829, c. 431.

Before the last of these acts, two important rights and interests in and to real estate remained, which could not be attached. 1. The right of a debtor to a conveyance by virtue of a bond or contract in writing *upon condition by him to be performed.* 2. The right to a conveyance by virtue of a bond or written contract, either originally without any condition to be by him performed, *or of which the condition has been performed.* The first class was made liable to be attached and taken on execution by the stat. 1829, c. 431. The second remains as at common law, and is not yet made liable to attachment or seizure on execution. It is "the estate, right, title and interest," &c. "to a conveyance of real estate *upon condition to be by him performed.* He is to have the same remedy by bill in equity, that is, the purchaser, &c., "*upon his*

performance of the conditions of such bond or written contract."

He contended, that all the right which True had at the time of the attachment was of the second class, and not attachable.

It was contended, that no sufficient notice was given of the attachment, if any was made, and therefore the defendant might well convey the land to the obligee. The notice relied on by the plaintiff, is not such as the statute requires, either in form or substance.

It was also contended, that the sale was a nullity, by reason of a misdescription of the property in the notices of the sale.

The return on the execution is not conclusive of the fact. If the officer has made a false return, the plaintiff is to have the remedy, and not the defendant.

Neither the attachment on the writ, the advertisement for the sale, nor the return on the execution are sufficient in form to attach and hold and sell the interest. The statute says, "that the *estate*, right, title and interest" may be attached and sold. In the return of the attachment and of the sale, the word *estate* is wholly omitted.

Another objection is, that it does not appear by the return of the officer, that any deed was made by the officer to the purchaser.

In his answer, the defendant denies the validity of the sale, and puts the plaintiff to prove it.

The officer merely returns, that he has "taken *all the right and equity of redemption*, which the said James True," &c. This language is wholly different from that in the statute, in meaning as well as in words.

The return is also defective in not showing at what place the sale was made.

It was contended, that the amendments were unauthorized by law, and were wholly insufficient to cure the defects pointed out. *Stevens* v. *Legrow*, 19 Maine R. 95.

The opinion of the Court was drawn up by

WHITMAN C. J. — The original attachment on *mesne* process, and levy of execution, were intended to be in pursuance of the statute, c. 431, of 1829. That statute provided, that "the estate, right, title and interest, which any person has, by virtue of a bond or contract in writing, to a conveyance of real estate, upon condition to be by him performed, whether he be the original obligee or assignee of the bond or contract, shall be liable to be taken by attachment on *mesne* process or execution."

It appears that True, the debtor of the plaintiff, held a bond for the conveyance of the lot of land in question, upon the performance of certain conditions therein expressed. It appears further, that, before the plaintiff in this action made his attachment, the condition of the bond had been performed, and that True's right to a conveyance had become absolute. The defendant, therefore insists, that, by the terms of the statute, True's right to a conveyance was not liable to be attached; and so that the plaintiff's attachment and levy were void. The language of the statute by him relied upon is, "upon condition to be by him peformed." The defendant's construction is, that the condition referred to in the statute, is one remaining to be performed, *after attachment made;* that, after the condition has been performed, the bond becomes absolute and is no longer a bond for the conveyance of real estate, upon condition to be performed. It may be admitted, that, if the contract were originally absolute, in its terms, for the conveyance of real estate, it would not be within the letter of the statute; and perhaps not within its purview; but as to this we give no opinion. If, however, a bond be made for a conveyance upon condition, and an attachment be made after the performance of the condition, and before a conveyance had been made, and such case be not within the purview of the statute, it cannot be doubted, it must be attributed to oversight on the part of the Legislature. It could not have designed to exempt estates so situated from attachment. But we apprehend when they speak of a bond, or contract upon condition

to be performed; it is to be regarded as descriptive merely of the instrument, which shall authorize an attachment. If the bond or contract, when made, was upon a condition to be performed, it is within the sound construction of the statute, and authorized an attachment. Though the condition be now performed, still it was a bond or contract on a condition to be performed. It is believed that the Legislature, in the Rev. Stat. c. 114, § 73, intended merely a re-enactment of the provision in the statute of 1829. The language is slightly varied, but doubtless intended to be of the same import. It was, that, "all the right, title and interest, which any person has, by virtue of a bond or contract to a deed of conveyance of real estate on *specified conditions*," may be attached, &c. This was manifestly intended as descriptive of the instrument, that should give such right. Whether the condition were performed or not, it would still be a bond or contract to convey on specified conditions. If the Legislature had intended a discrimination between a bond on condition not performed, and one in which it had, at the time of the attachment, been performed, they could not have failed, so to have expressed their meaning. But there could have been no good reason for rendering interests, where the condition had been performed, unattachable. It would have been to place valuable interests in estates beyond the reach of creditors, which is against the policy of the law. We cannot doubt, therefore, but that both descriptions of estates were equally comprehended under either statute.

Most of the other objections, urged by the counsel for the defendant, are obviated by the officer's return, upon the execution. It was unnecessary for him to return, that he had given a deed to the vendee under his sale. It is sufficient that it appears he had done so by the production of the deed itself.

The amendments of the return were such as have often received the sanction of this Court. Before the amendments were made, the defendant could not have misunderstood, upon looking at the return, as it was, that the proceedings by the

officer had been substantially what the amended return shows them to have been. He had no rights to be affected resembling those of a stranger thereto. He had, as the evidence abundantly shows, notice of the original attachment; yet thought proper to place himself in his present predicament.

The language complained of in the notice to account, &c., could not have misled the defendant, or have left him in any doubt of the object of it. No set form of words is necessary in such cases. On the whole, though the arguments of the defendant's counsel, are not only elaborate, but ingenious, yet we cannot regard his conclusions as satisfactory.

Conveyance decreed as prayed for.

WILLIAM C. HAMMATT, *Ex'or, versus* WILLIAM EMERSON.

A partial failure of consideration for a note, given in payment for land sold, not arising out of a failure of title, but out of fraudulent misrepresentations respecting the quantity of timber trees then upon it, may be given in evidence in defence in a suit upon such note, while it remains in the hands of the seller, or in the hands of one having no superior rights.

And if the purchaser makes a contract to sell a portion of the land to another, and gives to the seller in part payment, a note, signed by such other as principal, and the purchaser as surety, this does not affect the relations between the seller and purchaser, nor take away the right of the latter to set up fraud in the contract, as a defence.

The law does not make the vendor responsible in damages, for every unauthorized, erroneous or false representation made to the vendee, although it may have been injurious. To make the party liable, the representation must have been false, have been fraudulently made, and have occasioned damage.

And where one has made a representation positively, or professing to speak as of his own knowledge without having any knowledge on the subject, the intentional falsehood is disclosed, and the intention to deceive is also inferred.

An agreement, containing a guaranty, that there is a certain quantity of timber upon a tract of land, does not necessarily include the idea or authorize the inference, that the person making it, knows the fact to be, as the guaranty stipulates, that it shall be, for the foundation upon which business is to be transacted.

Hammatt *v.* Emerson.

A deed of a grantee of the State, cannot be considered as belonging to the archives of the State, and it cannot be proved by a copy made by the Land Agent.

Where a paper belongs to the archives of the State, proof of its contents may be made by a duly authenticated copy.

Letters addressed to a public officer in his official capacity, when received, become public documents and may be proved in like manner. But extracts or portions of them cannot be received.

Where letters have been written by the agents of the seller, and their contents made known to the purchaser as an inducement to make the purchase, the original letters only can be produced in evidence, without proof that they have been lost.

A copy of the decree of the Circuit Court of the United States, although not made in a case between the parties, is the only legal testimony to prove the facts stated in the decree.

The representations made by the agent of the plaintiff to the defendant may properly be given in evidence on the question of fraud. But the inducements which operated on the mind of the agent are not admissible.

When parol proof of admissions, made in conversations or declarations, is introduced, it is limited to what was said or done at the same time, relative to the same subject.

When proof is introduced respecting admissions made in and proved by bills and answers in chancery, letters and other written documents, the whole matter contained in such bill, answer, letter or other written document becomes testimony in the case, for a part cannot be received and a part excluded.

Inquisitions, examinations, depositions, affidavits and other written papers, when they have become proofs of its proceedings, and are found remaining on the files of a judicial court, are judical documents.

Where a deposition of a party to the suit, taken to be used in another court in a case between other parties, is offered in evidence in this Court by the opposing party, the impression is, that the whole deposition becomes evidence in the case.

After the trial, and before the arguments on the questions of law, the plaintiff deceased, and William C. Hammatt, was appointed Executor, and prosecuted the suit.

"Assumpsit. Two counts founded on the following notes.

"Value received, we, Hazen Mitchell, as principal, and William Emerson, as surety, jointly and severally promise to pay William Hammatt or order, two thousand nine hundred and twenty-five dollars, on or before the twenty-ninth day of June,

in the year of our Lord one thousand, eight hundred and thirty-seven, and interest annually. June 29, 1833.

"$2925,00. "Hazen Mitchell,

"Witness, Daniel McCann." "William Emerson."

"At the trial, before TENNEY J., after reading the note, the execution of which was admitted, the plaintiff rested.

"The defendant then opened his defence, and placed it on the ground, that the note declared on was obtained by fraud.

"The plaintiff then contended, that as by the admission of the defendant, there had been no rescinding or offer to rescind the bargain and sale, and no restoration or offer on the part of the defendant to re-deed or restore the land for which the note was given, that this defence on the ground of fraud, was not open to him. But the Court ruled otherwise.

"The defendant then introduced the deposition of George W. Coffin, taken Nov. 7, 1844, which is part of the case. The plaintiff objected to the third and fourth interrogatory and answer thereto, and to the admission of the copy of the deed A, and the agreement B, as not admissible; but the Court admitted them and they were read. Plaintiff also objected to the 5th interrogatory and the answer and the admission of the copy of the assignment dated Dec. 2, 1832; but the Court admitted them. Plaintiff also objected to the 8th interrogatory and answer, and to the admission of the copy of the letter in paper C, or extract from William Hammatt's letter to said Coffin, dated March 20, 1828, and also of the letter in D, from same to same, dated July 3, 1828. Also the copy of the report of Eben Greenleaf and W. C. Hammatt dated June 28, 1828; but the Court admitted them.

"The defendant offered a deposition of the plaintiff given in another case, between said defendant and others and Warren and Brown, in relation to a sale of the same township now in question, and taken at the request of said Emerson on interrogatories proposed by said Emerson, and read therefrom the 4th interrogatory and answer, a part of the second interrogatory and a part of the second answer. Also the 3d and answer, the 6th and answer, a part of each of 6th only. The plaintiff

contended, that if any part of the questions or answers were read, all should be read, but the Court ruled otherwise.

"In another stage of the case, the plaintiff was permitted to read the remainder of the second question and answer, and he desired to read the remainder of the 6th question and answer, but the Court did not permit him so to do.

"He also offered and desired to read all the deposition or other parts, which he contended had a bearing on the case, but the Court ruled in relation to this deposition, that the plaintiff could read only such parts as go to qualify or explain the portions read by the defendant."

Paper A. referred to in the instructions of the presiding Judge.

"7th of March, 1833. I will sell township No. one, 10th range, at 45,000 dollars or at whatever the pine timber on the same shall amount to, at 125 cts. per M. in case the purchaser elects within 30 days after the purchase, to pay in that way instead of the $45,000. I will sell for $25,000, my mills at Orono, containing 2 board saws, 4 clapboard machines, 1 sapper, 2 shingle machines, 1 Lath do. with ample water power to propel the same; the house lot which was purchased with the mill, one half a log boom on Stillwater, on lease of ten years, $350 to pay, a board sluice and rafting privilege, $10 per year for 14 years, to pay for same, the whole $70,000 to be paid, $10,000 cash down, and the residue in six annual payments with interest annually and perfectly secured. The mills and timber may yield an annual income of 20,000 dollars.

"Wm. Hammatt."

Paper B. also referred to in the instructions.

"I hereby authorize and empower Hazen Mitchell and Cyrus Goss, to sell on my account, and notify me of said sale on or before the 10th of April next, township No. 1, 10th range, on the following terms, viz:— $5000 cash down, $5000 in six months, $5000 in twelve months, $5000 in eighteen months, $5000 in two years, $10,000 in three yeas and $10,000 in four years, all with annual interest from the 10th of April, 1833, and satisfactory security, if sold at the above price of 45,000

dollars and no more. I will pay a commission of 2½ per cent. on the same, but the said Mitchell and Goss, may sell at higher price and pay over to me 45,000 dollars as above, retaining whatever they may obtain over and above said sum, instead of said commission of 2½ per cent.; the title will be perfect as I have a clear deed from the Commonwealth. I will guarantee that there is 45,000,000 feet (board measure) of pine timber, on the township, and the purchaser may elect within thirty days of the purchase, to take it at a survey of all the standing pine timber at one dollar per thousand, or pay the said forty-five thousand dollars, but it must be understood, that the absolute purchase is concluded, and the cash payment made on or before the 10th of April as aforesaid. Wm. Hammatt."

"Howland 20th March, 1833."

"If the township is sold, I will sell my mills at Stillwater at $25,000. $1000 cash down, $4000 rent the present year, and the remaining $20,000, on a term of years, with interest payable semi-annually. "Wm. Hammatt."

"William Hammatt of Bangor, in the county of Penobscot, being produced, sworn and examined in behalf of the respondents in the title of these depositions named, doth depose as follows: —

"To the first interrogatory he saith, that he is sixty-one years of age and resides in Bangor; that since 1824, during his residence in Maine, he has had the management of the public lands belonging to Massachusetts, so far as selling timber upon them was concerned, and has purchased several townships of timber land of Massachusetts.

"To the second interrogatory he saith, that he hath been such proprietor. He purchased said township in 1828, in August, he thinks. On referring to his minutes, he finds that he did so purchase in August, 1828, in company with Mr. Thacher of Boston. They purchased of the Commonwealth of Massachusetts. In Dec. 1832, he bought Mr. Thacher's part and became the sole proprietor. He had never seen the township before he purchased. All the knowledge he had of it was from the report of Wm. C. Hammatt. He had a num-

ber of other townships examined at the same time by Mr. Hammatt. He directed his son, W. C. Hammatt, to examine all the timber townships then set apart for Massachusetts, which were eight or ten in number, with a view to purchase. His report on township number one, range ten, was as favorable as upon any other township, and this is one of those which he purchased at the highest price. The examinations by W. C. Hammatt were partial or limited as he had only a month in which to do all the work. He directed Mr. Hammatt to make such examination only as would satisfy *him* that there were eight million feet of timber on a township that was accessible by teams and water conveyance. There was not so much timber reported upon this township as upon some others but it was said that the timber was better and more convenient to be got off.

"To the third interrogatory he saith, that he owned it till June, 1833. He granted a permit on said township and had an agent there to take an account of the timber cut under that permit, and directed him to employ his leisure time in exploring and ascertaining the character and amount of timber there was upon the township, and from his verbal report he obtained information.

"In the winter of 1832–3, he employed John Shaw, as his agent, to take an account of timber cut on number one in the eighth range, which is across the lake from this township. Shaw was directed to take opportunities to examine number one, in the tenth range. The information received from Shaw confirmed me in my good opinion of the township.

"To the fourth interrogatory he saith, that he had cut, while he owned it, about three million feet board measure. It was cut under a permit to Bartlett and Roberts in the winter of 1828–9 and 1829–30. He believes the quality was very good.

"To the fifth interrogatory he saith, that in June, 1833, he sold the township to William Emerson for forty-five thousand dollars, two and a half per cent. off, he thinks.

"To the sixth interrogatory he saith, that he had confidence

in John Shaw, and did rely upon the information he gave at the time the deponent sold said township; that he did then know that Hazen Mitchell was interested in said purchase. He does not know on what said Mitchell relied.

"To the seventh interrogatory he saith, that on the thirty-first of March, 1835, he purchased of the Commonwealth of Massachusetts, in company with Warren & Brown and S. H. Blake, one third each, township number three, in the fifth range; said Shaw was employed to explore said township, about the time of the purchase, but he cannot say whether it was immediately before or immediately after the purchase. He thinks they did not rely upon Shaw's opinion in making the purchase, paying the money, or in giving obligations.

"To the eighth interrogatory he saith, that he does not know what said township was worth when he sold it, unless the price indicates its value. He does not know what it was worth in 1835.

"To the ninth interrogatory he saith, that in April, 1835, he gave Warren and Brown, at their solicitation, a certificate of which he believes the annexed paper, marked A, to be a true copy. He kept no copy at the time, but the annexed copy of certificate has been examined by him and he thinks it is a true copy.

"To the tenth interrogatory he saith, that some time, in the winter of 1832–3, he gave a bond, he thinks, running to W. C. Hammatt and J. B. Morgan to sell said township at about one dollar and a half an acre, if paid for within a certain time. Said Hammatt and Morgan did not make a demand of a deed within the terms of the bond. After the bond had expired, some other persons, to whom, as I understood, one half the interest in the bond had been assigned, insisted upon a conveyance of one half said township being made to them. He refused to convey because the bond was forfeited, and he declined selling one half. If he sold any he wished to sell the whole.

"To the eleventh interrogatory he saith, that they paid the Commonwealth a quarter of a dollar an acre, and he paid Mr.

Thacher at the rate of a dollar an acre for his interest in it. He sold it at about two dollars an acre. On the thirty-first of March, 1835, he purchased what he considered a good township, at two dollars an acre, of the Commonwealth of Massachusetts. He can state no further.

"The Court instructed the jury, that in order to avoid the evidence furnished by the note, the defendant must prove, that there was a fraud on the part of the plaintiff, and that this defence of fraud was open to the defendant, and that, to establish fraud, he must satisfy them: —

"1. That representations were made by him, that he knew were not true, or that he had not good reason to believe were true.

"2. That defendant was induced by such representations to enter into such contract.

"3. That he has sustained damage.

"That there is a difference between the expression of an opinion and the assertion of an absolute fact.

"That the Court felt bound to give the jury distinct ruling, as a matter of law, of the meaning and effect, of the two papers A and B, introduced into the case.

"That as to the first paper A, dated March 7, 1833, it was only the expression of an opinion, and not a statement of a fact.

"That the paper B. was different, and was in itself the representation of a fact, and a statement that there was the quantity of lumber on the township therein stated, and that the jury would so regard it.

"That the paper was in the case, and from the proof (to which the Court called the attention of the jury) they would find whether it had been seen by defendant, and that they would take the Court's construction of its meaning and legal effect. That they would look particularly at Mitchell's deposition, as to what he says respecting the renewal of those instructions.

"That on the question, whether the plaintiff knew or had good reason to believe, that the representations in B were un-

true, that the plaintiff was bound to inform himself, and not to represent, unless he had good grounds for his representations. The Court then called the attention of the jury to the evidence on this point.

"The Court further instructed the jury, that the representations must have been made for the purpose of producing the result. Was the defendant induced by these representations to give this note? If the plaintiff made representations which he knew to be false, or had not good reasons to believe to be true, and defendant was at all influenced by them to sign the note, the defence of fraud is made out. That it was not necessary, that defendant should have been solely induced by them, or that they should have been the principal inducement, if they had influenced him at all, so that without them he would not have given the note; it is sufficient, if it was not more than one in one hundred of the inducements. That the plaintiff was not responsible for the representations of Shaw's report made by Mitchell to Emerson, but as to the representations made by Goss and Mitchell, or either, the jury would determine whether they made such representations as the agents of the plaintiff, or were acting therein for themselves. If acting on their own behalf in those representations, and not by his authority, the plaintiff was not liable for their doings; if as agents in such representations, he must be held responsible for all those statements and representations, and that Mitchell and Goss might be regarded as agents of the plaintiff in the sale, although they might each have been in fact purchasers of one-third, if the evidence satisfied them that such was the fact; and in commenting upon the facts the Judge remarked, that as Emerson was surety for both Goss and Mitchell, the jury would naturally ask themselves, whether it was to be inferred therefrom that he inquired of them as to the grounds of their confidence of the value and quality of the town, and was told by them; that the plaintiff had contended, that so far as this note was in question, that unless Mitchell could defend against it, the defendant, who had signed as surety, could not. But the Court instructed the jury,

that although Mitchell, Goss and Emerson, were in reality the purchasers of $\frac{1}{3}$ each, and Emerson, a surety for Mitchell, for his $\frac{1}{3}$ on this note; yet, as between plaintiff and defendant, they must regard the defendant as purchaser of the whole township and the arrangements of Goss, Mitchell and Emerson were of no importance to the plaintiff, excepting as throwing light upon the question, from whom the representations came; that they might regard this note as if it read, Emerson, principal, as well as Mitchell, and if the jury was satisfied that the defendant was induced to sign the note by false and fraudulent representations of the plaintiff, as before explained, made by him or Goss and Mitchell acting therein as his agents, it was a defence, although Mitchell might not have been defrauded and had no defence, and had had the one third, and realized therefrom more than he gave for it, in this purchase. If the jury found, under these instructions, fraud, they would look to see if any damage accrued to the defendant therefrom. That if the jury were satisfied, notwithstanding the fraud, the defendant had not been a loser thereby, they would return a verdict for the plaintiff; that if the defendant had lost by the fraud of the plaintiff, the whole amount of the note in suit, their verdict must be for the defendant, but if his loss had been for a part only of this note, they would deduct such part and return a verdict for the balance.

"The verdict was for the defendant. To which rulings, instructions, admissions and exclusions the plaintiff's counsel excepted."

There was also a motion filed to set aside the verdict as against the evidence, and the whole evidence was reported on that motion.

E. F. Hodges, for the plaintiff.

This is an action upon a note given in the purchase of a township of timber land, by the defendant and Mitchell and Goss, in thirds. This note, signed by Mitchell, as principal, and Emerson, as surety, was given for the third purchased by Mitchell. In the purchase, Emerson took the deed of the whole land and gave bonds to Mitchell and Goss, to deed

them their thirds upon payment of the notes signed by him in the purchase.

The defence offered by the defendant is fraud, to prove which the representations made by the plaintiff of the amount of timber on the township were shown.

I. The plaintiff insists, that the charge of the Court is erroneous, as it touches the relations of the parties to the contract and each other. There are three theories to be adduced from the charge upon this subject.

1. That the Court left it for the jury to say, whether the defendant purchased his third of the land, induced by the false representations of the plaintiff, and if so, it would be a defence.

This is error, for the representations do not concern or touch the consideration of the contract sued. The defendant may have received an injury in some previous and other negotiation, but it could not be offered here as a defence or a set-off.

2. The second theory is, that the Court left the jury to find whether the defendant signed as surety, induced by like representations; and instructed them, that it would be a defence, if found in the affirmative. This is error, for the representations proved only touch the value of the property conveyed and not the credit given to the principal, and the Court should not have left it for the jury to presume from this that the defendant was induced to insure Mitchell's note by such representations.

Again, the Court took this view of the charge from the jury when they told them "they might read the note as if it read Emerson, principal, as well as Mitchell."

Again, Emerson took the property as security. The Court leave us to assume that Mitchell had sold the third, for which this note was given, and received for it more than he gave. Now Emerson, as holder of the property, is the trustee for the plaintiff, and if he allows Mitchell to dispose of it, to an amount sufficient to pay the notes, he is estopped from saying he has been defrauded and urging this defence.

Lastly. The Court tell the jury to assess damages. What

damages could the surety have suffered if Mitchell sold for more than he gave?

3. The third theory is, the Court charge that the defendant purchased the whole land, and paid for it in Mitchell's note, which he signs as surety; he is now at liberty to defend against his signature, provided it was obtained by these representations.

The answer to this theory is this: —

The facts are not so. The defendant himself makes proof in showing the consideration of the note, that the land was purchased in thirds, and though Emerson took the deed, he gave bonds to the others, and the whole transaction was conducted by the plaintiff as a sale to the three.

II. The plaintiff again contends, that the court erred in their ruling, respecting the fraud, and insists the jury should have been left to decide, whether the plaintiff knew the representations were false or had a false intent.

In support of this, the plaintiff calls the attention of the Court to the following voluminous list of authorities. *Kidney* v. *Stoddard*, 7 Metc. 252; *Lobdell* v. *Baker*, 1 Metc. 201; *Tryon* v. *Whitmarsh*, 1 Metc. 1; *Dobell* v. *Stevens*, 3 B. & C. 623; *Baldwin* v. *Whittier*, 4 Shepl. 30; *Pothill* v. *Walker*, 5 B. & Ad. 114; *Freeman* v. *Baker*, 7 B. & Ad. 196; *Humphrey* v. *Pratt*, cited in 48 E. C. L. R. 828; *Haycraft* v. *Creasy*, 2 East, 92; *Moens* v. *Heyworth*, 10 Mee. & W. 147; *Cornfoot* v. *Fowke*, 6 Mee. & W. 358; *Taylor* v. *Ashton*, 11 Mee. & W. 401; *Ormrod* v. *Huth*, 14 Mee. & W. 651; *McDonald* v. *Trafton*, 3 Shepl. 227; *Wilson* v. *Fuller*, 3 Ad. & El. 830, N. S.; *Shrewsbury* v. *Blount*, 2 M. & G. 507; *Holbrook* v. *Burt*, 22 Pick. 554; *Stone* v. *Denny*, 4 Metc. 151; *Ames* v. *Millward*, 8 Taunt. 637; *Paisley* v. *Freeman*, 3 T. R. 60; *Corbett* v. *Brown*, 8 Bing. 33; *Linsey* v. *Selby*, 2 Ld. Ray. 1118; *Foster* v. *Charles*, 6 Bing. 396; *Adamson* v. *Jarvis*, 4 Bing. 66; *Medina* v. *Stoughton*, 1 Salk. 210; *Page* v. *Burt*, 2 Metc. 371; *Rawlins* v. *Bell*, 1 M. G. & S. 951; *McCobb* v. *Richardson*, 24 Maine R. 82; *Allen* v. *Addington*, 7 Wend. 9; *Upton* v. *Vail*, 6 Johns. R. 181; *Ashlen* v. *White*, 1 Holt. 387.

III. The plaintiff then complains further, that the Court erred respecting paper B.

1. The Court should not presume to construe it, but should have left it to the jury. 1 Greenl. Ev. p. 400; 5 B. & Ald. 34; *Corbett* v. *Brown*, 8 Bing. 33; *Rainbow* v. *Bishop*, 7 Carr & P. 591; *Power* v. *Burham*, 7 Carr & P. 376; 10 Mee. & W. 147; 1 Stark. Ev. 427.

2. The Court did not construe the paper correctly. Inasmuch as the subject matter, history and language of the contract forbid such an interpretation. *Page* v. *Bent*, 2 Metc. 370; *Tryon* v. *Whitmarsh*, 1 Metc. p. 1; *McCobb* v. *Richardson*, 24 Maine R. 85; *Haycraft* v. *Creasy*, 2 East, 92.

IV. The plaintiff objects to the introduction of improper and exclusion of competent testimony.

1. Coffin's deposition and papers A, B, C and D, annexed, are subjects of objection.

B and D, are not public documents and should have been annexed in the original.

A, is a deed from the State to the plaintiff and by presumption of law is in the hands of the plaintiff. The plaintiff, then, should have been notified to produce the original document in order to lay the foundation of secondary evidence. *Kent* v. *Weld*, 2 Fairf. 459; *Queen's Case*, 2 Brod. & Bing. 288.

Paper C, is inadmissible as a copy and as being extracts and and not the whole document. *Queen's Case*, 2 Brod. & Bing. 284; *Rex* v. *Cleeves*, 4 C. & P. 221; *Dennis* v. *Barber*, 6 Serg. & Rawle, 420.

2. The exclusion of parts of the deposition and parts of particular interrogatories and answers. *Ives* v. *Bartholemew*, 9 Conn. R. 109; *Earl of Bathurst's case*, 5 Mod. Rep. 9; *Carver* v. *Tracy*, 3 Johns. Rep. 427; *Fenner* v. *Lewis*, 10 Johns. R. 38; *Credit* v. *Brown*, 10 Johns. R. 365; *Lawrence* v. *Ocean Ins. Co.*, 11 Johns. R. 261; 9 Johns. R. 141; 3 Salk. 154; 3 Ball. & Beat. 386; 21 Pick. 243; 2 Greenl. R. 216; Saund. Ev. 45; Gilb. Ev. 50, 51; 3 Cow. Phil. notes, 926; Phil. Ev. 359; 18 Maine R. 175; *Hewit* v. *Piggott*, 5 C. & P. 75; 2 C. & P. 569; *Smith* v. *Bland*, Ry. & M. 257;

2 Doug. 788; *King* v. *Clewes*, 4 C. & P. 221; *Randle* v. *Blackburn*, 5 Taunt. 245; *Thompson* v. *Austin*, 2 D. & R. 358; 15 East, 103; 11 Mass. R. 6—10; *King* v. *Day*, 7 C. & P. 705; *Holland* v. *Rawlings*, 7 C. & P. 38; *Watson* v. *Moore*, 1 C. & K. 626; 2 B. & P. 548; Gres. Eq. Ev. 13, 325; *Catt* v. *Howard*, 3 Stark. R. 3; *Kelsey* v. *Bush*, 2 Hill's R. 440.

3. The answer of Goss, that the representations of plaintiff induced him to purchase. This is objected to as being foreign matter.

4. Paper E, annexed to Mitchell's deposition, is objected to as being a copy of an original and as being intrinsically inadmissible.

5. The copy of a decree in the case of *Warren & als.* v. *Emerson & als.* is objected to. We say the bill and answers should have accompanied it.

Evans and *Rowe*, argued for the defendant. No rescinding of the contract was necessary. The jury have found that the note was obtained by means of the fraudulent representations of the plaintiff, and the damages sustained by such representations, may be given in evidence in an action for the consideration money, in whole or in part. 2 Wend. 431; 3 Wend. 236; 8 Wend. 109; 22 Pick. 510; 14 Pick. 198; 3 N. H. Rep. 458; 5 Carr. & P. 343.

The verdict ought not to be set aside on account of any rulings of the presiding Judge upon the admission of evidence.

The copies were not put in to prove a title or to establish a contract, but merely as to collateral facts, where the same strictness is not necessary.

The copy of the deed, paper A, annexed to Coffin's deposition, was put in merely to show, that the land was sold at a certain time. This might have been done by parol. 17 Mass. R. 165; 7 Pick. 10; 13 Pick. 523; 14 Pick. 133; 15 Pick. 185; 1 Greenl. Ev. 97, note. Besides, the statute provides, that a foreign deposition, as was that of the land agent of

Massachusetts, may be rejected or admitted at the discretion of the Court.

Papers B and D, annexed to Coffin's deposition, are copies of public papers, belonging to the land office, and cannot be taken therefrom. A copy is the best evidence to be had and is admissible. 1 Greenl. Ev. 533; Gresley on Ev. 115.

Paper C, containing all the letter relating to that subject, though not the whole letter, was not called for by us, but was put in by the deponent as part of his answer. All that was contained in them might have been proved by parol, by the testimony of the deponent. 4 Metc. 459; 1 C. M. & R. 277; 3 Watts & S. 395; 2 Stevens' N. P. 1517; 9 Cowen, 115; 6 Peters, 352.

The ruling in relation to Hammatt's deposition was correct. Every thing pertinent to the portion read, or tending to explain or elucidate it, was suffered to be read in evidence. There is no more reason for permitting distinct and independent facts to be given in evidence by the witness or deponent, made at the time of the conversation called for, than if made at any other time. In the testimony of a witness, the whole must be stated in order to see, whether it does or does not qualify. But in a deposition, where the whole is seen, nothing, but what relates to the subject of inquiry, is admissible. Greenl. Ev. § 201, 218; Gresley on Ev. 13; 13 Ves. 53.

The jury found that Goss and Mitchell were the agents of the plaintiff, and their statements to Emerson in that character were admissible in evidence, whether communicated to the plaintiff or not. The letters written were properly admitted to show the whole business, and the way in which the representations of the plaintiff or his agents induced the defendant to make the purchase. Every thing said or written, pertinent to the inquiry, was admissible. 5 Bing. N. C. 97; 2 Meeson & W. 532; 4 M. & W. 337; 3 Sumn. 1.

There is no ambiguity in the charge of the Judge, respecting the right of the defendant to set up fraud as a defence. The plaintiff contended, that it could not be done, because the defendant was a surety on the note. The instruction was,

that if the contract should be found to have been fraudulent, and the suretyship occasioned by the fraud, that the mode of signing made no difference, and the instruction is warranted by authority as well as principle. Chitty on Con. 528; 3 B. & Cr. 605; 5 Bing. N. C. 142; 2 Kent, 483. But if there had been ambiguity in the charge, the only remedy was by requesting instructions free from the ambiguity.

It can make no difference to the person injured by the fraudulent representations, whether the person making them knew them to be false or not. And he who makes the representations is equally liable for the consequences, whether he was entirely ignorant on the subject, and knew not that they were true or false, or knew them to be false. 1 Story's Eq. § 192; 2 Kent, commencement of c. 39; 3 Campb. 506; 18 Pick. 109; 1 Metc. 201; 4 Metc. 151; 4 Bing. 66; 3 Shepl. 227.

Where the representation relied on is in writing, it is for the Court to give a construction to it. The construction given to the paper designated by letter B, was right. It was merely that an offer to guaranty to a certain amount, was a representation of the existence of such fact. 3 Campb. 462; 4 Campb. 144; 2 Pick. 214; 4 C. & P. 45; 13 Wend. 277.

Kent, for the plaintiff, replied.

The opinion of the Court was afterwards drawn up by

SHEPLEY J. — This suit is upon a promissory note, made by Hazen Mitchell, as principal, and the defendant, as surety, and received with others by the testator in part payment for a township of land, at that time conveyed by the testator to the defendant. The other notes have been paid. The defence is a partial failure of the consideration paid for the land, not arising out of a partial failure of the title, but out of misrepresentations, respecting the quantity of standing timber trees then upon it.

1. The first question presented is, whether the defendant can be permitted to make such a defence to this note. The law, as most generally administered in this country, allows such

a defence to be made to a bill or note received in payment for personal property sold, while it remains in the hands of the seller, or in the hands of one having no superior rights.

A partial failure of the title to real estate conveyed, has not been permitted to operate as a defence *pro tanto* to a note received in payment for it. *Lloyd* v. *Jewell*, 1 Greenl. 352; *Howard* v. *Witham*, 2 Greenl. 390; *Wentworth* v. *Goodwin*, 21 Maine R. 150. In such cases the parties have been considered as entitled to that remedy, which was secured to them by their own agreements in the covenants contained in their deeds, as best suited to the fair adjustment of their rights.

When the purchaser obtains a perfect title to the whole estate, and yet finds the estate to be different, from what it was fraudulently represented to be, he can have no remedy upon any covenants usually found in conveyances. Not having contemplated such an event he could not be expected to have provided a remedy for it by any covenant or special contract. He must rely upon the remedy which the law may provide. That he finds in an action on the case, suited to enable him to recover damages for the injury thereby occasioned. Should he be allowed to prove the amount of such damage and to have it applied to reduce the amount to be recovered in a suit upon the note, the principles of law and rules of evidence applicable to an action on the case, would guide the Court and jury in making the estimate. While the note is in the hands of the payee or of one having no superior claims, the rights of the parties may be as well and as fully determined in one, as in two suits. Circuity of action may thereby be avoided, and should the vendor prove to be insolvent, the rights of the injured vendee may be better secured.

2. The second question presented is, whether the relations of the parties to the sale and purchase and their rights arising out of the form of this note, presenting the defendant as a surety for Mitchell, were correctly presented to the jury by the instructions.

It appears, that Goss and Mitchell were desirous of being

interested in the purchase, and that the testator required, that the township should be sold to a purchaser or purchasers responsible for the amount of the purchase money; and that they therefore applied to the defendant to make the purchase, under an agreement between them and him, that he should convey to each of them, one third part of the township upon payment by each of one third part of the purchase money. If this arrangement between them was communicated to the testator, he does not appear to have been a party to it, or to have had any connexion with it. The defendant became the purchaser of the whole township; and he paid or secured the whole purchase money. He derived the means to do so from Mitchell and Goss in proportion to the share, which he obliged himself by bond to convey to each of them. The relation of principal and surety between the makers of this note, received by the testator in part payment, did not alter or affect the relations or rights existing between him and the defendant as the seller and purchaser of the estate. This would have been quite apparent, if there had been no agreement, that Mitchell should become interested in the purchase. If in such case, he had paid the amount of the note to the defendant, the right of the defendant to prove, that he had been injured by the fraudulent representations of the testator, who was not therefore entitled to recover it of him, would not thereby be affected. The mere form of the note could therefore present no obstacle to the introduction of the defence. Nor could the relations between the defendant and Mitchell and Goss. The testator could not introduce an agreement or any subsequent dealings or proceedings between others, with which he had no connexion, for any other purpose than to prove, that the defendant had made such a disposition of the estate, that he had not suffered any, or if any, not so great loss, as he had alleged. If the defendant made such a disposition of the share, which he had obliged himself to convey to Mitchell, that he suffered no loss, that fact might be properly shown to disprove or to diminish the damages claimed. Mitchell being, according to the testimony, neither in fact, nor by intendment of law, a

purchaser from the testator, but only entitled upon certain conditions to become a purchaser from the defendant, his loss or freedom from loss can have no other effect upon the rights of the seller or the purchaser. If he had paid his share of the purchase money in full to the defendant, and had sustained a serious loss, that fact could not have been introduced by the defendant to enhance the damages claimed by him. It would still continue to be true, that he had suffered no loss on account of that share. The plaintiff does not appear to have been aggrieved by the instructions on these points.

3. The next question presented by the exceptions is, whether the jury were correctly instructed, that the fraud might be considered as proved, if they were satisfied, "that representations were made by him that he knew were not true, or that he had not good reason to believe were true."

The common law requires good faith in every business transaction, and does not allow one to intentionally deceive another by false representations or by concealments. But it does not make the vendor responsible in damages for every unauthorized, erroneous, or false representation made to the vendee, although it may have been injurious. The representation must have been false, have been fraudulently made, and have occasioned damage. *Fraus* includes the idea of intentional deception. When one has made a false representation, knowing it to be false, the law infers, that he did so with an intention to deceive. And when one has made a representation positively, or professing to speak as of his own knowledge, without having any knowledge on the subject, the intentional falsehood is disclosed, and the intention to deceive is also inferred. The action to recover damages for such a representation is in law denominated an action of deceit, and the declaration should allege, that the representation was made with an intention to deceive, or that it was falsely and fraudulently made, which is equivalent to it. That a false representation or concealment, made or withheld with an intention to deceive, is an essential ingredient in the maintenance of such an action, is most clearly established by the decided cases. In

the leading one of *Pasley* v. *Freeman*, 3 T. R. 51, Mr. Justice Buller says, "that knowledge of the falsehood of the thing asserted constitutes fraud." And Mr. Justice Ashhurst says, "the *quo animo* is a great part of the gist of the action." The whole current of decisions in England, since that time, runs in the same channel with an apparent diversion occasionally, when some unlawful act, express or implied warranty, guaranty, or agency, becomes an ingredient in the case and affects the principle upon which the decision has been made. In such divergent cases the influence of another element upon the decision is not always very fully or clearly stated. It is true, that Lord Kenyon stated, in the case of *Haycraft* v. *Creasy*, 2 East, 104, that "the intent was immaterial, if the act done were injurious to another," but he delivered a dissenting opinion and the decision made by other members of the court repudiates such a doctrine. Mr. Justice Lawrence stated, in order to support the action, the representation must be made *malo animo*." Mr. Justice Le Blanc said, "by fraud I understand an intention to deceive." In the case of *Polhill* v. *Walter*, 3 B. & Ad. 114, Lord Tenterden appears to have in some degree yielded assent to a position taken in argument, that it was "enough if a representation is made, which the party making it knows to be untrue, and which is intended by him, or which, from the mode in which it is made, is calculated to induce another to act on the faith of it in such a way, as that he may incur damage, and that damage is actually incurred." The case however does not appear to have been decided upon the latter clause of that position, but upon the principle, upon which the cases of *Foster* v. *Charles*, 6 Bing. 396, and S. C. 7 Bing. 105, and of *Corbett* v. *Brown*, 8 Bing. 33, were decided. His lordship considered a wilful falsehood to be essential to the maintenance of the action, but it does not appear to have occurred to him at that time, that when one makes a representation, which he knows to be untrue, that the law infers, that he did it with an intention to deceive. In the case of *Foster* v. *Charles*, as reported in 6 Bing. 396, Tindal C. J. said, "the law will infer an improper motive, if what the

defendant says is false within his own knowledge, and is the occasion of damage to the plaintiff." This explains his meaning, where he said in the same case, that he was not aware, that it was necessary to show the motive, which actuated the defendant, or that it could be material, what the motive was; that is, whether the motive for making a representation, known to be false, was to benefit himself or a third person, or what it was, could not be material; the improper motive or intention to deceive, the law would infer from proof, that a representation known to be false had been made. There is danger, that one may be misled by noticing the verdict of the jury in the same case, as reported in the 7 Bing. 105, and that the plaintiff had judgment upon it. The jury returned a verdict for the plaintiff, but added, "we consider there was no actual fraud on the part of the defendant, and that he had no fraudulent intention, although what he has done constituted a fraud in the legal acceptance of the term." The verdict was found under instructions, which were considered as explaining the *addenda.* These were, "that if the defendant made representations concerning Jacque, the tendency of which was to occasion loss to the plaintiff, knowing such representations to be false, and intending thereby to benefit himself, he was guilty of fraud in the common acceptation of the term; if he made such representations knowing them to be false, without proposing thereby any advantage to himself, but proposing, perhaps, to benefit a third person, he was guilty of fraud in the legal acceptation of the term." The jury appear to have had their attention called unnecessarily to the consideration, whether the representation was made from a motive of benefit to himself or to a third person. This was immaterial. Judgment was rendered upon the verdict upon the conclusion by the Court, that "the jury in finding that he had no intention to defraud, mean only, that he was not actuated by the baser motive of obtaining an advantage for himself," and that he was guilty of fraud by stating what he knew to be false. In the case of *Corbett* v. *Brown*, 8 Bing. 33, a new trial was granted on the principle, that

fraud or intentional deceit must be inferred from a representation known to be false, by him who made it.

The case of *Fuller* v. *Wilson*, 3 Ad. & El. N. S. was an action on the case alleging, that the defendant made false representations with an intention to deceive, injure and defraud. As it was presented on the first trial, it did not appear, that the defendant made personally any representations. It did appear, that her attorney, without any instructions from her, made false representations without knowing them to be false. Lord Denman, in his opinion, appears to have adopted a proposition contained in a dissenting opinion of Lord Abinger, C. B. delivered in the case of *Cornfoot* v. *Fowke*, 6 M. & W. 358, "that whether there was moral fraud or not, if the purchaser was actually deceived in his bargain, the law will relieve him from it." If such were the law, upon which actions on the case for deceit were to be decided, the only question would be, whether the purchaser was actually deceived by the false representations, without any regard to the consideration, whether the seller fully believed them to be true and made them without any intention to deceive. Such a doctrine cannot be admitted without making a great change in the well settled principles of law. That case was again tried, a special verdict was found, judgment was entered for the plaintiff in the Queen's Bench, and a final decision was made in the Exchequer Chamber, upon a writ of error. The facts, as stated in the special verdict, were in some respects different from those proved on the first trial. The judgment of the Queen's Bench was reversed. 3 Ad. & El. N. S. 68. In the case of *Evans* v. *Collins*, 5 Ad. & El. N. S. 804, Lord Denman, in delivering the opinion of the court, again exhibited doctrines similar to those, which he had advanced in the case of *Fuller* v. *Wilson*. The plaintiffs being sheriffs of London, handed a writ against one John Wright to their officer, Slowman, for service. Slowman, hearing of a person of that name, described him in a letter to the defendants, received by their clerk, who told Slowman, that the person described was the John Wright named in the writ. Slowman detained and imprisoned

him. As he proved to be a different man, Slowman, or plaintiffs as his principals, were obliged to pay him damages. Lord Denman said, "the sufferer is wholly free from blame, but the party, who caused his loss, though charged neither with fraud nor with negligence, must have been guilty of some fault, when he made a false representation." — "The allegation, that the defendant knew his representation to be false, is therefore immaterial." Upon this ground, the plaintiffs recovered in an action on the case for deceit. The essence of this doctrine is, that an injury occasioned by a false representation accompanied by "some fault," is sufficient to support such an action. The law of England on this subject does not appear to be so vague and unsatisfactory. The plaintiffs might have been entitled to recover in a proper action, upon the principle, that if one directs his servant to do an act supposed to be lawful, and the servant suffers damages in consequence of his obedience, he may call upon his master for indemnity upon an implied engagement to save him harmless.

The whole doctrine was elaborately examined in Massachusetts, in the case of *Stone* v. *Denny*, 4 Metc. 151. Mr. Justice Dewey, in his opinion says, "that now as formerly to charge a party in damages for a false representation not amounting to a warranty, it must appear that it was made with a fraudulent intent, or was a wilful falsehood." — "Such fraud will be inferred, when the party makes a representation, which he knows to be false, or as to which he has no information and no grounds for expressing his belief." — "So also if he positively affirms a fact as of his own knowledge and his affirmation is false, his representation is deemed fraudulent." The conclusion was, that the action "could only be maintained, when the false representation had been intentional on the part of the vendor, or what would be equally fraudulent in law, knowing that he was affirming as to the existence of a fact, about which he was in entire ignorance."

The law on this subject was examined in an opinion delivered by Savage C. J. in the case of *Allen* v. *Addington*, 7 Wend. 1, wherein he states, "it must therefore be considered

settled, both in England and in this State, that an action lies for a false recommendation of a third person, by which the plaintiff sustains damage, provided such recommendation be made with an intention to deceive and defraud the plaintiff." He states, that it is not necessary, that he should have intended to defraud the plaintiff in particular, if there be proof of a general intention to defraud.

In this State, the law in relation to this action was stated in the case of *McDonald* v. *Trafton*, 15 Maine R. 225, to be that "fraud in such cases consists in an intention to deceive. Where the evidence does not prove, that the party making the representation knew it to be untrue, the fraud can be established only by proof of a design to deceive by making statements, of which the party knows nothing." In the case of *Ingersoll* v. *Barker*, 21 Maine R. 474, the jury were to find, whether the defendant induced the plaintiff's agent to relinquish a lien by fraudulent representations. They were instructed, that they must be satisfied, that the property was obtained "by representations, which were false, known by him to be false, made with a design to deceive and obtain the property, and that the agent of the plaintiffs was thereby deceived." The instructions also stated, that if the defendant "made false representations and known to him to be false, the intention would be left to the jury, and intention to deceive would, as a matter of fact, be implied, unless there were facts and circumstances in the case to rebut such implication." In the opinion delivered by Whitman C. J. it was said, "we are unable to see wherein the rulings of the Judge, who presided at the trial of this cause, or his instructions to the jury were justly exceptionable. Fraud is almost always a matter of inference from circumstances. Direct proof of it can seldom be expected. Concealment and disguise are often essential ingredients in it. It consists in intention." Kent, speaking of the principle established by the case of *Pasley* v. *Freeman*, and by other English and American cases, says, "misrepresentation without design is not sufficient for an action." 2 Kent's Com. 490.

It is insisted by the counsel for the defendant, that a less

rigid rule is exhibited in the authorities cited by him. Story, in his commentaries on equity jurisprudence, § 193, says, "and even if the party innocently misrepresents a fact by mistake, it is equally conclusive ; for it operates as a surprise and imposition on the other party." His purpose was to speak of the principles of law, upon which relief might be obtained in equity, and he did not design to apply such a doctrine to a false representation made by a vendor. Nor would the cases cited by him in support of the proposition, authorize it. An innocent misrepresentation of a fact, inducing another to act upon it, may conclusively bind the party making it, in certain cases. This rule was admitted and applied in the case in equity of *Harding* v. *Randall,* 15 Maine R. 332. But the doctrine has never been applied to representations made by a vendor to a vendee.

By applying the doctrine, as herein asserted, to the instructions in this case, it will be perceived, that if one may make representations, "that he had not good reason to believe were true," without any intention to deceive ; the instructions cannot be considered as sufficiently guarded to prevent an erroneous conclusion. The jury would be authorized to determine whether the vendor had or had not good reason to believe that his representations were true. They may therefore have found, that he had not good reason to do so, because he was too credulous or careless to avoid being deceived by information obtained from others, by which no intelligent person in the exercise of common prudence, ought to have been deceived. Such a finding would be based upon the imprudence or carelessness of the vendor, and not upon any fraudulent purpose or intention to deceive. Although it may be highly improbable, that the verdict rests upon any such basis, yet, as the Court cannot by the means afforded, determine that it does not, injustice might be done, if judgment were rendered upon it.

4. A fourth question presented is, whether the instructions respecting the paper bearing date on March 20, 1833, subscribed by the testator and identified as paper B, were correct.

They were instructed, that it "was in itself the representation of a fact and a statement, that there was the quantity of lumber on the township therein stated." That paper authorized Mitchell and Goss to make sale of the township of land upon certain prescribed terms, and it contained the following clause. "I will guarantee, that there is 45,000,000 feet, (board measure) of pine timber on the township; and the purchaser may elect within thirty days of the purchase, to take it at a survey of all the standing pine timber at one dollar per thousand, or pay the said forty-five thousand dollars." This clause appears to have been designed to offer to the purchaser an election, to be made within thirty days after he had actually made the purchase for the sum of forty-five thousand dollars, to purchase at that price, or upon payment of one dollar per thousand feet for all the standing pine timber, to be ascertained by a survey. And to bind the seller after such an election to deduct the difference, in case a less quantity than forty-five millions should be found upon it, from the forty-five thousand dollars already secured to be paid. The owner of a township of land without having any personal knowledge or information, upon which he could safely rely, respecting the standing timber upon it, might be willing to make such a contract for the sale of it. The purchaser could not neglect for more than thirty days to make an election and have such survey made, and yet do it at any subsequent time, and then call upon the seller to make good the difference between the amount found upon it, and forty-five millions, and yet the same effect may be produced by regarding the guaranty as a positive representation, that there were in fact forty-five millions upon it. For if it were regarded as such a representation, its wilful falsity might be established by such a survey, and the purchaser, by an action founded upon such false representation, might obtain all the advantages, which he could have obtained by a compliance with the terms of the guaranty. And the result might be, that both parties would find themselves some years after the purchase and sale in the same position, as they would have been, had the election been made under the guaranty within the

thirty days. But such could not have been the intention of the parties. The seller could not have intended by that guaranty to assert, that there certainly were forty-five millions feet of standing timber upon the township, for the paper contemplates it as fact yet uncertain and yet to be ascertained by a survey, and that it might fall short of that quantity, and that the seller might be obliged on account of it to make a deduction from the price secured to be paid.

It can readily be perceived, that a person of the most delicate moral sense, might be willing to guaranty or warrant, an article to be of a certain quality, or an estate to contain a certain quantity of limestone, or of coal, or of pine timber upon it, and yet be wholly unwilling to assert the same to be a matter of fact. An agreement then, containing a guaranty does not necessarily include the idea or authorize the inference, that the person making it, knows the fact to be, as the guaranty stipulates, that it shall be for the foundation, upon which business is to be transacted. The document referred to in this case, is of that character, and the extent of the inference fairly deducible from it, is, that the person making it, so fully believed, that the fact would prove to be so, that he was willing to take a less sum for the land, if it should prove to be otherwise.

5. Several objections taken to the admission of testimony are still insisted upon, and it may be desirable to have them determined, that they may not arise again on a new trial.

The deed of a grantee of the State, cannot be considered as belonging to the archives of the State, and it cannot be proved, by a copy made by its land agent. The copy thus made and introduced, as annexed to the deposition of George W. Coffin, of the deed from the Commonwealth of Massachusetts to the testator, does not come within any rule authorizing its admission.

The contract made by the agents of the Commonwealth, to convey the township to Charles Thatcher, with an assignment of it made by Thatcher to Hammatt, appears to have been surrendered to the Commonwealth by Hammatt, and to have

become a paper belonging to its archives; and proof in such case might be a duly authenticated copy.

The letters addressed to a public officer in his official capacity, when received, become public documents to be proved in like manner. But extracts of portions of them cannot be received.

The letters from Hazen Mitchell to Josiah S. Little and to Cyrus Goss, and the letter from Goss to Mitchell could be legal evidence only upon the ground, that their contents were communicated to, and approved by Hammatt, or that they were written by his agents, acting within the scope of their authority, and their contents made known to the defendant as an inducement to purchase. There appears to have been some testimony tending to prove this, and authorizing their introduction; but the original letters only, could be thus introduced, without proof that they had been lost.

The copy of the decree of the Circuit Court of the United States, although not made in a case between these parties, was the only legal testimony to prove the fact, that the sale made by the defendant to Warren and Brown, had been annulled, and the consideration decreed to be restored.

The testimony of Cyrus Goss, detailing the representations made to the defendant by him, acting as the agent of Hammatt, appears to have been properly admitted. That portion of his testimony containing a statement of what induced the witness to purchase, should not have been admitted.

That part of the testimony of Amos M. Roberts, which states, what would have been considered a good township, should have been excluded. He could not properly be admitted to testify to matters of opinion, with certain exceptions not authorizing such testimony.

Another question is presented, not free from difficulty, respecting the admission of a portion and the exclusion of the residue, of a deposition of the plaintiff, taken and used in another court in a case between other parties.

The doubt is, whether the rule respecting admissions made in conversations or declarations, and proved by parol testimony,

be applicable; or the rule respecting admissions made in, and proved by bills and answers in chancery, letters, and other written documents.

When proof of the former kind, is introduced by parol testimony, it is by the more recent decisions limited to what was said or done at the same time, relative to the same subject. *Prince* v. *Samo*, 7 Ad. & El. 627; *Sturge* v. *Buchanan*, 10 *idem*, 598; *Garey* v. *Nicholson*, 24 Wend. 351; *Clark* v. *Smith*, 10 Conn. R. 1. If this rule be applicable, it appears to have been correctly applied.

When proof of the latter kind, is made by a document, the whole matter contained in it, becomes testimony in the case, for part cannot be received and a part excluded. 1 Stark. Ev. (ed. by Metc.) 282 to 289; *Lynch* v. *Clerke*, 3 Salk. 154; *Roe* v. *Ferrars*, 2 B. & P. 548, and note (a); *Lawrence* v. *Ocean Ins. Co.* 11 Johns. 260. It has been decided, that this rule does not apply to the day book of a party, containing entries of divers matters at different times. *Catt* v. *Howard*, 3 Stark. Rep. 3. Or to the records of proprietors of lands made at different adjournments of the same meeting. *Pike* v. *Dyke*, 2 Greenl. 213.

Its applicability to a deposition, presented as in this case, does not appear to have been decided in any case noticed. By the answer of eminent counsel, made to a question put by Mr. Justice Coleridge, in the case of *Prince* v. *Samo*, it appears, that the question now presented, was not known by them to have been at that time decided.

The deposition of the plaintiff, after it had been used in the cause for which it was taken, became a judicial document on the files of that court, from which it could not be removed without leave. When thus obtained, and offered in this Court, it could not be legally admitted in the character of a deposition. Nor could it be treated as such. No marks or erasures could properly be made upon it to indicate the portions admitted and excluded, for it must, as a judicial document of another tribunal, be preserved in the condition, in which it was presented. It could be received only after proof or admission of

the signature of the plaintiff and as a paper signed by him. If leave could not be obtained for its removal from the files of another court, the signature being proved, a duly authenticated copy might have been received. But to receive a part and to exclude a part of a copy of a document coming from the files or records of another court, would, it is believed, be an unauthorized course of proceeding.

Inquisitions, examinations, depositions, affidavits, and other written papers, when they have become proofs of its proceedings and are found remaining on the files of a judicial court, are judicial documents. 1 Stark. Ev. 212, 260.

In the case of *Benedict's adm'rs* v. *Nichols*, 1 Root's Rep. 434, it was decided, that the statements of one, made and reduced to the form of a written examination in the court of probate, could not be proved by parol testimony; and that the whole examination being produced, must be read and taken together. But in that case, the present question does not appear to have been decided, for the parts proposed to be received and excluded, contained statements respecting the same subject; and not, as in this case, respecting different subjects.

In the case of *Faunce* v. *Gray*, 21 Pick. 243, the deposition of the defendant, taken *in perpetuam*, was received in evidence, not as a deposition but as a written statement and confession made by him. It does not appear that any question was made, whether a part of it could be read and the residue excluded.

As the deposition of the plaintiff in this case, could not be received, or dealt with as such, or in that character, as it had become a judicial document, and could only be proved and received as such; the impression is, that the rule respecting the admission of judicial documents, became applicable to it; and that the whole document would become testimony in the case.

Exceptions sustained,
and new trial granted.

DAVID BUGBEE *& ux. versus* EDWARD SARGENT, *& al.*

Where an estate is devised on condition of, or subject to, the payment of a sum of money, or where the intention of the testator to make an estate, specifically devised, the fund for the payment of a legacy is clearly exhibited, such legacy is a charge upon the estate; and a court of equity may decree, that the person in whom the estate is vested shall execute the trust.

THIS was a bill in equity against two of the legatees and the heirs at law of Edward Sargent, deceased. The same suit was before the Court at an ealier state of the proceedings, on a demurrer to the bill. That case is reported in Vol. 23, 269.

After the demurrer was overruled, the legatees in their answers rejected the devises to them. The facts are stated in the opinions of the Court in that and in the present case.

Kelley, for the plaintiffs, considered that all the questions, which could arise in the present case, were decided when the parties were before the Court at the former hearing on the demurrer. 23 Maine R. 269.

Among other points, it was there decided, that after the rejection of the devise, that the land went to the heirs at law charged with a trust, and held for the payment of this legacy.

A. W. Paine, for the defendants, contended that by the will this legacy was not a charge upon the land devised, but on the devisee personally. A devise upon condition is not a charge upon the estate. *Temple* v. *Nelson*, 4 Metc. 584. The case cited from Paige, in the former case, and seemingly relied upon, it was said, was not in accordance with any other decision, and ought not to be considered as law. 3 Mason, 178; 5 Ves. 545. Had the devisee elected to have accepted the devise, there would have been no charge upon the land. But if ever a charge, it was so at the commencement. Whether a charge or not does not depend on any contingency happening afterwards.

The opinion of the Court was drawn up by

TENNEY J. — The testator, Edward Sargent, in his will, devised to his wife his homestead farm; and to his brother, Joseph Sargent, one half of another parcel of land; and the other

half of the same to his nephews Edward Sargent and Benjamin Sargent, two-thirds to the former, and one-third to the latter, conditioned that the brother should pay a legacy of $200, to his sister, Sarah Sargent; and that Edward and Benjamin should pay to Sarah Hasty, now Sarah Bugbee, one of the plaintiffs, a legacy of $300, in the same proportion, in which the devise was made, in manner in the will afterwards mentioned. It does not appear that the testator was the owner of any other real estate. He bequeathed to his wife all his personal property, including notes and accounts, conditioned, that she should pay all his honest debts, out of said property; to his sister, Sarah Sargent, the sum of $200, to be paid by his brother Joseph in one and two years from the time he should come into possession of the land devised to him; and to Sarah Hasty the sum of $300 dollars, to be paid two-thirds by Edward, and one-third by Benjamin Sargent, in one and two years from the time they should come into possession of the land severally devised to them.

This suit was brought by the said Sarah Bugbee and her husband against the devisees, the executrix and the heirs-at-law; and it was requested in the bill, that the said Edward and Benjamin, who it was stated had not taken possession of the land or accepted the devise, should elect to accept or reject the devise; if the former, that they might be decreed to execute the trust; if the latter, that the land charged with the legacy might be decreed to be sold, and the proceeds appropriated to the payment of the legacy. Upon a demurrer filed by some of the defendants, various questions were presented; and it was decided, that the legacy was a charge upon the estate devised to Edward and Benjamin Sargent, and that "the beneficial interest in it, which the plaintiffs have, while the legal title is in others, constitutes a trust;" and the demurrer was overruled. 23 Maine R. 269. The devisees, Edward and Benjamin, have since filed their further answers, declining to accept the devise.

On a hearing upon the bill and answers, the counsel for the defendants still deny that the land devised is charged with the

legacy; and insist that the decision is not supported by the authorities. No question is better settled than that which relates to the one presented. If any difficulty arises, it is whether the will shows an intention of the testator to charge the land devised, with the payment of the legacy. Real estate devised, is not as of course, charged with the payment of legacies. It is never charged, unless the testator intended it should be; and an intention must be expressly declared, or fairly and satisfactorily inferred, from the language and disposition of the will. *Lupton* v. *Lupton*, 2 Johns. Ch. 614. It is not believed that a case can be found, which conflicts with this rule. The case cited from the 4th of Metcalf, 584, is in no wise inconsistent with it; but on the contrary, in substance fully supports it. "The language and the disposition of the will," satisfied the Court, that the testator, in that case, did not intend to charge the *remainder* after the particular estate was determined, with the payment of the expenses incurred in the maintenance of the devisee of the life estate, a *non compos*, beyond the produce and profits thereof. Upon a construction of the will, they held, that it was the intention of the testator, to provide for the maintenance of the *non compos* son, but that the provision made was clearly expressed, and was not designed to be a charge upon the remainder, devised to another son upon condition, he not having accepted the devise.

The case at bar is very distinguishable from the one invoked. In this will the testator disposed of all his real estate and personal property. His intention was, that Sarah Hasty should have a legacy of $300. It was not to be paid by the executrix; such a construction is excluded by the terms of the will, and there was nothing from which she could make the payment as she had absolutely the devise of the farm on which the testator had lived; and all the personal property charged only with the debts. But the payment was to be made by Edward and Benjamin, and they were to have the devise only on the condition that this legacy should be paid. The testator manifestly intended that out of the value of that land, Sarah Hasty should first be entitled to the amount of the legacy; and the

devisees to the residue. It was not his design, that she should be deprived of the bounty which he provided, on the contingency that the nephews should decline to receive what he supposed for their benefit, and therefore, that it should pass to the heirs, who had received all that he chose to give them, or who he did not intend should participate in his property.

The heirs-at-law, having possession of the land, should make sale thereof, or so much as is necessary to raise the sum for the payment of the legacy to Sarah Bugbee, and

Decree accordingly.

ANDREW PIERCE *versus* WOODBRIDGE ODLIN.

Where a mortgage of lands, of which the mortgagor has no recorded title, is made (and duly recorded) to him who is the absolute owner thereof by the records, and the mortgagee assigns to another "all his right, title and interest in and to the within mortgaged premises," and this assignment is also recorded; such record must be regarded as notice of such assignment, to after attaching creditors and purchasers of the mortgagee.

And such mortgagee, making such assignment, and those claiming title under him, as after attaching creditors or purchasers, are estopped to deny the title of the assignee by virtue of the mortgage.

THIS case came before the Court on the following statement of facts: —

"Writ of entry dated May 22, A. D. 1844, to recover possession of a tract of land named in the writ, being one undivided half part of No. 33 and 34, on Rufus Gilmore's plan of the northwest of Bangor.

"*Demandant's title.* — John C. Dexter and wife, conveyed said lots No. 33 and 34, to Samuel Smith of Bangor, by deed of warranty, dated March 21st, 1835, recorded April 7th, 1835, in the Penobscot registry. On the 20th day of January, 1836, on a writ issued against said Smith, all the right, title and interest, which the said Smith had to any real estate in Penobscot county, was attached.

"The writ was duly entered and continued from term to term,

until the June Term, 1838, when judgment was rendered for the demandant, and execution issued and a levy was made on the land named in the writ, and also on the other undivided half part.

"*Tenant's title.* — The said Smith conveyed by deed of warranty, dated March 21, 1835, duly acknowledged and recorded, March 19, 1836, in the Penobscot registry, the whole of the said lots to one Taylor and Wm. H. Foster, in equal undivided moieties; the said Foster and Taylor conveyed each one undivided half of said lots, by separate deeds of warranty, in mortgage to secure certain notes named in the same to said Smith; the said Foster's deed, dated March 21, 1835, and duly acknowledged and recorded March 23, 1835, in Penobscot registry, with an assignment of said mortgage deed and notes from said Smith to one Wm. Hasey, Jr. duly acknowledged, and recorded April 17, 1835; and also an assignment of said deed and notes to the tenant by said Hasey, which was duly acknowledged and recorded in Penobscot registry, June 12, 1835, which assignment and conveyances are to be copied and made part of the case. Subsequently and on the 21st day of November, 1836, the said Foster conveyed his interest in the land, to one Patten, and said Patten conveyed the same to the tenant, by deed dated May 25, 1837, and recorded.

"The Court to give judgment for demandant or tenant on the foregoing statement.

"Wm. H. McCrillis, for tenant.

"Jas. S. Rowe, for demandant."

The assignment from Smith to Hasey, made on the back of the mortgage deed, and recorded on April 17, 1835, was in these words: —

"Know all men by these presents, that I, Samuel Smith within named, in consideration of one dollar to me paid by William Hasey, Jr., of Bangor, gentleman, the receipt whereof I do hereby acknowledge, do hereby assign, transfer and make over unto said Hasey, his executors, administrators and assigns, all the right, title and interest which I have in and to the with-

in mortgaged premises and also the notes in said mortgage described, with power to collect the same to his own use. In witness whereof, I have hereunto set my hand and seal, this fourteenth day of April, 1835. "Samuel Smith." [L. s.]

"Signed, sealed, and delivered in presence of,

"_____ _____".

There was no witness to this assignment.

Rowe, for the demandant, said that the land in controversy in this case is the other undivided half of the same lots, to recover which the suit was brought, *Pierce* v. *Taylor*, 10 Shepl. 246. The only difference in the cases is, that in the former the mortgage from Taylor to Smith, remained in Smith until the levy of the execution. In the present case, Smith had assigned the notes and mortgage from Foster to him, to Hasey, and Hasey to the tenant. He should rely on that case, until he heard what distinction was claimed for the tenant.

Kelley, for the tenant, said both parties claimed under Sam'l Smith, for the deed from Smith to Foster must be laid out of the case, as it was not recorded until after the attachment. We rely on the deed from Smith to Hasey and from him to the tenant. Smith's assignment, as it is called, is a valid deed to convey the land to Hasey. No particular form of words is necessary to convey lands. Here all Smith's right, title and interest in the "within mortgaged premises" are conveyed. 4 Mason, 45; 4 Kent, 461; 1 Mass. R. 219; 2 N. H. R. 402; 3 Johns. R. 484; *Frost* v. *Deering*, 21 Maine R. 156.

But if this is not to be considered as an absolute deed of conveyance of the land, still it must operate as an estoppel upon Smith, and all claiming under him as privies in estate, to deny that the land then belonged to Smith. Neither he, nor any one claiming under him, could ever afterwards claim any thing in the land against his assignee. 1 Story's Eq. p. 376; 16 Maine R. 146; 20 Maine R. 228; 21 Maine R. 130; 3 Pick. 52; 14 Pick. 374; 15 Pick. 82; 17 Mass. R. 249; 7 Conn. R. 214; 7 Greenl. 96.

Rowe, in reply: — This is a mere assignment of a personal interest, the notes and mortgage. It is not a conveyance of

the land to Hasey, but a mere passing over to him of the notes of Foster with Foster's mortgage. It was not the intention of either of the parties, that Smith should convey any estate or interest of his own, but merely that Foster's notes, with the security Foster gave, should be transferred to Hasey. And this is all which the language used authorizes.

The assignment of the mortgage by Smith was not witnessed. To convey land, a deed of it must be made, which is witnessed by at least one witness. Witnesses, or at least a witness, is one of the essential requisites. Stat. 1831, c. 36, § 1. And it is the same by the Rev. Stat. c. 91.

But if Smith is estopped to deny, that Foster had a good title to the land, there is no such estoppel upon his grantees.

The opinion of the Court was drawn up by

WHITMAN C. J. — The land demanded was set off to the plaintiff by levy on execution as the property of Samuel Smith, as whose it had been attached on the original writ in the suit, to satisfy the judgment on which the execution had issued. The attachment bears date Jan. 20, 1836. Before that time Smith had taken a mortgage of the premises in fee, and had assigned it to one Hasey, who had assigned the same to the tenant; so that the tenant had, before the attachment, acquired a good title to the premises demanded, against Smith, he being estopped to dispute the title he had thus been the means of making to the tenant; and Smith's privies in estate are also estopped. If he had, subsequent to these assignments, conveyed the premises to the plaintiff, he could not sustain a title, so acquired, against that of the tenant under the mortgage and assignments. The attachment and subsequent levy amount to nothing more than a statute mode of conveyance from Smith to the plaintiff. Either mode of conveyance must be subject to all prior liens created by the grantor and regularly apparent of record.

The decision in the case of *Pierce* v. *Taylor*, 23 Maine R. 246, cited by the plaintiff's counsel, as decisively in his favor, is very distinguishable from the case here. In that case Smith,

the debtor, had simply taken a mortgage from Taylor, the defendant, who, so far as appeared of record, at the time the attachment was made by the plaintiff, had no title. This did not divest Smith of any title he had, as apparent of record, at the time of the attachment, aside from that acquired under his mortgage. If by accepting the mortgage Smith would be estopped, as between him and Taylor, to dispute the title of the latter, still it was but an equitable estoppel, not arising from any express language of the former, importing a grant or conveyance from him. For such language only, was Smith's creditor bound to search the records in order to ascertain whether the title had passed out of him or not. He was not bound to look for the language of some third person, whose name he could have no previous knowledge of, to ascertain if he had conveyed to Smith in such a manner as to work an estoppel between him and Smith. Whereas if there were an express transfer, as in the case at bar, from Smith to a third person, and that apparent of record at the time the plaintiff made his attachment, he would be bound to notice it, and his levy could not defeat its operation. *Plaintiff nonsuit.*

PENOBSCOT BOOM CORPORATION *versus* DANIEL WILKINS.

As a general rule, where property has been attached by an officer and delivered to a third person, who has given an accountable receipt therefor, promising to re-deliver it on demand, the receipter may be discharged from his liability, by proof that the property, when attached, was not owned by the debtor, but by a third person into whose hands it has been delivered.

And if the attaching officer be under no liability to the creditor for the appropriation of the property attached to the payment of the debt, the receipter will be discharged on proof of that fact.

But if such receipter for property, in his promise given to the officer, admits that, "this receipt shall be conclusive evidence against me, as to the receipt of said property, its value and my liability under all circumstances, to said officer," he is estopped to deny that it was the property of the debtor; and the officer cannot set up, as a defence to an action against him by the creditor for refusing to deliver the property attached, to be taken on execution, that it did not belong to the debtor but to the receipter.

ACTION of the case against Wilkins, as former sheriff of the county, for the default of Fowles, his deputy, in not keeping personal property, attached on a writ in favor of the plaintiffs against Barzillai Brown, so as to be taken on execution.

On July 9, 1836, Fowles returned on the writ an attachment of one hundred thousand feet of pine boards. At the Oct. Term of the S. J. Court, 1839, the plaintiffs recovered judgment against Brown for $467,93, debt, and $95,87, costs of suit, took out their execution, and within thirty days after judgment had a legal demand made by an officer having the execution, upon Fowles for the property, who did not produce it.

At the trial of this action, before TENNEY J. it appeared, that when the property was attached Fowles did not remove it, but left it where it was, taking therefor the receipt of the defendant and Ira Wadleigh; that before the trial Fowles, for the consideration of fifty dollars, delivered up the receipt to Wadleigh, and he took his name and Brown's from it; and that Wadleigh was offered as a witness, to prove, that, at the time of the attachment, the property belonged to him, and not to Brown.

The presiding Judge ruled, that such evidence, if admitted, would not constitute a defence to the action. A default was then entered by consent, to be taken off, if the ruling was erroneous.

Wadleigh produced the receipt, which was in these words. "Penobscot, ss. July 9, 1836. Received of J. P. Fowles, deputy sheriff, one hundred thousand feet of merchantable pine boards valued at twelve hundred dollars, which is attached by said Fowles as the property of Barzillai Brown of Bangor, merchant, on the following described writ, viz. one in favor of the Penobscot Boom Corporation in said county, returnable to the court of common pleas next to be holden at Bangor, within and for the county of Penobscot, on the first Tuesday of October next, 1836. And we hereby (in consideration of one dollar paid to us by the said officer,) jointly and severally promise and agree to keep said property safely, and return the same to him or to his order or successor in

office, on demand, in like good order as at present, free of expense to the officer or creditor; and we further agree that a demand on any one of us for said property shall be binding on the whole.

"And we further agree that this receipt shall be conclusive evidence against us as to our receipt of said property, its value before mentioned, and our liability under all circumstances to said officer for the full sum above mentioned.

"_____

"_____"

J. Appleton and *D. T. Jewett*, for the defendant, said that the ground of defence was, that the defendant should have been permitted to show, that the property attached was not at that time the property of the debtor, but of another person.

The law is well established, as a general rule, that such evidence is admissible, whether the suit be by the plaintiff against the officer, or by the officer against a receipter. *Fuller* v. *Holden*, 4 Mass. R. 498; *Canada* v. *Southwick*, 16 Pick. 556; *Robinson* v. *Mansfield*, 13 Pick. 139; *Johns* v. *Church*, 12 Pick. 557; *Wallis* v. *Truesdell*, 6 Pick. 455; *Bursley* v. *Hamilton*, 15 Pick. 40.

It was said at the trial, that the defendant is estopped from setting up this defence, because Wadleigh, the owner of the property, signed the receipt to the officer. But if it would have been so in a suit by the officer against the receipter, it can be none in the case of the creditor against the sheriff. The creditor had nothing to do with the receipt. That is a matter entirely between the officer and the receipter. The creditor is neither a party or a privy to the receipt, or of the parties to it. *Johns* v. *Church*, 12 Pick. 557.

The evidence should have been admitted, even if the doctrine of estoppel applies, to show that the damages should be merely nominal. 11 Mass. R. 247; 2 Story's R. 292.

Kent and *McDonald*, for the plaintiffs, admitted, that the general rule was, that it was a good defence for the officer to show that the property did not belong to the debtor at the time it was attached. But they contended, that it was equally

well settled, that the receipter for property, who in the receipt had admitted that it was the property of the receipter, was estopped to deny it afterwards. As it respected the creditor, the officer and the receipter, it was the same as if the receipter had no claim; and he had none, and the defence necessarily failed. *Dewey* v. *Field*, 4 Metc. 381; *Sawyer* v. *Mason*, 19 Maine R. 49.

The opinion of the Court was drawn up by

SHEPLEY J. — This is an action on the case against the defendant, as former sheriff of this county, for the alleged default of J. P. Fowles, one of his deputies, respecting personal property, attached by him on July 9, 1836, on a writ in favor of the plaintiff, and against Barzillai Brown. Fowles returned upon the writ an attachment of one hundred thousand feet of pine boards as the property of the debtor, and took an accountable receipt therefor, signed by him and one Wadleigh, containing this clause. "And we further agree, that this receipt shall be conclusive evidence against us as to our receipt of said property, its value before mentioned, and our liability under all circumstances to said officer for the full sum above mentioned."

The plaintiff in that suit recovered judgment at the October term of this Court, in the year 1839, and placed the execution issued thereon in the hands of a deputy sheriff, who within thirty days after judgment, demanded of Fowles the property attached, and he neglected or refused to deliver it.

The defence presented is, that the property attached did not belong to the debtor, but was the property of Wadleigh, and of Joseph Smith. It has been decided, that an officer may exonerate himself by such proof. He is permitted to "prove, that he was guilty of no neglect, and that the plaintiff had sustained no injury by his non-feasance;" and to do this on the ground, that he would become a trespasser by seizing upon execution the property attached. *Fuller* v. *Holden*, 4 Mass. R. 498.

It has also been decided, that his bailee, who has given an

accountable receipt for the property, may be discharged by proof, that it was not owned by the debtor, but by a third person, into whose hands it has been delivered. For the reason "that the sheriff was not liable to an action for not levying upon these goods." *Learned* v. *Bryant*, 13 Mass. R. 224; *Fisher* v. *Bartlett*, 8 Greenl. 122.

The sheriff holds the property attached in his official character in trust for the person, who may be legally entitled to receive it, or to have it appropriated for his benefit. He is bound to conduct faithfully toward the creditor, and all others interested in the execution of that trust. If the creditor may legally avail himself of the property attached to pay his debt, the officer will be guilty of mis-feasance or non-feasance, if he deprive him of the means, by which that is to be accomplished in due course of law.

There are cases, in which his bailee is not permitted to make defence against an attaching officer by proof, that the debtor did not own the property. And if the officer were not then liable to the creditor or owner for the amount, which he might recover of his bailee, he would be enabled to cast off the character of official trustee, and to derive a personal benefit from the property thus attached and recovered. This the law will not permit him to do.

In this case the deputy of the defendant surrendered to his bailees their accountable receipt, for a valuable consideration paid to him. The defendant can therefore be exonerated from his liability by proof, that those bailees could have successfully resisted a suit brought by his deputy against them, to recover the value of the property attached, or so much thereof as would satisfy the claim of the creditor.

The case states, that about one-fourth part of that property belonged to Smith. But there is no proof, that he ever asserted his right to it, or that he ever received it or its proceeds. The receipters could not upon this proof make any valid defence against a recovery for the value of it.

The other three-fourths, according to the proof, were the property of Wadleigh, who receipted for it with the debtor.

When the owner of property admits in his written stipulation to account for it, that it is the property of the debtor, he is estopped to deny it. *Wallis* v. *Truesdell*, 6 Pick. 455; *Johns* v. *Church*, 12 *ib.* 557; *Robinson* v. *Mansfield*, 13 *ib.* 139; *Bursley* v. *Hamilton*, 15 *ib.* 40; *Canada* v. *Southwick*, 16 *ib.* 556; *Dewey* v. *Field*, 4 Metc. 381; *Sawyer* v. *Mason*, 19 Maine R. 49; *Dezell* v. *Odell*, 3 Hill, 216.

It has been asserted that the case of *Johns* v. *Church*, is opposed to this doctrine. The receipter in that case, was not held to be estopped by such an admission, because he had delivered the property and discharged himself from his obligation. The Court held, "that the estoppel should not extend beyond the terms and duration of the contract," thereby admitting it to be binding to that extent. And the same Court so considered in the case of *Robinson* v. *Mansfield*. Nor is the case of *Lathrop* v. *Cock*, 14 Maine R. 414, opposed to this doctrine. The receipter was not held to be estopped in that case to prove, that he owned the property, because his stipulation contained no words admitting the property to be in the debtor or in any other person.

In this case the receipt not only states, that it was attached as the property of the debtor, but the receipters therein agree, that it shall be conclusive evidence of their liability to the officer for the value of it under all circumstances. It is said that this could not have been the intention of the parties, for the receipters would then be liable to pay the amount to the officer, if the plaintiff failed to recover judgment, or to place an execution issued thereon in the hands of an officer within thirty days thereafter. The true meaning undoubtedly was, that they should be liable to the officer under all circumstances, in which he would be liable to others. It would seem to have been the design, that Wadleigh should waive his rights to the property so far, as to allow it to be used by the officer to secure the payment of that debt. The last clause of the receipt does not admit of any other rational interpretation.

Under such circumstances the deputy of the defendant could not show, that the plaintiff had not been injured by his conduct, nor could he be justified in neglecting to produce the property

attached, or so much of it as would be sufficient to satisfy the plaintiff's demands.

Judgment on the default.

THE INHABITANTS OF BANGOR *versus* THE INHABITANTS OF BRUNSWICK.

At the trial of an action between two towns wherein the place of settlement of a pauper is the subject of controversy, the declarations of the pauper respecting his intention, in going from one place to another, made days before he left, and unaccompanied by any acts, are not admissible in evidence.

On motions to set aside a verdict on the ground that it was against the evidence at the trial, and also on the ground of the discovery of new and material evidence since the trial, it is sufficient to authorize the granting of a new trial, if the Court are satisfied, that the facts of the case were not fully understood at the trial.

THE action was brought to recover the expenses incurred in the support of one Jones, alleged to have had a legal settlement in Brunswick.

This case came before the Court on a motion to set aside the verdict, because it was against the evidence given at the trial, and on another motion, subsequently filed, to set aside the verdict on account of the discovery of new and material evidence first known to the defendants since the trial. The report of the evidence at the trial, was agreed to be correct by the counsel, and certified to be so by the presiding Judge.

No question of law was raised, on the argument, by the counsel for the respective parties.

J. A. Poor, for the defendants.

Wakefield, for the plaintiffs.

The opinion of the Court was drawn up by

TENNEY J. — It is insisted by the defendants, that the verdict against them in this action for the recovery of the value of supplies, furnished by the plaintiffs to one William S. Jones, who was alleged to have his legal settlement in the town of

Brunswick, should be set aside on the ground that it was against the evidence in the case. On the trial of another action between the same parties, for further supplies for the same pauper, a verdict has been returned for the defendants. From the year 1834 to the year 1840, a period of more than five years, the residence of Jones had generally been in Bangor, during which time it was not shown that he received any aid as a pauper. In the summer of 1837, he went to Boston and other places in Massachusetts, and returned, the early part of September of the same year. Whether he left with the intention of residing elsewhere, without any design, at the time, of returning to Bangor, or whether he went for the purpose of obtaining more profitable or desirable employment, with the expectation to return, was a principal question at both trials. At the former, several witnesses testified, that he spoke of leaving Bangor, and declared his intention not to return. Seaman Foster said, that some time before Jones left, in the summer of 1837, he talked of going; said he should get employment as a carrier of newspapers, which his brother was printing in Boston, and repeatedly declared that he should not come back; and that "he went away in pursuance of this arrangement." According to the testimony of Wm. H. Vinton, when Jones went away, in 1837, he said he wished to better his condition and get employment; — intended to go to Boston and carry newspapers and not return. He went in the steam boat, and Mr. Garnsey gave him his passage. The declarations made by Jones to the other witnesses, touching his intentions in leaving Bangor, were made at times previous to that when he left, were unaccompanied by any acts, and might have been uttered with a very different design, from that which influenced him, when he actually took his departure.

The intentions of Jones, which he expressed to Foster were also previous to the time, when he left and were not a part of the *res gestae.* When the witness speaks of his going away, "in pursuance of this arrangement," we do not understand, that any thing was said manifesting any intention of returning

or the contrary, but that he went away as he said before, he should do.

It may perhaps have been reasonably inferred, that the declarations of Jones made to Vinton, were at the time, that he was leaving Bangor in the steamboat for Boston, if there were nothing in explanation, beyond what appears in the report, of the testimony in the trial of the first action. But in his subsequent examination he testified, that "*not long* before he went away, *a week or three or four days*, he said there was a theatrical company here, that went away about that time, and he said they promised him employment in Boston, in tending the drop scene; and if he did not get that chance, he should go west, where his brother was, and said he should not come back again." It did not appear that he had more than one conversation with Jones on the subject of his leaving Bangor. This was not at the time when he was leaving and could have at most only a remote bearing upon the question at issue.

Opposed to this evidence is the express testimony of the pauper himself, who best knew his motives, that he did not leave Bangor with the intention of not returning, but for the purpose of getting work; and if he was not successful in that, it was his design to return; that he never abandoned his residence in Bangor, or left it, to go away elsewhere to reside. It appeared also that his name was upon the list of voters of Bangor at the annual meeting in September, 1837; he voted there, and his name was checked on the list. At the last trial, it appeared that the pauper's name was added to the list in 1837, after it was made out, and that it must have been inserted upon examination.

From the whole evidence before us, we are satisfied, that the facts of the case were not fully understood at the trial, and that they should be submitted to another jury.

New trial granted.

JOHN BARKER, JR. *versus* JOHN E. HESSELTINE.

Where a lot of unimproved land is taxed as the "*real estate of a non-resident proprietor whose name is unknown*," described in the assessment only as a certain lot on a certain plan of lots in the town, and is advertised and sold as such, for the purpose of obtaining payment of the tax, when in fact, at the time of the assessment and long before and afterwards, the owner of the land, deriving his title under a deed of the lot duly recorded, resided in the same town wherein the lot of land is situated — such sale is illegal and void, although the collector conformed in all respects in making the sale to the provisions of law.

WRIT OF ENTRY, demanding an undivided half of lot No. 101, on Holland's plan of lots in Bangor. The demandant proved title to that lot in himself, by a deed dated Jan. 16, 1833, and immediately recorded. On April 29, 1833, he conveyed one undivided half to J. G. Moody, and this deed was duly recorded. The lot then was, and still is, unimproved land. The demandant during the whole of the year 1833, and ever since, has been an inhabitant of Bangor.

The tenant claimed title to the demanded premises under a sale to him by Newell Bean, collector of taxes of Bangor, for the year 1833, for the purpose of obtaining payment of the taxes assessed thereon by the assessors of Bangor for that year. The collector's deed was introduced, as was also proof for the purpose of showing the legality of the proceedings of the assessors in making the tax, and of the collector in making the sale.

In the assessments, under the general description of — "An inventory of the real estate of non-resident proprietors in Bangor, A. D. 1833, and assessments thereon," this lot was thus taxed.

"Names, No. of lot, Description of property, No. acres, Value, Tax,
"Unknown. 101. Holland's plan. 70. $560. $2,63."

In the notices of sale, return to the treasurer and deed, the description was similar to that in the assessment.

Moody, for the demandant, among other objections, contended, that the stat. 1821, c. 116, § 30, the only authority at that time for the sale, did not permit the sale of land for the

payment of taxes thereon, when the owner of the land resided in the town in which the land was situated. In this case the land was taxed as property the owner of which was unknown, when the proprietor lived in the same town, and where the records shew him to be the owner. It was the unimproved land of a resident in Bangor, and could not be legally taxed, as if the owner was unknown. The statute no more authorises the sale of the land for the payment of taxes on unimproved than on improved land, where the owner resides in the town where the land lies. No sale by the collector can give a title to a purchaser, be his own acts ever so legal, if the tax was illegally assessed. He considered the case, *Brown* v. *Veazie*, recently decided, (25 Maine R. 359,) as decisive of this. See also *Moulton* v. *Blaisdell*, 24 Maine R. 285.

Cutting, for the tenant, said that the tax acts provide for the taxing of all real estate, to the owner or owners, if known; and where unknown, it was to be taxed as being such.

How is it to be determined, whether the owner is, or is not known? No tribunal is pointed out in the statute, to settle the question, and assessors must determine it for themselves. And their determination is conclusive of this matter, so far as it concerns the assessment of the taxes.

But even if it is to be shown on the trial, that the owner might have been known, and that he should have been taxed for this lot, still this is a matter between the owner and the assessors or the town. It is enough for the collector to describe and treat the land in his collection as it is described in the tax bill committed to him. The collector is under no necessity of going and examining all the records of the county and trying to find whether a lot of land, taxed as if the owner was unknown, was really owned by some inhabitant of Bangor. And if the owner of land will not give it in to the assessors after he has purchased it, he has no cause of complaint, if the land continues to be taxed as non-resident. And if he will not pay the taxes on his land, he ought not to complain, if the land is sold to pay them.

The opinion of the Court was drawn up by

WHITMAN C. J. — The case of *Brown* v. *Veazie*, 25 Maine R. 359, may be referred to as containing much of the reasoning, and some of the principles upon which the case before us must be decided. The sale in this case, however, was by a collector, for the non-payment of taxes, assessed upon the premises, as being unimproved land of a non-resident proprietor. In that, it was of an estate assessed as belonging to a proprietor unknown. The collector in the case before us, under the statute of 1821, c. 116, § 30, after due proceedings previously had for the purpose, might proceed to sell; but his sale would be inoperative, if the assessment were unduly made. It would be essential in such case, that the estate so assessed should be actually unimproved land of a non-resident proprietor. The assessing of it as such might excuse the collector, under his tax bill and warrant, for proceeding to sell it, even if the assessors had made their assessment through mistake, in supposing the estate to have been that of a non-resident proprietor, when in fact it was not such; and might be considered as responsible only for due proceedings on his part, unless his covenants, contained in his deed, should extend his liability further. But still the title would not pass to his grantee, unless the estate, at the time of the assessment, were actually that of a non-resident proprietor.

The plaintiff in this case, at the time the assessment was made, and for many years before and since, was a resident in Bangor, where the estate in question was situate; and previous to the assessment had become the owner of the estate, by a deed duly recorded, and has not parted with his interest therein. It was erroneous, therefore, in the assessors of that town to assess it as unimproved land belonging to a non-resident proprietor. The tenant's title then, as set up by him, must be adjudged void; but, as agreed by the parties, a new trial is to be had.

Elias H. Derby *versus* Amasia Jones.

When buildings are conveyed, and are described as standing on a lot of land, it usually becomes apparent, that it was not the intention to convey the land. In such case the superstructure only passes.

When it is apparent, that the language, stating that they are standing upon a certain lot, is used only to describe the place where they are situated, in like manner and with like effect as if the deed had stated them to be standing on a particular square or street, no inference can be justly drawn, that it was not the intention, that the land on which they stand, but not the lot named, should pass by the conveyance.

By a devise or grant of a messuage or house, the land on which it stands will pass with it, unless there be something to indicate that such was not the intention.

But where the facts and circumstances in the case, clearly indicate, that the intention of the parties was that the land should not pass, the house only is conveyed.

If the buildings only, and not the land on which they stand, are conveyed by the deed, the covenant therein, that the grantor will not claim "any right or title to the aforesaid premises," applies only to the buildings, and can have no influence upon any title to the land subsequently acquired by the grantor.

If the demandant, in a writ of entry, fails to show any title to the real estate demanded in himself, he cannot recover, although it should appear, that the tenant also had no title.

Writ of entry, demanding two thirds of a lot of land, on which were standing a house and a stable, in Oldtown.

The material facts appear in the opinion of the Court.

The deed from Jones, the tenant, to Dwinel & al. under which the demandant derives his claim of title, was in these words: —

"Know all men by these presents, that I, Amasia Jones of Orono, in the county of Penobscot, in consideration of two hundred dollars to me paid by Luther Dwinel, Calvin Dwinel and Rufus Dwinel of Bangor, the receipt whereof I do hereby acknowledge, have remised, released, sold and forever quit claimed, and do for me and my heirs by these presents remise, release, sell and forever quit claim unto the said Dwinels, their heirs and assigns, the house and stable on the mill lot, at Great Works, built and now occupied by me.

"To have and to hold the aforementioned premises with all the privileges and appurtenances thereunto belonging, to them, the said Dwinels, heirs and assigns forever; so that neither I, the said Jones, nor my heirs or any other person or persons claiming from or under me or them, or in the name right or stead of me or them, shall or will by any way or means, have, claim or demand any right or title to the aforesaid premises or their appurtenances or any part or parcel thereof forever.

"In witness whereof I, the said Amasia Jones, have hereunto set my hand and seal this 29th day of March, in the year of our Lord one thousand eight hundred and thirty-three.

"Amasia Jones. [L. s.]"

"Signed, sealed and delivered in presence of Joel D. Thompson."

This case was continued the preceding year to be argued in writing, and the opening argument was prepared by

Washburn, for the demandant.

This argument did not come into the hands of the Reporter.

Cutting argued for the tenant, contending in the first place, that nothing passed by the deed, but the house and stable, as personal property, and not the land on which they stood. Several circumstances were adverted to, tending to show that no land was expected to be conveyed. The consideration named was merely the value of the buildings to be carried off the land whereon they stood; there is no description of any land in the deed, but the description is "the house and stable on the mill lot," excluding all supposition of a conveyance of the land; it was a mere quit claim deed; and no part of the land was then owned by Jones, the grantor, but in part by the grantees. 8 Conn. R. 374.

There is no estoppel in consequence of that deed. It has no covenants whatever, and could create no estoppel, had it been a conveyance of land. But it conveys none.

Even if the land which Jones afterwards purchased has become the land of the demandant by way of estoppel, but two thirds in common can be held by him, and he can main-

tain no action against his co-tenant, without any ouster, or any thing equivalent. *Colburn* v. *Mason*, 25 Maine R. 434.

Washburn, in reply, said, that the description of the land was definite in the deed, "the house and stable built and now occupied by me," "on the mill lot at Great Works," was merely further description. There is no disagreement between the English decisions and our own on this subject.

This, like that in *Fairbanks* v. *Williamson*, cited in the opening argument, (7 Greenl. 96.) is a deed with covenants of special warranty. They are in this respect substantially alike.

The opinion of the Court was drawn up, and read on June 30, 1848, by

SHEPLEY J. — The conveyances introduced by the demandant shows, that he has acquired the title to two undivided third parts of the premises, if those premises were conveyed by the tenant to Luther Dwinel and others, by his deed bearing date on March 29, 1833. By that deed the tenant remises, releases, sells and forever quit claims "the house and stable on the mill lot at Great Works, built and now occupied by me." Testimony was introduced, which proves that the mill lot at Great Works was lot numbered seven according to Holland's survey; that it was a large lot, and that it had been surveyed into a number of small lots. That the house and stable stand upon the small lots numbered 16, 17, 23 and 24, and that these small lots were enclosed by a fence.

When buildings are conveyed and are described as standing on a lot of land, it usually becomes apparent, that it was not the intention to convey the land. In such cases the superstructure only passes. *Marshall* v. *Niles*, 8 Conn. R. 369.

When it is apparent, that the language stating, that they are standing upon a certain lot, is used only to describe the place, where they are situated, in like manner and with the like effect, as if the deed had stated them to be standing on a particular square or street, no inference can be justly drawn, that

it was not the intention, that the land, on which they stand, but not the lot named, should pass by the conveyance.

In this case the words "on the mill lot at Great Works," may have been, and they probably were, used to describe the place where they were to be found; for the deed affords no other means of ascertaining it by the designation of any town and street or other locality. If that clause be considered as introduced for that purpose only, and as having no tendency to disclose any intention respecting the quantity or quality of the estate conveyed, the description of the estate will then be found in the words, "the house and stable built and now occupied by me;" and the inquiry will be, whether by those words the land upon which they stand, will be conveyed.

A messuage, it has been said, consists of two things, the land and the edifice. That the chief substance is the soil, although the superstructure and the soil are one entire thing. Plowden, 170. Mr. Justice Ashhurst stated in the case of *Doe* v. *Collins*, 2 T. R. 502, that the distinction between house and messuage seemed to be too subtle, and that what would pass by the one would pass by the other. The rule of law may be considered as established from the earliest times, and as continued without any essential variation, that by the devise or grant of a messuage or house the land, on which it stands, will pass with it; unless there be something to indicate, that such was not the intention. Co. Litt. 5, b; Com. Dig. Grant, E. 6; *Carden* v. *Tuck*, Cro. Eliz. 89; *Hearne* v. *Allen*, Hutton, 85; *Doe* v. *Collins*, 2 T. R. 498. The same rule has been applied to devises, grants, and reservations of mills. *Whitney* v. *Olney*, 3 Mason, 280; *Howard* v. *Wadsworth*, 3 Greenl. 471; *Blake* v. *Clark*, 6 Greenl. 436; *Moore* v. *Fletcher*, 16 Maine R. 63. There are certain facts in this case clearly indicating that such could not have been the intention. It appears, that the tenant, when he made that conveyance, did not own the land, on which the buildings stood. He had built those buildings upon land owned by others. And one of the three persons, Rufus Dwinel, who owned the land, was also one of the three persons, to whom the

buildings were conveyed by the tenant's deed of release. The words used in that deed are all appropriate to convey buildings thus situated. There is no covenant of seizin or other language in the deed particularly applicable to an interest or estate in lands. What shall pass by a devise or conveyance is purely a question of intention. 2 Saund. 401, note 2. To decide, that the tenant intended by the use of such language to convey or attempt to convey land, which he did not own, would be to declare, that his intention was to do wrong by an attempt to disseize the real owner. And to suppose also that one of the grantees, Rufus Dwinel, intended to become a party to an attempt to take so much of the land from his cotenants, and to convey it to his associate grantees. Such an intention cannot be admitted without proof. The inference therefore, which the law might make, that the land, on which the buildings stand, was intended to be conveyed, is prevented by the testimony proving the circumstances, under which that conveyance was made.

The tenant subsequently acquired the title to a tract of land embracing the premises demanded, by a deed from Rufus Dwinel, M. P. Sawyer and C. Q. Clapp, bearing date on Nov. 14, 1833. And it is contended that by his covenant contained in the prior deed to Luther Dwinel, Calvin Dwinel and Rufus Dwinel, he is estopped; and cannot be permitted to assert any title to be in himself, or that the subsequently acquired title enures to the prior grantees.

If the conclusion already stated be correct, that the house and stable only, and not the land, on which they stand, were conveyed, it necessarily follows, that the covenant contained in that deed, that he will not claim "any right or title to the aforesaid premises, or their appurtenances or any part or parcel thereof forever," applies only to the house and stable and not to the land; and that it can have no influence whatever upon the tenant's title to the land subsequently acquired, or upon his right to assert it in a court of law.

The demandant introduced copies of certain judgments, executions and levies made upon the premises by judgment

creditors of the tenant, but did not show, that he had acquired any title under them. He must recover in this writ of entry upon the strength of his own title. Failing to show any title to the real estate demanded, a nonsuit is to be entered.

OLIVER H. HINCKLEY *versus* JOHN W. AREY.

As a general principle the same individual cannot be the agent of both parties; but persons having undertaken certain duties of a peculiar character, such as brokers, are treated as the agents of both parties.

In making a contract for the composition of a debt, the same man cannot be the agent of both parties; but when the composition is agreed upon with the creditor by the agent of the debtor, he can be the agent of the creditor for another and distinct purpose.

The payment of a part only of a sum due, at the time and place of payment, on a promise to cancel the whole claim, discharges the indebtedness to the amount of the sum paid and nothing more, there being no consideration for the promise to discharge. The least consideration, however, in such case is sufficient to make the agreement binding.

ASSUMPSIT on two promissory notes.

The case was submitted on a statement of facts, as it was termed, setting out the testimony of witnesses, and the introduction of depositions, at a trial in the district court; and concluding thus: —

"The foregoing evidence being out, the case by consent was taken from the jury and submitted to the Court on the question, whether the facts proved constituted a good defence in law, each party reserving the right to appeal. The Court to render judgment by nonsuit or default."

The *material facts proved by the evidence* are given in the opinion of the Court.

Rowe, for the defendant, said that the facts appearing in the statement show, that here was an agreement to discharge the debt, made on a good consideration and executed. This is a good accord and satisfaction. Mr. Hubbard was first the agent of the debtor in effecting the settlement, and was then the agent of the creditor in holding the money for his use.

Besides, when the plaintiff informed Mr. Hubbard, that he would take the money, which was offered to him, the money became his, and not the money of the defendant. The contract was completed.

The consideration for the promise was sufficient. There was an advantage to the creditor, in obtaining a part of his debt, when otherwise he would have received nothing, and a disadvantage to the debtor, in forbearing to obtain a discharge in bankruptcy in consequence of the agreement to discharge the debt. He cited 16 Johns. R. 86; 22 Wend. 325; 13 Mass. R. 424; 2 Metc. 283; 2 B. & A. 328; 3 Metc. 491; 12 Shepl. 450.

J. Appleton, for the plaintiff, contended that here was neither payment nor accord and satisfaction.

To constitute an accord and satisfaction, the agreement must be executed. 19 Wend. 516; 1 Smith's L. Cases, 146; 2 T. R. 24; 17 Johns. 124; 14 Pick. 317.

Mr. Hubbard could not be the agent of both parties. Nor does the evidence warrant the assumption, that he attempted to act as such, or was so considered by either party. 3 Metc. 139.

The opinion of the Court was drawn up by

TENNEY J. — The action is upon two promissory notes of hand; and the defence is accord and satisfaction.

The defendant consulted N. Hubbard, Esq. as counsel relative to filing his petition to become a bankrupt. He was advised first to make an effort to compound with his creditors. He acted on that advice and empowered Mr. Hubbard to make an offer to the plaintiff in furtherance of that object; this was done, and an answer was returned by the plaintiff, in which he writes, "you say that Capt. Arey is going to pay his debts in that easy way without he can get his demands in for nothing, and if Mr. Arey will give me $30, you can settle with me." After several offers on the part of the plaintiff and Mr. Hubbard, by the authority of the defendant, the latter caused to be made the offer to pay $25 in full discharge

of all the plaintiff's claims against him, including the notes in suit. In reply to this offer, the plaintiff sent a message to Mr. Hubbard in these words, "you may settle with Arey for $25." Hubbard thereupon informed the defendant, that his offer was accepted, and having obtained the money of one, whom the defendant had engaged to advance it, he informed the defendant, that it was all settled, and the defendant took no further steps to become a bankrupt. In two or three days after receiving the money, Mr. Hubbard informed the plaintiff "that he had settled with the defendant for him for the $25, and had it to give to him." It being in the evening the plaintiff said he did not wish to go for the demands that night, but would obtain them in two or three days, bring them to him, and take the money.

As a general principle the same individual cannot be the agent of both parties. But persons having undertaken certain duties of a peculiar character, are treated as the agents of both parties; such are brokers. A broker is strictly therefore a middle man, or intermediate negotiator between the parties. Story's Agency, § 28. "But primarily he is deemed merely the agent of the party, by whom he is employed; and he becomes the agent of the other party, only when the bargain or contract is definitively settled as to its terms between the principals." *Ibid.* § 31. In making a contract for the composition of a debt, the same man cannot be the agent of both parties; but when the composition is agreed upon, by the agent of the debtor with the creditor, he can be the agent of the other party for another and a distinct purpose. The acceptance of the offer made to the creditor by the agent of the debtor, may, with no impropriety, be accompanied with a direction to the person, who had acted as the agent in making the contract, to receive for the creditor the sum agreed upon.

Mr. Hubbard was the defendant's agent for the specific purpose of making offers for him and receiving those of the other party; the last offer made for the defendant was satisfactory to the plaintiff and he accepted it, by saying, "you may settle with Arey for $25," and the fair import of the language

authorized Mr. Hubbard to receive the money for him. This interpretation of the plaintiff's meaning is confirmed by the language of Mr Hubbard to him, "that he had settled with the defendant for him, for the $25 and had it to give to him;" the meaning of this could not be misunderstood by the plaintiff, that for the latter he had received the sum agreed upon from the former. It could not have been legitimately considered as having reference to the agreement of settlement, for that had been before concluded. The plaintiff made no objection to what was done, but said he would take the money when he should receive the demands from the person who had the possession of them.

It is well settled, that the payment of a part only of a sum due, at the time and place of payment on a promise to cancel the whole claim, discharges the indebtedness to the amount of the sum paid and nothing more, there being no valid consideration for the promise to discharge. But the least consideration in such a case has been held sufficient to make the agreement binding.

In this case, the plaintiff was informed, that the defendant contemplated taking the benefit of the bankrupt act, which was then in force. If this intention had been carried out, the plaintiff would lose the whole debt, beyond what he might receive as a dividend; and the latter, judging from his letter, he did not consider as very valuable. To save himself from a greater loss under the law, he agreed upon the terms of composition offered. The defendant, upon the agreement and payment to Hubbard, took no further steps to obtain relief under the bankrupt law.

The payment of the money to Mr. Hubbard was a payment to the plaintiff, and the agreement under which it was paid was upon a good and valid consideration.

Plaintiff nonsuit, and judgment for defendant.

SAMUEL GARNSEY *versus* JAMES ALLEN.

If the indorser of a note has paid to the indorsee a part thereof, he may recover the amount so paid of the maker, in an action for money paid, although a part of the money still remains unpaid.

It is wholly immaterial whether such payment be made in money or other property, if it be received as a payment of so much.

And evidence offered by the maker, that the property received by the indorsee of the indorser was in fact of less value than the amount for which it was received, is inadmissible.

The receipt of the indorsee to the indorser, is admissible evidence to show payment.

THIS is an action of assumpsit for money paid on a judgment against the plaintiff, in favor of R. C. Johnson, founded on a note signed by the defendant, dated Sept. 8, 1835, payable to William Bailey or order, and by him indorsed, in two years from date, with annual interest, and indorsed by the plaintiff; writ is dated Sept. 3, 1843. The trial was before TENNEY J.

The plaintiff, to maintain his action, introduced a copy of said note and of the original suit and judgment recovered thereon, at the September term of the district court, county of Waldo, A. D. 1841, and introduced the original execution, dated Oct. 13, 1841, issued on said judgment, for $646,71, damages, and $10,90, costs, on which appeared the following indorsements, viz. "Nov. 29, 1842, received by bill of Johnson, $11,39. Nov. 29, 1842, received by the Reynolds buildings, $100. Dec. 6, 1842, received of John Huckins, $52,30, and an assignment of said judgment and execution to John Huckins by said Johnson and a receipt from said Huckins to the plaintiff for the $52,30. All these papers and memoranda are objected to, without other proof of the matters stated; but the Court permitted them to be read to the jury without any other proof or evidence, but signatures thereon were not denied.

R. C. Johnson testified, that he was the holder of Allen's note in April, 1841, and after that time Garnsey settled with him and $11,59 was indorsed as balance of a bill of Johnson, and that Garnsey released a certain claim on the Reynolds

buildings, which he called worth $100, and that Huckins paid him $52,30 for the assignment of the execution.

The papers may be referred to as part of the case.

The defendant then proposed to show, that the original note given by him to Bailey was void for want of consideration, or that the consideration had entirely failed; that for the purpose of compromising the claim of Johnson as the holder of said note and another claim, he, on the 29th of April, A. D. 1841, assigned to said Johnson certain notes, or an interest in certain notes, secured by mortgage on real estate in Bangor, in value equal to the full amount of all claims said Johnson had upon him, which was accepted and received by said Johnson on that day, in full discharge of all claim upon the said Allen, as the maker of said note, and the said Allen was thereby fully and forever discharged.

He further proposed to show that the interest of said Garnsey in the Reynolds buildings was of no value, though the sum of $100 was agreed to be paid therefor and indorsed on said execution as received therefor.

But the Court, for the purposes of this trial, ruled all said testimony as inadmissible, it being admitted there was no fraud or collusion between plaintiff and Johnson, or any other.

That the payment of Allen, having been prior to the rendition of judgment, in the suit against Garnsey, and nothing offered tending to show that Garnsey was notified of the facts relied upon by the defendant.

The defendant thereupon submitted to a default, subject to the opinion of the whole Court. If the foregoing testimony is sufficient upon legal principles to maintain the action, and the testimony offered for the defence is inadmissible, then the default is to stand.

But if the plaintiff's testimony is inadmissible, or the testimony offered should have been received, then the default is to be taken off and the case stand for trial.

J. A. Poor, for the defendant. The grounds of defence, insisted upon by the counsel, are stated in the opinion of the Court.

In support of the position, that when a note or debt is once paid, no title to it can pass to another by indorsement or assignment, he cited, 6 Mass. R. 85; 24 Pick. 270.

Cutting, for the plaintiff, said that the note was once the property of the plaintiff, and no defence could then have been made against it. If it had again become his property entirely, no matter whether he paid any thing for it or not, he could have recovered it of the defendant. He has not however paid but a part of the note, but he is entitled to recover of the defendant so much as he has paid, without paying the whole. 20 Johns. R. 367; 10 Wend. 502. And it matters not in what way the payment was made, whether in money or land, or buildings or an interest in a building. It is enough, if it was such as the creditor was willing to receive as so much towards his debt.

The holder of the note recovered judgment against the plaintiff as indorser of the note. He knew of no defence to the suit against him, as indorser and could make none. If the defendant had paid the note, he should have given notice of it to the other parties to the paper, that they might avail themselves of the payment. If the defendant really paid any thing on the note to the then holder, without having the same indorsed thereon, he cannot set it off against the claim of the present plaintiff, as he had no notice of such payment.

The opinion of the Court was drawn up by

WHITMAN C. J. — The plaintiff, the second indorsee of a note, made by the defendant, negotiated it to R. C. Johnson, before it became due, who recovered judgment thereon against the plaintiff. It may be presumed, as no question appears to have been made about it at the trial, that the plaintiff had been duly notified of a demand made in due season, upon the maker, without obtaining payment of him; and so that judgment was properly obtained against the plaintiff for the amount due thereon. And evidence was introduced, and, though objected to, was admitted, that the plaintiff had paid

Johnson, in part satisfaction of the execution, issued on said judgment, the sums of $11,39 in cash, and $100,00 in a right to a building transferred to Johnson, and that the execution and judgment were thereupon assigned to one Huckins, who received of the plaintiff the further sum of $52,30 thereon, and thereupon the plaintiff insists that he has a right to recover those sums of the defendant as money paid to his use.

The defendant's ground of objection is, first, that the receipts entered on the execution, though the genuineness of the signatures is not questioned, were not evidence of payment, contending that there should have been other proof of those payments. But those receipts of Johnson and Huckins were good against them, so that they could not claim the amount of the payments, evidenced by them of the defendant; and while they would be good evidence for him, it would seem that they ought to be sufficient evidence, that the plaintiff had discharged so much of a debt, for which he was but collaterally liable for the defendant.

It is next objected, that there should have been other evidence of the assignment to Huckins. It is not objected that the assignment is not in apt words for the purpose, nor that the signature of Johnson thereto is not genuine. It does not seem that further evidence of its execution could be required.

It is next insisted, that the plaintiff should be held to prove, as this is an action for money paid to the defendant's use, that the right to the building, transferred to Johnson, for which he had agreed to allow $100 on his execution, was worth that sum. With regard to this, it should be borne in mind that this was the defendant's own debt; that it was due, originally, by note of hand to the plaintiff; that the plaintiff, if he had obtained the note, might have recovered the whole amount of it of the defendant, without his having a right to object, that the plaintiff had obtained it, if fairly done, for ever so trivial a consideration. It is sufficient for him, that, if the plaintiff recovers this sum of him he will be discharged of so much of

a debt, against which he could not have defended himself, if the note were in the hands of the plaintiff, and had been put in suit against the defendant. And the same reasoning will suffice to show, that the offer, by the defendant, to show, that the right to the building was of little or no value, was properly rejected. The defendant had only to pay his own debt. It mattered not to whom, so that, upon doing it, he obtains a proper discharge from it; and according to the case of *Butler* v. *Wright*, 20 Johns. 367, it matters not that the claim upon him is for a part instead of the whole debt.

Finally, it appears to have been insisted, that the whole debt had been paid to Johnson, before the institution of the suit against the plaintiff; but it was admitted that the plaintiff was not informed, that any such payments had been made; or of any pretence of it till judgment therefor had been obtained against the plaintiff; and therefore the proof of any thing of the kind was ruled to be inadmissible, and we think with propriety. *Exceptions overruled.*

NICHOLAS WHITE *versus* TRISTRAM F. JORDAN.

A party can have no right to select a portion of the evidence introduced, and request instructions upon the effect it should or might have upon the minds of jurors, when examined separately from the other evidence applicable to the same point.

The rule of law is well established, that a payment made in money of a part does not operate to extinguish the whole debt, although it be received as a payment in full. There must be some consideration for the relinquishment of the portion not paid, or the agreement to receive a part payment in full will be without consideration and void.

When a case is brought before the Court by bill of exceptions, no question which is not presented by the exceptions, is open for consideration. The legal conclusion is, that all other necessary instructions were correctly given.

The Court cannot imply a promise, so as to take the contract out of the operation of the statute of limitations, as an inference of law, from the payment of a part of the debt; but the evidence should be submitted by the Court to the jury, with proper instructions, to enable them to do it.

EXCEPTIONS from the District Court, ALLEN J. presiding.

Copies of the papers in the case, material to the right understanding of it, are given *verbatim* in the opinion of the Court. The verdict in the district court being for the defendant, the plaintiff filed exceptions to the rulings and decisions of the presiding Judge, and to his refusal to give instructions as requested.

The case was argued in writing.

J. Appleton, for the plaintiff.

That the plaintiff is entitled to recover, were it not for the note filed in set-off, will not be denied. The only question arises in relation to the note given by Stuart to Jordan and by him filed in set-off to the plaintiff's claim.

The note of Stuart is dated Sept. 19, 1834.

Under the circumstances of this case, the plaintiff relied upon the statute of limitations as a bar to the note filed in set-off. If the statute of 1821, c. 62, § 9, is applicable, and the plaintiff insists that it is, it is a perfect bar. *Little* v. *Blunt*, 16 Pick. 359; 1 Pick. 263.

The requested instruction being in accordance with adjudged cases, should have been given.

The statute of limitations was a perfect bar against the claim filed in set-off. The Court however ruled that the statute of 1821 did not apply, but that the case was to be governed according to the principles of the Revised Statutes. This instruction was erroneous. The bar had become perfected before the Statutes went into effect. *Battles* v. *Fobes*, 18 Pick. 532; 19 Pick. 578; *Shepley* v. *Waterhouse*, 22 Maine R. 497.

2. The receipt was a perfect defence. The note of Stuart was given for stumpage. A portion had been liquidated in a trade between the parties and the amount paid at New York of $75,50 was for the balance due and was in full of the note. The note would have been given up, had it been there. The receipt was given instead.

3. If it be insisted that the payment was only a part payment and that as a part payment it would be effective as a recognition of the debt, and as a renewal or new promise, I

answer, such is not the law. An express promise to pay is necessary to revive a debt, which has been outlawed. 8 Greenl. 353; Chitty on Contracts, 821.

The payment in this case, if it is to be considered and treated as a part payment, is not a new promise or a recognition of additional indebtedness from which a promise may be inferred. No promise arises expressly or impliedly from such payment. There is a most marked difference between a part payment *as such* and a payment of part, which is made and received as a payment in full discharge of a debt due. In the latter case, no promise by implication can arise, and none is expressly made. The payment of part to be in discharge of the whole, precludes the idea of an implied promise to pay the remainder of the note.

An offer to pay part of the note, the payment to be in discharge of the whole, does not revive the debt against a plea of the statute of limitations. *Atwood* v. *Coburn*, 4 N. H. Rep. 315; *Lawrence* v. *Hopkins*, 13 Johns. 288; *Exeter Bank* v. *Sullivan*, 6 N. H. Rep. 131; *Smith* v. *March*, cited, 6 N. H. Rep. 131.

Still less would a payment made to the creditor in discharge of the whole debt, and so accepted by him, be considered as a promise to pay any additional sum.

Part payment into Court will not take a case out of the statute of limitations, where the general issue and the statute of limitations are pleaded. 10 English Common Law R. 5; 13 English Common Law R. 447.

Where the debtor's agent had instructions to offer claimant a *part* of the debt in discharge of the whole, and the claimant *refusing* to take part, the agent pays the amount in part discharge, it is *not* a part payment by the debtor to take the case out of the statute. 29 English Common Law R. 319.

Still less when the creditor takes *it in full discharge*, and the debtor so receiving it, should it be considered as a part payment.

4. The requested instruction, that "the receipt was evidence from which the jury might infer the note of Stuart to Jordan

was paid," was correct and should have been given. *Blanchard* v. *Noyes*, 3 N. H. Rep. 519; *Henderson* v. *Moore*, 5 Cranch's R. 10.

The instruction given was a denial of that proposition and was erroneous.

5. The receipt, if for less than the amount of the note, was a bar, the payment being made at New York, where neither party resided, and without the production of the note to which Stuart had a right before payment.

Stuart was entitled to the note upon payment, and if the payee, upon offer of payment, should refuse to give up the note, the payor might withdraw it. *Hansard* v. *Robinson*, 7 B. & C. 90.

The rule, that a payment of part is not to be treated as accord and satisfaction when the parties so agree, is one purely technical, and is to be followed only when required by the strict rules of the law. *Brooks* v. *White*, 2 Metc. 287.

In this case the payment was made without the production of the note, at a *place*, where the payee, Jordan, had no legal right to the payment, he not having the note with him.

Rowe, for the defendant.

The deposition of Stuart, the payee of the note, was introduced by plaintiff and shows these two facts, conclusively: — That the note, on which the payment of March 10, 1837, (described in the receipt of that date,) was made, is the note filed in set-off; and that the payment of $75,50, was the only consideration for that receipt.

Plaintiff made two objections to the note: —

1. That it was barred by the statute of limitations.

2. That it had been paid.

The plaintiff excepted to the ruling of the district Judge.

That ruling was in strict conformity to the law as settled by all the cases on the subject. *Fitch* v. *Sutton*, 5 East, 230; *Cumber* v. *Wayne*, 1 Strange, 425; *Harrison* v. *Wilcox & al.* 2 Johns. R. 448; *Dederich* v. *Leman*, 9 *ib.* 333; *Seymour* v. *Minturn*, 17 *ib.* 169; *Smith* v. *Bartholomew & al.* 1 Metc. 276.

The counsel asserts that a portion of the note had been paid, that the $75,50 was for the balance due.

This assertion, made, as it is, in the face of Stuart's testimony and a report of all the evidence in the case, is entitled to praise for its boldness. I trust that the counsel in his closing argument will direct the attention of the Court to the evidence on which he relies to justify the assertion. Such evidence, if to be found will help him. But it cannot help his case. It would have authorised the jury to have returned their verdict for the plaintiff under the instructions given; and must show that the plaintiff's cause of complaint is against the jury, and not against the Judge.

The objection mainly relied on, is the statute bar. The question on this point, is, whether the case comes within the old statute, or the new; whether the six years are to be reckoned from the date of the note, Sept. 19, 1834, or from the date of the payment, March 10, 1837. If from the latter, then the instruction was correct, for the contract was not affected by the act of 1821, prior to its repeal. *Crehore* v. *Mason*, 10 Shepl. 414.

That part payment of a debt before it is barred, postpones the operation of the statute, and furnishes a new point of time from which the six years are to run, would seem to be too well settled by authority to be questioned. 14 Pick. 390; 2 Fairf. 152; 20 Maine R. 345.

But the counsel contends that we are not entitled to the benefit of the rule, because, he says, we do not come within the reason of the rule — that a new promise is necessary, and none can be implied from a payment under such circumstances. I doubt whether the rule, to the full extent to which it is clearly established, including payments after, as well as before, the bar has attached, can be reconciled with the view now entertained, that the statute is one of repose. It had its origin in the idea, that the statute was founded on presumption of payment; from which it naturally followed that any thing, which rebutted that presumption, prevented the bar. It has survived the doctrine from which it sprung, and stands now a

fixed rule of law, established by a uniform course of decisions, and recognized, if not confirmed, by the Legislature. Rev. Stat. c. 146, § 23. I refer, also, to *Wyatt* v. *Hodsdon*, 8 Bing. 309, decided since Lord Tenterden's act; and *Ilsley* v. *Jewett*, 2 Metc. 168, since the revision of Mass. statutes.

The defendant therefore, might, I think, safely rest on the law, without undertaking to show a new promise.

But if such new promise be necessary, it is easy to show it from the facts.

The counsel argues that no new promise can be implied, because the transaction shows that Stuart had no intention of paying any more. I might take issue with him on the fact. The whole transaction consisted of these two acts; the payment by Stuart; and the giving the receipt by Jordan. The first alone can be looked to for evidence of Stuart's intention. That indicates no such intention. Nothing was said, or done, indicative of a design not to pay more, should it afterwards appear that more was due. Stuart's account of the matter shows that both parties were acting under a mistake as to the amount of the note.

But waiving that, I maintain that a new promise is a necessary implication of law, from the fact that a part of the debt remained unpaid. The intention of the party paying has nothing to do with it. The law, in all cases, implies a promise from indebtedness — from a moral and legal obligation; and none the less decidedly, because the indebted party shows that he does not mean to pay.

There is a distinction, very manifest, when we come to the reason of the rule, between payments before, and after, the debt is barred. In the former case there is a continuing indebtedness — legal obligation to pay the balance, from which the law implies the promise; in the latter, there is no legal indebtedness, but merely a moral obligation, which furnishes only a consideration for an express promise, and not the foundation of an implied one.

The whole case appears to me to turn on the question, whether the payment was partial, or in full. It was *de facto,*

a part payment, and must in law have the effect of a part payment unless the receipt gives it the effect of a payment in full. If it operates as a part payment, then it leaves a balance due, from which the law implies a promise. If it operates as a payment in full, then it settles the case on the other point, and the plaintiff has no occasion to invoke the aid of the statute bar.

The court below, in withholding the instructions requested in relation to the receipt, committed no error. The receipt would authorize no such inference. No payment was ever made on the note, save the $75,50. Plaintiff put in the receipt and deposition together, and then asked the Court to instruct the jury, that they might infer, from the receipt alone, the existence of a fact which was negatived by the deposition.

The Judge did not forbid such inference. He submitted the whole evidence to the jury, instructing them, only, that the receipt was not proof of *satisfaction*, without evidence of other consideration than the $75,50. If the plaintiff rested his case on proof of *payment*, the jury were at liberty to find that fact from any evidence before them, including the receipt. If the jury had been satisfied that the rest of the note had been paid, and only $75,50 remained due at the date of the receipt, they would have returned their verdict for plaintiff.

In his fifth proposition, the counsel takes the position, that the fact of payment having been made at New York, in the absence of the note, was a sufficient "other consideration"; because Stuart was under no legal obligation to pay it *then and there.*

I might take issue with him on his law; for the note was due, and Stuart was liable to a suit on it wherever he might be. I might argue on the fact, that Stuart's deposition negatives the idea that any discount was made on that, or any other account. But argument on either law, or fact, is unnecessary, for the proposition does not touch any matter now at issue between us. If the circumstances of the payment were evidence of "other consideration" for the receipt, he

had the benefit of it under the instructions given. If the jury erred in not finding "other consideration" from those circumstances, their error furnishes no ground for excepting to the ruling of the Court. He could have requested instructions in accordance with his views. From the silence of the case on this point, it is a necessary inference, either, that he did not ask such instructions, or, that if he did ask them, they were given. He had liberty to argue under the ruling that here was evidence of such consideration.

The opinion of the Court was delivered June 30, 1848, by

Shepley J. — The suit is upon a promissory note made by the defendant on July 21, 1836, for forty dollars, payable to John Stuart or bearer, in one year from date, with interest. The note continued to be the property of Stuart for a long time, after it became payable. The defendant filed in set-off a promissory note made by Stuart on Sept. 19, 1834, for one hundred and fifty dollars, "towards stumpage of lumber cut on township No. 1, Bingham purchase, as my bond may certify, dated July 11, 1834, signed by Thomas Wentworth," payable to the defendant or bearer. The plaintiff contended, that this note had been fully paid; and also that the defendant's right to recover upon it was barred by the statute of limitations.

To prove payment he introduced a receipt signed by the defendant and bearing date on March 19, 1837, stating, that he had received of Stuart, "seventy-five dollars $\frac{50}{100}$ in full for a note dated some time in October, 1834, the same and signed by said Stuart for some stumpage in a trade between said Stuart and myself." As the receipt did not describe the note with sufficient accuracy to identify it, the deposition of Stuart was introduced for that purpose. It stated the time, place and circumstances in relation to that payment. Upon this testimony the question arose whether that note had been paid in full, or only in part.

The Judge was requested to instruct the jury, "that the receipt was evidence, upon which the jury might infer the note of Stuart to Jordan was paid." It will be perceived,

that this request was not made for instructions respecting the true construction or legal effect of the receipt. It might be explained, and its literal import might be controlled by the other testimony, and its effect must be considered in connexion with that testimony. A party can have no right to select a portion of the evidence introduced and request instructions upon the effect that it should or might have upon the minds of jurors, when examined separately from the other evidence applicable to the same point. This has been often stated; and the requested instruction was properly refused.

The jury were instructed on this point "that the receipt of itself was no defence to the note beyond the amount paid, unless there was evidence to satisfy the jury of other consideration." The rule of law is well established, that a payment made in money of a part, does not operate to extinguish the whole debt, although it be received as a payment in full. There must be some consideration for a relinquishment of the portion not paid, or the agreement to receive a part as payment in full, will be without consideration and void. The instructions authorized the jury to consider, whether any such consideration was proved. It is said, that "the ruling given did not explain the law or state it satisfactorily." If there were any omissions to do so, the counsel might have requested appropriate instructions. This Court cannot conclude, that there were any such omissions, when no evidence of it is presented in the bill of exceptions. The instructions on this point, which are the subject of complaint, were correct, and the legal conclusion is, that all other necessary instructions were correctly given. No question, which is not presented by the bill of exceptions, is open for consideration.

On the second point the counsel for the plaintiff, "requested the Court to instruct the jury, that the statute of limitations of 1821, was applicable to the note filed in set-off." This was refused, and the jury were instructed, that "the Revised Statutes were to govern." This would be correct, if Stuart made a new promise, when the payment was made by him on March 19, 1837. If he did not make a promise at that time, the

defendant's right to recover upon that note would have been barred by the act of 1821, before it was repealed; and in such case the rights of the parties should have been determined by the provisions of that act. *Crehore* v. *Mason*, 23 Maine R. 413. It became necessary to decide upon the effect of the payment made by Stuart in the month of March, 1837, under the circumstances exhibited by the testimony, for the purpose of determining, by which of those statutes the rights of the parties were to be decided. There is no proof, that Stuart made at that time any declarations amounting in law to a promise. The jury might have been fully authorized to find, that there was no other consideration for that payment than the duty to pay his debt; and that the defendant was not bound by the acknowledgment contained in his receipt, that it was received as payment in full. For when the question was distinctly put to Stuart, whether that money was paid in full for the note, the answer was, "it was, I presume, the receipt says so, and he wrote the receipt himself." He does not testify, that there was any express agreement made between them, that the amount paid, on account of the place of payment and absence of the note, should be received as payment in full; or that there was any conversation between them indicating any consideration other than the usual one, that a creditor desires to obtain payment of his debtor.

If that payment be regarded as made in the ordinary course of business between debtor and creditor, it would be evidence, from which the jury should infer a new promise. But such a payment does not authorize the Court to do it as a legal inference. *Oakes* v. *Mitchell*, 15 Maine R. 360; *Pray* v. *Garcelon*, 17 Maine R. 145; *McLellan* v. *Albee*, *idem*, 184; *The Exeter Bank* v. *Sullivan*, 6 N. H. Rep. 124; *Sigourney* v. *Drury*, 14 Pick. 387; *Sands* v. *Gelston*, 15 Johns. R. 511; *Bell* v. *Morrison*, 1 Peters, 351; *Tanner* v. *Smart*, 6 B. & C. 603. In the case of *Linsell* v. *Bonsor*, 2 Bing. N. C. 241, Tindal C. J. said, that "a distinct and unqualified acknowledgment would have the same effect as a promise, because from such an acknowledgment the law implies a

promise to pay." But that case arose under the provisions of the act of 9 Geo. 4, c. 14; and the grounds for such a legal inference are stated by Mr. Justice Gaselee, that "the words of the late statute are 'promise or acknowledgment;" that means an acknowledgment, from which the law would imply a promise to pay.

To authorize him to give unconditional and absolute instructions, that the rights of the parties were to be determined by the provisions of the Revised Statutes, the Judge, it would seem, must have concluded, that the law would infer a promise from the payment made by Stuart. The jury might have been instructed to inquire, whether that payment was made under such circumstances, that it amounted to an admission, that the debt was then due; that if they came to that conclusion, they should infer a promise made at that time to pay it, and that in such case the rights of the parties were to be determined not by the provisions of the act of 1821, but by those of the Revised Statutes; and that if they should not so find, their rights would be determined by the provisions of the statute of 1821. The Court appears to have erred by implying a promise as an inference of law, from a payment of part of the debt, instead of submitting the testimony to the jury with proper instructions to enable them to do it.

Exceptions sustained and new trial granted.

BULAH FRENCH *versus* LEMUEL S. PRATT.

At common law, a widow is entitled, in the assignment of dower, to one third out of each tract or parcel of the land. And this method of endowment is denominated "according to common right."

But where the dower is assigned by the heir, he may assign the whole of one or more of the several tracts in lieu of a third of each one, which will be a good assignment, if accepted by the widow. And this is called an endowment "against common right."

If dower be assigned "according to common right," and the widow be evicted, by paramount title, of the third assigned to her in one parcel, she is entitled to be endowed anew in the remainder of that parcel. But if the widow be endowed "against common right," and be evicted of a part of the land assigned to her, she can have no new assignment of dower by reason thereof.

And if a widow be endowed "against common right," according to the course of proceedings under probate jurisdiction, and be evicted by paramount title, of a part of the land so assigned to her as dower, this gives her no right to be endowed anew in other lands, either at common law, or under Revised Statutes, c. 95, § 14.

THE action was dower. The demandant claimed dower in the premises as widow of Zadock French, deceased, alleged to be seized thereof during the coverture.

Among other alleged grounds of defence, the tenant, by brief statement, averred that she had an assignment of dower in all the real estate of her late husband, under the authority of the probate court, which gave her certain entire lots in lieu of one third of each lot in which she was entitled to dower in the whole estate; that she accepted of the same as her dower; and that the heirs assented to the assignment. The demandant replied that she was lawfully evicted from a portion of the land in which the dower was assigned.

After the whole evidence was out, the case was withdrawn from the jury and submitted to the decision of the Court, who were empowered to enter a nonsuit or default; and to draw all inferences a jury would be authorized to draw.

The facts are stated at the commencement of the opinion of the Court.

The case was argued in writing.

Moody, for the demandant.

It is for no doubtful right or remedy, that the demandant asks the interposition of the Court but for a manifest right and plain remedy — the one acknowledged, and the other afforded by the explicit provisions of our statute law, and the clear principles of the common law. Rev. Stat. c. 95, § 14, provides, "If a woman be lawfully evicted of lands assigned to her as dower, &c." "she may be endowed anew in like manner as though no such assignment had been made." This language appears intelligible, clear and unambiguous, and to convey a distinct idea of a right and a remedy. Does this mean what it seems to mean, and is it to be of force to effect what it seems to promise? or does it keep the word of promise to the ear, to break it to the hope?

The plaintiff's case, I say, is the case expressed in clear language in the statute; she has been deprived by a lawful eviction of land assigned to her as dower, and she asks of the Court nothing more than the application to her case of that statute remedy.

But if ingenuity could suggest a doubt as to the meaning of the language, the principle which it seems to declare is one well settled by judicial decisions. If a widow be at any time lawfully evicted of her jointure, (which is a provision in lieu of dower,) she may repair the loss or deficiency by resorting to her right of dower at common law. 4 Kent's Com. 54, 69.

Every assignment by the heir, or sheriff, of dower, implies a warranty so far that the widow on being evicted by title paramount may recover one third of two remaining third parts of land whereof she was dowable. *St. Clair* v. *Williams*, 7 Ohio R.; Cruise's Digest, 200, § 26, part 2, 110; *Bedingfield's case*, 9 Coke's Rep. 176.

The third point decided in the last case is, that when the wife is endowed of the immediate estate descended to her husband's heir, if she be afterwards impleaded, she shall vouch the heir and be newly endowed of other lands which the heir

has. 4 Coke's Rep. 122; *Hastings* v. *Dickinson*, 7 Mass. R. 153; *Scott* v. *Hancock*, 13 Mass. R. 168; 1 Metc. 66.

If a wife endowed of her third is evicted, she shall have a new writ of dower, and be endowed of other lands. 2 Dane's Abr. 670; Stat. 27, Hen. 8, c. 10.

The assignment of dower must be of land whereof she is dowable, and an assignment of other land whereof she is not dowable, or of a rent arising out of the same, is no bar of her dower. Coke Lit. 34, b.

In some cases she shall have a new assignment of dower, as when she is evicted out of the lands assigned to her, she shall be endowed of one third of the remainder. 1 Cruise's Digest, 198, sect. 18.

The position is established by these authorities, that without a statute provision, a widow on failure of her dower, in whole or in part, by eviction, is entitled at common law to amends by a new assignment, and that an action of dower lies for her.

But if the question were a new one, common sense and common justice would alike demand such an adjudication. The purpose of the law of dower, is to put the widow in possession of a life estate in one third of the lands of her husband, not of any other person. That is her title and her right, and if by mistake of the heir, by a wrongful exercise of jurisdiction on the part of the court of probate, or by the consequences of her husband's acts, she is put in possession of lands not his, or upon which a paramount claim of a stranger exists, by the enforcement of which she is driven off, the purpose of the law is not accomplished — she is not endowed of her husband's lands — she has not any longer her right, that right which no earthly power can gainsay, the right of a life estate in one third of the lands of her husband. And when the mistake or the error is discovered she is entitled to have it rectified — to have the deficiency made up to her, and the proceedings in the attempted assignment necessarily become *quoad hoc* null and void. — That a foreclosure of a mortgage is a legal eviction — see *White* v. *Whitney*, 3 Metc. 81. So is the yielding to a paramount title of one demanding possession. 4 Mass. R. 349.

The statute and the common law which give this remedy contemplate precisely this state of facts; they suppose an assignment, an acceptance of said assignment; and an enjoyment for a time, of the lands assigned.

The objection set up in the brief statement then involves a statement of the very facts necessary for the plaintiff to establish, to maintain her action — to bring herself within the purview of the statute.

But the proposition that she has so barred herself, by the very acts and facts, which by statute alone constitute her claim, is not only wholly inadmissible, but quite unintelligible. There is no proof of any formal acceptance. What did she do? She petitioned for her dower, as the statute giving her the remedy sought, supposes, and as the law authorizes, she entered upon the lands assigned her by a Court having jurisdiction. This is all. She made no bargain, executed no deeds, signed no release, made no contract to take other lands in full satisfaction, or in lieu of any other claims. Besides, the law does not give the widow a choice what part of the land shall be assigned to her, provided she gets one third in value. *Taylor* v. *Lusk*, 7 J. J. Marsh, 636.

She could not successfully have resisted the action of the Court, for they had a right to assign her lands under mortgage. *Wilkins* v. *French*, 20 Maine R. 118. But even if she knew the mortgage, and her liability to be deprived of that land, which is denied, such knowledge cannot affect her, and she forfeited no rights by it. If the Court had a right to assign it, she had a right to take it, a right to submit to the Court in the reasonable expectation of the mortgage being discharged and with a full knowledge that if she was deprived of the property, the law would give her other property instead of it. 2 Rep. 59; Perk. sect. 420.

Another ground of argument may be anticipated from the language of the pleading, that this was an assignment against common right, because the Court gave her several entire parcels, instead of one third of each parcel, and that having entered under it that act is to be construed into an acceptance

and release. How does this conclusion follow from the premises any more than if it was not against common right? It involves, again, as much as before, the glaring injustice of making her responsible for the mistakes of a court of competent jurisdiction, to which it was not in her power to refuse submission.

This is not strictly an assignment against common right, as it is defined in the books. Cruise, after speaking of an assignment by the sheriff, says, "But when dower is assigned by the heir, he may assign one manor in lieu of a third of three, which will be good if accepted by the widow, and this is called an assignment against common right." 1 Cruise's Digest, 197; 1 Rol. Abr. 683.

To make it technically such, it must be made by the heir. And the case which will be mainly relied on by defendant's counsel, was that of an assignment by the heir. But an assignment made by the court of probate, if made consistently with the rules of law, cannot be said to be against common right, in any sense which can affect the validity of the assignment, or work any other consequences to the petitioner, than if it was made differently.

That this assignment was made upon principles well settled and often recognized by the Courts, can hardly be questioned, after we find that the Courts have in many cases declared that the assignment must be made so as to set off not one third of each parcel, but such parcels as will yield to the widow one third of the income, and in parcels best calculated for the convenience of herself and heirs. *Leonard* v. *Leonard*, 4 Mass. R. 533; *Miller* v. *Miller*, 12 Mass. R. 454; *Conner* v. *Shepard*, 15 Mass. R. 164.

In this case, the demandant has done no more than petition for her legal dower, and enter upon such land as the Court in their discretion, set off to her as her legal dower.

She has submitted to the authority of the Court, nothing more. And shall this operate as a release of her claim to dower, and prevent a new assignment?

Dower is a claim highly favored in law. Lord Coke says,

"it is commonly said that three things be favored in law, life, liberty and dower." Co. Lit. 124, b. And nothing but her own release can bar her of the right.

To bring the force of analogy against it, I will cite a few cases to show what acts of the widow have been decided not to bar her dower. *Hastings* v. *Dickinson*, 7 Mass. R. 153; *Gibson* v. *Gibson*, 15 Mass. R. 106; *Catlin* v. *Ware*, 9 Mass. R. 218; *Hildreth* v. *Jones*, 13 Mass. R. 525; *Robinson* v. *Bates*, 3 Metc. 40; 4 Kent, 54.

The Court will not be deterred by a difficulty, if there be any, in extending a remedy, to which the plaintiff has a legal right.

Be the right declared, and although the plaintiff has used in her action, the common form of declaring for one third, she will be satisfied, and indeed wishes for no more in this and the other cases, than that proportion of each parcel which will make good her loss.

And there will be no difficulty, though perhaps some little labor for commissioners appointed as in ordinary cases, to ascertain that portion. Must she recover one third or nothing, as defendant contends, dower being one third?

Cutting, for the tenant.

Assuming that the plaintiff has succeeded in establishing by legal testimony the necessary preliminary acts, then the question arises, is she, under the circumstances of this case, entitled to dower?

I say that she is not, because she has heretofore been endowed of other lands to the full extent of her legal and equitable claims in all the lands. Her counsel contends that she is, because she has been lawfully evicted of a part of her assigned dower, and relies on chap. 95, § 14, R. S. which is, "If a woman be lawfully evicted of lands, assigned to her as dower, or settled upon her as a jointure, or deprived of the provision made for her by will, or otherwise, in lieu of dower, she may be endowed anew in like manner, as though no such assignment or provision had been made."

Zadock French died Dec. 30, 1830. Plaintiff petitioned

judge of probate for dower, July 26, 1831. Warrant from judge to assign dower issued same day. Return by commissioners, Aug. 29, 1831. Return of dower accepted by decree dated, Aug. 30, 1831.

The estate returned by commissioners, of which plaintiff was dowable was valued at $61,199,50. And the commissioners return, that "they have set off to plaintiff one full third part of said estate for her dower therein," which would amount in value to $20,399,83. It will be perceived that the commissioners assigned not the third part of each lot, but in lieu thereof distinct and separate lots.

To this assignment the widow made no objection, but assented; she did not appeal from the decree accepting said return; entered into possession, and conveyed by deed some of the lots, received the rents and profits of the whole, and still receives them, excepting the Exchange, which she received nearly 11 years.

Now this case is precisely the case of *Jones et ux.* v. *Brewer*, 1 Pick. 317, where the Court say, "This was an assignment against common right. An example of such an assignment in the books is, where the heir, on the acceptance of the widow, assigns one manor, in lieu of a third part of each of three manors. It is a principle, in such cases, that she takes subject to all incumbrances by the husband. Co. Lit. 32, a, and note 197. If the estate assigned, turns out to be more valuable than a third, she may still hold it; and on the contrary, if it proves less valuable, she must bear the loss."

If it be contended that the case at bar differs from the case cited, because this is assignment by probate and that by deed, then I will refer to the deed in which it appears, that the estate "was assigned to her for her life, as and for her dower, and to be holden in full satisfaction of her dower and subject to all the conditions and liabilities of dower, and with all the privileges and incidents to dower belonging and appertaining." So that the deed was of the same force and effect as though assignment had been made by decree of probate judge, "subject to all the conditions, &c.," and one of the incidents to dower is, that the widow may be evicted. "If the estate

assigned turns out to be more valuable than a third, she may still hold it." Mark this language, for it is particularly applicable to this case, for if the plaintiff was not dowable in the Exchange, then it should not have been appraised among the other estate of her husband; then deduct the sum of $10,000, from the appraisal, and it will leave $51,199,50, of which she was dowable, one third of which is $17,066,50, instead of the $20,399,83, the dower assigned, a difference in her favor of $3,333,33,—a sum, for which the widow could well afford to run some risk—a sum which would support any ordinary widow.

Again, this risk was one anticipated and assumed by the plaintiff. She knew of the mortgage to Peters, for she had signed the deed relinquishing her dower; and she had previously signed Ebenezer French's bond to account for the proceeds of real estate to be sold under license from this Court, by paying the debts due from the estate, among which was this very debt due to Peters, as appears by said French's list of claims filed in probate office and the judge of probate's certificate to this Court, as a basis for said license. The conclusion is inevitable, therefore, that she relied on her son Eben, (the administrator,) that he would discharge his duty and pay the debts and thereby discharge this mortgage. One of the conditions of his said bond was, "That if he shall observe the rules of law for the sale of real estate by executors or administrators and shall dispose of the same and account for the proceeds thereof agreeably to the rules of law, then, &c."

Now the said administrator, as well as the judge of probate, certified to this Court, debts amounting only to $29,624,78,
and personal property to . . . 2,860,88,

leaving a balance to be paid by sale of real estate, of 26,763,90.

Said French testifies that he sold under said license, from $25,000 to $30,000 worth of real estate. He must also have had a large income from rents which would go into the funds of the estate for discharging debts. Then who can pretend, if said administrator had discharged his duty accord-

ing to the conditions of his bond, in "accounting for the proceeds," the Peters debt would not have been paid and his mortgage discharged? And if the plaintiff, his mother, had not, through parental affection, signed his bond, she might have had her remedy on it, for the principal in that bond has never to this day accounted for a single dollar. Now if any one is to suffer, who should it be, the innocent purchasers under the administrator's sale, or the plaintiff, his surety?

Said French further testifies, that "he could have paid $5,000, in 1835, almost any time." From what funds? Certainly from the funds of the estate. Why did he not pay Peters then, and comply with the conditions of his bond? And why did not the plaintiff see that it was done? Because she then relied on the integrity and ability of her son to discharge the mortgage at any time, and never had the least idea of ever calling on purchasers of other real estate to contribute in dower.

I may well say then, that she accepted of the Exchange as part of her dower, knowing of and assuming the risk respecting the mortgage.

And if by her own neglect, or the neglect of the administrator, or for any other cause, she has been evicted, she must meet that contingency, for it was one by her assumed.

But I have another answer to this suit. The assignment of the Exchange, was a legal assignment; it entitled the plaintiff to redeem and to hold the whole estate during her life, and an estate through her descendible to her heirs; or in the words of C. J. Whitman, in case the widow redeem, "she would hold during her life, and her heirs after her, until the amount paid by her, had been refunded." *Wilkins* v. *French*, 20 Maine R. 118. This decision then settles this case beyond all doubt; for if the widow had the power to redeem by paying merely the interest on the amount due on the mortgage, and neglected it, it is now too late for her to complain; she has been evicted through her own neglect. The decision in Wilkins and French was made in June Term,

long before the mortgage was foreclosed, consequently she knew her rights.

And now I would appeal to common sense, if I may here be allowed to appeal to such a deity, how this Court, after solemnly deciding that the dower thus assigned was legally assigned and gave the widow such rights, if she chooses not to avail herself of them, she shall subsequently be allowed to disturb the title of 300 individuals, who purchased and had no such rights to redeem?

But there is another and distinct reason why the plaintiff should not sustain her action, for it appears that she was endowed to the amount of $20,399,83, and has been evicted of such endowment only to the amount of $10,000; and she still retains (excepting what she has sold,) the balance, viz: — $10,399,83.

How then can she "be endowed anew in like manner as though no such assignment had been made?" for such is the language of the statute. Shall she retain this $10,399,83, and also be endowed in one third of all the other real estate owned by her husband during the coverture? for such is the claim in this case. If so, the result would be this—she would be dowable in one third of $61,199,50, deducting the Exchange $10,000, viz. $51,199,50, one third of which is $17,066,50, to which add the dower which she still retains, viz. $10,399,83, and it will amount to $27,466,33, the very modest claim which this widow now makes. And there is no such thing as a fractional part of dower; such a thing was never known; and the statute says she shall be endowed anew as though no such assignment had been made.

She has not released the balance, neither can she, for she has sold a part of it.

The Court, I know, will give this case due and weighty consideration; it involves hundreds of other suits, besides 6 or 8 now pending, as many suits as there are lots of land in the commissioner's schedule, yea more, for they have been divided and sub-divided and owned by different individuals. The plaintiff has no equity in her claim; she is in possession of a

large estate, as dower, much more than enough for her support. This is an attempt by heirs; an experiment which I apprehend neither law or justice will sanction.

The opinion of the Court was drawn up, and read, June 30, 1848, by

TENNEY J. — In Dec. 1830, Zadock French, the husband of the plaintiff, died intestate. According to the inventory returned to the probate office by the administrator upon his estate, the personal property was appraised at the sum of $2,680, and the real estate of which the intestate died seized, at the the sum of $59,819. The claims returned as existing against the estate amounted to the sum of $29,624,78, in which was included a note held by E. D. Peters, secured by a mortgage given by the intestate upon the Penobscot Exchange Coffee House, and certain lots of land connected therewith. In the mortgage deed the plaintiff relinquished her right of dower in the premises conveyed. Upon the note so secured there was due on Jan. 19, 1831, the sum of $10,600.

On the petition of the administrator he was authorized by the Supreme Judicial Court, at a term held in the county of Penobscot, on the second Tuesday of June, 1831, to sell real estate of the intestate sufficient to pay the sum of $25,000, of the just debts and incidental charges. On July 26, 1831, upon the petition of the plaintiff, a commission issued from the probate court, directing the assignment of dower to her of all the real estate of which her husband died seized; upon which the commissioners returned their appraisal of all such real estate at the sum of $61,199,50, the lot out of which dower is claimed in this action being a part; and that they had assigned to the widow, one full third part of all the real estate of which the intestate died seized. The assignment was of certain entire lots, instead of one third part of each, including the Exchange Coffee House, and the lots connected. The report of the commissioners was accepted by the judge of probate, without objection, and the widow entered into the actual possession of the estate assigned to her, and in a part

of which she has since conveyed her interest. She occupied the Exchange Coffee House herself, or by her tenants, till March, 1842, when the mortgage thereon, to secure the note held by Peters, was foreclosed. The other portions of the estate assigned to her, she still possesses. It appears that the administrator made sale of real estate of the intestate under the license, and from the avails and other means, paid debts due from the estate to the amount of from $35,000 to $40,000, and that the note of Peters was reduced in its amount in the fall of 1835 to about $4,000 or $5,000; and that he was unable to pay this balance. The administrator has never made any return of his doings to the probate office, since he was licensed to sell, nor made any settlement of his administration.

This is an action of dower, *unde nihil habet*, wherein the plaintiff demands against the defendant her just and reasonable third part of lot No. 57 in Bangor. The tenant in his defence, among other grounds, relies upon this, that there was assigned to the plaintiff not one third part of each lot of land of which the intestate died seized, but there was assigned to her certain entire lots and messuages in lieu and instead of one third part of each lot of which the intestate died seized, by commissioners appointed by the judge of probate upon her petition; that the return made by the commissioners, was duly accepted and recorded; and that the said assignment was accepted by the plaintiff as and for her dower, and by and with the consent of the heirs of the intestate. The plaintiff, in a counter brief statement, admits the assignment referred to in the brief statement of the tenant, but alleges, that after she had been in the occupation of the Penobscot Exchange Coffee House for a time, she was lawfully evicted therefrom; and therefore is entitled to be endowed anew.

In support of her action, the plaintiff relies upon statute chap. 95, sect. 14, which is as follows. "If any woman be lawfully evicted of lands assigned to her as dower, or settled upon her as a jointure, or be deprived of the provisions made for her by will, or otherwise, in lieu of dower, she may be

endowed anew, in like manner as though no such assignment or provision had been made."

This right of a widow to be endowed anew, if she is evicted of lands first assigned to her as dower, is regarded by the plaintiff's counsel, perhaps very properly, as an affirmance of a common law right, rather than as the introduction of a principle, entirely new.

"When dower is assigned, there is a warranty in law implied, that if the tenant in dower is impleaded, she shall vouch the heir, and if evicted, shall recover the third of the remainder." Co. Litt. 38, b; 1 Cruise's Digest, Title Dower, chap. 4, sect. 26. "In some cases a woman shall have a new assignment of dower. As when she is evicted out of the lands assigned to her, she shall be endowed of a third of the remainder." 4 Rep. 122, a. The widow, at common law, is entitled in the assignment of dower, to one third out of each parcel of land, and if the assignment be made by the sheriff, he is obliged to assign a third part of each manor, or a third part of the arable, the meadow and the pasture. This method of endowment is denominated "according to common right." Co. Litt. 30, b, 32, b, and 39, b.

But when dower is assigned by the heir, he may assign one manor in lieu of a third of three manors, which will be good, if accepted by the widow. And this is called an assignment "against common right." The endowment by metes and bounds, "according to the common right," is more beneficial to the wife than to be endowed "against common right," for then she shall hold the land charged in respect to a charge after her title of dower." 1 Cruise's Digest, Title Dower, chap. 4, sect. 12; Co. Litt. 32, b, note 2. "If the husband dieth seized of other lands, in fee simple, and the same descend to his heir, and the heir endoweth the wife in certain of those lands, in full satisfaction of all the dower, that she ought to have, as well in the lands of the feoffees as in his own lands, this assignment is good, and the several feoffees shall take advantage of it. And therefore if the wife bring a writ of dower against any of them they may vouch the heir, and he

may plead the assignment, which he himself hath made in safety of himself, lest they should recover in value against him." Co. Litt. 35, a. This doctrine of the common law of England has been recognized as the law of this country. *Jones & ux.* v. *Brewer*, 1 Pick. 314; *Scott, petitioner*, v. *Hancock & al.* 13 Mass. R. 162.

It is not denied by the plaintiff's counsel, that if the heir should assign as dower an entire parcel of land, in lieu of one third of several parcels, and the dowress should accept the same, so as to bind her, she would take it charged with the incumbrances; but it is insisted that when the assignment is made by authority of the judge of probate, it is otherwise; that the widow is not at liberty to object to an assignment made by order of a court of competent jurisdiction.

The power of the judge of probate does not extend to an assignment of dower in lands of which the husband was not seized at the time of his death; or of lands of which the husband was so seized, when the right to dower is disputed by the heirs or devisees. Stat. chap. 95, sect. 3; *French* v. *Crosby*, 23 Maine R. 276. Judge Jackson, in his treatise upon Real Actions, page 327, in reference to a plea in bar to an action of dower, "that her dower has been already assigned," says, "that it will vary in one case from English forms. By our laws the judge of probate for the county, where the estate of the husband is settled, may cause the widow's dower to be assigned to her by three freeholders appointed by him, and such assignment, being duly accepted and recorded in the probate office, is binding upon all persons interested. This authority of the probate court, it is presumed, would be confined to the real estate of which the husband died seized. The statutes contemplate the settlement of the estate among the widow and heirs or devisees of the deceased." It would seem to follow, that such assignments of dower, being made by the consent of the heirs or devisees of the lands of which the husband died seized, it is only another mode of assigning dower by the heirs or devisees, and the dower so assigned is subject to all the incidents, which would attach to an assignment made by them. If it were made "according to common

right," and the dowress is evicted, she is entitled to be endowed anew; if "against common right," she takes the land charged with all incumbrances, and is concluded.

But it is insisted, that before a widow can be concluded by an assignment of dower "against common right," if there should be an eviction, she must not only accept the dower assigned by the judge of probate, but must give a written and sealed release of all claim to the residue of the estate. No such release seems to be required where the assignment is made by the heir, and no good reason is pointed out, for its necessity, where dower is assigned by the judge of probate. According to lord Coke, in the previous citations, "where dower is assigned by the heir, he may assign one manor, in lieu of a third of three manors, which will be good, *if accepted* by the widow." In the case of *Jones & ux.* v. *Brewster*, the assignment of one entire parcel, instead of a third of each of several parcels, was made by release instead of the mode usually adopted; but it was not upon that distinction that the decision rests. The release of the widow was so qualified, that it was to have no other operation, than would the acceptance of the same land under a different mode of assignment. The Court say, "the important point in every case of that kind is, that the widow has accepted, what could not have been lawfully assigned to her against her will." And when it is said to be a voluntary release of a legal right for something supposed to be equivalent or more, it is not understood that she was regarded as barred merely because she had given a written release as evidence of the assignment, more than if she had accepted the assignment properly made, without the release.

Before an assignment made by commissioners appointed by a probate court can have any validity, it must be accepted by the court, and a decree thereupon passed, and all become matter of record. Upon the question of acceptance, the heirs and the widow are entitled to be heard. She may claim to have the assignment made "according to common right," if it has not been done. She can object to an assignment "against common right;" and there would certainly be great propriety

in this, if the land assigned was incumbered, and she exposed to an eviction. If her objection should not prevail, and the report should be accepted, she would have the right of appeal, or might perhaps refuse to accept the assignment, and resort to her remedy by a direct demand upon and action against the tenant of the freehold. But if she should interpose no objection to the assignment, suffer the commissioners' report to be accepted, a judgment thereon to be recorded, and under that should enter upon the enjoyment of the lands assigned, it is difficult to see wherein she has failed to accept the dower as effectually as she could by her deed. She has become a party to a judgment of a court of competent jurisdiction, which judgment by her acts she carries into full execution.

Was it intended by the section of the statute relied upon, to extend the privileges beyond those which a widow holds under the common law? This provision secures rights to a widow, when she has been obliged to yield her dower to a paramount title, without pointing out the remedy; for this, other provisions of law must be resorted to, in order to make that right available. If she comes within the meaning of the law, "she may be endowed anew, in like manner, as though no such assignment had been made." If, at the time of the eviction the whole estate of which the husband died seized is in the possession of the heirs and devisees, and they interpose no objection to the new endowment, a new petition may be presented to the judge of probate, and the proceedings will be precisely as they were upon the former application. If those who are tenants of the freehold in the land of which the husband died seized, at the time when the new assignment is called for, resist her right as claimed, the probate court has no jurisdiction of the matter, and the widow must resort to her action of dower, after a legal demand upon the tenant and his refusal to make the assignment. And here again it is her right, if any she have, "to be endowed anew, in like manner as though no such assignment had been made." She is entitled to be endowed of all the lands of which her husband was seized during the coverture, unless she is in some manner

barred thereof. The right which she would enforce is not affected by any thing before done, if she is entitled by virtue of that provision. In the trial of an action of dower, the questions are, whether the husband was seized during the coverture, and is he dead; and what is the damage for detention? Stat. chap. 144, sect. 5. If she obtains judgment, a writ of seizin shall issue, requiring the proper officer to cause her dower to be assigned, sect. 8, and the quantity of land to be set off is one third part, and determined by certain fixed rules of law, which do not change, to meet the equities of particular cases.

If a widow is evicted of only a part of the lands first assigned to her as dower, can she retain the remainder, and still be endowed anew, in the same manner as though no such assignment had been made? If she can be endowed anew, upon an eviction of three fourths of her dower and retain the other fourth, she can claim the same right upon the eviction from any part, however small, and retain the residue. It requires no argument to show the injustice and absurdity of such rules. And the counsel for the plaintiff does not claim any right to more than sufficient to supply the loss of that of which she has been deprived. But the probate court cannot authorize commissioners to assign so much only as will make up the deficiency; the new commission cannot be engrafted upon the old; the considerations, which brought the first board to the result which they reported, cannot enter into the deliberations of the new board. The value of the property may have materially changed in the meantime. The part which the widow still holds may have vastly increased in value, and the part from which she has been evicted may have depreciated; or a contrary change may have taken place. If she shall resort to her actions against the tenants of the freehold, she will be met by the same embarrassments and obstacles. We have seen that there is no remedy open to her, excepting to recover her dower; to that she is fully entitled, or she can claim nothing. No issue can be made and tried in an action of dower to determine the relative value of the

lands lost and those which are still possessed by the widow. Such a duty, it is believed, was never undertaken by a court of common law; or was ever directed by such court to be performed by the sheriff, who had committed to him for execution a writ of seizin, upon a judgment in an action of dower.

Again, on the failure of title in that part, which was first assigned to the widow as dower, the quantity of land out of which dower would be taken after such failure, is so far diminished, and her rights are limited in the same ratio.

If practice would authorize such a commission from a probate court, or the trials of such issues; or such assignments upon a writ of seizin under other circumstances, the provision of the statute invoked, forbids its application to such a case as the present; she is to be endowed anew, *in like manner as though no such assignment had been made.*

It is manifest, that where a woman is endowed "against common right," according to the course of proceedings under probate jurisdiction or at common law, there is an insurmountable difficulty, in making restitution to the dowress from the estate for any loss which may arise by reason of an eviction from a part of the lands assigned. If she is endowed of one third of each parcel of land, and the whole of any parcel passes into other hands under a paramount title, she is not prejudiced, for the estate of the husband is so much diminished in quantity, and she should not have dower in lands not owned by the husband. If the paramount title covers only the part assigned to the widow, she is then entitled to be endowed anew of a third part of the two thirds remaining, and there is no interference with other parcels. When the residue of the real estate, of which the husband died seized, after deducting the part assigned to the widow, is sold for the payment of debts or otherwise, the purchasers will understand, that as long as she holds one third they have a perfect title to the two thirds of each parcel, if the title was in the intestate; but if she is endowed of entire parcels instead of a third of each parcel, purchasers of the latter would, upon the plaintiff's view of

the law, be exposed to a deprivation of one third of the land which they had purchased under authority of law. Before it could be held, that proceedings, which tend to such inconveniences, irregularities, losses and absurdities can be authorized as legal, some positive rules of law should be shown, which require it. None such have been found. A widow endowed against common right, if there is no title paramount to that of her husband, holds the dower by a tenure which is not affected if the title to the whole of the residue of the estate should fail, and if she takes dower in this manner, she is also subject to be deprived of the whole or a part, without recourse to other portions of the estate to supply the loss.

When these principles are applied to the case at bar, it is apparent that the plaintiff does not bring herself within the provision of the statute, so that she can recover in the present suit, upon that ground.

But it is again insisted, that the tenant has shown no title in the premises described in the plaintiff's writ, and therefore he is not entitled to contest the right of the plaintiff. It is quite manifest from the pleadings and brief statements, that this question was not intended to be raised at the trial. The defence disclosed by the tenant's brief statement was, that the plaintiff had been endowed of all lands of which the husband had died seized. Instead of leaving the tenant to sustain that defence, and to show that he was entitled to set it up, by a counter brief statement, the plaintiff undertook to avoid its effect by relying upon an eviction of a part assigned to her as dower. But the widow is shown to have been endowed in all the lands of which her husdand was seized at the time of his death; the premises described in the writ were a part of those lands. She has no right of dower therein; she can recover only upon the strength of her own title; by her writ, pleadings and course of proceedings, she has treated him as tenant of the freehold entitled to defend against her claim; and his possession cannot in such aspect of the case, be presumed to be other than lawful. *Plaintiff nonsuit.*

Daniel T. Jewett *versus* Warren Preston *& al.*

Where one was declared a bankrupt under the late bankrupt law of the United States, the personal property of the bankrupt, whether inserted in his schedule of effects or not, vested in his assignee on his appointment. And if the property be sold by the assignee, pursuant to a decree of sale by the Court, the property vests in the purchaser, and he may maintain an action for the recovery thereof in his own name.

Where the party claims title to articles of personal property by virtue of a deed of mortgage thereof, the title to the property does not vest in the mortgagee until a delivery of the deed to him or his agent.

If the condition of a mortgage of personal property is, that the deed shall be void on the payment of two notes, particularly described by their amounts and dates, according to their tenor, and the mortgagee never had any notes conforming to those described in the condition, either in the amount or dates, the mortgagee acquires no title to the property by virtue of the mortgage, although at the time he was the holder of two other notes against the mortgagor for different sums and with different dates.

Trover, to recover the value of certain furniture, books, &c., particularly described.

The articles were originally the property of Preston, one of the defendants. He was declared a bankrupt on March 21, 1843, and put into his schedule of effects this property in this way only: — "Also my right to redeem certain personal property and household furniture mortgaged to said Convers Francis, Jan. 10, 1839, for the consideration and payment of $1,642." On March 23, 1843, J. W. Carr was appointed assignee. The effects of the bankrupt were decreed to be sold, and he advertised to be sold on Sept. 20, 1843, "sundry articles of personal property. The right of redeeming sundry articles of personal property mortgaged. Said property will be sold subject to any liens and liabilities and to all equities existing between the parties, and the interest only that said estate has to the same will be transferred." The property was thus described in the bill of sale from the assignee to the plaintiff. "Said Preston's right and interest, or all the interest that I, as assignee, have to certain personal property represented in said Preston's schedule to be mortgaged to Convers Francis, Jan. 10, 1839, for the consideration and payment of $1,642. A

schedule of which was given me by said Preston, a copy of which is hereunto annexed."

The deposition of Mr. Francis, one of the defendants, "taken in a case pending in the District Court of the United States," was offered in evidence by the plaintiff, and objected to, but admitted. The property had not been removed from the actual possession of the said Preston, when the suit was brought.

The defendants proved that a mortgage was made of the property by Preston to Francis, on Jan. 10, 1839, but there was no evidence that the mortgage bill of sale was ever delivered to said Francis, but there was testimony tending to prove, that the property was delivered to an agent of said Francis "in the fall of 1842."

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

At the trial, before SHEPLEY J., the jury were instructed, that by virtue of the act of Congress establishing an uniform system of bankruptcy, and the proceedings under it, all the interest of Preston in the articles mortgaged passed to his assignee in bankruptcy, and he ceased to have any interest in them; that if they were satisfied, that the assignee sold and conveyed to the plaintiff all the interest which he thus acquired, the plaintiff would thereby become the owner of the articles mortgaged, so far as the ownership was before in Preston, and if there was then no subsisting valid mortgage of them, would become the owner of those articles — that the mortgage would not become effectual for the conveyance of any interest in them from Preston to Francis, without a delivery of the mortgage deed to Francis or to some other person for him; that proof of delivery of the property named in it would not of itself be sufficient to prove a delivery of the deed.

The Judge was requested to instruct the jury as in the paper annexed, marked A, but refused.

If any of these instructions or rulings were erroneous, or if the refusal to instruct was so, the verdict for the plaintiff was to be set aside and a new trial granted.

The counsel for the defendants request the Court to instruct the jury: —

1. That the right or interest purchased by the plaintiff was the right stated in Preston's schedule, in the advertisement by the assignee, and in his book in which he recorded his sales, and from which he read the description of the property to be sold at the time of sale, was a right to redeem the furniture under the mortgage made to Francis.

2. If the assignee sold all the debtor's right in the property, it was his right as described in the schedule, advertisement and assignee's book, viz. all the right Preston had in the right to redeem — and that the purchaser took no right but the right to redeem.

3. That if there was no mortgage subsisting at the time of the sale, there was no right to redeem, and the plaintiff took nothing by the sale.

4. That if there was a mortgage in force at the time of the sale the plaintiff has no right to the property or to this action, without redeeming or offering to redeem.

5. That the plaintiff, having bought only a right to redeem under the mortgage to Francis, cannot set up any title against Francis — that he has no right to contest the validity of the mortgage, or to set up the defence against it, that it was fraudulent.

6. That no one but a creditor has a right to contest the validity of the mortgage, and the plaintiff not being a creditor cannot be allowed to do so.

7. That the mortgage if not effective from the beginning, became effective as soon as accepted or ratified by Francis, against any person claiming under any title acquired subsequently.

8. That the furniture did not pass and vest in Carr, the assignee, by virtue of the bankrupt law.

H. Warren, for the defendants, contended that the first part of the instruction of the presiding Judge was erroneous. That should not have been given, but the law was correctly stated in our first request for instruction. It was merely Preston's

right to redeem the property, which was put in the schedule in bankruptcy, and which was advertised and sold by the assignee. The purchaser cannot dispute that there was a mortgage, or contest its validity. If there was no mortgage, there was no right of redemption. 3 Metc. 147; 13 Mass. R. 515; 6 Greenl. 289; 10 Mass. R. 421; 19 Wend. 514.

But if any one could contest the validity of the mortgage, it was a creditor only, and the plaintiff is not in the place of a creditor, but of the bankrupt only. The sixth request therefore should have been complied with.

The instruction that the property could not pass until the delivery of the deed, as applied to personal property, was erroneous. It might have been correct, if the subject had been real estate. Personal property may pass by delivery only, and in this case the delivery before the bankruptcy was proved. 15 Wend. 545; 5 Munf. 160.

D. T. Jewett, pro se, and with him was *J. Appleton*, contended that all the personal property of the bankrupt passed to the assignee, whether mentioned in the schedule of effects or not. The sale of the property was of the whole interest of the bankrupt in it. It was not the equity of redemption which was sold, but the property said to be under a mortgage.

But even if the equity only was sold, the mortgage was extinguished, if it ever existed, as the notes it was made to secure were not produced at the trial, and were shown not to be in existence by the deposition and letter of Francis.

There was no attempt made to show a sale or mortgage to Francis, except by a bill of sale under seal. The delivery of the deed, in such case is as essential to pass personal as real estate.

Hobbs, for the defendants, replied.

The opinion of the Court was drawn up by

WHITMAN C. J. — The property of Preston, on his becoming a bankrupt, vested in his assignee, who, instantly thereupon, became entitled to possession of it and might have taken

it from the bankrupt, or any one else in possession of it. In fact, the possession of it by the bankrupt, was the possession of the assignee, the bankrupt being but the keeper of it for the assignee. It was not necessary it should be inserted in the bankrupt's schedule in order to give the assignee such right. The bankrupt act, of 1841, § 3, is explicit to this effect. The right to the property, for the conversion of which this action was brought, and which was never out of the actual custody of Preston, if the defendant, Francis, had no right to it, might be sold by the assignee, under the order of Court obtained for the purpose; and it appears, that the assignee had authority to sell, and did sell whatever right he had to it to the plaintiff. The plaintiff, thereupon, became entitled to the possession of it, the same as the assignee had before been, if Francis had no right to it. Whatever right the assignee had, before the sale, was divested out of him, and if his right was a perfect one to the whole of the property unincumbered, it could not, by the sale, have vested in any one else but the plaintiff. By that act nothing by way of implication or otherwise, could have been vested in, or could be considered as reserved to, any person, other than the vendee named, unless such other person had become entitled thereto before Preston became a bankrupt.

Now it remains to be ascertained, whether the defendant, Francis, had acquired a right to the property before Preston became a bankrupt. The mortgage relied upon by him bears date Jan. 10, 1839; but his letter, under date of Sept. 4, 1843, shows that at that time, no such mortgage had ever been delivered to him, or to any one to his knowledge for his use; and there is no proof in the case tending to show that he was mistaken. The law is well settled, that every deed must be considered as taking effect from the time of its delivery. Francis, then, at the last named date, had no title to the property. Preston, therefore, had not then been divested of his interest in it by virtue of the mortgage deed, and it must have vested in his assignee. But if the mortgage deed had been seasonably delivered, there are still other difficulties in the

way of its becoming effectual. It purports to have been made for the purpose of securing the payment of two notes of hand — one for seven hundred dollars, bearing date July 13th, 1828, and one for five hundred dollars, bearing date Jan. 31, 1835. Now the letter of Francis, before alluded to, shows that he never had any such notes; and his deposition, which was properly admitted as containing what may be deemed to be his admissions, is to the same effect. He says the notes he had were three in number, viz. one for eight hundred dollars, one for one thousand dollars, with five hundred dollars paid and indorsed on it, and the third for seven hundred dollars; neither of them bearing date as stated in the mortgage.

Thus it appears, that it is unimportant to consider, whether the mortgage was fraudulent as against the claims of *bona fide* creditors, or against the policy of the bankrupt law. Whatever was said and done therefore, at the trial, in reference to those matters, was irrelevant, and may be laid out of the case, as the mortgage was from the beginning inoperative. The instructions and rulings, having reference to the merits of the case, cannot be deemed otherwise than correct; and the instructions requested, and not given, were properly withheld. They could not have been warranted by the true effect of the evidence bearing upon the nature of the case.

Judgment on the verdict.

JAMES T. SOUTTER *& al. versus* EMERSON D. PORTER.

The conveyance by a tenant in common of a portion of the common estate by metes and bounds, will not necessarily be inoperative upon his own rights or the rights of others. The law will give effect to such conveyance, so far as it may do so consistently with the preservation of the entire rights of the co-tenant, and no further. If the estate so conveyed by metes and bounds, or any part of it, shall, upon partition of the premises, be assigned to the right of the grantor or his assignee, the conveyance embracing it may operate, and convey the title from the grantor to the grantee.

Such a conveyance of a tenant in common, however, cannot in any event operate, contrary to the expressed declarations and intentions of the parties, to convey an estate in common instead of an estate in severalty.

Soutter *v.* Porter.

Where one tenant in common conveys a portion only of the common property by metes and bounds, a creditor of the grantee, who levies his execution upon an undivided share of the whole common estate, acquires nothing by such levy.

THIS was a petition for partition. At the trial before SHEPLEY J. the petitioners read a deed of release to themselves from Stephen Goodhue, dated Aug. 29, 1844, acknowledged same day, and recorded Aug. 29, 1844, conveying all interest in the premises.

Respondent read a deed, dated April 1, 1833, recorded 2d same April, Micajah Drinkwater to John McLaflin, conveying one half of the premises in common; deed of mortgage of same date, of same premises from the grantor to grantee, reconveying same in mortgage, recorded April 10th, 1833. An assignment of that mortgage from Drinkwater to the respondent, made Oct. 4, 1839, recorded same day; record of a judgment recovered by Drinkwater for possession of the premises, declaring on the mortgage and an entry by virtue of an execution issued thereon, made Jan. 19, 1837, to foreclose the mortgage; deed dated April 3, 1833, duly recorded 11th of same month, from John McLaflin to Stephen Goodhue, releasing the south half; deed of same date from Goodhue to McLaflin, releasing the north half; deed May 3, 1834, duly recorded 5th of same month, Stephen Goodhue to Albert Baker, conveying the south half with warranty.

Petitioners then read the record of a judgment recovered by them at the July term of this Court, 1844, against Albert Baker; and of a levy, duly made and recorded, on the south half of the premises by metes and bounds. Respondent then read, subject to objection, the record of a judgment recovered by Joseph Stover against Albert Baker, July term, 1844, and of a levy on eight twenty-sixth parts of house and lot in controversy, the same having been attached on mesne process by said Stover subsequently to an attachment of the same by the petitioners.

All the documents may be referred to and copies put into the case at the election of either party. The case was taken

by consent from the jury and submitted to the decision of the Court from the testimony, or so much thereof as may be legal; and judgment was to be entered according to the legal rights of the parties.

No one of the papers referred to came into the hands of the Reporter. The facts, however, are stated in the opinion of the Court. When the opinion was read, July 1, 1848, it was suggested, that there was error in one statement, the papers were re-examined, and it was found that there was no error in the statement.

This case was argued in writing.

Hobbs, for the petitioners.

The respondent does not claim to be sole seized. By his plea he denies the tenancy in common or seizin of the petitioners, as alleged in their petition.

To what are petitioners entitled?

The answer to this question will depend in part on the legal effect of the conveyances of McLaflin to Goodhue and Goodhue to Baker, under whom petitioners claim.

If Baker's title to the south half is void, the petitioner's title, so far as it depends on the levy against Baker, must fall with it.

But if Baker's title is void against the petitioners it is also void against Stover, a subsequent attaching creditor.

If void against both, then petitioners' title is established by deed from Goodhue to them, dated Aug. 29, 1844. That deed conveyed all Goodhue's interest in the whole parcel.

It is conceded that the partition deeds between Goodhue and McLaflin are voidable by respondent, and by his dissent become inoperative and void as to him. But the respondent, by introducing them to displace the petitioners' title to an undivided half of the whole would seem to give his assent to the partition made by his mortgagor; and if adopted by him, said partition deeds establish the title of Baker to the south half, and consequently confirm the petitioners' levy on the south half, as the property of Baker.

But if such use of said partition deeds by the respondent is

not to have that effect, then the petitioners contend, that the deed from Goodhue to Baker is not wholly void. It conveyed all Goodhue's interest in the south half, to wit, an undivided half of it, or one quarter of the whole.

"In such case there is no reason of justice or policy which should prevent the grantee from holding an undivided moiety of the whole." *Varnum* v. *Abbot*, 12 Mass. R. 478.

It is no injury to the respondent to give the deed this construction. He will still retain his share as before.

If the deed, Goodhue to Baker, conveyed to him half undivided of the south half, the petitioners acquired the same title by their levy, for a levy is a statute conveyance, and does not differ in its legal effect from a conveyance by deed. *Varnum* v. *Abbot*, 12 Mass. R. 476; *Waterhouse* v. *Gibson*, 4 Greenl. 230.

The levy of petitioners took Baker's interest in the south half. It is an estoppel on Baker, and consequently on Stover. *Varnum* v. *Abbot*, 12 Mass. R. 474; *Bartlett* v. *Harlow*, *ib.* 354.

That levy was not entirely fruitless and void. If on partition the respondent's half should be so assigned as not to include any part of that taken in execution by petitioners, there is no reason why they may not hold what has thus been taken on this execution. 12 Mass. R. 354. A levy under similar circumstances was held valid in *Brown* v. *Bailey*, 1 Metc. 254.

If Stover cannot set up title against petitioners, much less can respondent. If he presents it in bar of petitioners' claim, it must be considered as an affirmation of partition by his mortgagor and Goodhue. The respondent owns only one half of the property, — the north half, if he affirms the partition by his mortgagor; an undivided half, if that is to be considered as void in regard to himself.

If respondent owns half, divided or undivided, petitioners own the other half, by the levy, as before shewn, or, by deed of Aug. 29, 1844. Stover has no interest in the premises.

If it is contended that the deed of Goodhue to Baker is

wholly void, then we say the title still remained in Goodhue of an undivided half of the whole and his deed of Aug. 22, 1844, conveyed that estate to the petitioners. And so the petition is maintained.

Rowe, for the respondent.

It is not denied, that the respondent is seized of an undivided half of the premises. The only question is, whether the petitioners are seized of any, and if any, what portion.

I deny that they are seized of any part. They first claim under Goodhue's release of Aug. 1844. They take nothing by that, for Goodhue had, then, no title.

On April 3, 1834, Goodhue and McLaflin were in joint possession of the premises, Goodhue having an unincumbered title to one undivided half, and McLaflin holding the other, subject to a mortgage to Drinkwater. On that day they executed mutual releases, whereby Goodhue held the south, and McLaflin the north half, in severalty.

On May 3, 1834, Goodhue, continuing in uninterrupted possession of that part, conveyed the south half, by deed of warranty, to Baker. Goodhue no longer had any interest in the premises, his title to the north half having passed to McLaflin, and his title to the south, to Baker. For whatever doubt may arise as to the effect of his deeds to McLaflin and Baker in other respects, there can be none as to their operating as estoppels to him and those who claim under him, by subsequent conveyances. *Varnum* v. *Abbot*, 12 Mass. R. 474.

The counsel throws out the idea that the introduction by us of the partition deeds of Goodhue and McLaflin, is a ratification of that partition, and confirms his client's title in severalty to the south half. Well, so far as this case is concerned, I can make no objection to the adoption of that doctrine. For the only effect will be a nonsuit; there being nothing to be divided — the petitioners holding nothing in common with the respondent.

The petitioners' second ground of claim is by virtue of the

levy of their execution against Baker, in the south half, by metes and bounds.

I deny that this gives them any right whatever to pray for partition.

If it be conceded that the levy passed all Baker's interest in the south half, the concession would not aid the petitioners' case. Before they can have partition they must show an undivided interest in the whole premises. Baker had no such interest, but only an undivided moiety of the south half, which is a very different matter from an undivided quarter of the whole. He could have maintained no suit for partition of the whole, for he had no interest in the north half; nor for partition of the south half, for that would work an injury to this respondent, which the law does not allow. The land, I understand, is covered by a block of houses containing two tenements, the one on the north and the other on the south half. The only just and convenient partition must be by a line drawn east and west between those tenements. The respondent would then hold one of the tenements in severalty. If this partition be granted, he will have assigned to him one half of the southern tenement; and in a similar partition, on a petition by McLaflin, who seems to have Goodhue's interest in the other half, he would have half of the northern tenement; half of each, instead of the whole of one. That proceedings, leading to such results, cannot be allowed, has been long settled on reason and by authority. *Porter* v. *Hill*, 9 Mass. R. 34; *Bartlett* v. *Harlow*, 12 Mass. R. 352; *Varnum* v. *Abbot*, 12 Mass. R. 476. It appears to me that the cases cited are conclusive against the maintenance of this suit.

But though satisfied with the result, I am not satisfied with the consequences that flow from the reasons that lead to it. McLaflin holds one half of the north tenement without having paid any consideration. Baker but half of the southern, when he has paid full consideration for the whole of that, or for half of both, and neither can have partition without the consent of the respondent; and such partition, if made, would give respondent one of the tenements in severalty, and thus destroy

the title of one of Goodhue's grantees. And there is but one way, in this view of the case, of avoiding this. That is, for one person to unite in himself, the McLaflin and the Baker titles, and then owning an undivided half of each tenement, he would be regarded as the owner of an undivided half of both, presenting the case supposed by Judge Jackson in the counsel's extract from the opinion in *Varnum* v. *Abbot*, 12 Mass. R. 478.

I prefer to arrive at the same result, — a nonsuit, by a course of reasoning that does not involve such consequences. And this I think may be effected, by aid of the common law doctrine of exchange.

"And, upon a similar principle, in case, after a partition or exchange of lands of inheritance, either party or his heirs be evicted of his share, the other and his heirs are bound to warranty, because they enjoy the equivalent." 2 Black. 300. "An exchange is a mutual grant of equal interest, the one in consideration of the other. If after an exchange of lands, or other hereditaments, either party be evicted of those which were taken by him in exchange, through defect of the other's title, he shall return back to the possession of his own, by virtue of the implied warranty contained in all exchanges." 2 Black. 323.

The mutual releases of McLaflin and Goodhue, were in effect, though not technically, an exchange. The transaction is substantially the same, as if it had been effected by an indenture executed by both parties, and containing the word "exchange;" and is to be governed by the same principles of law. Goodhue gave his interest in the northern tenement, in exchange for McLaflin's interest in the southern, which was equal. Consequently, when he, or his grantee was evicted of that interest, through defect of McLaflin's title, he, or his grantee, returned back to the possession of his former interest in the northern half. This eviction was by the entry of Drinkwater to foreclose his mortgage in Jan. 1837. Prior to that time, in May, 1834, Goodhue had conveyed to Baker, by deed of warranty. Baker occupied Goodhue's position in reference

to the exchange. He held the land released by McLaflin, and lost it by the foreclosure, through defect of McLaflin's title. McLaflin released to Goodhue, his heirs and assigns, to hold to him, his heirs and assigns against the claims of all persons claiming under McLaflin. Baker, as Goodhue's assignee, was the person evicted. His is the claim for indemnity, on the authority quoted, and it is to him the interest in the northern half should revert. Or, if Goodhue's interest in the northern half should, on the principle of exchange, revert to him, as it would revert to him, not as a personal right, but as appendant to the ownership of the southern half, and as he had conveyed to Baker by warranty, the title would enure to the benefit of Baker, who would thus be in possession of an undivided half of the whole. Such a result would be just to all parties, and carry out their obvious intentions. And, as it is the settled rule of law, so to construe deeds as to give effect to the intent of parties, and any other construction must, in this case, thwart that intent, and work injustice, I submit this view to the consideration of the Court.

How would the parties stand in this view of the case?

Baker was in possession of, and owned an undivided half of the whole, at time of petitioners' levy. They levied on the southern half by metes and bounds. They have no interest in the northern, and, as before shown, therefore cannot have partition. Besides, Stover has since levied on eight twenty-sixths of the whole, and he may maintain a suit to have that share set off to him, for, in this view of the case, Baker, at the time of Stover's levy was, undoubtedly, seized of at least one fourth of the whole, the petitioners having taken only his interest in the south half.

Such a result would not work a great injury to petitioners for they may still levy on the remaining eighteen twenty-sixths.

It will be obvious to the Court, that the latter view is not presented, so much with reference to the question between the parties in this case, for it cannot affect the decision of that, as with reference to questions which will arise between different attaching creditors of Baker. It seems to me desirable to

have the decision put upon such grounds, as will leave no room for future controversy.

Hobbs, for petitioners, in reply.

Does the respondent disown the partition of McLaflin and Goodhue? If so, that partition is void, so far as respondent is concerned.

Does he assent to that partition? He cannot hold the partition both void and valid.

The partition deeds of McLaflin and Goodhue are void or valid, as the respondent may choose to consider them. If void, then nothing passed by them. The title to one half undivided remained in Goodhue till his conveyance to the petitioners. If valid, then the petitioners are owners of the southern half, by metes and bounds, and are perfectly willing to become nonsuit if the respondent chooses to confirm the partition.

The respondent cannot invoke an estoppel against the petitioners, arising from the deeds of Goodhue. The respondent is not a party or privy to them, nor in any manner bound by them, but is a stranger to the partition and deed to Baker.

The doctrine has been long established that one who is not bound by an estoppel cannot take advantage of it; that a stranger shall not be bound by, or take advantage of, an estoppel. Co. Lit. 352, (a); *Lansing* v. *Montgomery*, 3 Johns. R. 382; *Braintree* v. *Hingham*, 17 Mass. R. 432; *Worcester* v. *Green*, 2 Pick. 425.

McLaflin has had no interest in the premises since the foreclosure of Drinkwater became absolute, because, as argued before, the partition is void or valid at the election of the respondent. If he does not assent to the partition as made, it is void and nothing passed by the deeds.

It is absurd for the respondent to say that void partition deeds had still the effect to convey to one of the parties, (and that party, the one who had no power to make partition,) one undivided fourth more than he originally had.

If, as the counsel for respondent suggests, it is the settled rule of law so to construe deeds as to give effect to the intent of parties, I think the Court will be slow to give such an

effect to the deeds of partition as he claims for them. If the Court cannot consider the partition valid they will, if possible, place the parties in their original position. This is not effected by the application of the doctrine of exchange.

The deeds of McLaflin and Goodhue effected a partition in common law, between tenants in common, in which there is no implied warranty, and such a partition has never been held an exchange. And again, the deeds do not contain the word "exchange," which is absolutely necessary to that mode of conveyance. Co. Lit. 50, (a); Shep. Touch. 295; 2 Black. Com. 323; *Cass* v. *Thompson*, 1 N. H. Rep. 65.

If the transaction was not a technical exchange, then there was no implied warranty, nor reversion of the original estate upon the eviction by Drinkwater.

But grant that the deeds were a technical exchange, then the fee in one half, undivided of the northern half, reverted to Goodhue, and remained in him till his conveyance to the petitioners.

The counsel for the respondent contends, that the reversion enured to the benefit of Baker, because the fee in the reverted estate was appendant to the ownership of the southern half, and this had been conveyed by deed of warranty to him.

One fee simple is never appendant to another, and the only way the reversion could enure to the benefit of Baker, would be by the estoppel of Goodhue by his deed, to claim an interest in the northern half. But his deed was of the southern half only, by metes and bounds.

Neither would such a result as the counsel wishes to establish, be just to the parties, for Baker has a remedy upon the covenants in his deed, and the reversion to him would not bar an action on those covenants. Stover has no undivided interest in the whole estate, for by their levy upon the southern half, the petitioners acquired all Baker's title in that part, and Baker and his subsequent grantee, Stover, are estopped by that levy to claim any interest in the southern half. *Varnum* v. *Abbot*, 12 Mass. R. 476. Stover's levy upon eight twenty-

sixths of the whole, was then void, for the reason that Baker had then no interest in the whole, or in any part. If Baker had still an interest in the northern half, resulting from the application of the doctrine of *exchange*, which I deny; and if it is conceded that Stover by his levy acquired that interest, which I also deny, still the respondent cannot be injured by him, for he has an interest only in the northern half, and therefore, as the counsel argues, cannot have partition.

The counsel for the respondent contends, that the petitioners cannot maintain this suit on the ground of their levy, for by that they acquired Baker's interest in the south half only. But he also contends that the reversion of the undivided half of the north half was appendant to the ownership of the south half. If it was so appendant, it passed by the levy to the petitioners. For the levy had all the effect of a deed from Baker. If Goodhue is estopped by his deed to Baker to claim an interest in the north half; Baker, and all claiming under him, are estopped by the extent. This excludes Stover's title to any part of the premises. The counsel assumes what is not the fact, that Baker at the time of the levy was in possession of one *undivided* half. But I apprehend that the Court, in the decision of this cause will adjudicate only upon the rights of the parties before them.

The respondent has a clear title to one undivided half of the premises, and if he were the petitioner, who could deny his right to partition, or disturb him in the occupation of the share that might be set off to him? He cannot be evicted of any part that may be assigned him on this petition. He ought not to be allowed to set up against the petitioners titles in other parties which they themselves cannot set up; or claim an estoppel against petitioners, arising from deeds to which he is an entire stranger. His attempts to uphold these titles can only embarrass his own.

The opinion of the Court was drawn up by

Shepley J. — The petitioners claim to be the owners as tenants in common of a moiety of a lot of land in the city of

Bangor, upon which two dwellinghouses adjoining each other have been erected, and to have their share set off for their separate enjoyment.

The respondent denies their seizin as tenants in common. The question presented is, whether they have, by the testimony introduced, established any title as tenants in common.

The respondent shows, that he is the owner of an undivided moiety of the premises in fee, having derived his title from a deed of conveyance in mortgage, made on April 1, 1833, by John McLaflin, to Micajah Drinkwater, who made an entry to foreclose the mortgage, on January 19, 1837, by virtue of a judgment recovered at law, and assigned the mortgage to the respondent on October 4, 1839. Stephen Goodhue, the owner of the other moiety, and John McLaflin, the mortgager, attempted to make a partition of the premises by deeds of release, mutually executed and delivered, by which McLaflin released to Goodhue his interest in the southerly half, and Goodhue released to McLaflin his interest in the northerly half of the premises on April 3, 1833. On May 3, 1834, Goodhue conveyed by metes and bounds the southerly half to Albert Baker, with covenants of warranty. The petitioners, having recovered judgment against Baker in July, 1844, by virtue of an execution issued thereon, caused a levy to be duly made and recorded upon the southerly half of the premises, by metes and bounds. By this levy and by the statute then in force, they obtained as good a title to the southerly half as their debtor, Baker, had therein.

Whatever effect the deeds of release made between Goodhue and McLaflin may have, as it respects the rights of others, they can have no effect upon the rights of the respondent. With respect to him the conveyance made by Goodhue to Baker, is but the conveyance of a tenant in common attempting to convey by metes and bounds, a portion of the common estate. Such a conveyance cannot impair or vary the rights of a co-tenant. The grantor, however, had some title to the premises conveyed; and his conveyance would not necessarily be inoperative upon his own rights or the rights of others.

The law will give effect to that conveyance so far, as it may do so consistently with a preservation of the entire rights of the co-tenant and no further. It may prove to be effectual to convey the title of the grantor to his grantee or it may not. That must depend upon a fact to be yet ascertained, whether the estate so conveyed by metes and bounds, shall upon partition of the premises be assigned to the right of the grantor or his assignee. Upon so much of the estate, as may be hereafter thus assigned, that conveyance embracing it, may operate and convey the title of the grantor to the grantee. If no part should be thus assigned, it will prove to be wholly inoperative. Such a conveyance of a tenant in common, cannot in any event operate contrary to the expressed declarations and intentions of the parties, to convey an estate in common instead of an estate in severalty. While the law for the purpose of making a deed operative will give it such a construction, that it may, if possible, convey by any legal mode of conveyance the estate intended to be conveyed, it will not permit such a construction, as would convey an estate of a different kind or description from that intended to be conveyed.

Neither the petitioners nor their debtor, Baker, acquired any title in common to an undivided portion of the premises. As the respondent exhibits no title to any more than an undivided moiety of the premises, that share may hereafter be assigned to him so as to leave the southerly half or most of it to be held under the title derived from Goodhue. If, upon a petition for partition, the southerly half should be assigned to the respondent, Goodhue might be subjected to an entire loss of his interest in the premises by the effect of his covenants of warranty, contained in his deed to Baker and by his deed of release to McLaflin.

It is not therefore probable, that a court of justice would accept and ratify proceedings in partition, that would have such an effect, if the entire rights of the respondent might be secured to him by an assignment of his share from the northerly portion of the premises. Should partition be hereafter made, by which the share of the respondent should be set off

from the northerly part of the premises, the deed from Goodhue to Baker, and the levy made by the petitioners upon the estate of Baker, would be operative and effectual to convey the remainder to them. For the levy made by Stover on an undivided portion of the premises, as the estate of Baker, could not prevail against their title, because their attachment was made before that of Stover, and also because Baker, by his conveyance from Goodhue, did not acquire any title as a tenant in common to an undivided portion of the premises, and the levy of Stover was made upon an undivided portion.

The petitioners further contend, that they acquired some interest in the premises by the deed of release made by Goodhue to them on August 29, 1844; that the releases made between Goodhue and McLaflin should be considered as entirely void, if their intended effect be avoided by the respondent. But such conveyances, made by tenants in common of a portion of the common estate by metes and bounds, as before stated, are not void with respect to other persons than their co-tenants. The petitioners could acquire no interest in the premises by the release deed made by Goodhue to them, for he had then no interest in the premises, upon which that conveyance could operate.

These doctrines will be found to be recognized in the cases cited by the respective counsel in their arguments; or to be deducible from the principles therein contained.

The petitioners failing to establish any title as tenants in common to an undivided share of the premises, their petition is dismissed with costs for the respondent.

HENRY BUTMAN *versus* DANIEL HOLBROOK, JR. *& al.*

In an action upon a poor debtor's bond, wherein it appeared, that the principal debtor disclosed before the justices, that he had, at the examination, in his possession, "a five dollar bank bill and a dollar in specie," and that before the oath was administered, he "paid over three dollars to his attorney, and three dollars to the justices, as their fees, which they exacted before allowing the oath;" *it was holden*, that under such circumstances the justices had no authority to administer the oath to the debtor, and that their certificate of having done so furnished no defence to the suit upon the bond.

THIS action was submitted on this statement of facts.

"This is an action of debt on a poor debtor's bond dated Nov. 14, 1845, and is to stand upon the following agreed statement of facts. The writ is dated May 25, 1846.

"The plaintiff, in proof of his declaration, offers the bond therein described.

"The defendant in proof of performance of the condition of said bond offers a certificate of two justices of the peace and quorum, that they had allowed the poor debtor the benefit of the oath prescribed in chap. 148, of Rev. Stat., dated Dec. 27, A. D. 1845, which certificate is a part of the case.

"It is agreed, that said Holbrook, the debtor, disclosed before the justices who signed the above mentioned certificate, that he had in his possession a five dollar bank bill on the Bank of Bangor, and one dollar in specie, with which he calculated to pay the expenses of this disclosure.

"It is further agreed that before the oath was administered, the six dollars above named were paid over, three dollars to said Holbrook's attorney, and three dollars to the justices, as their fees, which they exacted before allowing the oath.

"If the plaintiff's action can be sustained on the above facts and evidence, a default is to be entered; if not the plaintiff will become nonsuit.

"C. P. Brown, plaintiff's att'y.

"A. Waterhouse, defendants' att'y."

The following is a copy of the certificate referred to in the statement of facts.

"STATE OF MAINE.

[L. S.] "Penobscot, ss. To the sheriff of our county of Penobscot or his deputies and to the keeper of the jail in Bangor in said County, GREETING.

"We the subscribers, two disinterested justices of the peace and of the quorum, in and for said county of Penobscot, hereby certify, that Daniel Holbrook, a poor debtor, arrested on a certain execution issued by the district court, for the eastern district on the 28th day of Oct. A. D. 1845, on a judgment obtained at said court, which was begun and holden at Bangor, in and for said county of Penobscot, on the first Tuesday of Oct. A. D. 1845, for the sum of sixty-eight dollars and seventeen cents, damage, and costs of court, taxed at six dollars and fifty cents, and enlarged by giving bonds to the creditor, and has caused Henry Butman, the creditor, to be notified according to law, of his, the said debtor's desire of taking the benefit of the one hundred and forty-eighth chap. of the Revised Statutes of this State, entitled for the relief of poor debtors, that in our opinion he is clearly entitled to have the oath prescribed in the 28th section of said chapter, administered to him by us, and that we have, after due caution to him, administered said oath to him. Witness, our hands and seals this 27th day of Dec. A. D. 1845.

"Joshua Hill, } Justices of the
"B. F. Mudgett, } Peace & Quorum."

C. P. Brown, for the plaintiff.

The bond, in this case, sealed and executed by the defendants, being in all respects a statute bond, supports the declaration in the plaintiff's writ and makes, on the part of the plaintiff, a perfect case. The burthen of proof is now shifted upon the defendants to show, that there has been a legal compliance with the conditions of the bond. In these proceedings nothing but a complete compliance with the law, will answer the end of the law. An attempt is here made to show that there has been a compliance with the first condition mentioned in the bond. If this attempt has failed the defence fails.

The defence fails for two reasons:—

First. Because the justices who assumed to act in the matter, had no jurisdiction in the case. And second, Even if they had jurisdiction, their subsequent proceedings were not such as the statute requires.

It is absolutely essential that the justices who signed the certificate mentioned in the agreed statement of facts, had jurisdiction of the matter, else their proceedings were *coram non judice* and void. This point has been repeatedly decided by this Court. In the argument on this point, the following authorities were cited. Rev. Stat. c. 148, § 46; Stat. 1844, c. 88; 15 Maine R. 337; 18 Maine R. 340; 13 Maine R. 136; 1 Johns. Cas. 20; 3 Wend. 267; 19 Johns. R. 37; Stat. 1836, c. 195, § 10; 23 Maine R. 489; 24 Maine R. 196 and 166 and 451; 23 Maine R. 26.

This Court has repeatedly decided, that when the proceedings, intended for the performance of the condition of a "poor debtor bond, takes place before justices having no jurisdiction" they are wholly void. *Ware* v. *Jackson*, 24 Maine R. 166; *Hovey* v. *Hamilton*, 24 Maine R. 451.

But even had the justices jurisdiction in the outset, the subsequent proceedings before them were not such as the statute requires, but in direct violation of both its letter and spirit. Consequently the oath was illegally administered and its administration wholly inoperative.

The case finds that the justices did not examine the notification and return, nor adjudge the same to be correct and in due form. Nor did they examine the debtor on his oath concerning his estate and effects, nor concerning his ability to pay the debt on which he had been arrested; all of which they are required to do by the statute before proceeding to take the disclosure.

Let us for a moment examine only one or two acts of proceedings before them; see what the statute requires in such case; and how their proceedings conform to the statute.

Chap. 148, sec. 29, Revised Statutes, provides: —

That whenever from the disclosure of any debtor, arrested or imprisoned on execution, &c. it shall appear that he possesses

or has under his control any bank bills, notes, &c. &c., or other property not expressly exempt by statute from attachment, &c. &c., if the debtor and creditor cannot agree to apply the same in part or whole discharge of the debt, the debtor may choose one disinterested person, &c. &c. The appraisers thus chosen and sworn, are to appraise such property.

The case finds that the description of property specified in the section above named was disclosed by the debtor.

On that property, thus disclosed, the creditor had a lien. The moment it was disclosed by the debtor his rights to it were fixed; his claim had precedence over all other claims.

The language of the statute giving his claim precedence over all others is express. c. 148, § 19.

That section, taken in connexion with the 29th section, shows clearly that the creditor, on whose demand the debtor is disclosing, has the right to the property disclosed to the exclusion of all others.

And the same has made it the duty of the debtor and justice to see that it was legally appropriated to the creditor's use in part discharge of his debt; and by the 30th section of the same chapter, thirty days are given to the creditor within which to take such property.

It would be the right of the justices unquestionably to exact their legal fees for taking the disclosure, before entering upon the disclosure, and then is the time when they ought to do so, unless they extend a credit to him for their fees, which they can do by acts as well as words.

By not exacting their fees before the disclosure was entered upon, they waive any right of theirs to any property disclosed by the debtor, whether as payment of fees in that particular case or on account of any indebtedness to them by the debtor generally.

In the case of *Harding* v. *Butler*, 21 Maine R. 191, the principle is settled, that the property disclosed must be disposed of as the statute contemplates or the whole proceedings of the justices are void.

A. Waterhouse, for the defendants.

The defendants rely upon the performance of the first alternative in the condition of the bond.

This alternative is, that the debtor "will within six months cite the creditor before two justices of the peace and quorum and submit himself to examination, and take the oath prescribed in the 28th section of chap. 148, Revised Statutes."

In proof of performance, the defendants put into the case, the certificate of two justices of the peace and quorum, of the examination and discharge of the debtor. This, if not conclusive, is competent evidence of the facts which it proves.

From the certificate, it appears clearly and positively in the language of the condition, that the debtor within six months did cite the creditor before two disinterested justices of the peace and quorum, did submit himself to examination and did take the oath prescribed in sect. 28, chap. 148, of the Revised Statutes. By this we prove a complete and literal performance of this alternative of the condition of the bond, and make out a full defence.

The first objection is founded on the assumption of what is not true.

The following authorities go to the extent, that the authority of the justices cannot be contradicted collaterally, in a suit in which they are not parties. *Buckman* v. *Ruggles,* 15 Mass. R. 180; *Nason* v. *Dillingham,* 15 Mass. R. 170; 9 Mass. R. 231; Johns. R. 549; 10 Mass. R. 290; 1 Metc. 359; 18 Maine R. 340.

The second objection to our defence is, that "the proceedings before the justices, admitting their jurisdiction in the outset, were not such as the statute requires, but in direct violation of its letter and spirit."

But it has been repeatedly settled, that the certificate is evidence, competent evidence at least, that the justices examined the notification and return, and adjudged the same to be correct; also that they examined the debtor on his oath concerning his estate and effects, and his ability to pay the debt; in short, of all the preliminaries as well as of the administration

of the oath. *Colby* v. *Moody*, 19 Maine R. 111; *Brown* v. *Watson*, 19 Maine R. 452; *Carey v. Osgood*, 18 Maine R. 152; *Burnham* v. *Howe*, 23 Maine R. 489.

But it further appears by the agreed statement, that during the course of the examination conducted by the plaintiff's counsel, the isolated fact was disclosed by the debtor, that he was or had been possessed of a five dollar bank bill, and one dollar in specie. This was not appraised. And upon this fixed fact the plaintiff rests all his hopes. For disguise it as they may, it has always been the understanding of all parties that the case would turn on this point alone. The case was made up with especial reference to it, with the understanding, as I supposed, that all other points were waived.

The debtor disclosed that he had in his possession a five dollar bank bill on the bank of Bangor, and one dollar in specie, with which he calculated to pay the expenses of his disclosure.

Before the oath was administered it was paid away for the expenses of his disclosure.

Were the justices authorized to give the oath?

Sec. 29, chap. 148 does provide that whenever from the disclosure it appears that the poor debtor possesses any bank bills or other property, &c., it shall be appraised in the manner there pointed out. This, however, is not a prerequisite to the administration of the oath; as will appear from an examination of sec. 27 of the same chapter.

The appraisal of the property follows in order of time the administration of the oath; but sec. 31st requires that sec. 29 shall be complied with before the justices make out and deliver the certificate. The oath then was properly administered.

It was held, indeed, in *Harding* v. *Butler*, 21 Maine R. 191, that the appraisal was a prerequisite to the administration of the oath; but that was a decision under the act of 1839, chap. 412, and is evidently controled by sections 27 and 31 of chap. 148 of the Revised Statutes.

But if this view be wrong, under the other construction do the facts sustain the plaintiff's objection?

If the justices had no authority to administer the oath, if it appeared that the debtor had in his possession "a five dollar bank bill, and one dollar in specie; does the case find these facts? Does it not appear on the contrary, that he did not, when the oath was administered, have in his possession a five dollar bill and one dollar in specie.

How could the justices require him to secure to the plaintiff, what he had not? But the plaintiff complains that he once had the five dollar bank bill and disposed of it by unfair means.

The facts are that the debtor came to the place of disclosure possessed of six dollars, which he had undoubtedly procured for the express purpose of "paying the expenses of his disclosure." It was set apart in his own mind and perhaps borrowed for that purpose. He states this to be his design; he pays three dollars to his attorney, and three dollars to the justices who exact it before administering the oath. 'Tis all he has — He is penniless, and yet they would deprive him of the benefit of the "act for the relief of poor debtors." And they would place every man in this dilemma. If he have not money enough to pay the expenses of his disclosure, as he has no credit, neither attorney or justices will aid him, and the benefit of the poor debtor act is out of his reach.

If he have money to pay his expenses and a part happens to be in a "bank bill," it will do no good to take the oath for the proceedings are void, and the poor debtor act has no relief for him. The law is reasonable and consistent with itself, but this construction would make it defeat its object. It would be but a mockery instead of a "relief of poor debtors." For no man could take the benefit of it.

But it is said that the money should have been paid the justices before the disclosure commenced, before in fact it was due them.

And the fact of its being mentioned in the disclosure would suspend the debtor between two alternatives neither of which were open to him; he could neither advance or recede; if he turned the money over to the creditor, the justices would

not give the oath — if he paid the justice fees with it the proceedings would be void.

The opinion of the Court was drawn up by

WHITMAN C. J. — By the Rev. Stat. c. 148, § 34, it is provided, that "If the debtor shall as aforesaid disclose any personal estate liable to be levied upon by said execution, the creditor shall also have a lien thereon, or so much thereof as the justices in their record shall judge to be necessary for the term of thirty days." And the debtor is not to dispose of any property on which the creditor has such lien within that time. If he should, he is to lose all benefit from the certificate granted by the jnstices. The debtor in this case disclosed, that he had in his possession a five dollar bank bill and a dollar in silver. By the Rev. Stat. c. 117, § 3, it is provided that these may be taken on execution. The lien therefore attached to the bank bill and silver in favor of the creditor, and they could not be disposed of otherwise, within the thirty days next after the disclosure, without working a forfeiture of all benefit from his certificate. The statement is, that, after the disclosure, and before he was admitted to take the oath, he paid away the bank bill to the justices and his attorney. This brings the case within the literal import of the statute to work a forfeiture.

But it is urged, that in his disclosure, he stated that he had the bank bill and silver dollar for the purpose for which it was applied, and that it would be unreasonable, so to construe the statute, as to deprive the debtor of the means of defraying the expenses of obtaining a discharge under the act for the relief of poor debtors. There is some force in this position, perhaps, but not enough to authorize us to disregard the literal import of the statute. Counsel sometimes, if eminent especially, exact large fees for services, sometimes not very arduous. If we might allow a debtor to retain one sum to remunerate his counsel, we might another, and this might amount to a large sum, and open a door to abuse and malpractice. The debtor might collude with some such attorneys as the present provis-

ions for their admission may introduce into the profession, and agree to pay a large sum, with the hope, or an understanding, that it would in part be afterwards restored to him. The fees payable to the justices are small as provided by statute, such as a debtor might well pay before making a disclosure, so that he might well guard himself against liability to be injured by the construction we put upon the statute.

Defendants defaulted.

THOMAS M. MOODY *versus* EDWARD C. BURTON *& al.*

Where a fraudulent conveyance of property is made for the purpose and with the intent to defraud creditors, an action on the case to recover damages, for that cause, by one of those creditors, against the parties to such fraudulent conveyance, cannot be sustained.

THIS was an action of trespass on the case against Burton, Rice, Adams and Hardy.

WHITMAN C. J. presiding at the trial, being of opinion, that the plaintiff could not in law support this action, if the facts alleged were proved, directed a nonsuit. The plaintiff filed exceptions. The facts are sufficiently stated at the commencement of the opinion of the Court.

In October, 1847, full written arguments were sent to the Court, it having been agreed at the June Term preceding, that the case should be argued in writing, by

J. Appleton and *Ingersoll*, for the plaintiff — and by

A. W. Paine, for the defendants.

In the arguments for the plaintiff, it was contended, that the plaintiff's declaration sets forth, in different modes, a claim on his part and a conspiracy on the part of the defendants to prevent his securing his debt by attachment, and to deprive him of all compensation for his services.

The material question then is, whether an action on the case for conspiracy against individuals, conspiring with a debtor to prevent a creditor from attaching such debtor's property,

and to defraud him of his debt, is maintainable. It would be a reproach to the law, if it was not.

The case of *Adams* v. *Paige & al.* 7 Pick. 542, settles the law, that in case of a conspiracy to defraud, a suit at the instance of the creditor is maintainable. The case of *Adams* v. *Paige*, in every important point, precisely resembles the one now before the Court. The end being the same, the means used are comparatively unimportant. The end in view, is the same in each, to defraud a creditor of his debt, to prevent, by means of fraudulent and fictitious proceedings, his securing the debt due.

The counsel here examined the facts in each case, and insisted, that there was no essential difference in the two cases.

The decision of the court in *Adams* v. *Paige*, is supported by the general principles of law, and by the cases of *Smith* v. *Tonstall*, Carth. 3; *Yates* v. *Joyce*, 11 Johns. R. 136; *Moore* v. *Tracy*, 7 Wend. 229. The case of *Penrod* v. *Mitchell*, 8 S. & R. is directly in point, and *Penrod* v. *Morrison*, 2 Penn. 126, goes quite as far as we contend the law to be.

This is the proper action; and it is rightly brought. Com. Dig. Action for conspiracy, A; 6 T. R. 634; 4 S. & R. 19; 7 Metc. 520; 7 Pick. 547; 2 Penn. R. 126.

For the defendants, these points, among others, were made.

In order for the plaintiff to maintain this action, he must show first, a right, — second, an injury done to that right by the defendants. 4 Burr. 2346, — and third, in a special action on the case, like the present, the facts must all be particularly specified in the plaintiff's declaration. 2 Greenl. on Ev. § 254, and cases there cited.

The plaintiff had no right here to be affected or injured. He had no interest as owner, in the least degree; neither had he any lien by contract or attachment on the property in question. The most that can be alleged is, that the plaintiff had a chance of acquiring a right to the property by attachment. It would be like the case of one who has interfered to prevent a supposed good bargain, which is not an injury for which the

law would give damages. 4 Pick. 425; 23 Pick. 224. On the facts, as stated by the plaintiff in his declaration, he had not even this chance. But if he had any, it was a mere contingent one. The defendants, who were summoned as trustees, were discharged, and the only ground of discharge, as the declaration alleges, was their false answers as trustees. For that, another and a particular remedy is provided by statute, and for that cause this action cannot be supported. Besides, the trustee process can create no lien or charge upon the property, but merely on the person.

Even if the plaintiff had a right, the defendants have done no wrongful act affecting that right. The fact, that the defendants' acts were all done prior in time, to the alleged existence or inception of the plaintiff's right, would seem to be sufficient to establish this position.

The injury for which the law will give damages must be the natural and proximate consequence of the wrongful act complained of; not remote and consequential, but certain and direct. 4 Burr. 2345; 2 Greenl. Ev. § 256. Besides, other creditors might have attached before the plaintiff and taken the property, so that on this account the damage was altogether uncertain and contingent.

It must appear, that the injury complained of, was one done especially to the plaintiff, and not to him, only in common with others. Co. Lit. 56, (a); 7 Metc. 283. Even in equity, the Court will not set aside a conveyance as fraudulent, in behalf of a creditor, until he has first levied his execution upon the land.

It was here argued, that there could be no rule or principle upon which damages could be assessed; and it was said, that the argument from inconvenience was entitled to great weight. 23 Pick. 224.

This plaintiff has no rights over other creditors. If one can sue, all may, and that too without reference to the amount of goods fraudulently covered.

But we have direct authority that an action of this description cannot be supported. *Smith* v. *Blake*, 1 Day's Cases,

258; *Lamb* v. *Stone*, 11 Pick. 527. These cases, and especially the latter, are directly in point. It was decided with great deliberation, and overrules *Adams* v. *Paige*, relied on by the plaintiff, if that case is actually in his favor. Whatever may be the technical form, the facts stated in *Lamb* v. *Stone*, are the same as in the case at bar. On the contrary, the material facts in this case, are the reverse of those in *Adams* v. *Paige*. There, the plaintiff had a plain and undisputed lien by attachment of the goods, which was defeated by the subsequent fraudulent sale of the goods on the execution of the defendants. There, the allegation and proof was, that the wrongful act was done and intended for the injury of the plaintiff, and he alone suffered. Here, on the plaintiff's own allegations all the creditors suffered alike. There, there was a certain and direct injury. Here, there was no certainty, or even probability, that the plaintiff could have taken this property, if the mortgage had not been made.

An argument is also deducible from the fact, that the statute has provided a special remedy to meet a case like the present, which remedy will exclude any remedy supposed to exist at common law. Rev. Stat. c. 148, § 49.

Comments were also made upon the other cases cited for the plaintiff.

For the plaintiff in reply, it was said, among other remarks, that the acts of the defendants were wrongful in themselves, and were intended to and did injure the plaintiff. Depriving a creditor of his debt was the end proposed in the present case as well as in *Adams* v. *Paige*. Variation in the means used in a conspiracy, cannot have the effect of discharging from legal liability, those who conspired.

The creditor has rights to the property of his debtor, that it shall be appropriated to the payment of debts; and any act tending to deprive him of that right, by means of fictitious sales or mortgages, is a fraud. There was as much ownership on the part of the plaintiff as in the case of *Penrod* v. *Morrison*.

It was insisted, that the declaration did show, that the plaintiff's debt was contracted before the fraudulent mortgage.

Whether rights were acquired by virtue of the trustee process or not, is immaterial. We say they were; but if they were not, we claim to recover on the ground, that the defendants conspired together to place this property out of the reach of attachment, and to deprive the plaintiff of all means of securing his debt. He claims to recover on the very grounds distinctly laid down in *Adams* v. *Paige* and in *Penrod* v. *Morrison.*

If a part of the defendants were liable under the statute for a false disclosure, it by no means follows, that all are not liable for a conspiracy.

There is no such difficulty, as to the amount of damages as has been argued. The loss of the whole of the plaintiff's debt was the direct consequence of the fraudulent acts of the defendants.

It is a sufficient reply to the objection, that the injury to the plaintiff was but a common one with other creditors, that the averments in this case are, on this subject, precisely those in *Penrod* v. *Morrison.*

The case of *Lamb* v. *Stone,* neither overrules nor pretends to overrule the case of *Adams* v. *Paige.* The latter is still the law of the land. The case of *Lamb* v. *Stone* is not an action of conspiracy, or case in the nature of conspiracy. It is not founded upon any illegal combination or confederacy, and the declaration does not set forth any conspiracy to defraud the plaintiff or defeat any legal process. The plaintiff's writ in the present case is the reverse of this in all these particulars.

The opinion of the Court was drawn up by

Shepley J. — This is an action on the case. The material facts stated in several counts, in the declaration are, that Burton being insolvent, entered into partnership with Rice, and that Burton and Rice, on November 13, 1843, made a conveyance in mortgage of certain personal property named, to Adams

and Hardy. That property, of the value of $25,000, was conveyed to secure a debt of $3500, alleged to be due to them. That the property was greatly undervalued. That it was to be forfeited to the mortgagees on failure of payment of the $3,500, on the fifteenth of December following. That it was agreed, that payment should not be made to redeem it, and that the property should become forfeited. That the mortgagees should not take advantage of the forfeiture, but should allow the mortgagors to have the control and benefit of the property. That the plaintiff, being a creditor of Burton, on May, 22, 1844, commenced a suit against him, and caused Adams and Hardy to be summoned as his trustees. That Hardy made a disclosure in that suit for himself and partner and claimed the property as forfeited to them. That they were upon such disclosure discharged. That the plaintiff recovered judgment against Burton, sued out an execution thereon, placed it in the hands of an officer for collection, and that he returned it in no part satisfied. It is alleged that all these acts were done by the defendants to place the property out of the reach of Burton's creditors, and with the intention to delay and defeat the plaintiff in any attempt made to collect his debt.

The presiding Judge being of opinion that the plaintiff upon proof of these facts, could not maintain his action, directed a nonsuit, and the case is presented by a bill of exceptions.

Stripped of the allegations describing the manner, in which the alleged fraud was perpetrated, the declaration presents the common case of a fraudulent conveyance of property, made for the purpose and with the intent to defraud creditors.

Creditors may consider such conveyances to be unlawful and void, and may cause the property to be applied to the payment of their debts by the use of any of the different legal and equitable processes applicable to their case and afforded by the law for that purpose. Some one of those processes has been found to be well suited to such a purpose, and by a proper selection and use of it, a creditor upon satisfactory proof

may obtain payment from property so conveyed, or from its proceeds in the hands of a fraudulent holder.

Omitting the selection of any of the long established remedies and the usual course of procedure, it is now proposed by an action on the case to seek, not the property fraudulently conveyed or its proceeds, but a judgment against those who were parties to the fraud, for the amount of damages, which the plaintiff can prove, that he has suffered by reason of such fraudulent conveyance. If such an action can be maintained in this, it may in every other case, where a fraudulent conveyance has been made of real or personal property with an intention to defraud creditors. If such an action upon such proof can be maintained by any one, it may be also by each creditor. There is nothing to give one a right superior to that of another. It is one of the essential elements of a special action on the case, that the plaintiff is entitled to recover damages for the injury which he has suffered, irrespective of the rights of other persons to recover in like manner damages for injuries suffered by them from the same act or cause. All are entitled to compensation for the injuries suffered from the same cause, and each may recover it for himself. The first suit commenced can have no effect upon subsequent suits commenced by others. The damages in such actions are not measured by proof or consideration of the benefit, which the wrongdoer may have derived from his wrongful or unlawful act. They are limited and measured only by the injury, which his conduct has occasioned. If therefore the principles which regulate this form of action are to be regarded and preserved, all creditors, who have been injured by a fraudulent conveyance of their debtor's property, must have an equal right to recover damages to the extent, to which each has thereby been a loser. And the effect upon a party receiving such a conveyance must be to subject him to damages in no degree regulated by the amount of property received, and limited only by the injury occasioned, it may be, to very numerous creditors similarly situated and injured. To place him in such a position the whole law regulating the rights and liabilities arising out of

proof, that one has received a conveyance of a debtor's property with an intention to defraud his creditors, must be changed. That law, as it has been administered in civil actions does not punish a person for becoming a party to such a fraud. Does not punish the debtor and vendor, who has thus conveyed his property. It only deprives the purchaser of all benefit to be derived from it, by declaring his title thus obtained to be void, when it may injuriously affect the rights of creditors. It leaves the moral turpitude and other injurious effect upon creditors and upon society to be punished, as the sovereign power may provide. To allow each creditor to maintain an action on the case against a fraudulent purchaser to recover damages, supposing them to be capable of legal estimation, would be to make use of a civil action for the recovery of sums, in the nature of a penalty, to the full amount of all, which could be recovered. For the fraudulent purchaser would acquire no legal title to hold that property against the rights of any such creditor by proof, that he had been compelled to pay many times its value. It would do this too, when there is a statute in this State authorising a recovery in the nature of a penalty, and yet limiting the liability of one, aiding a debtor in the fraudulent concealment or transfer of his property to prevent its attachment or seizure, to double the amount in value of the property concealed or transferred. If such an action as this may be maintained against a fraudulent vendee, it may, upon like principles, against the fraudulent vendor or against any *particeps fraudis*. And in such case the amount to be recovered must be wholly in its nature penal, more so than in a case of recovery by virtue of the provisions of the statute c. 148, § 49. This action has accordingly been as appropriately commenced against vendors as vendees. The debt of the creditor will not be satisfied *pro tanto* by a recovery and collection of damages from a vendee or a *particeps fraudis*. A debt due from one person cannot be satisfied by the recovery of damages from another person, unconnected with and a stranger to it, without some statute provision. The creditor would recover damages in satisfaction for an in-

jury suffered, not on account of a debt due and in satisfaction of it.

How are the damages, which a creditor may thus recover, to be proved and estimated? The plaintiff had obtained no lien on the property conveyed by attachment, judgment or in any other manner. Had no special property in or claim to it. The only proof of loss or injury, which he could make, would be, that his debtor had fraudulently conveyed his property without having received any value for it, and with the intent to avoid the payment of his debt. And that he had no other means of obtaining payment. All other creditors could make the same proof. Upon such proof he could not be entitled to recover the amount of his debt; for that is still subsisting, and it may yet be collected. Nor could he be entitled to recover the value of the property conveyed; for to that he had no better claim than other creditors. He has not therefore lost it. If it had not been fraudulently conveyed, it was as probable, that it might have been applied to the payment of other debts, as to his own. The debtor might have disposed of it fairly and for a valuable consideration; or have lost it by accident or misfortune. The only loss or injury shown by the proof would be, that he had been deprived of a chance or possibility of obtaining payment from that property. This would be stating his loss or injury too strongly, for he would still have the chance of attaching or securing it, or its proceeds, in the hands of the fraudulent holder. A jury would be authorized then to estimate the value only of his chance to secure it and have it applied to the payment of his debt while in the hands of his debtor; for this only has he lost. There would be no data, tables, or other means afforded, by which such a chance could be estimated. The loss or injury would be too uncertain and remote for legal estimation. An action like the present can be maintained only by proof of a direct, certain and material injury. *Benton* v. *Pratt*, 2 Wend. 385; *Lamb* v. *Stone*, 11 Pick. 527. In the case of *Pasley* v. *Freeman*, 3 T. R. 51, it was said, that the action would be maintained by proof of fraud and damage. While it was justly

stated in *Lamb* v. *Stone*, that there might be legal torts, in which the damage to individuals might be great, and yet so remote or contingent as to furnish no ground of action. The injury should be so definite and certain, that it may be particularly described in the declaration. And it should be proved as described. *Reynolds* v. *Kennedy*, 1 Wilson, 232. *Pangburn* v. *Bull*, 1 Wend. 345.

A still further objection to the maintenance of this action is, that the plaintiff does not appear to have suffered any damages, not common to all the creditors of Burton. Com. Dig. Action upon the Case, B. 2. One might as well maintain such an action against another for causing the air to become noxious from a nuisance equally affecting a whole neighborhood.

Most of the cases cited and relied upon for the maintenance of this action were examined and distinguished from a case like this in the opinion delivered by Mr. Justice Morton in *Lamb* v. *Stone*, in which there was an unsuccessful attempt made to maintain a similar action. It would be unnecessary to notice any of them again if the case of *Adams* v. *Paige*, 7 Pick. 550, had not been still relied upon as authority for the maintenance of this action. The essential difference between them consists in the fact, that the plaintiffs in that case had caused the goods of their debtor to be attached for the security of their debt, and had thereby acquired a right to have them by proper proceedings applied to the payment of their debt in preference to all other creditors, who had not previously caused them to be attached. Of this right, which proved to be a valuable one, they were deprived by the fraudulent conduct of the defendants. That constituted a good cause of action capable of proof, and of certain estimation, and one not common to all other creditors. In this case the plaintiff had no such lien or right.

In the case of *Moore* v. *Tracy*, 7 Wend. 229, the plaintiff was induced, by the fraudulent conduct of the defendants, to sell certain goods on credit to one known to the defendants to be insolvent, by which he lost their value.

The case of *Penrod* v. *Mitchell*, 8 S. & R. 522, and 2

Penn. 126, has been much relied upon, as an authority for the maintenance of the action. In neither of the opinions, delivered by eminent judges in that case, were the objections, which were stated in the case of *Lamb* v. *Stone*, or which have been here noticed, considered and obviated; and they are of a character too important to be yielded to mere authority not binding upon this Court.

Under general leave to amend, the counsel for the plaintiff have presented with their arguments in writing a new count, drawn recently and since a nonsuit was entered. Not having been presented to the Court and allowed, it is not a part of the case presented by the exceptions taken at the trial. Yet if the action might thereby be sustained, the court might be induced to remove the nonsuit and to allow the amendment proposed to be made. There is an additional averment in it which, it is contended, may be material. It is that the defendants "corruptly did combine and conspire together," to defraud the plaintiff by the acts before stated. Whenever a premeditated fraudulent conveyance of property has been made, such an allegation might perhaps be made and proved. The law which defines and regulates the liabilities of the parties to a fraudulent conveyance, has not arisen and existed without a knowledge, that it might be so; and it cannot be varied by the insertion or omission of such an averment. It cannot in this case be essential, for the denial of the plaintiff's right to maintain the action has not arisen out of any defective or insufficient averments, but out of the insufficiency of the facts stated, to enable him to maintain it. The additional facts stated in the proposed count, are in substance that the plaintiff's debt was contracted before the conveyance was made in fraud of it, and that an attachment of the goods conveyed was prevented by the fraudulent representations of the defendants. It will be perceived, that the conclusion could not be different in accordance with the principles already stated, if such additional facts had been presented by the declaration.

Exceptions overruled,
and nonsuit confirmed.

DANIEL WILKINS *versus* HENRY WARREN *& al.*

A person commenced an action, and during its pendency became a bankrupt under the U. S. bankrupt act of 1841, and afterwards failed to support his action, and judgment was rendered against him for costs of suit, his bankruptcy not being then interposed by him as an objection — in an action of debt upon that judgment, his bankruptcy furnishes him with no defence.

THE present defendants, Warren and Brown, brought a suit against Wilkins, the present plaintiff, which was entered in this Court at the October Term, 1839, having been previously commenced in the court of common pleas, and an appeal entered. It was tried at the October Term, 1840, and a verdict returned in favor of the then defendant. Certain questions of law arose upon a report of the case by the presiding Judge. There was subsequently, an argument of these questions, and at the June Term, 1843, judgment was rendered on the verdict, and the then defendant and present plaintiff recovered judgment against the present defendants for his costs of suit, $74,61. No plea or suggestion of the bankruptcy of either of the defendants was made at the time of the judgment or during the pendency of that suit. The present suit is debt on that judgment.

The parties agreed to a statement of facts, from which the foregoing statement is obtained, and it also appeared therefrom, that Warren, one of the defendants, entered his petition under the provisions of the bankrupt law of the United States of August 19, 1841, in the month of November, 1842, and was in the same month, declared a bankrupt. The statement shows, that Warren afterwards received his certificate of discharge, but the time when does not appear.

They also agreed, that if the Court should be of opinion, that the bankruptcy of the defendant furnished a full defence to this action, the plaintiff was to become nonsuit; and if not, that the defendant, Warren, was to be defaulted. Brown did not appear in this suit.

Jewett & Crosby, for the plaintiff, said that the certificate of discharge purported only to discharge the defendant from

his debts, "owing by him," "at the time of the presentment of his petition to be declared a bankrupt," in November, 1842. And the bankrupt law authorizes a discharge of nothing more. The claim of the present plaintiff could not have been proved as a debt against Warren and Brown at that time. A part of it is for costs accruing afterwards, and no legal claim existed until the judgment in his favor. They considered the authorities decisive for the plaintiff. 6 Hill, 250; 6 T. R. 695; 4 Bingh. 57; 14 East, 197; 5 Taunt. 778; and, as directly in point, *Woodward* v. *Herbert & al.* 24 Maine R. 358.

Warren, pro se, said he found no authorities in the American books, applicable to a case like this. But in England it is well settled, that when bankruptcy occurs between the verdict and judgment, the bankrupt is discharged from costs. Eden on Bankruptcy, c. 23, § 10; Stephen's N. P. 691; 1 H. Bl. 29; 3 M. & S. 326; 2 Brod. & B. 8; 1 Bingh. 189; 1 G. & J. 107; 5 M. & S. 508; 1 Cowp. 138; 5 T. R. 365; 1 B. & P. 134; 11 Ves. 648.

The opinion of the Court was by

WHITMAN C. J. — This is an action of debt on a judgment, recovered for a bill of costs, in an action, in which the present defendants were plaintiffs, against the present plaintiff, as sheriff of the county of Penobscot, for a default alleged to have been committed by one of his deputies; and in which they were unsuccessful. After the commencement of that action, and before its termination, the present defendant, Warren, became a bankrupt, in pursuance of the statute of the U. S. of 1841; and now contends that, by reason thereof, he is not now liable in this action. It does not appear that he, or the other defendant, when the nonsuit was ordered, interposed any objection to the entering up of judgment for the costs of the adverse party. Under such circumstances it would seem to be scarcely necessary to do more than to state the defendant, Warren's, proposition, in order to have its fallacy instantly detected. He has, however, cited a number of authorities, in reference to judgments for costs, recovered against bankrupts,

in actions instituted before they became such, in which rules of Court have been obtained for discharging them from arrest on execution. But in most of the decided cases the recoveries of judgment had been for debts and costs, in which the debts had been proveable before the commissioners. In such cases it was obviously reasonable, that the costs should be held to be no good ground to authorize an arrest of the bankrupts. In the other cases cited, the right to judgment for costs had accrued, though not in each case entered up, before bankruptcy; so that the right to prove them, under the commission, had been perfected; and the dicta cited from the elementary authorities are predicated upon those decisions, and can have no effect beyond their import.

In the case at bar, the nonsuit was not entered till after the bankruptcy of Mr. Warren; and the present plaintiff of course had no debt due to him from the defendants upon the happening of that event, and, therefore, had none that could be proved before the commissioners; and this seems in the English courts to constitute the criterion to settle the question, whether a bankrupt should be discharged from an arrest on execution or not. It is believed that no case can be found in which a bankrupt has continued his suit in court, after his bankruptcy, and has finally been nonsuited upon its being discovered that he had no just cause of action against his adversary, in which the court has undertaken to liberate him from liability to his adversary for his costs of suit.

Besides; if Mr. Warren had a right to claim an exemption from the payment of costs, the time for him to have done so was when the final decision was had. Not then having done so the judgment may well be deemed to have been properly entered up; and cannot now be treated as null and void.

Defendants defaulted.

THEODORE HOLBROOK *versus* JOSEPH B. FOSS.

The contract upon which a judgment at law has been recovered, is merged and extinguished by the judgment, which constitutes a new debt, having its first existence at the time of the recovery.

A debt having its first existence after the debtor had filed his petition and had been declared a bankrupt, under the bankrupt law of the United States of 1841, could not have been proved in bankruptcy against him, and is not discharged by a certificate obtained by the bankrupt, in pursuance of such proceedings, after the existence of the debt.

THIS case came before the Court on the following statement of facts.

Debt on a judgment. Plea, bankruptcy of the defendant.

It was agreed by the parties, that on Nov. 30, 1841, the defendant gave the plaintiff a note for $198,39, payable to the plaintiff or order in six months. June 9, 1842, the plaintiff sued out a writ on said note for the October Term of the district court for Penobscot county, which writ on the same day was served by attaching defendant's real estate and by giving a summons.

The action was duly entered and continued to January Term, 1843, and again to May Term, 1843, when it was defaulted.

This action is debt, to enforce that judgment. On December 9, 1842, the defendant filed his petition in bankruptcy, in the United States District Court, for Maine District, and duly entered the same. After notice he was on February 21, 1843, declared a bankrupt. After further proceedings, on December 1, 1846, he obtained a decree of said Court, that he be discharged from all the debts due and owing by him at the time of filing his said petition, and which were proveable in bankruptcy; and on the same first day of December, 1846, obtained from the clerk of said court a certificate of discharge, which was to be evidence of all the facts it recites.

If on these facts this action could be maintained, the defend ant was to be defaulted; and if not, plaintiff was to become nonsuit.

This case was argued by

W. C. Crosby, for the plaintiff — and by

Kelley, for the defendant.

Crosby, in his argument, cited 12 Mass. R. 268; 6 Hill, 250, 254; 1 T. R. 361 and 715; 1 Moore and P. 291; 4 Bingh. 493; 1 Harr. Dig. 498; 2 Stark. Ev. 131; 13 Eng. Com. Law Rep. 110.

The opinion of the Court was delivered on a subsequent day in the same Term by

SHEPLEY J. — This is an action of debt upon a judgment, recovered by the plaintiff against the defendant in the district court holden in this county in the month of May, 1843. The suit, in which that judgment was recovered, was commenced upon a promissory note made by the defendant on November 30, 1841, and payable to the plaintiff or order in six months.

The defendant presented his petition to be declared a bankrupt to the District Court of the United States on Dec. 9, 1842. On Feb. 21, 1843, he was declared to be a bankrupt; and he obtained his certificate of discharge from that Court on Dec. 1, 1846.

By the fourth section of the act of Congress to establish an uniform system of bankruptcy, the certificate is made to operate as a full and complete discharge of all debts, contracts and other engagements of such bankrupt, which were proveable against him.

The question presented for decision is, whether the judgment, thus recovered in May, 1843, can be considered to be a debt, contract, or other engagement of the defendant existing on Dec. 9, 1842, and proveable against him in bankruptcy.

The rule of law is, that the contract, upon which a judgment at law has been recovered, is merged in and extinguished by the judgment, which constitutes a new debt, having its first existence at the time of its recovery. The promissory note, by virtue of which it had been recovered, no longer continued to be a debt due from the defendant to the plaintiff. The

judgment not being a debt due from the defendant at the time, when his petition was filed, could not have been proved in bankruptcy against him. It was not therefore discharged by the certificate, which he obtained in the year 1846. *Todd* v. *Maxfield*, 6 B. & C. 105; *Thompson* v. *Hewett*, 6 Hill, 250. The act of Congress does not appear to have made any provision for the relief of the defendant under such circumstances, and he can only be discharged from the payment of his debt by bringing himself within its provisions. The attachment made upon the estate of the defendant on the writ upon the note cannot vary the result. If the plaintiff might have obtained payment from that property, he was under no legal obligation to do so. *Defendant defaulted.*

FRANCIS B. GARLIN *versus* HASTINGS STRICKLAND.

In a replevin suit, if the name of the plaintiff be put upon the bond by one without any authority therefor, from the plaintiff, it is not such a bond as the statute requires, although signed by two sureties.

An officer has no authority to serve a writ of replevin, without first taking such bond as the law requires.

Where a *deputy sheriff* took property on a replevin writ, without first taking such bond as the statute requires, and the suit was entered in Court, and judgment rendered in favor of the defendant for a return of the property, with damages and costs; and an execution was issued on the judgment, and a return made thereon by a proper officer, that he could find neither the property replevied, nor property, nor body of the execution debtor; and the judgment creditor brought an action of the case against *the sheriff* for the default of the deputy, alleging in one count, that the service of the replevin writ was made without first having taken to the defendant in that suit "a bond with sufficient sureties," and in another count alleging "the default to be in not returning said replevin writ and bond;" *it was holden*, that the action was barred by the statute of limitations of 1821, c. 52, § 16, unless commenced within four years of the time of the alleged service.

THIS case came before the Court upon the following report.

"Case against the defendant as late sheriff of this county for the default of his deputy, Fowles.

"The first count alleged the default to be in the service of

a replevin writ in favor of one Smith against the plaintiff in this writ, "he, the said Smith, not having first given said Garlin, or the officer for said Garlin's use, a bond with sufficient sureties, &c."

"The second count alleged the default to be in not returning said writ and bond.

"The writ is dated May 9, 1845. General issue and statute of limitations were pleaded.

"The original writ of replevin was dated July 30, 1840, and was returnable and entered at the Oct. Term, district court following.

"The action was finally determined at the January Term of said court, 1844, by the plaintiff's becoming nonsuit. A return of property was ordered, and writ and bond ordered to be placed on file. Judgment was also rendered for $21,00, damages for detention, and $57,93, costs. Execution for return of property, &c. was issued, dated Feb. 19, 1844, and placed in the officer's hands for service, who made return of same that he could not find the horse replevied or any property, or body of defendant.

"When the writ of replevin was issued it was procured by one Hodsdon, (a friend of the plaintiff, Smith,) who then made a bond in usual form, in which said Smith was called plaintiff, and principal, to which bond said Hodsdon then signed Smith's name, as principal, and then signed it himself with one Hunt, as sureties.

"The writ and bond thus executed were placed in the officer's (Fowles') hands for service, who thereupon replevied the property (a horse) and delivered it to one Hunt for plaintiff who immediately drove the horse to the place of residence of said plaintiff and sureties. On his way he met the plaintiff, and informed him of the replevin, but said nothing about the signing of the bond.

"The action was afterwards entered and prosecuted by plaintiff, Smith's, directions to final judgment as aforesaid.

"The writ and bond were never returned to court. Said Hodsdon had no previous authority to sign said Smith's name

to said bond, nor was there any ratification of the signing, except as aforesaid, nor any evidence that Smith knew his name had been so signed. Said bond was under seal by all.

"The defendant offers the deposition of Reuben Seavey to prove that the horse replevied was actually the property of said Smith, the plaintiff objecting to its introduction. If admissible, the Court are to give it such effect as it is legally entitled to.

"The docket, entries in same in said action of replevin, and record of same are also offered by the defendant, and if admissible, plaintiff objecting, are also to have such effect as they are legally entitled to.

"If upon the foregoing facts the Court are of opinion, that the right of action is barred by the statute of limitations, or for other reason the suit is not maintainable, the plaintiff is to become nonsuit. If on the contrary the action is maintainable a default is to be entered and judgment to be rendered for such amount and on such principles as the Court may direct, except as hereafter mentioned.

"The value of the horse in the replevin writ was laid at fifty dollars. The plaintiff also alleged, that the sureties named in said bond were not sufficient, and the defendant alleged their sufficiency.

"If the Court shall be of opinion, that the plaintiff, upon proving the insufficiency of said sureties, in addition to the foregoing facts, can maintain his action, and not without such proof, then this action is to be entered neither party.

"The writ and all other papers in the original suit may be referred to. "Ezekiel Whitman, the justice presiding," &c.

A. W. Paine, for the plaintiff.

The bond taken by the officer was in form proper, the name of the plaintiff, in the original suit, was to the bond, and there were two sureties. There was testimony at the trial, that the name of the then plaintiff was put there without authority. He, however, pursued the action, and of course, as the bond and writ were together, saw his name, and ratified the act of his attorney in placing it there, by taking advantage of the

real or supposed benefit arising from the act. And the present plaintiff, by declaring as he has, has treated the bond as if signed by the plaintiff in replevin. There is no ground for saying, that the whole proceedings in court in the replevin suit were void, and that the only remedy was by an action of trespass against the officer for taking the property. Even if he had that right, he was under no necessity of taking that course. 3 Pick. 232; 7 Greenl. 118; 2 Fairf. 71; 12 Wheat. 64; 2 Metc. 163; Stat. 1821, c. 63, § 9.

It must be kept in recollection that the present plaintiff was the *defendant* in the replevin suit. It was wholly uncertain whether he would recover judgment against the plaintiff in that action or not, until judgment was rendered in his favor; and impossible to ascertain the amount of his damages, or have a judgment for a return until that time. There must be a vested, uncontingent, present right, before a cause of action accrues. The injury and damage to the plaintiff could not be ascertained until the judgment was rendered. There could be no damage, until it was determined by the judgment, that the property replevied belonged to the then defendant and present plaintiff, and that he was entitled to a return, and damages for the detention. The cause of action accrues only, when the right to have a return and damages becomes fixed and certain. If the present plaintiff had brought this action before judgment, he must have failed in it. The statute of limitations therefore can furnish no defence to this suit. 2 Greenl. Ev. § 433, 434; *Harriman* v. *Wilkins*, 20 Maine R. 93; 12 Mass. R. 127; 17 Mass. R. 60; 9 Metc. 564; *Bailey* v. *Hall*, 16 Maine R. 408.

Until judgment, the only liability of the officer is to the plaintiff in replevin. After judgment the liability to the plaintiff ceases, and his liability to the defendant in replevin begins.

D. T. Jewett, for the defendant, said that if there was no legal bond, then the service of the writ was unauthorized by law, and was in fact no service. It was a mere trespass, a taking of the property without any legal precept. This presents

two fatal difficulties. The first, that his action is misconceived, the evidence reported not supporting it. It should have been trespass. *Purple* v. *Purple*, 5 Pick. 226; *Cady* v. *Eggleston*, 11 Mass. R. 282. The second is, that as there was no bond, the injury consisted in the taking of the property of the present plaintiff illegally, and the statute of limitations is a complete bar. The sheriff can be holden but four years for any act of his deputy.

If the claim be that the present plaintiff, has suffered in consequence of the return of the officer, that he had taken a sufficient bond, when he had taken none, then the cause of action arose as early as the return day of the writ, and the result must be the same, if the claim be for not returning the writ. In any point of view which can be taken of this case, the statute furnishes a complete bar. Stat. 1821, c. 52, § 16; *Williams College* v. *Balch*, 9 Greenl. 74; 16 Mass. R. 455; 12 Mass. R. 127; *Betts* v. *Norris*, 21 Maine R. 314; *West* v. *Rice*, 9 Metc. 564.

There is no ground for saying, that there was a ratification of the act of signing after it was done. There is no evidence of it. Besides, this was a paper under seal, a bond, and there can be no ratification of the act of signing and sealing such instrument, but by paper under seal. *Paine* v. *Tucker*, 21 Maine R. 138.

The opinion of the Court, TENNEY J. concurring in the result only, was drawn up by

WHITMAN C. J. — There seems to be no question but that the defendant's deputy had the writ of replevin in his possession, for the purpose of being served, as alleged by the plaintiff; and it must be presumed to have been in common form. In such case the mandate was to replevy the goods, &c. provided the plaintiff gave to the defendant a bond, with sufficient surety or sureties, to restore the property, &c. and to return the writ and bond, to the court named in the writ. It is very clear, from the case as reported, that the deputy neither took a bond of the plaintiff as required, or made any return to the

Court. If, therefore, the proper action to be brought is trespass on the case, the plaintiff, upon the general issue, would seem to have made out a good case.

A bond appears to have been prepared, and probably in due form; but, instead of being executed by the principal, or any one authorized by him for the purpose, the plaintiff's name in that suit was put to it by one, who afterwards signed it as surety, and who had no authority from the principal to put his name or seal to it. It is immaterial whether the sureties were good or not; for not being executed by the principal, or any one having authority from him for the purpose, the deputy had no legal right to take the goods from the possession of the present plaintiff; and in doing so he became a trespasser; and was amenable, in an action of trespass *vi et armis* or trover, for the goods. *Purple* v. *Purple & al.* 5 Pick. 226. Such would be the appropriate remedy. The injury was direct and immediate, and not consequential. Whether a special action of the case is sustainable in such case may at least admit of a doubt.

In cases like the present it does not seem, that the not returning of the writ and bond formed a legitimate ground of complaint, on the part of the plaintiff. He has proved, in effect, according to his first count, that no bond as required by the statute, was taken. If none was taken none could be expected to be returned. The allegation that the bond had not been returned supposes, necessarily, that one had been taken. The proper and only ground of complaint, that no bond had been taken, which is alleged and proved, is the gravamen, if any, to be relied on. The statute does not require, if there be no bond taken, that one shall be returned. Such a requirement would be absurd: and if the statute does not require it, the not doing it is no ground of complaint. The plaintiff's only ground of complaint, therefore, arises from the wrongful taking of his property, when wrested from him, under color of authority when none existed. It is much like the case of an attachment of property to secure a debt, when the Court issuing the writ commanding the attachment, has

no jurisdiction; or perhaps, more like a lawful attachment of property, and a failure to complete the service by leaving a summons the requisite time before Court, whereby an officer would become a trespasser *ab initio*. In either case the ground of complaint, for which an action would lie in favor of him whose property had been taken, would not be for not returning the writ. His only remedy would be by an action of trover or trespass *vi et armis*, against the officer making such a void attachment, or those who had ordered or co-operated with him in making it.

The statute of limitations in such case must begin to run from the time the trespass was committed. The case of *Harriman* v. *Wilkins*, 20 Maine R. 93, is not applicable to such a case. In that case, (an action of replevin,) a bond was taken, duly executed, both by the principal and surety. The officer had duly returned that he had, pursuant to his precept, taken a bond. The defendant had a right to rely upon his return so made. He had no right to a suit upon the bond till judgment in his favor had been rendered, nor until there had been a breach of its condition. *Plaintiff nonsuit.*

JOSHUA W. HATHAWAY *versus* SAMUEL LARRABEE.

Courts will give effect to the returns made by officers, although informally made, when the intention is sufficiently disclosed by the language used, to be clearly discernible. But when the obscurity is so great, that the purpose cannot be ascertained, they will not attempt to make the return effectual by a construction merely conjectural.

Where an officer made a return of an attachment upon a writ, against three defendants, in the following words — "Penobscot, December 28, 1836, at eleven o'clock A. M., I have attached all the right, title and interest the defendant has, in and to any real estate in the county of Penobscot" — *it was held by the Court*, that the language was too vague and uncertain to create a lien by attachment on the estate of either one of those defendants.

THE action was covenant broken on the covenant against incumbrances in the deed of the defendant to the plaintiff, dated September 20, 1839, and recorded September 21, 1839.

Buck and Kidder brought a suit against Nathaniel French, Joseph Richards and Henry Burgess, and a return was made thereon by a deputy sheriff in the following terms: —

"Penobscot, December 28, 1836, at eleven o'clock A. M., I have attached all the right, title and interest, the defendant has in and to any real estate in the county of Penobscot.

"H. Winslow, Deputy Sheriff."

Judgment was recovered, and a levy made upon the land described in the deed from the defendant to the plaintiff, on December 18, 1839. The land was within the county of Penobscot.

If that return on the writ constituted a valid attachment of the land as the property of French, one of the defendants in that suit, the plaintiff was entitled to recover; but if it did not he was to become nonsuit.

Hathaway, pro se, would hear what objection could be made to the plaintiff's right to recover, and reply.

S. W. Robinson, for the defendant, contended that the supposed attachment was void for uncertainty. It is impossible to ascertain from the officer's return what was really attached. There is no mistake, for both the noun and the verb are in the singular number. This cannot be an attachment of the estate as the property of all, but of one only. And of which one? How can the Court determine? Neither of the defendants had been named by the officer before, and the attachment must be void from the impossibility of applying to either of the defendants in that suit.

I can find no authority directly in point on either side. The following, however, may throw some light on the subject. *Whitaker* v. *Sumner*, 9 Pick. 308; *Baxter* v. *Rice*, 21 Pick. 197; *Reed* v. *Howard*, 2 Metc. 36; *Leadbetter* v. *Blethen*, 18 Maine R. 327.

Hathaway, in reply. There were but two parties to the suit, *Buck & al.* v. *French & al.* the plaintiff party and the defendant party. And an attachment of all the real estate of the defendant, in the county, is the same in effect, as if the words *defendants or either of them* had been used.

If the return had been, *all the real estate of the defendants*, the argument would have been, and with as much propriety, that the attachment held only the joint estate. But such a return has always been held to cover the estate of each. If the singular number had been used in a deed, and three persons had signed it, every one knows that it would convey the land of all. So here they are all named in the writ, and it is immaterial whether the officer uses the singular or the plural. The intention clearly is, that the property of each defendant was to be embraced in the return of an attachment; and the intention is always to govern. *Litchfield* v. *Cudworth*, 15 Pick. 27.

The opinion of the Court was drawn up by

SHEPLEY J — The suit is upon a covenant of warranty in a deed from the defendant to the plaintiff, made on Sept. 20, 1839, conveying a lot of land situated on the corner made by Penobscot and Pine streets, in the city of Bangor. The lot was conveyed by Harvey Reed to Nathaniel French on Dec. 9, 1836. French conveyed the same on May 25, 1837, to John S. Ayer, from whom the defendant derived his title.

Charles Buck and Camillus Kidder, commenced a suit against Nathaniel French, Joseph Richards and Henry Burgess, on Dec. 28, 1836; and on that day a deputy of the sheriff made a return upon the writ in the following words: —"Penobscot, Dec. 28, 1836, at eleven o'clock A. M. I have attached all the right, title and interest the defendant has in and to any real estate in the county of Penobscot." The plaintiffs in that suit subsequently obtained judgment and caused an execution issued thereon to be levied upon that lot of land as the estate of Nathaniel French.

If the return of the officer, made upon that writ, operated as an effectual attachment of that lot of land, the plaintiff may be entitled to recover. If it did not, there is no proof, that the covenants of the defendant have been broken.

Courts will give effect to the returns made by officers, although informally made, when the intention is sufficiently dis-

closed by the language used to be clearly discernible. When the obscurity is so great, that the purpose cannot be ascertained, they will not attempt to make the return effectual by a construction merely conjectural.

The plaintiff contends, that the several persons named as defendants in that writ constituted the party defendant, and that the officer must be regarded as using the term defendant, to designate the party defendant, composed of three persons. This is not in accordance with the common use of language as exhibited in judicial proceedings to designate parties defendant, when there are more than one. When the plaintiffs or defendants in a suit have been numerous, courts have authorized and even required, that the terms plaintiffs or defendants, should be used in the pleadings instead of all the names; but they do not appear to have authorized them all to be regarded as one and to be designated by the use of one of those terms in the singular number. *Meeke* v. *Oxlade*, 1 B. & P., N. Rep. 289; *Davison* v. *Savage*, 6 Taunt. 121. Such a use of language to designate several persons as parties defendant is not usual in common parlance. The officer, who made the return, must have known that there were three defendants, and yet he used the singular number apparently without any mistake, for the verb connected with the substantive is also in the singular number. Could a person, who inspected the writ and return upon it for that purpose, properly conclude, that the real estate of Henry Burgess had been attached? No person should be deprived of his right to sell, or to purchase an estate as free from incumbrance, when he cannot ascertain by an inspection of the officer's return, that it has been attached. There is nothing in the case authorizing the inference, that a stranger upon an inspection of the writ and return upon it could have concluded, that the words used to make an attachment were more applicable to one than to another of the three defendants.

When several persons subscribe an instrument containing a covenant or promise in language applicable to one person only, they are, as the plaintiff contends, all bound. Each one by subscribing the instrument adopts the language as applicable

to himself. There is little of similarity between such a case and the present. Neither of the defendants in that suit adopted the language used by the officer or appropriated it to himself. It does not appear, that the officer intended to attach the estates of all those defendants. The language used by him leads to a different conclusion. The Court is not authorized to give an effect to the language by construction not warranted by its literal meaning or by any usage in judicial proceedings, or in common parlance. Without such a construction the language is too vague to create a lien by attachment on the estate of either one of those defendants. The attachment being void for uncertainty no title superior to that conveyed to the plaintiff could be obtained by the levy; for that was made long after there was evidence in the registry, that the estate had been conveyed. *Plaintiff nonsuit.*

JOHN S. SAYWARD, & *al. versus* HENRY WARREN.

In an action of replevin, a plea or brief statement, alleging that the defendant was not in the possession of the property, at the time the same was replevied, nor claimed to own it at that time, is bad in substance.

An action of replevin may be maintained against one who has wrongfully taken the property of the plaintiff, and for a time detained it, but who has, before the commencement of the suit, sold and delivered it to another.

REPLEVIN for a quantity of hay. With the general issue, *non cepit*, the defendant filed the following brief statement: —

And for brief statement the defendant says, that he did not take said property as alleged, that at the time said property was replevied he did not have the same in his possession, or claim to own the same, but had previously parted with all his right, title and interest therein. — And further, that at the time said plaintiffs sued out their writ, they had no interest in said property nor ever since have had. — And further, that said property by said plaintiffs replevied, to wit: said hay, was cut from, and was the produce of land in the possession of and owned by said defendant.

At the trial, SHEPLEY J. instructed the jury, that unless the defendant was in possession of the hay, or claimed it as his own, at the time of the service of the writ, the action could not be maintained; and that if the jury should believe, that the sale of the hay by the defendant to his brother was a *bona fide* sale, and the delivery of it was before the service of the writ, the action could not be maintained. The verdict was for the defendant, and the plaintiffs filed exceptions.

There was also a motion for a new trial filed, because the verdict was against evidence; and on this motion the whole evidence was reported.

Ingersoll, for the plaintiffs, contended that the instruction was erroneous, because it changed the issue in replevin, from the time of the taking and detention to the detention of the property at the time of the service of the writ.

Under this instruction the defendant might take the plaintiff's property wrongfully, and detain it until the day of the service of the writ, and defeat the action, by placing the property in the hands of another person, perhaps wholly irresponsible, and thus compel the plaintiffs to pay the costs, as well as to cause them to lose their property.

The brief statement does not deny any material allegation in the writ. It should, to be good, have denied the taking and detention. 11 Mass. R. 119 and 313.

The officer was directed to replevy the hay in the hands and possession of the defendant, and the officer returns that he has "replevied the within hay." This return is conclusive that the hay was then in possession of the defendant. *Stinson* v. *Snow*, 1 Fairf. 263.

In replevin the suit is not commenced until the bond is given, and the defendant would always have time to shuffle the property out of his hands, and thus furnish a defence to the suit, if the instruction was right.

Cutting, for the defendant, contended that the plaintiff must have the property in his possession, or claim it as his own at the time of the replevin, or he fails in his action. 1 Esp.

N. P. 350, and cases there cited. Trespass or trover may be maintained for the illegal taking, but replevin cannot. The property must be detained until the time of the service of the writ. *Lathrop* v. *Cook*, 14 Maine R. 414.

The issue, usually, is upon property in the plaintiff at the time of the commencement of the suit; and that cannot be, in replevin, until the bond is taken. Before that is done, the officer cannot make any service.

The officer, by virtue of a writ of replevin against one, cannot take property in the possession of another, claimed as his own. Until the property is taken by the officer and restored to the plaintiff, there can be no service. The replevin bond is to be given to the defendant in the suit; and if the officer can take property out of the possession of one man on a writ against another, the latter may lose his property, without remedy, and without any opportunity to defend, and to show the property to be his own. The instruction of the presiding Judge was strictly legal, and in accordance with the decision of this Court in *Lathrop* v. *Cook*, and should be sustained.

The opinion of the Court was drawn up and delivered June 30, 1848, by

WHITMAN C. J. — This is an action of replevin, to which the defendant pleads the general issue, *non cepit;* and files a brief statement under the statute, setting forth, among other things, that he was not in possession of the property replevied, nor claimed to own the same at the time it was replevied from him; and the ruling of the Court appears to have been, that, if such was the case, the action was not maintainable; and to this the plaintiff took exceptions.

The first obvious remark to be made is, that such a plea, for such in substance it is, is unprecedented; and, in such case, doubts might well be expected to arise as to its admissibility, as, if it be admissible, it is a matter of no little surprise, that it should not heretofore, have been found necessary to have had recourse to it; especially as this species of action has been of frequent occurrence — as much so as almost any other

known to the law — as long and as far back as the history of the common law can be traced. The gist of the action at common law is, the unlawful taking. It is true, nevertheless, that a detention is also alleged; but the general issue is *non cepit.* Even the denial of the detention by a plea, without traversing the taking, is unprecedented; and it is believed would be bad on demurrer. Much more should a plea be so considered, which merely denied that the defendant had possession of the goods, and disclaiming any ownership therein at the time the suit was commenced. In Comyn, title, Replevin, A. it is laid down, even, that if cattle, after the taking, return to the owner, still that replevin lies for the wrongful taking. And again — same, title, C. replevin lies against him who takes the goods, and against him who commands the taking. If so, clearly, he who commands the taking could not plead, that he was not in possession, and claimed no property in the goods; and much less could the actual wrongdoer be allowed to do so. Mr. Justice Van Ness, in delivering the opinion of the Court, in *Pangburn* v. *Patridge,* 7 Johns. R. 140, remarks, that "possession by the plaintiff, and an actual wrongful taking by the defendant, are the only points requisite to support the action." And again — he says, "the old authorities are, that replevin lies for goods taken tortiously, or by a trespasser; and that the party injured may have replevin or trespass at his election." And again — "if this question be considered upon principle, it is proper this action should be maintainable whenever there is a tortious taking of a chattel out of the possession of another." And the cases of *Thompson* v. *Button,* 14 *ib.* 84, and *Clark* v. *Skinner,* 20 *ib.* 465, are confirmatory of this position; and in *Chapman* v. *Andrews,* 3 Wend. 240, Mr. Justice Sutherland says, "the doctrine of this Court I consider as settled, that replevin lies for such a taking as will sustain an action of trespass *de bonis asportatis.* And such, undoubtedly, was the common law, as is fully shown in *Pangburn* v. *Patridge.*

In Massachusetts it seems to have been held, that a wrongful detention is so far a wrongful taking, as to authorize the

sustaining of an action of replevin; and in cases in which it may be at least doubtful, if an action of trespass *de bonis* could be sustained; for it is understood, that this determination is not confined to cases where by the misconduct of the party, in reference to goods lawfully taken, he has become a trespasser *ab initio*. *Bailey* v. *Stubbs*, 5 Mass. R. 280; *Badger* v. *Phinney*, 15 *ib.* 359; *Parker* v. *Fales*, 16 *ib.* 147; *Marston* v. *Baldwin*, 17 *ib.* 606. These decisions may, however, find support from the phraseology of the statute of Massachusetts, of which ours is a transcript, as remarked by Mr. Justice Wilde, in the case last cited, which is, that the action may be brought when goods are "taken, detained or attached;" thus extending the common law remedy for goods wrongfully detained. Yet a writ of replevin, with the declaration therein, as prescribed in the statutes of Massachusetts and of this State, must be as if predicated upon a tortious taking; and it may well be doubted if one alleging a wrongful detention merely, would not be held to be bad on a plea in abatement, if not upon demurrer.

In the position taken in defence in the case at bar, the unlawful taking, and also the wrongful detention, with the exception of the moment at which the writ was served, must be considered as admitted; for they are not traversed. And if by the general issue pleaded they should be considered as traversed, the evidence was conclusive, that the defendant did take the hay replevied, and sold it. He, therefore, was the cause of the detention and virtually did detain it, till replevied. At any rate, he must be considered as having commanded the detention of it to that very moment; for selling it to a third person is in effect commanding him to detain it. And he who commands a taking, we have seen, is liable to this process; and could not plead, that he had not the property in possession, and did not claim to own it, as matter in full defence. The effect of such a disclaimer might be to prevent a judgment for a return, in case the defendant should prevail upon proper defence made. The judgment against him would be for damages only for the unlawful taking or detention. If

any third party claimed to own the goods, it would be for him to vindicate his rights in any mode that might be appropriate.

Exceptions sustained.

CALVIN CHAMBERLAIN *versus* JAMES SANDS *& al.*

If a paper be recognized by a witness as containing a correct statement of the facts in relation to a certain transaction, as they were known to him when it was presented to him at a previous time, he may use it for the purpose of refreshing his recollection, although it had been drawn up by another person more than twenty days after the events transpired. But unless the paper is recognized by the witness as a correct account of the transaction, it is inadmissible for such purpose.

The general rule of evidence is well settled, that a party cannot be permitted to discredit his own witness. And no exception to the rule will permit the party to introduce testimony to prove, that his witness had at different times made declarations at variance with his testimony.

The minutes of the proceedings of two justices of the peace and of the quorum, selected and acting in the examination of a debtor desirous of taking the debtors' oath, informal as a record, but containing minutes from which a more extended and formal record may be made, are admissible in evidence until the record is completed.

Where "there were two citations by the same debtors to the same creditor on different bonds made out at the same time and returnable at the same time"; and the minutes of the justices states, that the plaintiff's attorney appointed "one of the justices to act on each citation," and where each citation contained a notice to the creditor, that all the debtors were to make a disclosure at the same time, it is to be understood, that such justice was authorized to act upon all the cases named in it, and to do all acts respecting it, which the law required to be done.

Where the justices had been duly selected by the parties and were at the place designated, "within the time at which the creditor was cited to appear," and one of three debtors was also there, and the attorney of the creditor, the justices have jurisdiction, and may adjourn to a different hour of the same day, and have power at such adjournment to take the disclosures of and administer the oath to all the debtors.

Although two of the debtors did not personally appear until the adjournment, yet that fact did not take from the justices their jurisdiction, nor authorize the creditor's attorney to withdraw the authority vested in one of the justices by his appointment.

Under the poor debtor act, (Rev. St. c. 148) the debtor may select one of the justices to take his disclosure at any time after the citation to the creditor has been prepared and before the tribunal has been organized.

THIS case came before this Court on the following exceptions: —

"This was an action of debt on a poor debtor bond, taken on an execution according to chap. 148 of Rev. Stat., dated Feb. 28, 1844, for the penal sum of $69,44.

"The due execution of said bond was admitted.

"The defendants introduced in defence the certificate, of J. H. Hilliard and G. P. Sewall, two justices of the peace and quorum for said county, of the administration of the poor debtor oath to said principal defendants, Sands, Burnham and Averill, Aug. 24, 1844, which certificate was in the form prescribed in sec. 31, chap. 148, of Rev. Stat., plaintiff objecting to it because it did not show how the justices were appointed, but the Court ruled that it made out a *prima facie* defence, and that plaintiff might show that the justices had no jurisdiction.

"Plaintiff's counsel then called said Hilliard, and was about to place in his hands a memorandum to assist his recollection, when defendants' counsel objected to it. It was a memorandum, in the handwriting of Mr. Prentiss, the attorney for the plaintiff, drawn up by him on the 16th Sept. 1844, in the form of a letter addressed to said Hilliard. Mr. Prentiss, being called on for his reasons for presenting said paper, stated, as counsel, that the memorandum was drawn up by him, when the facts were fresh in his memory, and that said Hilliard examined it the next day, when fresh in his recollection, and said it was correct, and that it remained in the hands of said Hilliard till Jan. 1846.

"The Court sustained the objection of the defendants' counsel, and ruled, that it was not proper for Mr. Hilliard to use said memorandum to refresh his memory as a witness.

"The said Hilliard had retained said memorandum till last January, when he returned it to him, and that he had had it ever since.

"Said Hilliard testified, that about 11 o'clock on the day of the disclosure, he thought a little before 11, Mr. Prentiss, on behalf of the creditor, came to him, told him that Sands had

appeared, that Burnham and Averill had not appeared, and that he wanted him to go up and hear the disclosure of Sands — that he did not recollect Prentiss' telling him that the hour had gone by and that he should have nothing to do with the disclosure of Burnham and Averill, if they did appear; that they finished the disclosure of Sands between 11 and 12, but did not then administer to him the final oath — that Ira Wallace, a surety on the bond, appeared and wished for a continuance on the ground, that Burnham and Averill were out of the village, till 2 o'clock P. M. — that Prentiss on behalf of the creditor, for whom he acted as attorney, after Sands' disclosure was signed and sworn to, protested against Burnham and Averill's disclosures, if they came afterwards, and said that he should have nothing to do with their disclosure, as the hour had gone by; and that said justices had no jurisdiction or right to adjourn till afternoon to give them an opportunity to appear, or to do any thing about their disclosure. He said we might then administer the oath to Sands. Said Prentiss left the office and did not return. The justices adjourned till 2 o'clock P. M. Neither Burnham nor Averill appeared in the forenoon. At 2 o'clock P. M. said Sands, Burnham and Averill appeared, and we administered the oath to them all; said Prentiss was not present.

"I was not appointed by any officer, — I had no authority except from Mr. Prentiss. I supposed I was acting right in taking the disclosure of Burnham and Averill, and that I had authority from Prentiss to do so.

"*H. E. Prentiss* testified that he went to the office of Cony and Sewall, the place appointed in the citation, at the hour of 10, the time appointed, that Sands appeared before 11, but Burnham and Averill did not — that he was governed by his watch, which was near five minutes faster than the Bangor time and which indicated a different time from the watch of Hilliard, — that a few minutes after 11, Bangor time, Sands having decided that he would disclose, he went for Mr Hilliard and told him, that Sands having appeared in season he was willing he should disclose, but that Burnham and Ave-

rill not having appeared, he would object to their disclosing, if they did appear, and that he asked him to go up and attend the disclosure of Sands, — that he appointed him to hear the disclosure of Sands only, and gave him no authority to hear the disclosure of Burnham or Averill, — that the disclosure of Sands having been made and signed and sworn to, something was said, he believed at first by Sewall, about adjourning till 2 P. M., and not administering the final oath to Sands till then, — that he told the justices that they might administer the poor debtor oath to Sands as soon as they pleased, but as the hour had gone by and Burnham and Averill had not appeared, he should wait no longer, and that he protested, that they had no right to disclose after that time, and that he should have nothing to do with any disclosure of theirs, and that they (the justices) had no power to adjourn, or do any thing about the disclosure of Burnham and Averill. — That this was at twenty-five minutes past 11 by his watch, which he looked at at the time. — That he then left the office and did not return that day. — That Sewall on that day did not suggest or pretend that he had been appointed a justice by Burnham or Averill, or that he had any authority from them, — that he made a memorandum of these facts soon after they occurred, and had a distinct recollection of them, and this memorandum is the same offered to be placed in the hands of Hilliard and was used by said Prentiss in giving his testimony.

"*G. P. Sewall*, called by defendants, testified that at the time the citation was made by his partner, Sands, Burnham and Averill were then to sign it, and that all at that time requested him to act as one of the justices in taking their disclosure. This evidence was objected to as inadmissible, because incompetent to prove a legal appointment of said Sewall by Burnham and Averill, but admitted, and it was the only evidence of his authority from them. Sewall testified, that they got together, he believed, about ten; that Sands' disclosure occupied but a few minutes, and that his impression was that the adjournment was moved by Wallace and ordered before 11; and that he assumed to act for the debtors; that

there were two citations by the same debtors to the same creditor, on different bonds made out at the same time and returnable at the same time; and that before commencing the disclosure of Sands, he asked said Prentiss if he appointed Hilliard, as justice on each citation, and he said yes.

The defendants offered the two citations with the following writing on the back of each, which said justices testified, that they made up and signed at the time of the disclosure, and that it was their only record of the disclosure. Said Hilliard testified, that it was written by Sewall, and that he had no recollection of noticing its phraseology as to his appointment at the time he signed it. Plaintiff objected to the admission of this writing, as not a record but only minutes from which to make up a record; but it was admitted. On cross-examination said Hilliard said he did not desire to make any alteration in the record, that he examined it before he signed it, and made an interlineation in his own handwriting. The record was as follows. "Penobscot ss. August 24, 1844. On the twenty-fourth instant, at ten A. M. the creditor, by H. E. Prentiss, his attorney, appeared and appointed J. H. Hilliard, Esq., one of the justices to act on each citation; Sands appeared only, and disclosed on each about eleven. After Sands' disclosure was partially completed, Wallace, a surety on the bond, appeared and requested an adjournment to two P. M., which was done; at that hour, each and all appeared, disclosed and were discharged, and took the oath. A certificate to issue stating these facts. "J. H. Hilliard, } Justices of Peace
"G. P. Sewall. } and Quorum."

"The citation was dated July 18, 1844.

"The plaintiff offered to show by the testimony of said Prentiss, that on two different occasions since said disclosure, said Hilliard had said, that he was appointed by said Prentiss to take the disclosure of Sands only, and had no authority from him to take the disclosure of Burnham or Averill; but the evidence was objected to by defendants' counsel and excluded by the court, on the ground that said Hilliard had been called by plaintiff.

" The Judge charged the jury, that the certificate made out a *prima facie* defence; that the burden of proof was on the plaintiff, to show that the justices had not jurisdiction; and this the plaintiff was permitted to do by parol evidence, notwithstanding the certificate and the record; that if Burnham and Averill at the time the citation was made out, requested Sewall to act for them in taking the disclosure, that request was a sufficient appointment, and authorized him to act; that they would find from all the evidence, the question of fact, whether Hilliard was appointed by Prentiss to take the disclosure of Burnham and Averill; that the record was not conclusive, but being made at the time was entitled to much consideration; that plaintiff had contended that by a true construction of the language of the record, it only stated that he had appointed Hilliard to take the disclosure of Sands, and did not state that he had appointed Hilliard to take the disclosure of Burnham and Averill; but the Judge instructed the jury, that this construction which plaintiff contended for, was incorrect, and that the language of the record would embrace all the parties embraced in the citation, and meant that Hilliard was appointed to take the disclosure of all three of the debtors; that plaintiff must satisfy them that Hilliard was not appointed by Prentiss to take the disclosure of Burnham and Averill; that if they believed that Hilliard's authority to act, was expressly limited to Sands, the plaintiff is entitled to their verdict; if appointed for all, he had authority to act for all. That plaintiff had contended that Burnham and Averill, not appearing in season, was fatal, and that they had no right to disclose after the hour had expired; and that even if Prentiss had appointed Hilliard to take the disclosure of Burnham and Averill, when he found they did not appear, he had a right to withdraw his authority, and that he did withdraw it. But the court instructed the jury that if the evidence in this case satisfied them, that within the time at which the plaintiff was cited to appear, the said justices came to the place appointed to take the disclosure, that said Hilliard was appointed by the plaintiff to act as a justice in taking the disclosure of all the debtors,

and that said Sewall previously to said time had been appointed by the debtors to act as such justice, that they had jurisdiction of the subject matter of the disclosure, &c., and that they had a right to adjourn till the afternoon. And that although two of the debtors did not personally appear till the afternoon, yet that the fact did not take from them the jurisdiction, nor authorize Prentiss to withdraw the authority vested in said Hilliard by his appointment. After the jury had been out some time they sent in a written request to the Judge for his minutes of the testimony of Hilliard and Prentiss, as to the conversations in Hilliard's office, when Prentiss went there after him; and the Judge called in the jury and repeated to them all the testimonies bearing on the question of Hilliard's appointment, and was then asked by one of the jury what was the legal meaning of the language of the record "that Hilliard was appointed to act on each citation," and if it meant that he was appointed to act in the disclosure of all three; and the Judge instructed him that it did, that to act on each citation meant to act on the whole subject matter of each citation. The jury after a few minutes returned a verdict for defendants. All the papers may be referred to. To the refusal of the Judge to permit said memorandum to be placed in the hands of said Hilliard, to his rejection of the declarations of said Hilliard offered by plaintiff, to his admission of the evidence to show the appointment of Sewall, to his admission of said writing called a record, to all his rulings and instructions to the jury, and to all other illegal rulings, orders or proceedings adverse to the plaintiff, the plaintiff excepts and reduces his exceptions to writing and signs the same before the adjournment of the court without day. "Henry E. Prentiss, plaintiff's att'y."

"The foregoing exceptions having been presented to the court before the final adjournment thereof, and being found conformable to the truth of the case, are hereby allowed and certified.

"Fred. H. Allen, Just. Dist. Court, presiding," &c.

Prentiss, for the plaintiff, argued in support of the seven

objections to the rulings and instructions of the District Court, stated in the opinion of this Court.

As authorities, he cited under the first: — 1 Greenl. Ev. § 436 and note; 1 Stark. Ev. 128.

Under the second: — 1 Greenl. Ev. § 444.

Fourth: — 3 Metc. 571.

Fifth: — *Ayer* v. *Woodman*, 24 Maine R. 196.

Ingersoll, for the defendants, said he would reply to such of the objections, as seemed to him the most plausible.

The first was rightly settled by the jury. The Court was clearly right.

The second is a mere question, whether he can impeach a witness called by himself.

As to the third, the only objection is, that it was too favorable for the plaintiff.

Fourth depends on the meaning of the words. Thinks this Court will understand the language to mean the same as the district judge did.

Fifth: — This is answered by the case cited for the plaintiff. *Ayer* v. *Woodman*, 24 Maine R. 196.

The opinion of the Court was drawn up by

Shepley J. — The suit is upon a bond made by debtors with sureties to their creditor in conformity to the provisions of the statute c. 148.

A certificate made by two justices of the peace and of the quorum, in the form prescribed, was introduced to prove performance of one of the conditions of the bond. The plaintiff called one of them as a witness and proposed to place in his hands a letter addressed to him by the plaintiff's attorney, purporting to state the facts, as they occured on August 24, 1844, being the day of the date of the certificate, to refresh his recollection. An objection was interposed. The counsel being called upon for his reasons, stated, that it was drawn up by him when the facts were fresh in his recollection, and was examined by the witness, when the facts were fresh in the

recollection of the witness, and that it was admitted by him to be correct.

1. It is contended, that the presiding Judge incorrectly decided, that the document could not be properly used by the witness for that purpose. If it had been recognized by the witness as containing a correct statement of the facts as they were known to him at the time, when it was first presented to him, he might have been permitted to use it for that purpose, although it had been drawn up by another person more than twenty days after the events transpired. This does not appear; nor is it apparent, that the witness desired to have the use of it. The counsel appears to have rested the right to have the witness use it, not upon an examination of the witness as to his knowledge of its accuracy, but upon his own statement respecting it. This may be explained by subsequent events. The facts stated in that paper were introduced in evidence by the testimony of the attorney. The witness had before been partially examined, and he was subsequently further examined, and he thus appears to have had an opportunity to have known the contents of the paper before his testimony was finally closed and before it was too late to have corrected any error made in the former part of it. As he did not do it, the plaintiff afterwards proposed to prove, that he had made declarations at variance with his own testimony and in accordance with the statements contained in that paper. Upon examination of all the proceedings at the trial as exhibited in the bill of exceptions, the paper does not appear, except from remarks of counsel, at any time to have been recognized by the witness as containing a correct account of the transactions; but rather to have been pressed upon his consideration to influence his mind during his examination. The decision of the Court under such circumstances cannot be considered as affording just cause of complaint.

2. The next objection is made to the exclusion of testimony to prove, that the witness thus called by the plaintiff had on two different occasions, made declarations at variance with his testimony. To the general rule, that a party cannot

be permitted to discredit his own witness, an exception was admitted, in the case of *Dennet* v. *Dow*, 17 Maine R. 19, that he might do so, when he was obliged to call an attesting witness. Otherwise the rule was affirmed. The present case comes within the rule, and not within the exception.

3. The next error alleged is the admission as evidence of the document, called a record, made at the time and signed by the justices. They testified, that it contained the only record of their proceedings and that they had no desire to make any correction or alteration of it. The statute does not in words require the justices to keep a record of their proceedings; but it authorizes them in certain cases to award costs, to issue an execution for them, and to do other acts, necessarily implying the existence of such a record. The paper signed by them is quite informal, and if it must rather be regarded as a paper containing minutes, from which a more extended and formal record could be made, it might, in accordance with decided cases, be received in evidence before such formal record had been made. *Davidson* v. *Slocomb*, 18 Pick. 464; *Pruden* v. *Alden*, 23 Pick. 184.

4. It is insisted, that an erroneous construction of that document was made by the presiding Judge in his remarks upon it to the jury. The counsel for the plaintiff contended, that the language of that record authorized the conclusion, that he had appointed one of the justices to take the disclosure of one of the debtors only. The jury were otherwise instructed. It is stated in the bill of exceptions, "that there were two citations by the same debtors to the same creditor on different bonds made out at the same time and returnable at the same time." The paper called a record states, that the plaintiff's attorney appointed "one of the justices to act on each citation." Each contained a notice to the creditor, that all the debtors were to make a disclosure at the same time. To act upon each citation is to act upon all the cases named in it, and to do all acts respecting it, which the law required to be done.

5. The record further states, that one of the debtors, "Sands,

appeared only and disclosed on each about eleven. After Sands' disclosure was partially completed, Wallace, surety on the bond, appeared and requested an adjournment to two P. M., which was done ; at that hour each and all appeared, disclosed, and were discharged and took the oath." It is insisted, that all their proceedings after eleven o'clock were void. Acting in obedience to their instructions the jurors must have found that the justices had been duly selected by the parties, and that they were at the place designated "within the time at which the plaintiff was cited to appear." One of the debtors was also there, and the attorney of the creditor. The tribunal thus correctly organized in due season, had jurisdiction of the case. The sixth section of the statute gave them a discretionary power, "to adjourn from time to time, as they see cause." They might proceed to take the disclosure of the one present ; and for their own convenience, or at the suggestion of one appearing in behalf of the absent debtors, might adjourn.

6. It is also insisted, that the instructions were erroneous in stating, "that although two of the debtors did not personally appear till the afternoon, yet that fact did not take from them their jurisdiction," nor authorize the plaintiff's attorney to withdraw the authority vested in one of the justices by his appointment. If the former clause of these instructions were not correct, the jurisdiction of the justices must depend upon the personal presence of all the debtors before an adjournment could take place. Such a construction would deprive the one who was present of the right to proceed in the absence of the others, and to obtain a legal discharge.

It would also prevent a debtor, who, by illness, mistake or casualty, should fail to be present at the appointed time, from performing the condition of his bond, unless there were time for a new notice. That neither party can revoke the authority of one of the justices, and thus interrupt the proceedings of the tribunal, after it has been duly organized and has entered upon the performance of its duties, was determined in the case of *Ayer* v. *Woodman*, 24 Maine R. 196.

7. It is further insisted, that one of the justices was not

legally selected by the debtors, because he was requested to act in that capacity, when they signed the citation to the creditor. The statute does not prescribe a time within which the selection shall be made. It is not perceived, that the rights of a creditor can be impaired by a selection made by a debtor, at any time after the citation has been prepared, and before the tribunal has been organized. There does not appear to be any period of limitation so appropriate, as that between the commencement of the proceedings and their completion, for the final action of the tribunal. *Exceptions overruled.*

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTIES OF WASHINGTON AND AROOSTOOK,

ARGUED JULY TERM, 1847.

William Benson *versus* William Thompson.

Where a ship is owned by two persons in equal shares, and one of them without any authority from the other, and without his knowledge or consent, repairs the vessel in a home port, he cannot recover of the other owner, any portion of the money expended for such repairs.

The plaintiff and defendant were the owners of the brig Martha Ann, in equal shares, from June 19th to September 10th, 1842. This is an action of assumpsit on an account annexed, with the money counts, wherein the plaintiff claims to recover of the defendant one half of the amount of the money expended by him, in repairs of the brig during the time they were joint owners.

Upon the evidence contained in nine depositions and a bill of sale, which were not to be copied but referred to, the parties agreed to submit the case for decision to the Court, "they making such inferences from the facts as a jury might do, on applying the principles of law to the whole evidence."

The view taken of the evidence by the Court appears in the opinion.

The case was argued in writing.

J. and *B. Bradbury*, for the plaintiff.

Between the 19th of June and the 10th of September, 1842, (during which time the plaintiff and defendant owned the vessel in equal proportions) certain repairs were made on the brig by plaintiff, amounting to $174,14, and wages accrued to Simon McDonald to the amount of $76,34. This action is brought to recover one-half of each of these sums of the defendant, the registered owner of the vessel during this period.

The present action is *indebitatus* assumpsit, brought upon an account annexed to the writ, with the usual money counts. Can it be maintained?

Part owners of ships are not partners, but tenants in common. 3 Kent's Commentaries, 151, 152, 154. Story's Abbott on Shipping, 68, (4th Am. Ed.); Collyer on Partnership, 681. The rights of tenancy in common, apply to the cargo as well as to the ship. 3 Kent, 157; *Jackson v. Robinson*, 3 Mason, 138. In fitting out a ship for a voyage, if one part owner advances the share of another, that constitutes a debt which he is entitled to recover in an action at law. Collyer on Partnership, 681. The rights of tenancy in common among part owners, apply to repairs as well as ownership, cargo, &c. Part owners are never constituted partners, *ipso facto*, in any thing pertaining to the vessel.

As the law presumes that the common possessor of a valuable chattel, will desire whatever is necessary to the preservation and employment of the common property, part owners have an implied authority to order for the common concern, whatever is necessary for the preservation and proper employment of the ship. Where a part owner pays the whole bill for repairs, or more than his proportion, he can call on the remaining part owners for contribution. Story on Partnership, 580, and authorities there cited. *Marshall* v. *Winslow*, 2 Fairf. 59.

The statute of 4 and 5 Anne, gave tenants in common of chattels, an action of account against each other for the recovery of any balances due either on account of the joint property. The action of the case has been substituted for the old action of account. *Indebitatus* assumpsit lies where one has received more than his share of the joint profits, or incurred

more than his share of the joint expenses. So that no objection can be properly taken to this form of action. *Brigham* v. *Eveleth*, 9 Mass. R. 538; and *Jones* v. *Haraden*, referred to therein, and there reported. *Fanning* v. *Chadwick*, 3 Pick. 420. 16 Pick. 401, is the case of a ship's husband against the other part owners.

Regarding this, then, as a question between part owners of the brig Martha Ann, the plaintiff is entitled to recover the amount which he claims in this action. This was the only transaction between these parties. The repairs were necessary and proper to fit the vessel for sea. The plaintiff, being in possession, had an implied authority to make them. The defendant received the additional value of the vessel in consequence of the repairs, and in good conscience has so much money in his hands belonging to the plaintiff.

J. Granger, for the defendant.

Can a part owner of a chattel incur expense upon it, without the knowledge or consent of his co-owner, and maintain an action against him for any part of such expense?

It seems to be well settled, by the common law of England, that he cannot. Story on Partnership, § 421, 427; Abbott on Shipping, 70. The common law on this subject remains unchanged by any statutory provision.

In no country, so far as my researches have extended, has it ever been decided, that one part owner of a ship, may compel his co-owner by suit to pay for repairs done without any notice to him.

The plaintiff's action cannot be maintained, because the general principle of law which has been uniformly adhered to in England is, that "if there be no express or implied agreement between the owners, either by their conduct, or by their acts, sanctioning any such repairs or expenditures, although any one or more of the owners have a right to incur them, yet they have no remedy over against the others for contribution for repairs or other expenditures made by them for the proper or necessary preservation of the vessel; but they must, whether they constitute a majority or minority of the owners, bear the

whole charge." Story on Partnership, § 421, 427; Abbott on Shipping, 70. And because the expenditures were made without the knowledge or consent of the defendant.

It is quite clear that a partner or tenant in common, can maintain no action at common law against his partner, after the partnership is dissolved even, or the common property has been sold, so long as there are a variety of outstanding claims upon the partnership, or upon the tenants in common. The action of assumpsit cannot be maintained, unless in a case where the judgment would be a final settlement between the parties. *Williams* v. *Henshaw*, 11 Pick. 79; *Vinal* v. *Burrill*, 16 Pick. 401; 6 Barn. and Cresw. 149.

The opinion of the Court was by

WHITMAN C. J. — The plaintiff seeks to recover of the defendant the one half of a certain sum, expended in repairs upon a vessel, jointly owned by them. It does not appear that the defendant had appointed the plaintiff ship's husband, or had ever requested him to make the repairs, or that any were desired or necessary to be made. Yet they were made at a home port, within some six or eight miles of the defendant's residence; and it does not satisfactorily appear, that he has ever assented to the propriety of their being made.

It is contended, however, by the plaintiff, that the defendant, whether he had knowledge or not that repairs were making, or gave his consent that they should be made or not, is nevertheless, liable for his proportion of the cost. This is a position which it will be difficult to sustain. That, as a general rule, one part owner of a chattel can bestow repairs upon it, and charge the one half, or any other proportion of the amount, to his co-tenant without obtaining his assent to the making of them, would hardly comport with the principles of justice.

But it would seem, that the plaintiff relies upon a distinction, supposed to exist between a ship and other chattels, in reference to the matter of repairs. And there are cases, where one co-tenant of a ship has been recognized by the oth-

ers as ship's husband, or managing owner, in which he may cause repairs to be made, without consulting them, and charge the expense to each according to his proportion of interest therein. And so also, if repairs become necessary in a foreign port, and are made to enable a ship to perform a voyage, upon which she had been despatched by all concerned, a contribution might be called for by the one who had advanced his money for the purpose. And it has been held that, as mechanics have a lien upon a ship, in certain cases, when repaired by them, they may, in such cases, though set to work by but one of the owners, maintain an action against them all for their pay. But that one of the joint owners of a ship, in a home port, can be allowed to incur an expenditure for repairs, without the knowledge and consent of the others, and then sue them for their proportions has never been allowed.

Mr. Abbott, in his Treatise on Shipping, (page 84,) after noticing, that some foreign writers have laid it down as a rule, if a ship is in need of repairs, and one part owner is willing to repair, and the other not, the one who is willing, may repair her at their joint expense, remarks that he does not find this rule adopted in practice in any country, and that such a rule in the case of the poverty of him who might be unwilling, would be extremely cruel.

But it is insisted, that the defendant had knowledge of the expenditure, and promised to pay his proportion of it; and, by the agreement of the parties, we are to determine whether such was the fact or not. Upon an examination of the evidence we are unable to come to the conclusion that such was the fact. The witness relied upon to prove it, was Simon McDonald. Taking him to be a credible witness, — and we are not disposed to go into an inquiry whether he is so or not, — his testimony is vague and unsatisfactory. It does not show that the defendant, prior to the time he speaks of, had knowledge of the expenditure; and of course, when he replied as the witness says he did, it cannot be inferred conclusively that he had any reference to a bill for repairs. The defendant may well be supposed to have known of the pre-

vious connection of the plaintiff with the vessel; and may be believed to have understood the plaintiff to refer to the old unsettled accounts concerning it. At any rate we cannot conclude, that the defendant had reference to the present claim, with any well grounded assurance. *Plaintiff nonsuit.*

HENRY MARSH *versus* BENJAMN M. FLINT.

Logs owned by one person cannot be seized, libelled and sold, under Rev. St. c. 67, § 9, to pay not only the expense incurred in driving them, but also the expenses incurred in driving, at the same time, the logs owned by another person. If the owner cannot be ascertained, the whole of the logs on which the expense has been incurred, and not a selected portion of them, is to be seized and libelled, so that each person, interested may have an opportunity to appear and claim his proportion of the property owned by him in severalty. Therefore, when different lots of logs, designated by different marks, appear by the libel to have been driven together, and when a portion only of them appears to have been seized and libelled, without any designation of the lot, or lots, from which it was selected, to pay the whole expense incurred, such libel, on demurrer thereto, cannot be sustained.

The libel is bad, on demurrer thereto, if it be alleged therein, merely, "that the owners of said marks of logs, at the time of their driving, and then and ever since, to the proponent are unknown," when the statute permits a libel thereof only when "the owner of such logs *cannot be ascertained.*"

The libel is also bad, on demurrer, if there be an omission to allege therein in substance, that the libellant had caused "an inventory and appraisement of the same to be made by three disinterested persons, under oath, appointed by a justice of the same county," as required by Revised Statutes, c. 132, § 4.

A LIBEL, of which a copy follows, was filed at the September Term, 1846, of the Eastern District Court: —

"To the Honorable the District Court for the Eastern District, next to be holden at Machias within and for the county of Washington, on the third Tuesday of September, A. D. 1846: —

"The libel and complaint of Henry Marsh, of St. Stephen, New Brunswick, lumberman, informs and gives the Honorable Court to understand that the proponent at a certain place unincorporated in said county, called Big Musquash stream, on

the twelfth day of June, A. D. 1846, was the owner and possessor of a certain quantity of pine and spruce mill logs, marked thus: — 'I ! ME. to wit: — eight hundred thousand board measure, then and there situate, for the purpose of being floated and driven to market or place of manufacture, to wit: — Vance's Boom, Baring, which logs of the proponent's then and there became and were so intermingled, and mixed with a certain other quantity of pine and spruce mill logs, to wit: — three hundred thousand feet, board measure, called the C. R. W. and marked thus C. R. W. one hundred and thirteen thousand feet board measure, marked thus | X | two hundred and fifty thousand feet board measure, marked thus X P. that the proponent could not drive and float his own logs towards the market and place of manufacture without the aforesaid marks.

"And the proponent avers, that he did drive his own logs and the mark aforesaid, and did expend in money the sum of seventy-nine dollars and sixty-three cents, in and upon the aforesaid marks of logs, in addition to, and over and above the expense of driving his own logs, for which he deserves to have by force of the statute in such case made and provided, a reasonable compensation, and that the sum aforesaid is but a reasonable sum by him so unavoidably expended upon the aforesaid marks of logs in driving his own.

"And proponent further gives the Honorable Court to understand, that no provision exists by law, and neither was any made to drive the aforesaid marks of logs upon said Big Musquash, towards the place of market and manufacture.

"That the owners of said marks of logs at the time of their driving, and then and ever since, to the proponent are unknown.

"That on the fifth day of August, A. D. 1846, at Calais, in said county, the proponent seized and took seventy-nine dollars and fity-six cents, being fourteen thousand feet board measure of said marks of logs, and them now detains for payment, for the sum expended in manner and form as aforesaid, and prays this Honorable Court to decree the same forfeit, or

make such other order thereon as to law and justice may appertain. "Henry Marsh, by his attorney, Daniel Tyler.

"Calais, August 5, 1846."

The Court ordered notice returnable at the February Term, 1847, when Benjamin M. Flint entered his appearance, and filed the following claim and demurrer: —

"And now Benjamin M. Flint comes into court, and claims and shows to the court here, that he is the owner and was at the time of the alleged seizure, as set forth in the complainant's libel, of the logs therein mentioned, marked thus l X l, and for plea says, that he ought not to be held any further to answer to the said complaint and libel, because, he says, it is altogether insufficient in law for the said complainant to have and maintain the same; because said complaint does not state and set forth, when, or where, or how, the said complainant seized said logs, nor how many logs, nor of what marks, nor when or how the said complainant seized said logs, nor how many logs, nor of what marks, nor when or how their value was ascertained, nor that any persons were legally chosen and sworn to appraise the same and estimate the value thereof, as the law requires, nor how far nor from what place, nor to what place he drove said logs, nor that the complainant made any inquiry for or used any diligence to ascertain the owner of said logs, nor does it state, that the said complainant could not ascertain the owner of said logs, nor that thirty days had not expired after said logs arrived at the place of their destination, at the time the said logs were seized by the said complainant; all of which should have been particularly stated and set forth in said complaint. And because different marks of logs, belonging to different owners, are seized and libelled on this complaint, without designating the number or quantity of any of said different marks of logs. All which the said Flint is ready to verify. Wherefore he prays judgment of the said libel, and that the said mark of logs may be restored to him; and for his damages for the unlawful detention thereof; and for his reasonable costs expended in this behalf.

"By his attorney, Joseph Granger."

To this there was a joinder in demurrer by the libellant.

The case was argued by

Fuller and *Tyler*, for the libellant — and by

J. Granger, for the respondent, Flint.

The opinion of the Court was by

SHEPLEY J. — This libel has been filed by virtue of the statute, c. 67, § 9, which authorizes a person having timber in the waters of this State, so mixed with the timber of another, that it cannot conveniently be separated to be floated to the place of market or manufacture, to drive all the timber so mixed, when no special or different provision therefor is made by law; and gives him the right to obtain compensation for his services.

The respondent, Benjamin M. Flint, appeared and claimed to be the owner of one lot of the logs designated by a certain mark, and put in an answer and special demurrer to the libel.

The libel alleges in substance, that on June 12, 1846, the logs of the libellant were in the Big Musquash stream, for the purpose of being floated to Vance's boom in the town of Baring; that they became so mixed with three other lots of logs designated by different marks named, that they could not be driven, without driving those other lots; and that he caused the whole to be driven; that no special provision of law for that purpose existed; that the owners of those lots of logs were at the time, and have since continued to be unknown; that the libellant on August 5, 1846, caused fourteen thousand feet, board measure, of those logs to be seized and detained for payment of the expenses incurred in driving them.

The libel does not state, that the whole of either lot, or what proportion of either lot was seized, or from what lot or lots the amount seized was selected.

The question therefore arises, whether logs owned by one person may be seized, libelled, and sold, to pay not only the expense incurred in driving them, but also the expenses incurred in driving the logs owned by another person.

A construction of the statute, that would permit this, must

rest upon the conclusion, that the legislature intended to allow the property of one person to be taken to pay the debt of another. If this were the design it would exhibit an attempt to violate private rights in a manner not permitted by the constitution. Such a construction should not be admitted, if the statute may receive any other reasonable one. So far is the statute from requiring such a construction, that it is apparent, that the legislature had no such intention. The person, who thus causes logs to be floated to the place of manufacture, is entitled to a reasonable compensation, to be recovered from the "owner," by an action on the case, if he be known. If the owner cannot be ascertained, the property may be seized and libelled according to the provisions of chapter 132. But it is the property on which the expense has been incurred, and not other property that may be seized and libelled. The whole of the property according to the provisions of the statutes, and not a selected portion of it, is to be seized and libelled. In such case each person may appear and claim his own proportion of property owned in severalty, and receive it, or so much of it as may not be required to pay the sum expended upon it with costs.

When, by the libel, different lots designated by different marks, appear to have been driven; and when a portion only of them appears to have been seized and libelled without any designation of the lot or lots, from which it was selected, no sufficient foundation is laid for a decree so framed as to avoid the application of the proceeds of the sale of the property of one man to pay a debt due from another.

The proceedings in this respect appear to have been irregular. The libel also is in this particular defective.

It is defective also, in that it does not allege, that the owner of those logs could not be ascertained.

The statute gives an action on the case against the owner of the logs for the recovery of the amount expended upon them. It permits a recovery thereof by a process against the property only, when "the owner of such logs cannot be ascertained." There is an essential difference between the allegation contain-

ed in the libel, that the owners are unknown, and that required by the statute, that they cannot be ascertained.

The libel is also defective in that it does not allege, that the libellant, after seizure of the property, "caused an inventory and appraisement of the same, to be made by three disinterested persons, under oath, appointed by a justice of the same county," as required by statute, c. 132, § 4. the value thus ascertained is declared by the statute to be "the rule for deciding, where the libel shall be filed." Such inventory and appraisement are necessary also to enable the court to make a correct and just distribution of the proceeds of the sales, and to enable it to ascertain, that all the property has been sold and accounted for by the officer, who executed the *venditione exponas.*

The demurrer is allowed, and the libel is dismissed with costs for the respondent, to whom the property claimed by him is to be restored.

WILLIAM TODD, JR. *versus* ROBERT B. WHITNEY.

The jury are to decide matters of fact, and those only. And when the facts are found by uncontradicted and unquestioned testimony, or by agreement, or by special verdict, their legal effect is matter of law to be determined by the Court.

When the intention of the parties are clearly and fully disclosed by the facts proved, neither Court nor jury can properly disregard them, and infer and substitute other and different intentions.

But where the intention is not clearly or necessarily disclosed by the proof of the facts, and that is to be ascertained to enable the Court to determine the legal effect of the facts coupled with the intention, it is the province of the jury to find the intention or purpose as a matter of fact.

THIS was an action of assumpsit to recover the amount of a promissory note for three hundred and fifty dollars, dated Feb. 11, 1845, given by defendant to plaintiff, payable on the first day of June, then next, with interest.

The general issue was pleaded and joined. Plaintiff read in evidence, the depositions of William Boardman, Robert M.

Todd, and Salem Laflin and the note of hand declared on.

The defendant read in evidence the depositions of Stephen Hill, Jr. and James Sprague, a bond of plaintiff's given to defendant, of even date with said note, for a deed of a certain sawmill, and the written admission of plaintiff in relation to the insurance of the mill, — and contended that as there had been such a change in the character and value of the property as the consideration for the contract to purchase, for which the note in suit in this action was given, that the defendant would not by law be obliged to complete the purchase, and that the plaintiff could not collect the notes given for the purchase money. The defendant further contended, that the evidence contained in the deposition of Hill, of the offers of plaintiff to sell the mill, and after the destruction of the mill to sell the privilege, was evidence from which the jury might infer, that the contract between the plaintiff and defendant, in regard to the sale and purchase of the mill, had been rescinded, or that the plaintiff had claimed to assert his right to treat the contract for a deed as broken on the part of the defendant and his rights under it at an end, — and in either case that the plaintiff could not by law enforce the collection of the note in suit in this action.

Shepley J. presiding at the trial, instructed the jury, that if they believed all the evidence in the case, the defence was not made out, and they must return their verdict for the plaintiff for the amount of the note. — And the jury returned their verdict accordingly. If the foregoing instruction of the Judge was incorrect, the verdict is to be set aside and a new trial granted, otherwise there is to be judgment on the verdict. The said depositions and note and admission of plaintiff, are made a part of this case; the depositions of Boardman and Hill to be copied and the other evidence may be referred to without copying.

Boardman's deposition was as follows: —

"I, William Boardman, of lawful age, do depose and say, that I wrote and witnessed the annexed note, and saw Whitney

sign it, the annexed note was first payment mentioned in bond given by Todd to Whitney.

"*Cross.* — This note was given for mill purchased by Whitney of Mr. Todd. The bond now shown me was written and witnessed by me and I saw Mr. Todd sign it. Sometime after the fire, my son, George Boardman, requested me to take care of what iron could be found, belonging to said mill, and put it away for whomsoever it might concern. — I did as he requested and had the iron put into a box and put into the store near toll bridge. This was done in consequence of Whitney's having bought and abandoned the mill, and if some one did not take care of it, the iron would be carried off. My son is concerned in business with Mr. Todd, but on what terms exactly, I do not know. — I have been employed by Mr. Todd as clerk.

"*In chief.* — Mr. Whitney told me he purchased said mill of Todd, and said he had got to make some repairs. — I should think for the occupier to keep said mill in repair, that four hundred dollars would be a fair rent for her.

"William Boardman."

Copy of note : —

"$350,00. Saint Stephen, February 11th, 1845.

"For value received, I promise to pay William Todd, Jr. or order, three hundred and fifty dollars on the first day of June next with interest. "Robert B. Whitney.

"Witness, William Boardman."

Copy of deposition of Stephen Hill, Jr. : —

"I, Stephen Hill, Jr. of lawful age, do depose and say, Mr. William Todd, the latter part of November last, offered to sell me the stream saw, in the mill, called the Providence, or I do not exactly know what they called her name, but it was the stream saw of the mill on the lower dam, which was burned last winter. He did not at this time mention any thing about any sale, or trade, made to Mr. Robert B. Whitney. He offered to sell me the mill and secure me a lease of a lot of land up river, and he made me an offer for the mill, without the lease, for two thousand or twenty-two hundred dollars. I am

not sure which price. There was nothing said about the time of giving me possession of the mill, he was to have given me four years for payment, equal instalments. I did not make up my mind to take her but was at a stand. I think I should have taken her this spring, had she not burned. I should have taken her at offer for the mill alone. We were talking something about the privilege this spring. Mr. Todd and myself had some talk about trading, he did not at this time say any thing to me about Mr. Whitney's having any claim on the privilege or mill.

"*Question by defendant's attorney.* — Did or not Mr. Todd in any of the conversations you had with him, say that he was under any obligation to sell the mill or privilege, to Robert Whitney?

"*Answer.* — No sir, he did not.

"*In chief.* — There was no trade between myself and Mr. Todd, there were no written propositions made — this mill was the half of the mill owned with Columbus Bacon, who owned the shore saw, it being a double mill.

"Stephen Hill, Jr."

J. Granger, for the defendant.

The case finds the presiding justice instructed the jury, "that if they believed all the evidence, the defence was not made out, and they must return their verdict for the plaintiff.

Was this instruction correct?

I contend that it was not, because it should have been left to the jury, upon the evidence, to say whether or not the plaintiff had claimed to treat the defendant's rights under the bond as forfeited, for non-performance on his part, or whether or not the contract had, by mutual consent, been rescinded.

There was evidence for the jury to pass upon, tending to establish the positions of the defendant. The inferences to be drawn from that evidence were for the jury. The evidence was not objected to as inadmissible. The effect to be given to it, was entirely within the province of the jury. They might well infer from the evidence, that the contract was rescinded.

Why else was the plaintiff endeavoring to sell the property? as we find from the testimony of Hill that he was.

Besides, owing to an inevitable accident, the plaintiff cannot perform the contract on his part. Why then should he be permitted to enforce it on the part of the defendant? The mill is not in existence and was not when the plaintiff's action was commenced. The mill was the principal inducement for the purchase.

If a contract be made for the purchase of property and before the conveyance is actually made, a material change in the property occur, without any fault on the part of the vendee or bargainee, such as the destruction of a considerable part of the property by fire, the purchaser cannot be compelled to complete the purchase. And if he has made payments on account of it, he may recover back such payments. 2 Kent's Com. 468.

Would there not be a most manifest injustice in compelling the defendant to pay his notes and take a deed of the *ruins* of a piece of property, principally destroyed by fire, while the plaintiff pockets the value of property through a policy of insurance.

The plaintiff has rebuilt the mill and sold it to a third person. It cannot be denied that he claimed to treat the contract with defendant as at an end; whether by mutual consent or otherwise is immaterial.

Now according to the authorities, if the defendant should be compelled to pay the note in suit in this action, he could recover it back. *Freay* v. *Decamp*, 15 S. & R. 227; 1 Metc. and Perk. Dig. 126. In *Brinley* v. *Tibbets*, 7 Greenl. 73, to prevent circuity of action, the court ordered that "judgment on default should not be entered, until the plaintiff placed on the files of the court, a deed of the land expressly for the use of the defendant." Upon the same principle, why should not the court in this case withhold judgment for the plaintiff altogether, as the plaintiff has disabled himself to perform the contract on his part.

If it be said that the defendant had the use of the mill a

portion of the year, the answer is, that if he had any beneficial use of it, over and above what he expended in repairs, which he denies, the plaintiff has a right of action against him to recover a compensation for such use and occupation; and may and probably will enforce it, even if he should recover the amount of the note sued in this action. The use of the mill constituted no part of the consideration for the note. If the consideration of the note has failed, the action must fail with it. The use of the mill cannot be brought in to prop it up. The defendant will be prepared to meet the claim for the use of the mill, when it shall be legally before the court.

Fuller, for the plaintiff.

1. The court did not err, in instructing the jury, that if they believed "*all the evidence*," the defence was not made out.

It was a question of *law* for the court, and not of *fact* for the jury to determine, whether, the contract had been rescinded, upon "*all the evidence*," there being no conflicting testimony in the case.

The jury could legally do no more, than believe *all the evidence.*

All the evidence, includes not only what the direct testimony tended to prove, but also, all legal inferences, which might legitimately be drawn from that testimony.

The law of the case, arising from all the evidence, falls entirely within the province of the court, and this line of distinction, is supposed to be very plainly delineated. 1 Cowen, 345.

Important contracts, affecting the realty, are neither to be made or rescinded by inferences; to be drawn from mere loose, hypothetical conversations, between third persons, resulting in no action.

I am not aware of any india-rubber, or sort of extension table power, which a jury possess, of drawing out important and material facts, out of certain other facts proved, in the absence of any testimony tending to prove the desired inferential facts.

2. Was the court correct in their instructions?

1845, February 11, is the date of bond and note in suit, being first note due; 1845, June 1, is the day the note became due; 1845, June 16, date of the writ; 1846, March, mill was burnt. The defendant's counsel is mistaken in his facts, when he says, "the mill was not in existence, when plaintiff's suit was commenced."

The case no where discloses, that the plaintiff has sold the mill, or done any act, to put an end to the contract; but on the contrary as late as the time when the mill was burnt, he studiously avoided doing any act, which might be construed as an *entry* for breach of performance. The mill irons were taken care of after the fire, "for the benefit of whom it might concern."

3. Is the destruction of the sawmill, more than a year after the contract of purchase, by inevitable accident, and almost a year after the first note became due, and suit thereon, to defeat plaintiff's right to recover any portion of the consideration?

The bond was sufficient consideration for the notes.

The mill itself, even if new, would not constitute more than half the consideration — the privileges and land would be worth more than the mill itself, to say nothing of irons.

I do not find the doctrine cited in defence, in 2 Kent, 468. But in page 370, I do find in Equity, "but if there be no ingredient of fraud, and the purchase is not seized, the insufficiency of title is no ground for relief against security given for the purchase money, or for rescinding the contract and claiming restitution of the money." "The party is remitted to his remedies at law, on his covenants to insure his title." When the defendant pays up his notes, it will be ample time to discuss the question, now prematurely raised. Judge Kent, in this connection, notices our own decision. 1 Greenl. 352.

The case cited from Pennsylvania, I have not seen. I do not perceive the applicability of the case he cites from the 7th of Greenl. to the present case. I think the case of *Manning*

v. *Brown*, 1 Fairf. 49, very much in point for the plaintiff. I also cite 13 Johns. R. 359; 14 Johns. R. 363.

The opinion of the Court was drawn up by

SHEPLEY J. — It is insisted, that the Court ought not, by its instructions, to have withdrawn the matters relied upon in defence from the consideration of the jury. The jury are to decide matters of fact and those only. When the facts are found by uncontradicted and unquestioned testimony, or by agreement, or by special verdict, their legal effect is matter of law, to be determined by the Court. Usually the intentions of parties are clearly and fully disclosed by the facts proved; and in such case neither Court nor jury can properly disregard them, and infer and substitute other and different intentions. There are many cases, however, in which the intention is not clearly or necessarily disclosed by proof of the facts. As in criminal cases, whether property be taken furtively or a wound be inflicted with an intention to kill, will not necessarily be disclosed by proof, that the property was taken, or that the wound was inflicted. So in civil actions, proof of certain acts or declarations might not disclose whether they were performed or made with an intention to defraud or deceive. In such cases, when the proof of the facts does not disclose the intention or purpose, and that is to be ascertained to enable the Court to determine the legal effect of the facts, coupled with intention, it is the province of the jury to find the intention or purpose, as a matter of fact.

In this case there being no contradictory testimony, it was, under the instructions, received as proof of the facts stated in it. There was no intention or purpose not disclosed by the facts to be ascertained, and thereby to be made an additional fact, to enable the Court to determine their legal effect.

The grounds of defence presented, and which it is insisted were incorrectly withdrawn from the consideration of the jury, will be found to present only questions of law.

The first is in substance, whether the defendant would be relieved from his contract to purchase, and from the payment

of his notes, by the change in the character and value of the property occasioned by the subsequent destruction of the mill by fire. There is no additional fact to be found. It is most clearly a question to be decided by the Court. The defendant had received a valuable consideration for the notes in the bond obliging the plaintiff to convey the estate to him upon payment of them. That consideration had not been impaired or varied by the destruction of the mill. He was in no condition to inquire, whether the plaintiff could or could not perform, until he had performed on his own part. Then he would be entitled to a conveyance or to damages to be recovered by a suit upon his bond. Whether the plaintiff had contracted to sell to another, or whether the property had been destroyed by the elements, was in a legal sense immaterial to him, until he had by his own performance become entitled to a conveyance. *Eaton* v. *Emerson*, 14 Maine R. 335. There is very little of similitude between the present case and one, where the parties to the contract of sale and purchase supposed property to be in existence at the time, which had in fact been before destroyed.

The second ground of defence was, that the contract for the sale and purchase of the mill had been rescinded. The facts being established by proof, this also was a question to be decided by the court. The jury were not entitled to infer it. It would not be rescinded by proof of the intentions of the parties, unless those intentions had been made effectual by proof of their acts or declarations. The facts stated in the deposition of Stephen Hill, Jr. would have no tendency to prove, that the contract had been rescinded. Those acts took place after the defendant had failed to make his first payment, and after this suit had been commenced to enforce it. The plaintiff might, without its having any effect to rescind the contract, endeavor to make sale of the estate to another, being satisfied that the defendant's rights, if any be had, should be ascertained by a suit upon the bond.

The third ground of defence, that the defendant would be relieved from the payment of his notes by the assertion on

the part of the plaintiff of a "right to treat the contract for a deed broken on the part of the defendant and his rights under it at an end," presents surely only a legal proposition arising out of the facts proved. If it were to be decided, as it is contended that it should have been, the effect would be, that the defendant might avoid the payment of his note by refusing to perform, and thereby forfeiting all rights under the contract, if the plaintiff would insist upon his legal rights.

If judgment must be entered for the plaintiff, the counsel for the defendant desires, that it should be delayed, that the defendant may have an opportunity to file a bill in equity for relief. He appears to have occupied the mill one year before it was destroyed by fire. A witness has stated, that a reasonable rent for it during that time would be $400. It does not appear, that the defendant had paid any part of the purchase money. The note in suit is for $350. The Court does not perceive, that he is in any danger of suffering loss, should he be compelled to pay the amount of this judgment.

Judgment on the verdict.

Inhabitants of Brewer *versus* Inhabitants of East Machias.

In an action by one town against another, where the declaration originally contained merely a count in *indebitatus* assumpsit, on an account annexed to the writ for supplies furnished an individual named and his family, an amendment may be made, by permission of the presiding Judge, by alleging specially, in a new count, such facts as would show a liability of the defendants for the same under the provisions of Rev. Stat. c. 32, entitled "of paupers, their settlement, and support."

If a father, having a legal settlement in a town, removes therefrom, leaving there a legitimate minor son, who remains there until he is of full age, such son will not thereby become emancipated, or acquire a settlement in that town during the time, in his own right.

In the trial of actions between towns wherein the settlement of paupers is the subject of controversy, it is not necessary to prove by the best evidence, the record, that the persons acting as overseers of the poor, were legally chosen and qualified. It is sufficient to show, that they acted as such.

Brewer *v.* East Machias.

When persons, having settlements in other towns, fall into distress and stand in need of immediate relief, the overseers of the poor are not under the necessity of inquiring or considering, whether such persons have or have not property, for any other purpose than to enable them to determine, whether they have actually fallen into distress, and are in need of immediate relief. It is the design of the law, that relief should be afforded to those found in that condition; and if they have property, the amount expended for their relief, may be recovered of them, by the towns in which they may have a legal settlement.

In the determination of a question presented by bill of exceptions, the court can consider only the testimony stated in the exceptions.

THIS case came before this Court, on the following exceptions to the decisions of ALLEN, Eastern District Judge.

This was an action originally brought before a justice of the peace, and tried, on an appeal in the district court, on an account annexed to plaintiff's writ, of which the following is a copy.

" Inhabitants of town of East Machias.

" To inhabitants of town of Brewer, Dr.

" 1843. For supplies furnished Levi Huntley and family, as follows: —

" Dec. 16, paid E. H. & S. A. Burr's bill,	$3,65		
" 22, " same "	,71		
" 25, " same "	3,33		
	——	7,69	
" 1844, March 6, " I. Chamberlain, Jr.'s "	5,22		
paid Dr. H. N. Page's bill, (med. serv.) "	2,25		
	——	7,47	
		15,16	
" Interest on same,		2,00	
		17,16"	

The writ contained no other count. A trial was had before the justice, and judgment rendered for the defendants, from which judgment the plaintiffs appealed to the district court, and entered their appeal at the February term, 1846. At the September term following, the plaintiffs' attorney moved for leave to amend, by adding the following count to the declaration. " Also for that whereas one Levi Huntley, on the twenty-fifth

day of December, in the year eighteen hundred and forty-three, had fallen into distress within the said town of Brewer, the plaintiffs then and there furnished, provided and laid out and expended the various articles and sums of money contained in the account annexed to the writ, for the relief and comfort of the said Levi Huntley; and the plaintiffs aver, that at the said time, the said Levi had his lawful settlement within the town of East Machias; that the said Levi, at said time, had fallen into distress within the said town of Brewer, and then and there stood in need of immediate relief; and that the said articles and sums of money, specified in the said account, were then and there necessary for the immediate relief and comfort of the said Levi; of which said several premises, the inhabitants of the town of East Machias, within three months next after the said articles and sums of money were so furnished, provided and laid out, and expended as aforesaid, had notice; whereby the said inhabitants of the town of East Machias, became liable, and in consideration thereof, then and there promised the plaintiffs, to pay them the same sum on demand." This motion was resisted by the defendants, but was sustained by the Court, and the amendment accordingly made. Whereupon the case proceeded to trial. The plaintiffs introduced evidence tending to show, that one Levi Huntley, alleged to have been a pauper and to have had his settlement in East Machias, fell into distress in Brewer, on the 10th of December, 1843, and was relieved by certain individuals alleged to have been overseers of the poor, in the town of Brewer. There was evidence that said individuals, acting as overseers of the poor, furnished relief to the alleged pauper, but there was no evidence of their election or qualification as overseers. After an examination of all the testimony on both sides, the defendant's counsel requested the Court to give the jury the following instructions.

1. That in order for a person to gain a legal settlement in any town by a residence of five years, it is necessary to prove that he lived and had his home in that town during five con-

tinuous years, without receiving any aid or supplies as a pauper from any town during that time.

2. That when the father of a minor child relinquishes his authority over him, and does not provide for his support; but by his consent the minor ceases to live in his father's family, resides in another town, makes his own contracts and receives his own earnings, he thereby becomes emancipated, and while so emancipated, may gain a legal settlement in his own right by five years continued residence in one town.

3. That if the father of the pauper had a legal settlement in Cutler, at the time he removed from that place to East Machias; and the pauper there being a minor, continued to reside in Cutler, and to make that his home, that place would be the place of his legal settlement.

4. That the jury should gather the intentions of the pauper, as to change of domicil and the place of his home, from his declarations and his acts all taken in connection.

5. That if the pauper dwelt and had his home in Cutler on the 26th day of January, 1826, at the time that town was incorporated; and had resided there for five continuous years, immediately preceding that time, he thereby gained a legal settlement in that town. Or if he resided in Cutler at the time of the incorporation of the town, but had resided there for a period less than five years, he would gain a legal settlement there by continuing to reside there till the five years were completed.

6. That a legal settlement once gained, continues till another legal settlement is acquired elsewhere.

7. That it is incumbent on the plaintiffs to prove, that the pauper had a legal settlement in East Machias, that he fell into distress in Brewer, that the overseers of the poor of that town furnished him with relief, and that the persons, who acted in that capacity, were legally chosen and qualified to act; and that such election and qualification must be proved by record evidence.

8. That if they shall find, that Levi Huntley, at the time he was so furnished with supplies, had property by which he could

relieve himself, or that the overseers of the poor of Brewer had funds of his in their hands to the amount of the supplies furnished, he could not have been a pauper within the meaning of the law.

No objection was made to the mode of proof, that certain persons were overseers in Brewer, until the evidence was all put in.

The Court gave the instructions requested in the 1st, 2d, 4th, 5th and 6th requests, but withheld those of the 3d; and as to the third request, instructed the jury, that a term of minority, under the circumstances stated in said request, was of no legal effect on the question of his settlement; and as to the 7th request, the Court gave all of it, except that the evidence of the election and qualification of the overseers, under the circumstances of the case, need not be record evidence. As to the 8th request, he stated to the jury, that if the said Huntley was in immediate necessity of relief, that he was a pauper, although they might believe that he had purchased a lot of land which had been partially paid for, and built a house on it, or had other property of which he could not avail himself to relieve his distress. The last clause of said request was withheld, there being no evidence that any overseer had money or available funds belonging to the pauper. The jury thereupon returned a verdict for the plaintiffs. To which several rulings, opinions and directions of the Court the defendants allege exceptions, &c.

The case was fully argued by

J. A. Lowell and *S. H. Lowell*, for the defendants; and by

Hobbs and *C. E. Pike*, for the plaintiffs.

The opinion of the Court was prepared by

SHEPLEY J. — The original declaration contained only a count on an account annexed "for supplies furnished Levi Huntley and family." The items of the account were then stated. An amendment was permitted in the district court, stating in a new count such facts, as would render the defend-

ants liable to pay the expenses incurred for the support of Huntley and family, as paupers having their legal settlement in the town of East Machias.

1. It is insisted, that this amendment introduced a new cause of action, and that it ought not therefore to have been permitted.

No other or different items were claimed by the amended, than by the original declaration. The cause of action was the supplies furnished to Huntley and family, as exhibited in each count. The plaintiffs claimed to recover for the same items and cause of action in the second count, and to do it upon different principles and rules of law, than those, which could have been applicable to the first count. Amendments of this description have often been permitted. When a plaintiff has declared upon a sale and delivery of goods, he has been permitted to amend by charging the defendant for the same goods as received, to be sold on commission. *Selden* v. *Beale*, 3 Greenl. 178; *Ball* v. *Claflin*, 5 Pick. 303. When he had declared against the defendant as a joint promisor, he was permitted to amend by declaring against him as a guarantor. *Jenney* v. *Pierce*, 4 Pick. 385.

2. It is insisted, that the instructions contained in the third written request ought to have been given.

The substance of the position is, that a father having a legal settlement in a town and removing therefrom and leaving there a minor son, who remains there until he is of full age, thereby emancipates the son, who will acquire a legal settlement of his own. Such a position cannot be sustained. The statute provides, that legitimate children shall follow and have the settlement of their father, if he have any within the State, until they gain one of their own. They cannot gain one of their own, while minors, unless they have been emancipated. Certain facts were alleged in argument to show, that the minor had been emancipated. The bill of exceptions, however, does not exhibit any testimony to prove it; and the Court can consider only the testimony therein stated.

3. It is further insisted, that the election and qualification

of the overseers of the poor, who furnished the supplies, could be proved only by record, as asserted in the latter clause of the seventh written request. Another clause in that request alleges, that it was incumbent on the plaintiffs to prove, that the persons, who acted in that capacity, were legally chosen and qualified. Had it been necessary to prove, that they had been legally chosen and qualified, the best evidence of the choice being the record, it should have been produced. But the plaintiffs were not required to prove that fact. It might be inferred from proof, that they had acted in that capacity. The decided cases are collected in notes under sections 83 and 92, in Mr. Greenleaf's treatise on evidence.

4. It is further insisted, that the Court erred in refusing to comply with the eighth written request, and in the instructions which were given in relation to property owned by Huntley.

The statute c. 32, § 29, requires overseers of the poor to provide immediate comfort and relief for persons having legal settlement in other towns, when they shall fall into distress and stand in need of immediate relief. They are not required to inquire or consider, whether such persons have or have not property for any other purpose, than to enable them to determine, whether they have fallen into distress and are in need of immediate relief. Persons may be found in that condition, who have property. And it is the design of the law that relief should be afforded to those found in that condition; and if they have property, the amount expended for their relief may be recovered of them by the towns, in which they may have a legal settlement.

When there is no testimony in the case, to which requested instructions can be applied, they are properly refused.

Exceptions overruled.

GEORGE A. SIMMONS *& al. versus* J. TILDEN MOULTON, *adm'r.*

Where a suit pending in court and the contract upon which it was founded were assigned; and afterwards the assignor died, and the action was prosecuted to judgment by the administrator; and the execution issued upon the judgment was satisfied by a levy on land; *it was held*, that a bill in equity, brought by the assignee, praying for a decree, that the administrator should convey the land levied upon to him, could not be sustained, the remedy being by process against the heirs.

THIS was a bill in equity, wherein the complainants alleged, that one Dickey gave a note to Joseph M. Brown; that a suit was brought by Brown upon that note, and property of the debtor attached; that during the pendency of the suit, Brown died; that Mr. Moulton was duly appointed administrator on the estate of Brown, and prosecuted the suit to final judgment; that an execution was issued upon said judgment, and was satisfied by a levy upon the real estate of Dickey, the debtor; that said Brown, in his lifetime, after the commencement of said suit, by his written instrument under his hand and seal, for a valuable consideration, assigned to the complainants all his interest in the suit and in the note, and authorized them to prosecute the same to satisfaction for their benefit; and that thereby an equitable interest in the judgment and real estate, became vested in the complainants.

The complainants prayed, that the court would decree that the administrator should execute and deliver to them a deed of conveyance of the premises on which the levy was so made.

The administrator put in an answer, merely saying, that the matters contained in the bill, were believed to be true, and that he submitted himself to the order of the Court thereon.

The case was submitted without argument.

B. Bradbury, for the complainants.

Moulton, pro se.

After a continuance *nisi*, —

Per curiam. — The Court have no power to order the administrator to make a conveyance of the premises, as sought by the prayer of the bill. The process should be against the heirs. *The bill is therefore dismissed.*

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF HANCOCK,

ARGUED JULY TERM, 1847.

NANCY SELLARS *versus* WILSON CARPENTER.

The Supreme Judicial Court had authority by law to make and establish the thirty-fourth rule of practice, adopted in 1822, respecting the admission of office copies in evidence in certain cases.

But in an action wherein a widow demands her dower, the thirty-fourth rule does not authorize the admission in evidence against her, without the proper proof of the loss of the original, of an office copy of a deed, acknowledged by her husband though not by her, and recorded, purporting to be a conveyance of the premises by the husband, and a relinquishment by her of all her claim to dower therein.

WRIT of dower. The demandant, at the trial before SHEPLEY J., proved the marriage, death of the husband, seizin of the husband during the coverture, and demand that dower should be assigned.

The tenant alleged, in his pleas, that the demandant had released all claim to dower in the premises, in a mortgage deed with Robert Sellars, her late husband, to one Wardwell, and that the mortgage had been assigned to the tenant. The tenant then offered in evidence an office copy of a deed purporting to be executed by said Robert Sellars and the demandant, dated June 15, 1824, acknowledged by Robert Sellars, June 26, and recorded June 28, 1824. By this copy it appeared,

that she had relinquished her claim to dower in the premises, but the copy did not show any acknowledgment of the deed by her. To the introduction of this copy the demandant objected, and insisted that the original deed should be introduced and proved. The presiding Judge admitted the copy, and instructed the jury, that the attested copy must be considered as *prima facie* evidence, that the deed was signed and executed by the demandant as it purported to be, and that the burthen of proof was thereby thrown upon the demandant, to show that it was not executed by her. The verdict for the tenant was to be set aside, if this ruling or instruction was erroneous.

The case was argued in writing.

W. G. Crosby, for the tenant.

The office copy of the demandant's deed, relinquishing dower, was properly admitted.

It was admissible under rule 34th, Supreme Court. "In all actions touching the realty, office copies of deeds pertinent to the issue, from the Registry of Deeds, may be read in evidence without proof of their execution, where the party offering such office copy in evidence, is not a party to the deed, nor claims as heir, nor justifies as servant of the grantee or his heirs."

The Court had authority to establish such a rule.

1. From the nature of its powers as a court of ultimate jurisdiction.

2. Also under § 7 and 9, c. 96, Revised Statutes.

The rule is not repugnant to law within the meaning of sec. 9. — Not repugnant to the laws of the Commonwealth — not repugnant to the laws of the State — are the expressions in the corresponding provisions of the statute of Mass. 1782, and of Maine, 1821. — By law was intended the written law, — or at most, the written law and those general principles of law upon which rights of persons and things directly depend, or are immediately controlled, — not mere rules of evidence whose bearing is only incidental.

But at the passage of the Revised Statutes it was the estab-

lished law that office copies of registered deeds, under circumstances similar to those of the present case, should be admitted in evidence. — The 34th rule and the practice under it were familiar to the compilers of the Revised Statutes, and to the Legislature by whom they were enacted, — and if it had been intended to have refused to the Supreme Court a power they had long exercised, it would have been done by clear and distinct and express words. — That the Court had authority to establish the rule, and would adhere to it, and that office copies of deeds were admissible in evidence, was settled as early as 1831, in *Woodman* v. *Coolbroth*, 7 Greenl. 181. By the establishment of the 34th rule and by the decision in *Woodman* v. *Coolbroth*, the Court gave an exposition of the meaning of Stat. 1821, c. 54, § 4, which the Legislature confirmed by using the words of the statute 1821 very nearly, in the Revised Statute.

So also in *Burghard* v. *Turner*, 12 Pick. 534, it was held that in a real action a copy of a registered deed, made to a common ancestor of the parties, is admissible in evidence, if there is no reason to presume the original to be in the possession of one party more than the other.

An office copy of a deed registered, is admissible in evidence when the grantee is out of the Commonwealth, and the original deed is not under the control of the party producing the copy. *Eaton* v. *Campbell*, 7 Pick. 10. An office copy of a registered deed is good evidence, *prima facie*, where the party producing it is not the grantee, nor presumed to have the original in his custody or power, although the grantee may be within the jurisdiction of the Court and might have been summoned to have produced the original. *Scanlan* v. *Wright*, 13 Pick. 523; *Ward* v. *Fuller*, 15 Pick. 185.

Where proof is by copy it is not necessary to produce a subscribing witness, to prove the execution of a deed. *Hathaway* v. *Spooner*, 9 Pick. 23.

The copy admitted in the case at bar, is within the rule, within its letter and its spirit. — The action is a real action; one "touching the realty." In England, title deeds generally

accompany the estate; — here, it is otherwise; and it was to prevent the great injustice and inconvenience, that would often result, if in proving a long chain of title, the production of original deeds and proof by subscribing witnesses of their execution were required, that the practice has prevailed of admitting office copies under certain restrictions. — And all the reasons for admission of office copies in any case seem to apply in full force, to the present.

Nor is the copy any the less within the rule, because the original was not acknowledged by the demandant. It was acknowledged by the husband, — and the acknowledgment by one of several grantors in a deed, is sufficient to make it admissible to registry. *Pidge* v. *Tyler*, 4 Mass. R. 541.

The acknowledgment of a deed by a wife relinquishing dower, who joins in the deed with her husband, is not necessary. *Catlin* v. *Ware*, 9 Mass. R. 218.

The Court may repeal the rule, if for any reason it ought not to stand, or may introduce further limitations, but so long as it remains unrepealed and without new limitations, it cannot be dispensed with in a particular case embraced in it. *Thompson* v. *Hatch*, 3 Pick. 512.

Hathaway, for the demandant.

In this action, defendant by special plea alleged, that plaintiff signed the mortgage deed, and relinquished her dower in the demanded premises.

1. It is incumbent on defendant to prove the allegation, and that affirmatively.

2. The office copy of the mortgage was not competent evidence, and was improperly admitted.

3. In case of the loss of a deed, and that being proved, an office copy would be admissible only after proof of the execution of the deed. *Kimball* v. *Morrill*, 4 Greenl. 368. Here was no proof of the execution of the deed or of its loss; nor is it an ancient deed.

4. "It is an indispensable rule of law, that evidence of an inferior nature, which supposes evidence of a higher in existence, and which may be had, shall not be admitted." This

point is sustained by authorities so numerous, that I shall cite none in its support. I state the proposition in the language of the law.

5. At common law, an office copy is in no case admissible, unless upon proof of the loss of the original, and after proof of the execution of the original. Such was the English common law which we inherited, and such is the law now here, unless changed by statute, or by some competent authority.

There is no such change by statute; and the change is made by no other authority, than the rules of practice adopted by this Court. Rule 34, 9 Greenl. 303.

6. And plaintiff contends, that the said 34th rule transcends the power of this Court, and is not binding.

The power of the Court to make rules is granted by Rev. Stat. c. 96, § 9. It is "to establish rules, &c. respecting the modes of trial, and the conduct of business, not being repugnant to law." This rule is neither respecting the "mode" or the "conduct of business." It undertakes, *propria vigore*, to make that competent evidence, which was not so before. It creates a new species of evidence unknown to the common law, and having no statute to support it. It is therefore, in the language of the statute, repugnant to law.

We are not entirely without authority upon this subject. In the case of *Mills* v. *Bank of the United States*, 11 Wheat. 431, 439, 440, the Court say, in commenting upon one of their rules, "if the rule attempted so interfere with, or control the rules of evidence, it certainly could not be supported." This case is directly in point.

7. Nor is it believed that the Legislature had the power to authorize the Court to make that rule, if they had attempted it. Although authorized to make laws themselves, they are not authorized to delegate that power to others.

8. But if the Court had authority to make the rule, it must possess the character of all general rules; it must be subject to exceptions, and regard may be had in its application to the reasons upon which it was established. And the plaintiff con-

tends, that if it be rightful in its application to the grantor, who appears by the copy to have acknowledged the deed before a magistrate, it should not be extended to the signature of the wife, who does not appear to have acknowledged the deed, and is not required by law so to do. Her right of dower is personal. *Croade* v. *Ingraham*, 13 Pick. 33.

A record of a deed with the acknowledgment of the grantor, certified by a magistrate, would not be likely to be found unless it had an original.

The estate usually changes hands, when conveyed, and a deed *forged* entirely, if recorded, would be almost certainly immediately discovered, and of no avail. Such an attempt would be in all probability detected and defeated, and therefore without object. The rule might therefore ordinarily be applied to the deed of the grantor, executed and acknowledged, without much apparent danger of wrong. But not so with the wife, relinquishing her dower. During the life of her husband she has no means of knowing whether her name is to his deeds or not. He executes the deed and acknowledges it before a magistrate. The magistrate, who takes the acknowledgment and the witness who attests, perform the same services and appear in the same manner upon the deed, whether her signature is to it or not. The estate passes. — The possession follows in the same manner whether her name is there or not; her whole dower may be transferred during the lifetime of her husband, without her having any knowledge, or any reason to suspect that her estate is not sure. And under the operation of this rule, the wife of a dissolute and abandoned man may count with no certainty upon her dower, although it be the favored estate of the common law. It was the favored estate, and we inherited it as such. — It is so now in England as it always has been; and there a wife cannot part with dower, but by deed duly executed, and acknowledged before a Judge of some Court of record, who shall certify upon the deed, "that being examined by him separately and apart from her husband, she acknowledged it

to be her free act and deed, without any compulsion or threats or control of her husband."

It would seem to be enough that our statutes have abolished that wholesome precaution and safeguard of the widow at common law, and taken away the necessity of the wife's acknowledgment of her relinquishment of dower, without the intervention of a "*rule of Court.*"

9. But it may be said, the ruling of the Court only made the copy *prima facie* evidence. That however was as much an interfering with the rules of evidence, and depriving the demandant of her legal rights, as if it had made it conclusive. It was changing the burthen of proof and putting it upon the party to whom it does not and ought not to belong. — If I would suppose a case to illustrate this point, I could not suppose one stronger than was presented on the trial of this action. The only subscribing witness to the mortgage was summoned to Court at the trial, to prove that when he signed his name as a witness, and took the acknowledgment of the deed of the husband, the name of the plaintiff was not affixed thereto; that he did not witness her signature; and he deceased at Court before the trial of the action.

Why should the burthen of proof be upon her? The deed would most likely be in the possession of the mortgagee or those claiming under him, and they all interested to have it out of the way.

10. The plaintiff contends that this is not an action "touching the realty" within the meaning of the 34th rule. Until an assignment the right of dower is personal and cannot be the subject of a lease. *Croade* v. *Ingraham*, 13 Pick. 33.

It is a personal right which can in no event defeat the inheritance, and no considerations of convenience can justify a rule which in its, operation must endanger the whole estate of the widow.

The opinion of the Court was drawn up by

WHITMAN C. J. — The plaintiff claims dower in a certain estate, of which her late husband, Robert Sellars, deceased,

was, when alive, and after her intermarriage with him, seized and possessed in fee.

The defence is, that Sellars, before his decease, conveyed the estate in fee and in mortgage to one Wardwell, after the decease of whom the mortgage was, by his executors, assigned to Messrs. Howard & Hale, who had before purchased the right in equity of redeeming the same; and afterwards conveyed the estate to the defendant. To prove his title, the defendant offered in evidence a copy of the mortgage, as recorded in the registry of deeds, which purported to be signed and sealed by the plaintiff in token of her relinquishment of dower in the estate so conveyed. The plaintiff insisted that the original should be produced, or that her execution of it should be proved; she denying that she ever placed her signature to it. This, the Judge presiding at the trial did not require, as he at the time, was under the impression, that the evidence offered, came within the thirty-fourth rule of this Court, which is, that, in all actions touching the realty, office copies of deeds, pertinent to the issue, from the registry of deeds, may be read in evidence, without proof of their execution, when the party offering such office copy in evidence is not a party to the deed, nor claims as heir, nor justifies as servant of the grantee, or his heirs." To this ruling, exception was taken; and it is now contended, and very ingeniously argued, that the Court had no authority to adopt such a rule; and if it had, that the present case was not within its intent and meaning.

We must now, in the first instance, determine whether the Court had authority to make such a rule. If it had not, we must disregard it. It is urged that the rule of law is general and of long standing, that a party producing a deed as evidence is bound to prove its due execution; and that the Court is only authorized to make rules concerning the mode of trial, and the conduct of business, and not repugnant to law; and such is the grant of power in terms, as contained in the Rev. Stat. c. 96, § 9, which is but a re-enactment of a similar provision, to be found in the act originally regulating the jurisdiction of this Court, passed soon after the adoption of our

constitution. The rule is clearly a regulation as to the conduct of business in Court, and, therefore, within the terms of the power granted, unless it can be deemed repugnant to law.

Deeds are not permitted to go to the jury in evidence until there is believed to be some evidence inducing the presumption of their having been duly executed. The rule as laid down, and contended for, is general in its operation, but like other general rules of law, has its exceptions ; upon the principle that, where the reason of the rule ceases the rule may be dispensed with. Whether there be evidence, which authorizes a deed to be read in evidence is, in the first instance, to be ascertained by the Court, being in effect but *prima facie* evidence, which may be controverted before the jury. Whether the general rule, that proof of execution by subscribing witnesses, or, when that fails, by other proof thereof, should be required, has been considered as subject to modification by the courts in various instances. If upon the inspection of a deed it appears to be thirty years old, and comes from the proper custody or depository to give it credence, it may be admitted in evidence without further proof of its execution. Here some degree of discretion must be exercised by the Court in considering of the concomitant circumstances, tending to fortify the presumption of its due execution.

Again: — If a deed is seen by the Court to be called out of the hands of the adverse party, who claims an interest in it, the Court will not compel any further proof of its due execution. 1 Greenl. on Evidence, § 571. So also where a bond is given by an officer in trust for the benefit of persons concerned, as the case of guardians, executors or administrators, to the Judge of probate, and approved by him. *Ibid.* § 573.

Again: — Since by the statute of the 27 of Henry 8, c. 16, a bargain and sale of an estate of inheritance or freehold is required to be enrolled, it has been held by the courts in England, that the enrollment should be deemed to be sufficient evidence of the execution of the deed as against all persons.

1 Chitty, 355, and cases there cited. The enrollment in England is very similar to our acknowledgment and registry. In the former it must be by an acknowledgment and registry in Court, and in the latter by an acknowledgment before a magistrate, and registry in a public office kept for the purpose. Accordingly in Maryland, where they have an ancient statute, probably like that of Henry 8, requiring that deeds should be enrolled, it has been held, that an exemplification of the record, which is but an authenticated copy, is competent evidence. *Dick* v. *Balch*, 8 Peters, 30.

It is believed that, long before the separation of this State from Massachusetts, it had been constantly ruled at *nisi prius*, in conformity to the principle of the rule adopted by this Court, to which no exception is known to have been taken, indicating an entire acquiescence therein by the bar of that State. And in *Eaton* v. *Campbell*, 7 Pick. 10, the Court, after remarking, that, in England, the grantee is furnished with all the title deeds, which is not the case with us, remark, that "to require him (the grantee,) to produce all the original deeds, for twenty years or more, and to bring the subscribing witnesses, would be unreasonable and oppressive;" and that it will be found convenient to have a copy from the register's office *prima facie* evidence, even when the grantor lives within the Commonwealth; until the case assumes a different shape on a question of fraud. It would seem to be clear, then, that there is no such inflexible rule of law, applicable to all cases, as to proof of the execution of deeds, as is contended for; and that this Court under the grant of power, before named, might, in the exercise of a sound discretion, well adopt the rule in question, by way of rendering, what before depended on a practice similar in effect, more certain and definite; and it has been acquiesced in since its adoption till now, a period of 24 years.

We now come to the second branch of the inquiry, which is, whether the rule could have been intended to reach a case like the present. As the rule in derogation of a principle before existing, of general application, it should not be allowed

to embrace cases not within the reason of it. In its adoption it was doubtless with a view to grantors, who were actually transferring some present estate, or extinguishing some claim, which they might seem to have to some estate. A deed to come within the rule must be touching the realty; that is, touching the realty at the time of its execution, and actually conveying or purporting to convey something. None other is required to be acknowledged or recorded, in order to be effectual. And a copy of the registry of any other writing, which might happen improperly to be recorded, would not be evidence. A deed of a grantor, not acknowledged, even if placed upon the record, would not come within the rule, because it would not be properly there; and because it would not have the additional evidence of a due execution, arising from an acknowledgment before a magistrate. Bonds, releases and other sealed instruments, not amounting to a conveyance of title to real estate, are under no circumstances reached by the rule.

These agreements, on the part of *femmes covert*, convey no present estate; they do not purport to do so; and hence they are not required to be, and seldom, if ever, are acknowledged. They are simply agreements, amounting in effect to extinguishments of rights, which are contingent, and may never exist, depending on their outliving their husbands. When they have any present interest, if they would convey it, they must join their husbands in the operative words transmitting title, and must acknowledge the same, as do other grantors. Here, then, there is a manifest distinction between one conveying an estate, and one merely agreeing to extinguish a contingent claim of dower.

The inducement to the adoption of the rule, was doubtless, in a good measure, owing to the knowledge, that all deeds, before they can be entitled to be recorded, must have the sanction, of an acknowledgment before a magistrate, and, having that sanction and being placed upon the record, which was thereafter open to the inspection of the grantor, affording evidence of acquiescence on his part, it might well be thought

unreasonable to allow him to question its validity. How is it with married women? Their signatures are placed to deeds, relinquishing their dower, with very little ceremony; with no acknowledgment before a magistrate; and often without the presence of witnesses, as is well known. Though their deeds may be placed upon record, they cannot be supposed to have any inspection thereof: and, if not agreeable to their husbands, if by chance informed of a record of a deed, purporting to bear their signatures, they can take no measures concerning it; and especially would such be the case, if their husbands had fraudulently placed their signatures to them. If when they come to have the right to dower perfected, they cannot call for proof of the execution of the deeds, which may purport to bear their signatures, their cases might be indeed unfortunate.

Moreover the language of the rule is not, in strictness, appropriate to include such cases. No one could claim as heir or justify as servant, of one merely relinquishing an inchoate right of dower. The rule supposes, that the party offering such office copy, may be in one or the other of those predicaments. The word, "party," may, with much propriety, be taken to mean a party to the conveyance of the estate; to the operative words passing it, and not to one who was no such party; but merely a party to the instrument for another purpose. That this is the true construction, derives force from the immediate connection of the word "party" with the words "claims as heir, nor justifies as servant," &c.

On the whole, we think the exceptions may be sustained.

WILLIAM J. MILLER *& al. versus* ROBERT P. EWER.

All votes and proceedings of persons professing to act in the capacity of corporators, when assembled beyond the bounds of the State, granting the charter of the corporation, are wholly void.

It is incumbent on the demandant, claiming title under a deed from a corporation, executed by one in the character of its agent, to prove that the corporation, by a legal vote, had authorized such person to make the conveyance.

But such corporation, duly organized and acting within the limits of the State granting the charter, may by vote transmitted elsewhere, or by an agent duly constituted, act and contract beyond the limits of the State.

An authority given in the charter, in general terms, to certain persons to call the first meeting of the corporators, does not authorize them to call such meeting, at a place without the State.

THE facts in this case, so far as they relate to the questions argued or decided, are found at the commencement of the opinion of the Court.

Written arguments were furnished to the Court; but they are too extended to admit of publication, as a part of any one case. Extracts from them, only, are therefore given.

Moody, for the plaintiffs.

May a corporation established by the law of one State and holding real estate therein, at a meeting held in another State, pass such votes and adopt such proceedings, authorizing the proper persons to convey said real estate, as will render a conveyance in pursuance of said votes, valid to pass the title of said company?

It is undoubtedly true, that this question has not been the subject of judicial decision in this State; nor has the identical proposition, been decided any where. Nor indeed is there any considerable number of adjudged cases, which have a direct bearing on the question. Still it is so far from being one, the solution of which is to be evolved solely by the exercise of the reasoning faculties, and the application of the judgment in the use of legal principles, indirectly only bearing upon it, and unassisted by the authoritative enunciations of legal treatises and

solemn judicial decisions, that a flood of light is in fact thrown upon it, by both.

If it were however a question new in principle, there are forcible, if not numerous reasons for settling it affirmatively.

The purpose and object of the Legislature is to empower associated persons, to conduct certain business processes with the unity and simplicity of operation of an individual actor, in an authorized name, and in that name to take and convey property, real and personal; the capacity to do which Chancellor Kent says is of the essence of a corporation. 2 Kent's Com. 224.

The charter, in express terms, gives the right to hold the first meeting whereever those calling it saw fit. Its words are, "are hereby empowered to call the first meeting at such time and place, and in such manner as they think proper."

And where is the authority or reason, even, for putting any other than the broadest construction upon these words, which they grammatically bear.

Certainly no public policy forbids it, no argument of convenience forbids it, no danger of conflicting sovereignty forbids it, since the operation of the vote is confined to property within the State.

On the contrary, to allow its validity is the only way of preventing a gross, practical injustice. And if the first meeting may be held out of the State, any other may well be. It is true that subsequently to this charter, this State passed a law requiring corporations to keep the office of its clerk, and its records and papers, at some place within this State.

But even this law did not require its meetings to be held in the State.

Is the argument that the corporation has no legal existence out of the sovereignty where it is created, and therefore cannot act beyond its limits?

The answer is, that is only true with respect to the foreign sovereignty, where it undertakes to act, and it is at the option of that sovereignty, to recognize its acts or not; it is an ar-

gument for that sovereignty, and not the one which created it.

The State that gave it a charter gave it being, recognized its existence in general terms, acknowledged the validity of its acts within the sphere of its powers and is bound in good faith ever so to recognize the one and acknowledge the other without regard to the place of its action, since its recognition was general, since it imposed no terms of place where it was to act by vote.

These are legitimate and forcible considerations, to show *a priori*, that validity should be given to this conveyance. Happily the settled law, so far as it goes, is strongly in affirmance of the same position. By the formation of a corporation a legal or artificial person is substituted for a natural person, and where a number of persons is concerned the property of individuality is given to them. Angel & Ames on Corp. 64. (2d Edit.) A corporation is a person for certain purposes in contemplation of law. *United States* v. *Amedy*, 11 Wheat. 412; *Beaston* v. *Farmer's Bank of Del.*, 12 Peters, 135. And has the same capacity to buy and sell as an individual. 5 Ham. R. 205. Like natural persons this artificial person may make contracts and perform acts within the scope of its powers, in States or counties where it has not its residence, and by the comity of nations and of states its acts are not merely recognized, but may be enforced. *Runyan* v. *Coster*, 14 Peters' R. 122; *Bank of Augusta* v. *Earl*, 13 Peters, 519. I refer the Court also to many cases cited by Angell & Ames, page 208, note 1. A corporation within the scope of its powers may agree to do any act at any place. *Bank of Utica* v. *Smedes*, 3 Cowan, 684; *McCall* v. *Byram Man. Co.* 6 Conn. R. 420.

In all these cases the objection to the validity and enforcing of the acts of the corporations was, that within those States where they were not chartered they could not act, they could not contract, they could do nothing, because they were not in *esse*, they had no legal existence, they were dead, they were precisely as if they had never been, and this certainly is the

utmost of the objection that can be made to this vote and the only form in which it can be put.

Indeed it seems very like an absurdity to say that a State shall recognize the existence of a foreign corporation and enforce their contracts made in it, and in the same breath to say, that the State of their creation shall deny the one and repudiate the other; the identical objection existing in both cases and no other. But there is an adjudicated case, which if it comes no nearer to this in principle than those I have cited, and I cannot imagine how one could, yet comes nearer to the precise point involved here. It is a case referred to in Angell & Ames, 63, 395, 396, as their authority for the position that private corporations are not restricted as to the residence of their members, or the place at which their meetings are to be held and their affairs to be conducted. *McCall* v. *Byram Man. Co.* 6 Conn. R. 428.

Why have the Courts so many times decided that proof of the exercise of corporate powers and performance of corporate acts in a corporate name, dispenses with the necessity of record proof and proof of regular actions by meeting after a legal organization, in respect to the holding and the conveyance of property? 12 Wheat. 71; 2 Fairf. 22; 3 Wend. 296; 8 Greenl. 365. Why have they decided that those acting as officers of corporations are presumed to be rightfully in office? that acts done by corporations which presuppose the existence of other acts to make them legally operative are presumptive proofs of the latter? Angell & Ames, 222; *Bank of U. S.* v. *Dandridge*, 12 Wheat. 83, 87; 14 Johns. R. 118; 12 Wheat. 70. Why decided when corporations have gone into operation and rights have been acquired under them, every presumption should be made in favor of their legal existence? *Hagerstown Turn. Coal Co.* v. *Creeger*, 5 Har. & Johns. R. 122.

Why decided that when the common seal appears to be affixed, and the signatures of the proper officers are proved, courts are to presume that the officers did not exceed their authority, and the seal itself is *prima facie* evidence that it

was affixed by proper authority, and the contrary must be shown by the objecting party? Angell & Ames, 158, and cases cited.

That the acts of the directors are sufficient to bind the company, is fully settled. 8 Wheat. 338, 357; 9 Wheat. 738; 12 Wheat. 64; 4 Cowen, 645, 659; 19 Johns. R. 60.

A corporation certainly could not set up such an objection to a deed of theirs.

The defendant claims to hold under Thomas as grantee of the corporation, and, therefore, cannot take advantage of this defect, if there be one. 2 Hill's South Car. Rep. 378.

Again: — Having shown the existence of the corporation and that it is a body which can take and convey real estate, and a deed duly executed by the officers of said corporation, is it incumbent on the plaintiffs to do more, who are not the immediate grantees of the company, and cannot be supposed to have access to the records of said company? *Lumbard* v. *Aldrich*, 6 N. H. Rep. 269.

T. Robinson and *Hinkley*, for the defendant.

The Bluehill Granite Company was never in such legal existence as would enable it to receive, or transmit a title to real estate.

It is argued, and authorities are cited by the plaintiff's counsel, that proof of the grant of the charter and corporate acts are sufficient to raise the presumption that the corporation was duly organized and its proceedings regular.

It is apprehended, that it is sufficient to answer, that if the plaintiffs had shown so much, and no more, a presumption might have arisen, that might have required rebutting proof on the part of the defendant; but as they have not rested their case upon such testimony, but have spread before the Court, all of the proceedings by which it was attempted to organize a corporation, and sustain its acts under the charters, they have themselves taken away the grounds of such presumption; and if those proceedings are insufficient, or not in accordance with the requirements of law, they fail to sustain the plaintiff's case.

A corporation is a creature of the law, and is constituted by the exercise of the sovereign power on the one part, and the action of the corporators in pursuance of the rules prescribed by that power. If there be a failure in the expression of the sovereign will by its appropriate organs, or in the manner in which the sovereign power has prescribed for the exercise of that will, then the corporate body does not begin to exist. If the corporators do not accept of the grant, or should fail to organize the corporation in the manner prescribed by law, there is a failure to give legal vitality to the body corporate.

Our first objection is, that the records do not show that the first meeting was called by the persons appointed for that purpose by the charter. This fact the records should have shown. *Middlesex Husbandmen* v. *Davis*, 3 Metc. 133 ; *Chester Glass Co.* v. *Dewey*, 16 Mass. R. 94.

That the first meeting should be called by the persons designated, is an important incident of the grant. It is the only guarantee, that the rights and convenience of the corporators shall be consulted.

The next objection is, that the place where it was attempted to organize the corporation, and where the subsequent meetings were held, and especially the votes relating to the land in question, was out of the jurisdiction of the State.

The charter introduced and relied upon, is a grant from the sovereignty of Maine. The corporators must in the organization and subsequent conduct of the corporation, conform to the laws of this State. Corporate powers are to be strictly construed. 2 Kent's Com. 298.

Is there any law of the State authorizing corporations to be organized and hold their meetings out of the State ?

None has been pointed out, and a strict construction of their powers, prevents any such authority to be derived from any supposed convenience to corporators, or by implication from any general or indefinite language used in the charter itself.

The parallel that has been run between a natural person and a corporation does not hold good in all particulars ; for

while the life and rights of the individual are not confined to place, but is a constituent part of the person, whereever it may go, the corporate power or legal vitality always remains within the sovereignty creating it. The corporators, as natural men, cannot take it abroad with them. It pertains to the sovereignty itself; is a legal enactment, a statute, and consequently, is nothing without the constantly sustaining power of the State.

But it is contended that whatever corporations may do within the scope of their corporate privileges, out of the jurisdiction of the State, and which is of no effect where the vote is passed, is valid and binding when brought within the State.

Without the authority of positive enactment, where does the counsel find ground for this principle? Analogy is against him. An act of incorporation empowers particular individuals to do certain specified things in a prescribed manner. The laws establishing our courts, do not, in so many words, say that the Judges shall not hold their terms in Boston; yet, it is apprehended, that if a district judge should render a judgment there, and award an execution, to be enforced at home, this Court would hardly sanction the proceeding. The selectmen are authorized to call town meetings. The statute does not say that the meetings shall be held within the corporate limits. Will it be contended, that if the selectmen of Bluehill should call a meeting of its inhabitants at Portland, and money should be there raised by taxation, such tax would be binding?

It is further contended, that the charter actually gives the power exercised by these corporators of completing the construction of the corporation by an organization in New York.

The language of the charter is, "That Pearson Cogswell and Jonas L. Sibley are hereby empowered to call the first meeting of said corporation at such time and place, and in such manner, as they think proper." What was the meaning and intention of the Legislature in the use of this general language?

We contend that some reasonable construction should be

put upon the language of the charter, and that the intention of the Legislature is the proper rule to be adopted in such construction. *Gore* v. *Brazier*, 3 Mass. R. 523, 540; *Pearse* v. *Whitney*, 5 Mass. R. 380, 382; *Stanwood* v. *Pierce*, 7 Mass. R. 458; *Gibson* v. *Young*, 15 Mass. R. 205.

The Legislature was granting a charter, for all that appears in it, to citizens of this State to do business within the State. It was establishing a corporation at Bluehill, and by the general law the organization would have been requisite within the county of Hancock.

The supposition that the organization could be effected out of the State, is incompatible with the then existing laws. The same charter provides that the corporators "shall be subject to all the duties and requirements incident by law to similar corporations." The statute of 1821, chap. 137, required that corporations of this description should "choose a clerk, who should be sworn by a justice of the peace, to the faithful discharge of his duty, and who shall record all votes of the corporation in a book by him kept for that purpose."

The 3d sec. of the act concerning corporations, approved Feb. 16, 1836, only a few days previous to this charter, provides that the property of a stockholder to the amount of his stock may be taken on an execution against the corporation; and the 4th sec. provides for the service of such execution by an officer of this state, — and in a certain contingency the officer is to leave a notice with the clerk of the corporation, thereby implying that the clerk of the corporation is within the precinct of some officer of this State. The 6th sec. corroborates and strengthens this implication, by requiring "the clerk of said corporation, on demand, to furnish the officer having the execution against the corporation, with the names and places of residence of the stockholders, who may be liable as aforesaid."

The authorities cited for the plaintiff almost entirely relate to the ability of corporations to contract.

They usually contract through agencies; and the comity of States and Nations enforces contracts so made. These agen-

cies are composed of boards of directors, or of general or special agents duly authorized by vote of the stockholders. Sometimes the appointment of agents and even officers of the corporation is committed to the directors. But in all cases the source of power is in the stockholders, acting with, and sustained by the sovereignty which has created the corporation.

The case which the counsel seems to rely upon with the most confidence, (*Bank of Augusta* v. *Earl*, 13 Peters, 519,) sustains this view.

The opinion of the Court was drawn up by

SHEPLEY J. — This is a writ of entry brought to recover a tract of land in the town of Bluehill, upon which a granite store has been erected. The demandants derive their title from the Bluehill Granite Company, and introduce a conveyance by deed of mortgage, of a tract of land, including the premises demanded, purporting to be executed by that company on April 6, 1837, by its president, John S. Labaugh, and its secretary, David E. Wheeler, to Matthew C. St. John, in trust for the benefit of certain persons therein named. And conveyances from the trustee and the *cestues que trust*, assigning that mortgage to William I. Tenney. Also copies of a judgment recovered by William I. Tenney, against that company, and of an execution issued thereon, and of the return of an officer upon it, showing a seizure and sale of the company's right to redeem that mortgage to William I. Tenney; and a deed of the same from the officer to him on June 2, 1840. And a deed from William I. Tenney to the demandants, made on June 29, 1843.

To prove that the president and secretary of that company were authorized to make and execute the mortgage to Matthew C. St. John, the records of the company were introduced; and the charter granted by an act of this State, approved February 29, 1836. The records of the board of directors were also introduced. It appears from those records, that a meeting of the corporators was called for the organization of the corporation, under its charter in the city of New York,

and that the charter was there accepted, and the officers of the corporation, president, secretary, and directors were chosen. And at a meeting of those directors, held in that city on April 6, 1837, the president and secretary thus chosen, were authorized by vote to make and execute the conveyance in mortgage, to Matthew C. St. John. There is no proof, that any meeting for the organization of the company, or for the choice of its officers, has ever been holden in this State. There is proof that the company, by a person acting as its agent, transacted business in this State, during the years 1836, 7 and 8.

It is contended, that the existence of the corporation is sufficiently proved by the introduction of its charter, and by the testimony, showing the transaction of business under it.

If this be admitted, the demandants must proceed further, and show that the persons who executed the conveyance in mortgage, were legally authorized to do it. If directors of the corporation, legally chosen, might transact business as such by vote of the board, at a meeting held in another State, and might authorize persons to execute a conveyance of real estate, yet it would be necessary, to show that such persons were legally chosen directors, before any conveyance made by their direction, could be considered as legally made.

The demandants must recover upon the strength of their own title, not because the tenant does not exhibit a legal title; and their right to recover will depend upon a decision of the question, whether the corporation has authorized any board of directors or other persons to make that conveyance of its estate.

There are a variety of corporations. It will only be necessary on this occasion, to speak of one class of them, corporations aggregate, composed of natural persons. It is often stated in the books, that such a corporation is created by its charter. This is not precisely correct. The charter only confers the power of life, or the right to come into existence, and provides the instruments by which it may become an artificial being, or acting entity. Such a corporation has been well defined to be an artificial being, invisible, intangible, and existing

only in contemplation of law. The instruments provided to bring the artificial being into life and active operation, are the persons named in the charter, and those who by virtue of its provisions, may become associated with them. Those persons or corporators, as natural persons, have no such power. The charter confers upon them a new faculty for this purpose. A faculty which they can have only by virtue of the law, which confers it. That law is inoperative beyond the bounds of the legislative power, by which it is enacted. As the corporate faculty cannot accompany the natural persons beyond the bounds of the sovereignty, which confers it; and they cannot possess or exercise it there. Can have no more power there to make the artificial being act, than other persons not named or associated as corporators. Any attempt to exercise such a faculty there, is merely an usurpation of authority by persons destitute of it, and acting without any legal capacity to act in that manner. It follows that all votes and proceedings of persons professing to act in the capacity of corporators, when assembled without the bounds of the sovereignty granting the charter, are wholly void.

This is a familiar principle, when applied in analogous cases to persons, upon whom the law has conferred some power or faculty, which, as natural persons, they do not possess.

The power conferred by law upon executors and administrators, cannot accompany their persons beyond the bounds of the sovereignty, which has conferred it. Story has collected numerous cases, in note under section 512, in his treatise upon the Conflict of Laws, proving the doctrine to be established both in England and in this country.

The same doctrine prevails respecting the powers of guardians. *Williams* v. *Storrs*, 6 Johns. Chan. 357.

The same doctrine generally prevails in this country, while it does not in England, respecting the powers of assignees under bankrupt and insolvent laws. The doctrine is stated and discussed and the cases are collected by Story in his treatise on the Conflict of Laws, c. 9, § 405 to 417.

If the artificial being, called the Bluehill Granite Company,

may be considered as having existence and active life in this State, by proof of its acts within her limits, it will be still true that it cannot have existence without her limits, and of course cannot make choice of any officers or agents there. It may maintain a suit without those limits, but that does not imply its existence or presence there. It may also contract without those limits. Being within them, it may, acting *per se*, by vote transmitted elsewhere, propose a contract or accept one previously offered. And it may, by an agent or agents duly constituted, act and contract beyond those limits. But it can neither exist, nor act *per se* without them, except by the assistance of its officers or agents duly elected or appointed within them.

The constitution and powers of such corporations were perhaps more thoroughly discussed and fully considered, than ever before by any judicial tribunal, in the case of the *Bank of Augusta* v. *Earle*, 13 Peters, 519. C. J. Taney, delivering the opinion of the Court, says, "It is very true, that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law; and where that law ceases to operate and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty.

The cases of *McCall* v. *the Byram Manufacturing Co.* 6 Conn. R. 428, and of *Copp* v. *Lamb*, 3 Fairf. 314, are relied upon as deciding, that corporations whose charters were granted by one State, could hold meetings, pass votes, and exercise powers in another State.

The question presented in the former case, was whether the secretary of a corporation was legally appointed by the directors at a meeting held by them in the city of New York. The charter had been granted by the State of Connecticut. The decision was in the affirmative.

The directors of a corporation are not a corporate body, are, when acting as a board, but a board of officers or agents, and they may exercise their powers as agents beyond the

bounds, where the corporation exists. It did indeed appear in that case, that all the meetings of the stockholders, and of the directors, were holden in the city of New York, but the capacity of the stockholders to act there, does not appear to have been examined and discussed.

In the case of *Copp* v. *Lamb*, the Court did not enter upon an examination of the question, whether the proprietors of common and undivided lands had, by virtue of an act passed by the Commonwealth of Massachusetts, power to organize and act as a corporation in another State. It appeared that the land demanded in that suit, had been granted by a proprietary, which had acted as such more than forty years before that time. And although the place of its first organization and action was within the State of New Hampshire, yet all its acts had been confirmed in a meeting held several years afterward, which does not appear to have been holden out of the Commonwealth of Massachusetts. It was under these circumstances, that the Court said, that it did not feel authorized to declare, that the proceedings were illegal and void, because the first meeting for organization was held in New Hampshire. The ground upon which the decision was made, appears to have been, that it was not competent for a person claiming title under one of the proprietors, who had acted as an officer of the proprietary at that meeting, to deny, after so long a time and under such circumstances, the legality of the exercise of corporate powers.

"Corporations created by statute, must depend for their powers and the mode of exercising them, upon the true construction of the statute." *Runyan* v. *The Lessee of Coster*, 14 Peters, 129. It is admitted in all the decided cases, that the sphere of action of a corporation is determined by the terms and intention of the legislation, by virtue of which it exists. That legislation, if it be possible to avoid it, is not to be so construed as to exceed the sovereignty of the legislative power. *Farnum* v. *Blackstone Canal Company*, 1 Sum. 47. That clause in the charter of the Bluehill Granite Company, which author

izes two persons named to call the first meeting of the company, at such time and place as they may think proper, cannot receive such a construction, as would authorize them to call the meeting at a place without the limits of this State. Legislative bodies do not usually in their acts of legislation use language to limit their operation, but use general language, and the limitation is implied and inferred from the extent of the legislative power. The language used in that charter does not require any other construction or authorize the conclusion, that it was the intention to authorize that meeting to be held without the limits of the sovereignty. The consideration, that it could not have been its intention to attempt to encroach upon another sovereignty, by putting into action a corporation there, might be sufficient to call for a construction, which would not authorize it. There were, however, other enactments in this State, referred to in the charter as explanatory of the powers granted, which clearly exhibit the intention of the legislature, that the corporate powers should be exercised only within the State.

There is a clause in that charter, which gives the corporation all the powers and privileges, and subjects it to all the duties and requirements incident by law to similar corporations. The law thus referred to, is the statute law, regulating manufacturing corporations.

By the act then in force defining the powers and duties of manufacturing corporations, c. 137, they were authorized to make by-laws, not repugnant to the constitution and laws of this State. Were required to divide their property into shares. The evidence of title to these shares was to be certificates signed by the treasurer. Transfers of these shares were to be recorded by the clerk in a book to be kept by him for that purpose. The corporations were authorized to make assessments upon the shares, and the treasurer, when the holders failed to pay, was authorized to sell them in a manner prescribed by the act, and to make conveyances of them to be recorded by the clerk. The act of March 15, 1821, c. 60, § 31, then in force, provided, when an execution had been issued upon a

judgment recovered against a manufacturing corporation, and a demand had been made by an officer upon the president, treasurer, or clerk of the corporation, that the same might be collected by a levy upon the property or body of a corporator. By the act of Feb. 12, 1828, c. 385, then in force, the treasurer of such a corporation is required to give public notice in a newspaper printed in the county, where the corporation is established, and if none is printed in that county, then in one printed in an adjoining county, of the amount of the capital stock actually paid in.

The directors are prohibited from making any dividends of the capital until all the debts due from the corporation have been paid. The agent or officer having charge of its property was required to deliver to an officer having a writ or execution against it, the names of the directors and clerk, and a schedule of all its property including debts. It was made the duty of the clerk or person having charge of the books of the corporation to produce the same in court, when certain suits were pending. By the act of Feb. 18, 1836, other provisions were made respecting the mode of calling meetings, the liability of the stockholders, the mode of collecting debts from the property of the corporation, and requiring the clerk of the corporation to furnish an officer having an execution against the corporation, with a list of the names and places of residence of the stockholders.

It is obvious, that those provisions contemplated the establishment and action of manufacturing corporations to be within the State. That their meetings were to be called, and their officers to be chosen by virtue of the laws of the State, and of course where those laws were operative. That the officers and especially the clerk was to be found within the State; and that he was to have the custody of the books and records within the State, to perform the duties required of him. All these enactments were obligatory upon the Bluehill Granite Company and its stockholders.

Whether the statute provisions of this State, and the inten-

tion of the legislative power, or the general rules of law respecting corporations, be examined, the conclusion must be the same; that this corporation could hold no meeting for the election of its officers or for the regulation of its affairs, without the limits of this State. That all such meetings and proceedings were without right or authority and wholly void.

If there were no directors *de jure*, were there any *de facto* having authority to convey the estate of the corporation?

Public officers, when appointed by the duly constituted authorities without any power to make the appointment, are regarded as authorized to perform their official duties, and their acts are to be regarded, as it respects other persons, as valid. *Commonwealth* v. *Fowler*, 10 Mass. R. 290. This is upon the principle, that they have been held out to the public by the duly constituted power as public officers, capable of performing certain public duties, and their acts are therefore to be regarded as valid. So when corporations have held certain persons out to the public as its directors or officers, those dealing with them as such and ignorant of their want of legal power, will be entitled to consider their acts as binding upon the corporation. And when there has been an informal or irregular exercise of an existing power of election, the officers so elected, until removed, are regarded as officers *de facto*, and their acts are obligatory upon the corporation.

But when the corporators have no power at all to proceed to an election, and when the officers must be considered as assuming to be such without any election, their acts cannot be binding upon the corporation, unless the corporation has held them out in the manner before stated to be its officers. If the law were otherwise, persons having no legal authority to act as corporators might assume it and proceed and elect officers, who by being considered to be officers *de facto* might convey the whole property of the corporation and divest it of all its rights. No decided case, it is believed, will be found to maintain such a doctrine.

In this case the grantee of the corporation, Mathew C.

St. John, or the *cestues que trust*, or William I. Tenney, their grantee or assignee, cannot claim to take the position of a purchaser from persons, who had been held out by the corporation to the public as its officers without any knowledge of their real character and authority. For it appears, that these conveyances were made to persons, who claimed to be stockholders actively participating in all the proceedings of the corporation, and they must be regarded as having a knowledge of all its acts, and of its legal right to act. The tenant is in no way connected with those proceedings, and is entitled to require, that the demandants should establish their title. They appear only to represent the legal title of William I. Tenney, as his assignees under an act of insolvency.

If there were no legally existing mortgage, there could be no legal sale at auction of the right of the corporation to redeem it. In such case the execution could only be satisfied from the real estate of the corporation by a levy and appraisal. Tenney obtained no legal title by that seizure and sale, and he could convey none to the demandants.

Under such circumstances it will not be necessary to consider, whether the tenant obtained any title whatever by the proceedings stated in the testimony.

Demandants nonsuit.

BILLINGS P. HARDY *versus* JOB NELSON.

If after a question of law has been presented for decision on a report of the Judge presiding at the trial, a motion be made to amend the pleadings, for the purpose of introducing a new matter of defence, it will not be granted, if the proposed defence would not be a valid one.

Where land is conveyed by the defendant to the plaintiff by deed of warranty, and the same premises, at the same time, are reconveyed in mortgage, with like covenants, to secure the payment of the purchase money, or a part thereof; and, afterwards, the plaintiff is evicted from a portion of the premises, and then brings a suit against his grantor, the defendant, upon the covenant of warranty, the money secured by the mortgage still remaining unpaid; the plaintiff is not estopped by the covenants in his mortgage deed

to the defendant, from showing a defect of title, or precluded thereby from maintaining his action.

If a deed conveys land, particularly describing it by metes and bounds, without any reservation or exception in the descriptive part, and contains covenants, that "the aforegranted and bargained premises are free of all incumbrances, except the dower of the widow of J. S." and that the grantor "will warrant and defend the same against the lawful claims and demands of all persons, except the claim of the aforesaid dower;" the tract of land assigned to the widow for dower is not excepted, but the covenants, merely, are so restricted, that they will not bind the grantor to warrant or defend against the life estate assigned to the widow as dower.

When a grantee has been evicted by virtue of a judgment recovered against him, that judgment is legally admissible, in an action upon the covenants of the deed, to prove the fact of eviction, but not, without notice, to prove the superior title of the recovering party. But if the grantor had notice, of that suit and an opportunity to appear and defend, it is evidence against him to prove the title of the party recovering.

Upon the breach of the covenants of warranty in a deed of land, where the grantor was seized when he conveyed the premises, and the grantee entered and continued in possession until evicted, the measure of damages, in this State, is the value of the premises at the time of the eviction, with interest, and the expenses reasonably and actually incurred in the defence of the suit.

COVENANT broken. At the trial before TENNEY J. the parties respectively introduced their evidence, which was all reported; and then agreed, that if the whole Court should be of opinion, that upon the evidence, the action was maintainable, judgment was to be rendered for the plaintiff, and the Court were to determine the amount of damages. And that if the action was not maintainable, a nonsuit was to be entered.

The material parts of the deeds and papers introduced, and the facts proved by the evidence, necessary to a proper understanding of the questions of law raised in the argument, appear in the opinion of the Court.

C. J. Abbott argued for the plaintiff, contending that the covenants in the mortgage deed ought not to prevent the plaintiff from recovering. If they operated as an estoppel, they should have been pleaded as such. But the covenants in a mortgage deed, made as this was, are not an estoppel. 2 Hill, 398; 10 Conn. R. 422.

The defendant could not have maintained an action upon those covenants. 15 Mass. R. 307.

Here the defendant was seized at the time of the conveyance, and the plaintiff is entitled to recover the value of the land at the time of the eviction, with interest, and the expenses incured to settle the title.

Hathaway argued for the tenant. The several points made by him in defence are stated in the opinion of the Court.

The opinion of the Court, WHITMAN C. J. holding the Court in the county of Washington, at the time of the argument, and taking no part in the decision, was drawn up by

SHEPLEY J. — This suit is upon a covenant of warranty contained in a deed, by which the defendant, on July 21, 1835, conveyed a tract of land on Deer Isle to the plaintiff. A part of it had been assigned to the widow of John Scott, for her dower, in the year 1795. Martha Greene, a sister of John and daughter of Nathaniel Scott, recovered judgment against the plaintiff, for four undivided seventh parts of the last named tract assigned to the widow, at a term of this Court holden in July, 1844, and evicted the plaintiff therefrom on September 11, 1845. The premises thus conveyed to the plaintiff were at the same time reconveyed by him to the defendant in mortgage to secure the payment of the residue of the purchase money, a part of which still remains unpaid.

The defendant pleaded *non est factum*, and general performance. A motion has been made by his counsel for leave to amend the pleadings, that he may plead in bar the covenants contained in that deed of mortgage. The case having been presented on a report of the facts proved before the presiding Judge by the consent of parties, a doubt arose whether the amendment could be properly allowed, without a discharge of the report. The deed of mortgage was introduced as testimony, and its effect upon the plaintiff's right to maintain this action may be considered under the motion to amend;

and if the proposed plea could not be useful to the defendant, it will not be desirable to have leave to plead it.

1. It is contended in defence, that the two deeds, executed between the same parties, at the same time conveying the same premises with like covenants, are to be regarded as parts of the same transaction. That the plaintiff is thereby estopped to allege a defect of title; and that the proposed plea must be regarded as a good bar to avoid circuity of action. The same points appear to have been made and decided in the case of *Hubbard* v. *Norton*, 10 Conn. R. 422.

Williams C. J. says, respecting estoppels, "they must be certain to every intent, and not be taken by argument or inference." Co. Litt. 352. "Norton and Stockwell sell to the plaintiff a piece of land and agree to warrant the title. They take a mortgage of the same grounds with like covenants to secure the purchase money. And it is now claimed, that the last covenants preclude or estop the plaintiff from a right of action on the others, because it is said, they are simultaneous. Unless all principles of common sense are disregarded we must suppose, that the deed of the defendants, conveying the land, in fact preceded that of the plaintiff, which was given to secure the consideration money for the land conveyed." "If then we must consider the plaintiff's deed as subsequent to that of the defendants, it can be no estoppel; because a warranty of title by the plaintiff, in a subsequent deed, will not prove, that the defendants had title, when they conveyed to the plaintiff, for the plaintiff might at the time, or immediately after, have purchased another title or removed the incumbrance. The contrary is so clearly implied as to become one of those presumptions of law, which cannot be rebutted. To create that legal certainty requisite to constitute an estoppel, the defendant must show, that the plaintiff could have no other title than that acquired by deed of the defendants." "Again it is said, these facts form a good defence, because the law abhors a circuity of action; and if the plaintiff can recover of the defendants, they can also recover of the plaintiff. This objection presupposes,

what is not admitted, that the plaintiff had not procured a title, when the deed was given, or since that time." "In support of the several objections of the defendants, it was said, that these deeds being given at one and the same time, and for one object are to be considered, as if they were one instrument. It is true, that to give effect to the intention of the parties, such a construction has been given."

"So too, where there is but one instrument, the law will adjudge priority of operation, although it be sealed at one and the same instant. Digges's case, 1 Co. 174, Res. 6. But in this case, the construction contended for by the defendants, would rather tend to defeat, than to carry into effect the intention of the parties."

As the defence proposed to be introduced would not be a valid one, the motion to amend the pleadings is overruled.

2. It is contended, that the covenant of the defendant did not warrant the title to that portion of the land, from which the plaintiff has been evicted.

The deed containing it conveys the whole of the farm formerly owned by Nathaniel Scott by metes and bounds; and it contains covenants, that "the aforegranted and bargained premises, are free of all incumbrances, except the dower of the widow of John Scott;" and that the defendant "will warrant and defend the same against the lawful claims and demands of all persons, except the claim of the aforesaid dower." The argument is, that the words, "except the dower of the widow," make an exception of the tract of land assigned to the widow for dower, and not merely of her life estate in it. Such a construction is inadmissible. That part of the deed, which describes the land conveyed, embraces the whole land without any exception. The only excepting clauses are found in the covenants. The language there is suited only to restrict them, so that they will not bind the defendant to covenant or warrant against the life estate before assigned to the widow for dower.

3. Another objection is, that the judgment recovered by

Martha Green against the plaintiff, is not legal evidence against the defendant, who was not a party to it, nor bound by it.

When a grantee has been evicted by virtue of a judgment recovered against him, that judgment is legally admissible to prove the fact of eviction, but not to prove the superior title of the recovering party. If the grantor however had notice of that suit and opportunity to appear and defend, it is evidence against him to prove the title of the recovering party. *Hamilton* v. *Cutts*, 4 Mass. R. 353; *Blasdale* v. *Babcock*, 1 Johns. R. 517; *Sanders* v. *Hamilton*, 2 Hayw. 282. It appears by the letter of Oct. 14, 1842, that the defendant had notice of the pendency of that suit, and that he urged the plaintiff to defend it, advising him, whom to retain as counsel.

4. This also disposes of another objection, that the plaintiff has not proved the superior title of Martha Green, to more than one seventh part of the premises; for the judgment, shewing that she recovered four sevenths, is at least *prima facie* evidence of her right to do so.

5. It is asserted, that the plaintiff is a discharged bankrupt; that he had conveyed the land or assigned the covenants; that there is no proof of his liability over to any one upon those covenants; and that he cannot for these reasons maintain the action. It may be sufficient to observe, that the case, as presented to the Court for decision, contains no proof respecting these matters.

6. It remains to consider what damages the plaintiff is entitled to recover. The testimony shows, that the defendant was seized, when he conveyed the premises to the plaintiff, who entered and continued in possession until evicted. In such cases the measure of damages for breach of the covenant of warranty is, in this State, the value of the premises at the time of the eviction with interest, and the expenses reasonably and actually incurred in the defence of the former suit. *Gore* v. *Brazer*, 3 Mass. R. 523; *Sumner* v. *Williams*, 8 Mass. R. 222. This amount, to be estimated as stated in a paper de-

posited with the clerk, the plaintiff will be entitled to recover; and the defendant is by agreement entitled to have the same applied to extinguish the amount due on his mortgage.

Defendant defaulted.

HANNAH H. ALLEN *versus* JOSEPH P. PARKER.

Where there is no agreement in the mortgage, that the mortgagee shall not enter into possession of the premises before a breach of the condition, the mortgagee may maintain an action to recover the possession, without proof that the condition has been broken.

Deeds which have been executed between the same parties at the same time, cannot be construed together, so that one should be limited by the provisions contained in the other, unless they relate to the same subject matter.

Thus, where the only condition of a mortgage was, that the mortgagor should "support the said Allen (the mortgagee) with suitable meat and drink, and all necessaries, and pay all doctor's bills for the said Allen," and where an agreement, under seal, was made between the parties at the same time, containing stipulations on the part of each, whereby it appeared, that it was necessary that the mortgagee should reside upon the premises, in order to be entitled to her support; *it was held*, that the condition of the mortgage could not be limited by the terms of the agreement.

WRIT of entry, demanding a tract of land in Brooksville, being the same conveyed to her by the tenant, Parker, by deed of mortgage dated July 28, 1845. The whole of the condition of the mortgage follows. "Provided nevertheless, that if the said Joseph P. Parker, his heirs, executors, or administrators, support the said Allen with suitable meat and drink, and all necessaries, and pay all doctor's bills for the said Allen, then this deed shall be void, otherwise shall remain in full force and virtue." There was no provision in the deed to prohibit the mortgagee from taking immediate possession.

On the same day, the parties entered into an agreement, of which a copy follows.

"Articles of agreement, made and concluded the twenty-eighth of July, in the year of our Lord, one thousand eight hundred and forty-five, by and between Joseph P. Parker, of Brooks-

ville, in the county of Hancock and State of Maine, Esq., on the one part, and Hannah H. Allen, of said Brooksville, on the other part, *witnesses*, that the said Joseph P. Parker, hath agreed, and doth hereby covenant and agree, that the said Hannah H. Allen shall have the exclusive right to the east room, and to have a privilege in all the other parts of the house she now lives in, and whereas there is now on the place seven cows, one three year old heifer, three year olds, one pair of five year old steers, and nineteen sheep and eleven lambs, valued at two hundred and fifteen dollars, the said Parker further agrees to keep the amount of stock on the place, for the mutual support of both, if hay can be cut on the place, sufficient to keep them, and the said Allen doth agree on her part to do what she is able for her support, and to let the said Parker have any or all the stock when he shall pay for them; and the said Allen further agrees to have the furniture used for the benefit of the house, and to let the said Parker have a bed for him to sleep on. "Joseph P. Parker, L. S.

"Hannah H. Allen, L. S.

"Signed, sealed and delivered
in presence of "David Walker,
"Eben S. Parker."

The facts appear sufficiently in the opinion of the Court.

The case was argued by

C. J. Abbott, for the demandant — and by

Hinckley, for the tenant.

The opinion of the Court, WHITMAN C. J. holding the jury Term in Washington at the time of the argument, and taking no part in the decision, was drawn up by

SHEPLEY J. — The demandant conveyed certain tracts of land in Brooksville, to the tenant, who at the same time mortgaged the same to the demandant, upon condition, that the tenant, "his heirs, executors, or administrators, support the said Allen with suitable meat and drink and all necessaries, and pay all doctor's bills for the said Allen."

The parties at the same time entered into a contract, under

seal, by which the tenant agreed to keep upon the farm certain stock, owned by the demandant, for the mutual support of both, if hay sufficient to keep them could be cut upon the farm; and to allow the demandant to have the exclusive right to the east room, and a privilege in all other parts of the house. The demandant agreed to do what she was able to do for her support, and to let the tenant have any or all the stock, when he should pay for them; and to have the furniture used for the benefit of the house, and to let the tenant have a bed to sleep on.

The demandant has commenced this suit to recover possession of the premises. The case is presented for decision by an agreed statement of the facts, by which it is admitted, that the demandant left the premises, and went to the house of Simeon Allen to reside; and that she did not do any thing after that time for her support. That she was about seventy years old, and unable to support herself; and that she could do but little towards it. That she was sick, and that the attendance of a physician, being necessary, was procured for her by Simeon Allen, who also furnished sundry articles necessary for her support. The tenant was called upon to furnish such articles for her support after she left the premises, and refused to do so, alleging, that he was only bound to furnish her a support upon the premises.

There is no agreement in the mortgage, that the tenant should continue in possession of the premises until the condition had been broken; nor is there any stipulation in the agreed statement, that the demandant should not recover without proof of it. It is provided by statute, c. 125, § 2, that a mortgagee may recover possession before any breach of the condition, when there is no agreement to the contrary. The demandant is therefore entitled to recover without any proof of a breach of the condition.

The case has been presented in argument, as if such proof were necessary, and such a consideration of it may prevent further litigation.

It was obviously the intention of the parties, so far as the agreement between them makes provision for it, that the demandant should receive her support upon the premises. The counsel for the tenant contends, that the agreement and the mortgage executed at the same time should be construed together, as constituting one contract or arrangement for her support, and that the condition of the mortgage should be regarded as limited by the agreement. Its performance is not secured by the mortgage. It is not therein referred to. It could not have been their intention to secure its performance by the mortgage. Many of the stipulations contained in it were made by the mortgagee. Some of those made by the mortgagor had reference to the purchase and keep of the stock upon the farm, a matter not named or alluded to in the mortgage. There is no definite provision made in the agreement for the support of the demandant. It is there referred to in a manner indicating, that some provision for it had been otherwise made. Deeds, which have been executed between the same parties at the same time, cannot be construed together, so that one should be limited by the provisions contained in the other, unless they relate to the same subject matter. If this were not so, two or more deeds, which were designed to exhibit distinct and independent contracts, would become amalgamated so as to exhibit but one contract. By adopting such a construction, as is insisted upon in this case, the agreement respecting the purchase and keep of the stock would become incorporated into the mortgage, to be secured by its condition. And yet it is obvious that such was not the intention of the parties. The deeds appear to have been drawn very informally and defectively. There is no provision made in the condition of the mortgage, or elsewhere, for the support of the demandant for any stipulated time. The mortgage and the agreement do not appear to have been intended to form one, but two separate contracts, having reference in part to different subjects, each of which contracts is to be enforced according to its own provisions, and for the accomplish-

ment of its own purposes. If the tenant has violated the conditions of the mortgage, he must be held responsible for it; and the demandant also for any violation of her covenants contained in the agreement.

Judgment for the demandant.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF WALDO,

ARGUED JULY TERM, 1847.

JACOB ELWELL, *Guardian, versus* GILMORE SYLVESTER.

A review of the judgment and proceedings on a petition for partition can be granted only upon the application of a party to the former process, or of one representing the interest of a party. There is no provision in the statutes authorizing a person, interested in the estate divided, to be first admitted to become a party to the proceedings after the partition has been ordered, and the proceedings have been finally closed.

Where a petition for a review of the judgment and proceedings on a petition for partition has been presented in the name of one as guardian and in behalf of certain minors, and notice has been ordered thereon, and the opposing party has appeared, it cannot be amended so as to make the minors the petitioners by such person as their guardian.

THE facts appear in the opinion of the Court.

F. Allen, for the petitioner, contended that the review might well be granted on the petition of any one interested in the estate, and cited Rev. Stat. c. 123, § 1.

And it is the duty of the guardian of minors to attend to this petition in their behalf. St. c. 121, § 10.

He moved for leave to amend the petition for a review by changing its present form to one by the minors, by the same person as their guardian.

W. G. Crosby, for the respondent, objected that the petition

could not be maintained in the name of the guardian of the minors. It is his petition, not theirs.

But if the petition for the review had been presented by the minors, it could not be sustained. The writ of review can only be sued out by a party to the former proceedings, or by a representative of a party. Rev. St. c. 123, § 10; *Mitchell* v. *Starbuck*, 10 Mass. R. 9.

No complaint is made, save of an unequal division, and that, had it existed, could only be righted on the return of the report for acceptance.

The opinion of the Court was prepared by

SHEPLEY, J. — This is a petition to obtain a review of the judgment and proceedings on a petition for partition. The respondent entered a petition for partition at the August term of the district court, in the year 1844, against persons unknown. Notice was ordered, and Samuel Duncan only appeared as a respondent at the term of that court holden in February, 1845. That court, at its August term, 1845, ordered, that partition be made, and appointed commissioners to make it. The report of the commissioners was made and accepted at February term, 1846. Electa Alexander appears to have been an owner of an undivided portion of the premises, until after the commissioners had notified and heard the parties interested, and had made out their report. She then deceased, and her estate in the premises descended to her heirs, for a part of whom the petitioner is guardian. Neither Electa Alexander, nor her heirs at law, became parties to those proceedings. There is now no allegation or proof, that the original petitioner claimed a greater share, than he owned, or that the judgment for partition was not legally and regularly entered. The complaint is, that the commissioners made an unequal partition of the premises. Although Electa Alexander did not appear and become a party to those proceedings, she appears to have had a knowledge of them. Her illness may have prevented her from attending to them; but her eldest son appears

to have represented her interest before the commissioners, whose report was accepted after a full hearing before the Court.

The counsel presenting this petition for a review desires to amend it, so as to make the minors petitioners by their guardian instead of presenting him as the petitioner in their behalf. If this were a suit at law by Elwell as the guardian of certain minors named, any judgment, which might be rendered, must be entered in his favor. It could not be entered in favor of the minors, for whom he professed to be acting. To allow an amendment, that would substitute the minors as the party plaintiff would be to introduce another party, in whose favor the judgment should be rendered, if one were obtained. This would be inadmissible.

It is not perceived, that there can be any substantial difference in this respect between proceedings by petition and by action. If there be a judgment rendered on a petition, it must be in favor of or against the petitioner.

But if the amendment were allowed, another insuperable difficulty is presented. The Court would then be called upon to grant a review of a cause on the application of strangers to it. For these minors were not parties, nor was the estate, which they have inherited, represented in those proceedings by their ancestor. This Court is indeed authorized by statute, c. 123, § 1, to grant reviews in civil actions, including petitions for partition. But where a review is granted, the course of proceeding is prescribed by statute, c. 124. There is no provision for the introduction of a new party. Proceedings between the same parties only are contemplated by the statute. When there has been an issue joined between them, the cause on review is to be tried upon that issue. When the judgment was rendered on default without any issue joined, the proper pleadings are to be made by the parties. The statute prescribes what judgment may be recovered by each party. A review only brings the former parties and their proceedings before the Court. It can do no more. The writ of review must be sued out by a party to the former suit or by one rep-

resenting the interest of a party. There is no provision in the statutes authorizing a person interested in the estate divided, to be first admitted to become a party to the proceedings, after partition has been ordered, and the proceedings have been finally closed. If the Court should entertain this petition and grant its prayer, neither the petitioner nor the minors could be profited by it, for they would not thereby become parties to the former proceedings; and there is no provision made, by which they could be admitted to become parties to them.

Petition dismissed with costs for respondent.

HERBERT R. SARGENT *versus* WILLIAM SALMOND *& al.*

The liability of the principal in a promissory note, to reimburse his surety for any payment made by the latter, in consequence of his so becoming surety, commences at the time the note is delivered to the payee; and whenever payment may be made by the surety, he is to be considered as a creditor of his principal, from the time the note was made and delivered.

A court of equity will assist a judgment creditor to discover and reach the property of his debtor, fraudulently transferred, although not liable to be attached upon a writ, or seised on execution, when the creditor has exhausted his remedy at law, without having obtained payment of his debt.

A judgment is evidence of the amount of indebtedness between the parties to it; but is not binding as to third persons, not parties or privies thereto.

If one has received a conveyance of an estate under such circumstances as will render the conveyance fraudulent as to creditors, still the grantee is not bound to restore this property to a creditor, to an amount beyond the sum justly due to him. And if a creditor takes judgment for double the amount justly due to him, a court of equity will not interfere to assist him in obtaining satisfaction of such judgment.

Nor will the Court interfere where land has been fraudulently conveyed, if the grantee has received no benefit therefrom, and the title is still a matter of controversy, and of litigation between such grantee and a claimant of the property.

BILL IN EQUITY against William Salmond and Mary P. Salmond.

In the opinion of the Court will be found a recital of all the material facts.

W. G. Crosby, for the plaintiff, said that the conveyance to

the daughter was fraudulent against creditors, both as it respected the real estate and the note transferred to Coombs. The land became substituted for the notes, and that land was conveyed to Mary P. Salmond without consideration, and is fraudulent as to creditors. We could not make a levy upon this land, because the title was never in the debtor, William Salmond; and it cannot be reached but in equity, and can be there. *Gordon* v. *Lowell*, 21 Maine R. 251; 20 Johns. R. 554.

Mary P. Salmond has brought a writ of entry to obtain possession of the land. We ask for a decree, that she should assign that judgment, and convey the land; and should prefer that to a decree for the payment of money.

Allyn, for the defendants, denied that the plaintiff was entitled to recover either on the ground of justice, equity, or law. He took judgment for just double the amount, which was due to him. Judgments may be inquired into by any one not a party to them. Jeremy, 492. The defendants have never had possession of this property, and have never derived any advantage from it, and it is wholly uncertain whether either of them ever will. The bill is at least premature.

The law allows the father to transfer to his daughter, or to any one else, property which could not be reached by any process of law. Creditors could not be injured by it, for they could not touch it. The conveyance was therefore good; and so are the authorities. Jeremy, 413, 414; Story's Equity, § 367.

There are three kinds of conveyances, as it respects consideration. 2 Black. 297. 1. For valuable consideration. 2. For good consideration. 3. Mere voluntary conveyances without any consideration. This is for a good consideration, being from a father to his child.

But the plaintiff is not entitled to be considered as a prior creditor, as the conveyance was in 1837, and the plaintiff's cause of action first accrued in 1840. He was not a creditor until he paid the money.

The opinion of the Court, SHEPLEY and TENNEY Justices, WHITMAN C. J. not being present, was drawn up by

TENNEY J. — In June, 1837, the defendant, William Salmond, being upon notes as surety for P. & E. T. Morrill & Co., conveyed all his real estate, which was of considerable value, to his three daughters without any valuable consideration. He also indorsed two notes, which he held for money lent, against that firm; and he caused a suit to be brought thereon in the name of Robert Coombs, and an attachment to be made upon the real estate of the firm, or some of its members. Coombs had no knowledge of the indorsement of the notes or of the suit, till it had been pending in Court for a considerable time; when he had information thereof, he objected to its further prosecution, but was prevailed upon by William Salmond to withdraw the objection; the suit passed to final judgment, which was entered up for $1372,45, debt, and for $18,80, costs. This judgment Coombs assigned to the defendant, Mary P. Salmond. A levy was soon after made upon the real estate, attached upon the original writ, by virtue of the execution issued on that judgment, and satisfaction obtained for the sum of $750. Coombs immediately after the levy, agreeably to an expectation of William Salmond, entertained at the time he indorsed the notes, and caused the suit to be brought thereon, and by an arrangement with both the defendants, released by quitclaim deed all his interest in the land set off, to the defendant, Mary P. Salmond. Coombs employed no attorney to bring or prosecute the suit, and never paid or agreed to pay any costs on account of the same; he did not know when judgment was obtained; chose no appraiser, when the levy was made, nor had he knowledge of the levy till afterwards; and has been at no expense in reference to it. He gave nothing for the notes, and has received no consideration for the assignment of the judgment, or the release of his interest in the property set off upon the execution.

The name of the complainant was on two notes to the Bel-

fast Bank as a surety, one dated in March and the other in April, 1837, and on which was the name of William Salmond. It is not now disputed, that these notes were made and discounted for the benefit of P. & E. T. Morrill & Co. Whether the complainant was a co-surety for that firm with William Salmond, or held the relation of surety to William Salmond, was a question in issue between the parties to this suit, which will be considered hereafter. These notes were received by the bank and the money paid therefor, prior to the conveyance of the real estate by William Salmond to his daughters, and the indorsement of the notes, on which the judgment in the name of Coombs was obtained. The complainant afterwards paid upon the two notes to the Belfast Bank, at different times, the sum of $882,06. William Salmond paid nothing on those notes. The complainant commenced a suit against William Salmond for the money paid and interest thereon, in which suit the defendant therein was defaulted, and judgment was rendered for the whole amount claimed and interest, execution was issued, and an officer returned thereon, that not being able to find any property on which to levy the same within his precinct, it was in no part satisfied, and the same judgment remains in full force and unpaid. The complainant asks the Court to decree, that the said Mary P. Salmond release her interest in the estate upon which the execution was extended, she having commenced a suit against the person in possession, but not having obtained judgment thereon; or to assign the judgment and execution which she may obtain in that suit to the complainant, or such other relief as may seem proper to the Court.

If the complainant and William Salmond were co-sureties on the notes to the bank, the liability of one to the other, to contribute his proportion, in the event that the principals should fail to discharge them, and payment should be made by one, attached at the time the notes were made and passed to the bank. If William Salmond was the principal and the complainant was the surety, the liability of the former to reimburse the latter for any payment made by him would

commence at the same time. *Howe* v. *Ward*, 4 Greenl. 195; *Thompson* v. *Thompson*, 19 Maine R. 244. The complainant having entered into the relation of surety for Salmond or as a co-surety with him for others, and having paid to the bank the larger portion of the two notes, was entitled to recover something of Salmond; the amount would depend upon the character of that relation. The complainant must be viewed as a creditor of Salmond at the time the money was paid by the bank upon those notes, and is entitled to complain, if any conveyance or transfer was made by his debtor without consideration, of any property afterwards. Such transfer would be a fraud upon him either in fact or in law. The attempt of William Salmond to convey the real estate to his daughters, and the transfer of his notes and the transactions which followed were a fraud upon the complainant and other creditors, and such as the law will not uphold to their prejudice.

It is said by the defendant's counsel, that the notes, which were transferred by William Salmond to R. Coombs, were not property, which could be made available to the complainant on his execution, and therefore the transfer was not injurious to him. And in support of this he relies upon Story's Equity Jurisprudence, sect. 367, and the cases cited in the note. It is laid down by this learned commentator, as the settled doctrine of English chancery, "that in order to make a voluntary conveyance void as to creditors, either existing or subsequent, it is indispensable, that it should transfer the property, which would be liable to be taken on execution;" that the statute of the 13th of Elizabeth was not intended to enlarge the remedies of creditors, or to subject property to execution, which was not previously in any way subject to creditors. Lord Thurlow in referring to the case of *Horn* v. *Horn*, reported in Amb. R. 79, where a different doctrine was intimated, said, "The opinion in *Horn* v. *Horn*, is so anomalous and unfounded, that forty such opinions would not satisfy me. It would be preposterous and absurd to set aside an agreement, which if set aside, leaves the stock in the name of the person, where

you could not touch it." *Gragan* v. *Cook*, 2 B. and Beatt. 233.

But Chancellor Kent says, "notwithstanding the plausibility of the reasoning in support of this doctrine, he should be very sorry to find it the settled doctrine of the Court; it seems too encouraging to fraudulent alienations." He reviews the authorities, and considers the contrary opinion as firmly established and adhered to in the courts of chancery, till the time of Lord Thurlow; and after noticing the decisions of Lord Thurlow, and those subsequent thereto, remarks, "I have not discovered any thing weightier than the *dictum* of Lord Thurlow repeated in subsequent cases." And again, "the authority of the cases of *Taylor* v. *Jones*, 2 Atk. 600; *King* v. *Dapim*, cited in a note to *Taylor* v. *Jones*, and *Partridge* v. *Gopp*, Amb. 596, may be considered as shaken, but they cannot be viewed as overruled by these subsequent doubts." *Bayard* v. *Hoffman*, 4 Johns. Ch. R. 450. The same principle was affirmed in *M'Dermutt* v. *Strong & al. ibid.* 687, and in *Hadden* v. *Spader*, 20 Johns. R. 554. In the last case an appeal was taken from the decision of the chancellor to the court of errors, and his decree was affirmed. Judge Woodworth undertakes to show by an examination of the cases, that in the times of Lords Hardwicke and Northington, and until our own revolution, the doctrine recognized by the courts in New York was the settled doctrine of England. He says, "he cannot too much approve the justice and morality of the rule laid down by his honor, the chancellor in *M'Dermutt* v. *Strong*, that if the creditor has taken and exhausted all the means in his power, at law, he will be entitled to the aid of a court of chancery, to discover and apply the property to satisfy his execution," and he adds, "that the decree of the chancellor is warranted by the established principles, which govern a court of equity. If property not tangible by an execution, is placed in the hands of a trustee, is there any hardship in requiring him to pay it to the creditor, instead of the *cestui que trust*."

The principle, as settled by Lord Hardwicke and other courts of chancery in England, and which has been well estab-

lished in New York, was applied by this Court in *Gordon* v. *Lowell*, 21 Maine R. 251. The ground now taken, does not seem to have been relied upon in that case; but upon a review of the cases bearing upon this point, we are confirmed in the correctness of the opinion there given.

The reasons given by Lord Thurlow for his disapproval of the doctrine in *Horn* v. *Horn*, which he expressed in such strong language, and the views taken by courts of chancery subsequently in England, it is apprehended are inapplicable under the laws of this State. The aid of chancery power is denied by them because by the statute of the 13th of Elizabeth, choses in action, and the like property, are utterly intangible by an execution; that if it is brought back to the condition in which it was before its fraudulent transfer, the creditor by virtue of his execution, is entirely powerless.

The Legislature, perceiving the difficulties in the way of creditors' rights, have provided, that a debtor in an execution, upon a judgment of an amount sufficient to expose him to arrest, if the creditor wishes to pursue the steps pointed out, cannot escape perpetual imprisonment, unless he should make disclosure concerning "his estate and the effects and the disposal thereof," — "and if it shall appear, that he possesses or has under his control, any bank bills, notes, accounts, bonds, or other contracts, or any property not exempted expressly by statute from attachment, but which cannot be come at to be attached," — so much of the same as may be necessary to discharge the debt and costs can be appropriated for that purpose. Rev. Stat. c. 148, § 25 and 29. And it is made penal for a debtor wilfully to disclose falsely, or to withhold or suppress the truth, in addition to liability to be punished criminally; and the person, "who shall knowingly aid any debtor or prisoner in any fraudulent concealment or transfer of his property to secure the same from creditors," is also exposed to the like penalties. Same c. § 47 and 49.

When the Legislature have shown a determination by general statutes, to protect the rights of creditors, and to guard them

from the losses, to which they would otherwise be liable by the frauds of debtors, in withdrawing their means of payment from exposure to direct attachment, and in the enjoyment of those means, without incurring the risk of their being taken away, it cannot be supposed, that they intended to limit their remedy to that which might prove wholly abortive, and to secure to those guilty of the fraud the very property which was its subject, or which was its avails.

If a debtor could be permitted to give to a relative or friend, in whom he had confidence, all the estate to which he had title, and place it beyond his own control, cause it to be changed into another species, where it should be still in existence, and where he should be allowed to participate in its fruits, the creditor might be able, if the fraudulent debtor could be compelled to make an honest disclosure, to inflict the deserved punishment upon the agents in the iniquity; but this alone would be a poor remuneration for his loss, when he could witness, that the property really his, contributed to sustain those, perhaps in affluence, who had defrauded him. As a remedy it is indirect, and often would be inadequate.

It cannot be believed, that it was the design of the statute to afford in no case any other mode of redress than such as is contained in its provisions. In the case of *Hadden* v. *Spader*, before cited, in reference to the insolvent act of New York, the Court say, "if an effectual remedy could be had, under that act, it does not affect the present question; it proves that there is a concurrent remedy; but that remedy is not effectual." Before a creditor could apply the statute in reference to "property, which could not be come at, to be attached," the debtor willing to commit a fraud would have an opportunity by the exercise of a dishonest ingenuity, to place it in a condition to be available to himself and secure against his creditor, if such aid as is now sought should be denied upon this ground.

The Legislature have manifestly not intended so to restrict creditors in their remedies. The provisions referred to are important and founded in wisdom, but they may be evaded and fail to afford to the creditor, the means to reach property trans-

ferred by the debtor, which as between them cannot legally vest in another. This Court have the power to hear and determine as a court of equity, all cases thereafter enumerated, where the parties have not a plain and adequate remedy at law. All cases of fraud are within the power conferred, and at law the remedy is not always one which is adequate.

But the counsel for the defendants contend, that the relief as sought in the bill cannot be granted, because the complainant wrongfully took judgment for a larger sum against William Salmond, than he was authorized by law to do; that he was a co-surety with Salmond for the firm of P. & E. T. Morrill & Co., and was entitled to a judgment for one moiety only of the amount paid, and interest thereon.

The bill charges that the complainant was a surety for the defendant, William Salmond, to the bank. To this allegation in the bill, the answer is, that the complainant and William Salmond were co-sureties of P. & E. T. Morrill & Co., to the Bank, and that firm was the principal; that Salmond received no part of the consideration paid by the bank upon either of the notes. There is no evidence in the case, that Salmond was the principal upon either of the notes, excepting that his name was first in order upon the paper. The relation which the respective makers of the notes held to each other is not shown by the notes themselves; and it is competent for the parties to prove by other evidence, who of the signers were principals and who the sureties. In addition to the answer, which is full and express upon this point, the cashier of the bank testifies, that by the books of the bank, after the notes were discounted, the money was paid to the firm of P. & E. T. Morrill & Co., or to one of its members. The judgment is evidence against William Salmond, the debtor therein, of the amount of indebtedness; but it is not binding against the other defendant, who was not a party to the judgment or the suit in which it was rendered. She is entitled to impeach it in this suit, commenced for the purpose of affecting her personally, or the interest in the property, which she claims as belonging to her. If she has received property of the other

defendant fraudulently as against the creditors of the latter, she cannot be bound to restore it beyond an amount sufficient to cover the just and legal claims of creditors. When the bill, answers and proof are considered, it satisfactorily appears, that the complainant took judgment against William Salmond for a sum larger than that to which he had a just and legal claim, and it does not conclude the defendant, Mary P. Salmond.

If this obstacle to a decree in the complainant's favor were removed, another difficulty is presented, which must induce the Court to withhold an order, that Mary P. Salmond make and execute a deed of release of her right in the land, on which the execution in the name of Coombs was extended; or that she account to the complainant for the value of the property, which is supposed to have been received by her, as the avails of the notes fraudulently transferred. The complainant has done nothing, which has in any manner created any right or interest in the land. Mary P. Salmond has acquired no other possession, than that derived from the deed of release of Coombs. The possession is in one who claims to hold adversely to her, against whom she brought a suit by a writ of entry, which suit is still pending between the parties thereto. A deed purporting to convey the land, executed and delivered by her, would pass no title, while the tenant withholds the possession, which neither she nor her grantee may ever obtain. The levy of the execution upon the land, held adversely, was insufficient to give her a right therein, which could be the subject of a decree by a court of equity. The title to the same must first be settled at law. If it were otherwise, no mode exists, and no facts appear, by which the value of the land thus situated can be ascertained.

Equity will follow the proceeds of property obtained in fraud of creditors' rights, into the hands of persons holding them, for the benefit of such creditors. In the case referred to and relied upon by the complainant's counsel, of *Gordon* v. *Lowell*, 21 Maine R. 251, the party who was decreed to pay the value of the property fraudulently conveyed to him, had

sold the same property, and received the purchase money, which he retained in his own hands, at the time the bill was filed.

Mary P. Salmond was the fraudulent assignee of Coombs' judgment, and the fraudulent grantee of the land taken in part satisfaction of that judgment. But when the complainant filed his bill, nor at any time since, has she received any thing on account of the notes fraudulently transferred by her father. And on this ground a decree that she should account, would be entirely nugatory, which is a sufficient reason for its denial.

An assignment of the judgment in favor of Coombs, would be ineffectual to give the complainant any right in the land, which was taken in execution issued on that judgment. The execution has performed its office so far as it has been satisfied by the levy, and an assignment could not operate upon the land already set off. It could transfer only the balance of the judgment remaining unsatisfied.

It would not be competent for the Court to order an assignment of the judgment which Mary P. Salmond is seeking to obtain against the tenant in possession of the land set off on Coombs' execution. No such judgment exists and cannot be the subject of an order of the Court.

Bill dismissed without costs and without prejudice.

SAMUEL L. HAZZARD *versus* JOHN W. HASKELL *& al.*

The law does not favor pleas in abatement; and it requires that they should be pleaded with great precision and certainty.

A plea in abatement to the writ must conclude with, "praying judgment of the writ"; and the prayer that it may be quashed, without praying judgment of the writ, is not sufficient.

And advantage may be taken of such defect on general demurrer.

THIS case came before the Court on a general demurrer to the following plea.

"And now the said defendants come and defend the wrong, &c., and for plea, say that they ought not to be held further to

answer to the plaintiffs' writ, because, he says, that the said plaintiff is not an inhabitant of this State, but is an inhabitant of the Commonwealth of Massachusetts, and because, he says, that said writ was not before entry in Court, nor now is indorsed by any sufficient person, who was or is an inhabitant of the State, nor is said writ indorsed by any person as by law required; all which he is ready to verify. Wherefore they pray that said writ may be quashed, and for their legal costs.

"By Wm. H. Weeks, def'ts attorney."

"Waldo, ss. July Term, 1846. Filed 1st day.

"W. H. Burrill, clerk."

N. and *H. B. Abbott* argued in support of the demurrer.

They objected that the plea was not verified by affidavit. The rule requires, that a plea in abatement should be verified by affidavit, unless it states that the facts appear of record.

If the plaintiff was an inhabitant of the State when the writ was sued out, no indorser is required. This plea, merely says that he was not an inhabitant of the State, at the time of the entry of the action in Court; and for that cause also, the plea is insufficient.

Weeks, for the defendants, said that an affidavit was not required in this case, because the writ describes the plaintiff as then an inhabitant of Boston in the Commonwealth of Massachusetts.

The plea states, that the plaintiff was not an inhabitant of this State, but was an inhabitant of another State, and the writ itself shows, that he was not an inhabitant of this State, at the commencement of the suit.

The opinion of the Court, WHITMAN C. J. taking no part in the decision, was drawn up by

SHEPLEY J. — The case is presented on a general demurrer to a plea in abatement. A special demurrer is not required in any such case. *Lloyd* v. *Williams*, 2 M. & S. 484.

The law does not favor such pleas, and it requires, that they should be pleaded with great precision and certainty. 1 Chit-

ty's Pl. 444. *Baker* v. *Gough*, Cro. Jac. 82. They must be good both in form and substance.

A plea in abatement to the writ must conclude with "praying judgment of the writ," and the prayer, that it may be quashed without praying judgment of the writ, is not sufficient. Co. Litt. 303, (a) note e. 2 Saund. 209, (a) note 1. *Hixon* v. *Binns*, 3 T. R. 185. The plea in this case containing no such prayer is bad in form.

Respondeas ouster.

RICHARD MOODY *versus* ISAAC CLARK *& al.*

If the record shows, that the two justices of the peace and of the quorum, selected by the parties in manner provided by law to take the disclosure of a debtor, "are unable to agree as to the sufficiency and legality of said notification," and "do not agree upon the selection of the third justice," and thereupon an officer makes the selection; this is sufficient to justify the selection of the third justice by the officer.

When the third justice has once been legally called in to act with the others, by reason of their disagreement, he should act until the final decision is made.

In a case coming into this Court by exceptions from the district court, no point can be raised except such as were taken in the district court.

THIS was an action on a poor debtor's bond. The defence set up was, performance by having taken the poor debtor's oath before two justices of the peace and quorum.

At the trial before SHEPLEY J. the defendants introduced the record of proceedings before M. Sleeper and D. W. Lothrop, and shew that they administered to the debtor the poor debtor's oath. The plaintiff introduced the record of S. Heath, Esq. Copies of these records follow: —

"Waldo, ss. June 15, 1846. — Before Manasseh Sleeper, Solyman Heath and David W. Lothrop, justices of the peace and quorum, within and for said county, all resident of Belfast: —

"Isaac Clark of Belfast, applicant for the privilege and benefit of the oath, authorized by the 28th section of chap. 148, of

the Revised Statutes of the State of Maine, upon an execution which issued from the office of Manasseh Sleeper, Esq., justice of the court of trials, for the town of Belfast, on the 15th day of December, A. D. 1845, which Richard Moody of said Belfast is creditor, and upon which said execution bond was given by said Clark, as referred to in the twentieth section of the chapter aforesaid. The said Clark appears and submits himself to examination before the said Sleeper and Heath, the said Sleeper being selected by said Clark, and the said Heath by said Moody, who thereupon proceed to examine said notification and return in the case, and the said justices are unable to agree as to the sufficiency and legality of said notification. Whereupon it became necessary to select a third justice according to the provision of the 46th section of the chapter aforesaid. The said Sleeper and Heath do not agree upon the selection of said third justice and thereupon Axel Hayford, a deputy sheriff, within and for said county of Waldo, legally competent to serve the precept, upon which said Clark was arrested, and gave bond as aforesaid, is applied to by said Clark, to select said third justice, and said Hayford thereupon selects said Lothrop. Thereupon said justices so selected, proceed to examine said notification and return, and said Sleeper and Lothrop being of opinion that said notification, the service and return thereon are in conformity with the requirements of the statute aforesaid, and in all particulars correct, so decide, (the said Heath dissenting from them in opinion.) Said justices therefore proceed to examine said Clark, on his oath, concerning his estate and effects and the disposal thereof, and his ability to pay the debt for which he was arrested, and gave bond as aforesaid, and upon said examination, and the hearing of the whole evidence, said Sleeper and Lothrop, a majority of said justices, are satisfied that said Clark's disclosure is true, and do not discover any thing therein, inconsistent with his taking the oath set forth in the 28th section aforesaid, and proceed to administer to him the same accordingly, and deliver to

him the certificate provided in the 31st section of the chapter aforesaid.

"Manasseh Sleeper, } "Justices of the peace
"D. W. Lothrop, } and quorum."

"Waldo, ss. June 15, 1846. — Before Solyman Heath and Manasseh Sleeper, Esq'rs, both justices of the peace and of the quorum, within and for said county: —

Isaac Clark of Belfast, in said county, applicant for the benefit of the poor debtor's oath according to the 28th section of chap. 148 of the Revised Statutes of this State, who had been arrested on an execution, which issued from the office of Manasseh Sleeper, Esq., justice of the court of trials for the town of Belfast, in said county, on the 15th day of December, A. D. 1845, in which said execution Richard Moody of same Belfast, is creditor, and upon which arrest on said execution a bond was given by said Clark agreeably to the provisions of said chap. 148.

"The said Clark appears and submits himself to examination before said justices, the said Heath being appointed and selected by the said creditor, and the said Sleeper appointed and selected by the said debtor. Whereupon said justices proceed to examine the notification to the creditor, and the return, and the said justices are unable to agree on the sufficiency and legality of the notification aforesaid, — whereupon without any attempt on the part of said justices to select a third justice, or even naming one, Clark, the debtor, at the suggestion of Mr. Sleeper, went out for a third justice, and the said debtor and A. Hayford, deputy sheriff, returned with David W. Lothrop, Esq., and by them, (the said Sleeper and Lathrop,) said debtor was admitted to the poor debtor's oath as prescribed in said chap. 148. The said Heath, one of said justices, dissenting from the other justices in the whole proceedings in the matter.

"S. Heath, } Justice of peace and quorum,
} of the county of Waldo."

The plaintiff offered testimony to prove, that the facts were according to the record made by Mr. Heath, but the testimony

was excluded. The presiding Judge ruled, that the action could not be maintained, and the plaintiff filed exceptions.

Williamson argued for the plaintiff, contending that the third justice was not legally appointed. There was no such disagreement between the two justices, as would authorize the defendants to call in an officer to appoint a third justice.

The certificate signed by the two justices cannot be a true record, as many of the facts stated therein took place before one of them was appointed, or present.

But if the record of Mr. Heath alone is not sufficient to counteract the other certificate, parol evidence is admissible to show the manner in which the justices were selected. *Ayer* v. *Woodman*, 24 Maine R. 196. If the Court was not legally organized, and this may be shown by parol proof, the proceedings are a nullity. *Williams* v. *Burrill*, 23 Maine R. 144, and *Bunker* v. *Hall*, *ib.* 26. The certificate of the two justices does not state, that the two first were unable to agree, as the statute requires, to authorize the appointment. 14 Mass. R. 20; 18 Pick. 295.

Crosby, for the defendants, contended that the third justice was legally selected. The record states, that the two justices were unable to agree, and did not agree, which is equivalent to saying they could not agree. It is not necessary to use the language of the statute, if the meaning of the words used is precisely the same.

When a third justice is once properly called in, he continues to compose a part of the Court.

The testimony offered was wholly immaterial, and was therefore rightly rejected.

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

TENNEY J. — This action upon a poor debtor's bond is defended upon the ground, that the debtor was admitted to his oath by a competent tribunal as appears by the certificate of Manasseh Sleeper and David W. Lothrop, two justices of

the peace and quorum, which was read in evidence without objection. The plaintiff denies the authority of the two magistrates, who administered the oath, and introduced the certificate of Solyman Heath, another justice of the peace and quorum, and who was selected by the creditor as one of the justices, and who acted with Sleeper, the one selected by the debtor, and with Lothrop, selected by a deputy sheriff after the disagreement of the other two, upon the question of the sufficiency of the notice of the debtor to his creditor. The former certificate states, "that the said Heath and Sleeper do not agree upon the selection of a third justice," and that thereupon, the officer made the selection; in the latter, after stating the disagreement touching the notice, it is said, "Whereupon without any attempt on the part of said justices to select a third justice, or even naming one, the debtor, at the suggestion of M. Sleeper, went out for a third justice; and the said debtor and A. Hayford, a deputy sheriff, returned with David W. Lothrop, Esq., and by them, (the said Sleeper and Lothrop,) said debtor was admitted to the poor debtor's oath as prescribed in chap. 148 aforesaid, the said Heath, one of said justices, dissenting fron the other justices in the whole proceedings in the matter.

After the disagreement between the members of the tribunal as first constituted, it became necessary that a third should be added. The two had the authority to select him; if they were unable to agree in the selection, the duty of making the choice devolved upon another. The law has not prescribed any time, that must intervene between that when it is ascertained, that a third magistrate must be called, and the time when an officer can proceed to make the choice; nor what the two shall do or omit to do, to constitute an inability to agree. If it should be thought the two justices manifested an unreasonable captiousness, or obstinacy in reference to the exercise of this part of their duty, it may nevertheless amount to a failure to agree upon the third magistrate. The statute requires no announcement from them, that they are unable to agree, so that the debtor can know the moment, when the

power has gone from them, and is to be exercised by an officer. If time should be taken in nominating different magistrates by one and the other of the two first selected, without agreeing upon any one, it might perhaps be said with propriety, that they were "unable to agree." But if instead of that neither would give to the other, the name of any one, it might be very unreasonable, but would it not be evidence of inability to agree, as much as when one should refuse to confirm the other's nomination? It is certainly strong proof that the two were unable to agree, when they did not agree, after a full opportunity had been enjoyed by them to do it, had they been disposed to improve it.

The debtor had his rights and was entitled to have the tribunal filled; if those in whom was the power to make the choice, omitted to do it, he might suppose, they were unable to do it, and he would proceed to have the selection made by an officer. If the two justices had chosen the third before the one who afterwards acted had taken his seat, the latter might be bound to yield his place to the former. But when Mr. Lothrop appeared, nothing of the kind had taken place, and he had authority to act as a member of the tribunal.

It is insisted, that the justice selected by the deputy sheriff, had no authority to act, further than in the settlement of the question, on which the disagreement took place. The two justices who first constitute the tribunal, in case of disagreement, "may select a third, and a majority shall decide." The decision, which a majority are empowered to make is not limited to any particular question, which may arise. — Such a construction might be attended with great inconvenience. — If the third justice should retire after the first question on which the others should entertain different opinions should be decided and afterwards another disagreement should occur, a fourth justice would be or might be necessary and so to an indefinite number. — It is manifest, that it was intended, the new magistrate should act, till the final decision.

The exclusion of the testimony, to corroborate the certificate of Mr. Heath was not improper, as the action cannot be

maintained, on the ground that every fact therein shown is true.

The point, that the justices were not shown to be inhabitants of Belfast was not taken at the trial, and it cannot now be raised. *Exceptions overruled.*

FRANKLIN ROLLINS *versus* JOHN RICH *& al.*

If an execution be executed by one having official power for the purpose, an omission of the direction to the officer may be supplied by an amendment, under leave of Court. And if there be an unauthorized erasure of the direction to the proper officer, and a new and different direction inserted, the rule which allows the supply of an omission would render proper the restoration of the precept to its former condition.

But *bona fide* purchasers having no notice of the fraud, could not be affected by any such amendment or correction, made after their right accrued, unless there is something upon the record from which the correction can be made. If there is any thing there, indicating facts which render it probable that every thing has been done necessary to secure the object attempted, and it can be proved that the law was complied with, a purchaser cannot with such notice sucessfully supplant the other party.

In a levy upon land, where it appeared that the names of the persons sworn as appraisers, and the names signed as appraisers to the certificate of appraisal, were identical, and where the officer in his return named the same persons as appraisers with the exception of an initial letter for a middle name in one, and expressly referred to the certificate of the oath and the signatures of the appraisers as relating to the same persons named in his return, *it was holden*, that there was sufficient evidence of their identity.

THIS was a writ of entry demanding two tracts of land. The controversy related exclusively to one of them.

The demandant claimed under a levy. The clerk of the court testified, that when the execution issued from his office, it was directed to the several sheriffs of all the counties in the State, naming them, or either of their deputies; that when returned, the words "*sheriffs*" "*or either of their deputies,*" had been stricken out, and the word "*coroners*" inserted over where the word sheriff had been written; and that the alteration had been made without his knowledge or consent. There

was no other evidence respecting the alteration introduced. The execution was recorded in the registry of deeds, as it read when altered. Neither of the parties was described in the execution as a sheriff or deputy sheriff.

The proceedings in making the levy, written upon the back of the execution, commenced with a certificate, of which a copy follows: —

"Waldo, ss. Nov. 19, 1842. Then personally appeared before the subscriber, one of the justices of the peace within and for the county of Waldo, Augustus C. Stiles, Mark S. Stiles and Isaac Abbott, and made solemn oath that they would faithfully and impartially appraise such real estate, as should be shown to them to satisfy this execution with all costs. —

"W. J. Roberts, Justice of the peace."

The certificate of the appraisers commenced thus: — "We, the subscribers, freeholders," &c. and afterwards said, "having been first sworn, having viewed," &c. and was signed by —

"Augustus C. Stiles,
"Mark S. Stiles,
"Isaac Abbott,
} Appraisers.

"Nov. 19, 1842."

The return of the officer commenced thus: —

"Waldo, ss. Nov. 19, 1842. Pursuant to the within execution I have caused three disinterested and discreet persons, freeholders of said county of Waldo, to be sworn as above, viz: — Augustus C. Stiles, chosen by the within named Franklin Rollins, the creditor, Mark Stiles, chosen by the within John Rich, the debtor, and Isaac Abbott, chosen by myself;" and was signed "C. W. Webster, Deputy Sheriff."

The demandant introduced evidence showing that there was no consideration for the conveyance of John Rich made after the attachment, unless a verbal promise to support the grantor and his wife. The attachment on the writ was Nov. 2, 1836, the debtor conveyed to John C. Rich, March 27, 1838; and John C. Rich conveyed to Franklin Rich and James M. Rich, Nov. 20, 1843.

The parties agreed to submit the case for the decision of

the Court, upon the evidence reported, and that the Court, should render such judgment as the rights of the parties might require.

Kelley and *Brown*, for the demandant, said that the conveyance was clearly fraudulent as to creditors. 23 Maine R. 192; 4 Greenl. 192; 19 Pick. 23.

As the alteration of the execution was wholly unauthorized, it was an entirely void act, and did not alter the legal effect of the execution. And as the time when the alteration was made does not appear, the presumption is, that it was made after the proceedings were completed.

The certificate of the appraisers, adopted by the officer, shows, that by Mark S. Stiles and Mark Stiles the same person was intended.

W. G. Crosby, for the tenants, insisted that the levy under which the demandant claimed, vested no title in him, for two reasons. — 1. It was not executed by an officer, who had authority so to do. — 2. One of the persons undertaking to act as appraiser was never qualified as the law requires; or that one who was qualified did not act in the appraisal.

1. The execution was directed to a coroner only, but was executed by a deputy sheriff. If it be said that the erasure of the word *sheriff*, and substitution of *coroner*, in the execution was made without authority, and therefore the service was by a person authorized to serve it, the answer is, that the record in the registry of deeds gives no notice of that fact, and that it shows, that the levy was made by one without authority; and it is notice of nothing more than what appears upon it.

2. The return of the officer shows that Augustus C. Stiles, Mark Stiles, and Isaac Abbot were chosen and sworn as appraisers. The appraiser's return is signed by Augustus C. Stiles, Mark S. Stiles, and Isaac Abbott. *Nye* v. *Drake*, 9 Pick. 35.

The first objection cannot be removed by an amendment of the registry, for there is nothing upon the execution to amend

by. The Court can give to the register no such authority, as they do to their own officers.

The second cannot be removed by an amendment, because the rights of third persons have intervened. *Fairfield & al.* v. *Paine*, 23 Maine R. 498.

The opinion of the Court, WHITMAN C. J. taking no part in the decision, as he did not hear the argument, was drawn up by

TENNEY J. — No objection is interposed to the recovery of judgment for possession of the land covered by the levy upon the first judgment obtained against John Rich and others. But it is insisted that no title was derived by the creditor under the other levy, it being inoperative and void. 1. Because the execution was directed to a coroner only, and not to a sheriff, or a deputy sheriff. 2. Because one of the persons undertaking to act as an appraiser, was not qualified by taking the oath; or one, who was so qualified did not act as such.

The execution, when it went from the hands of the clerk, who signed it, was directed to the sheriff of the county of Waldo, where the land lay, and to his deputies. These officers were authorized to execute it; one of them did serve it, and made his return in his official capacity. When the execution was left at the registry of deeds to be recorded, with the return upon it, there had been an alteration in the direction. *Sheriffs and their deputies* were erased and *coroners* inserted. This alteration was unknown to the clerk, and was wholly unauthorized. When and by whom it was made, there was no attempt to show.

That the conveyance of this land by the debtor in the execution to John C. Rich, as against the creditors of the former then existing, of which the demandant was one, was fraudulent, seems established by the evidence in the case, and a defence of the action, by showing it otherwise, is not attempted. But it is insisted, that as the tenants were *bona fide* purchasers, ignorant of the fraud of the former conveyance, they were chargeable only with what the records disclosed, and this pre-

sented no evidence of title in the demandant, excepting the levy. The forms of writs are prescribed by the statute; and the form of an execution requires a direction to the officer, having power to serve it. But if executed by one having official power for the purpose, the omission of such direction may be supplied by amendment under leave of Court. *Hearsey* v. *Bradbury*, 9 Mass. R. 95; *Wood* v. *Russ*, 11 *ibid.* 271. If there has been an unauthorized erasure of the direction, and a new and different direction inserted, the rule which allows the supply of an omission, would render proper, a restoration to the former condition of the precept.

But *bona fide* purchasers having no notice of the fraud, could not be affected by any such amendment or correction, made after their rights accrued, unless there is something upon the record, from which the correction can be made. If there is any thing there, indicating facts, which render it probable that every thing has been done necessary to secure the object attempted, and can prove that the law was complied with, he cannot with such notice, successfully supplant the other party. *Fairfield* v. *Paine*, 23 Maine R. 498.

Upon an inspection of the records, the tenants would find, that an execution in which neither of the parties was represented to be a sheriff or a deputy sheriff, was directed to a coroner and a levy made by a deputy sheriff; he must see that there was an irregularity; but that notwithstanding that, the levy was made by an officer competent to make it, and that the officer to whom it was directed had no authority for such a purpose. He knew where to find the original execution, and by calling upon the officer who had it in keeping, he could have learnt what has been shown, that there had been an illegal alteration made after it was issued, and that he might well suppose, that it was in all respects perfect and properly directed, when it went into the hands of the officer, and when the levy was completed; but whether so or not, the facts, which would have come to their knowledge by the exercise of common care, should have been a notice to them, that a correction of the alteration might well be apprehended. If a correction

were made by an order of Court, the order and the correction could be entered upon the record in such a manner, that the just rights of all would be secured.

2. The names of the persons sworn as appraisers, and those who purport to be signed to the certificate of appraisal, are identical. In the return of the officer, he says, he had caused three disinterested and discreet persons, "to be sworn as above, viz. Augustus C. Stiles, chosen by the within named Franklin Rollins, the creditor, Mark Stiles, chosen by the within named John Rich, the debtor, and Isaac Abbott, chosen by myself," and after describing what had been done touching the appraisal, and the delivery of seizin by metes and bounds, he adds, "as by the certificates of the justice and appraisers above written, and which are to be taken as part of this return." — The adoption of these certificates as part of the officer's return recognizes the persons sworn, and who signed the appraisers' certificate, as those, who were appointed, in the manner pointed out to make the appraisal; and if the officer had omitted in his return, all but their given names, it is difficult to perceive how there could have arisen any misapprehension in reference to the appraisers who were sworn and acted as such.

After the execution on which the last levy was made shall be corrected so as to stand as it was when it was issued, judgment is to be entered for the demandant for the possession of the premises described in his writ.

ANONYMOUS.

The stat. of 1847, c. 13, entitled "An act additional to chapter eighty-nine of the Revised Statutes, respecting divorce," does not repeal the laws then in force on that subject; but merely gives further power to the Court, "to decree a divorce from the bond of matrimony," in cases not then "provided for by law."

The Court, therefore, have no power to decree a divorce, under the third provision of Rev. Stat. c. 89, § 2, or under Stat. 1847, c. 13, for the cause of desertion by one of the parties for a time less than "for the term of five successive years."

DURING the law circuit of 1848, libels for divorce were presented, in several of the counties, for the cause of desertion by one of the parties for a term of time less than five years; on the supposition, that the stat. of 1847, c. 13, authorized a decree of divorce for such cause.

The first of that description, which came before the Court, was sent to the county of Cumberland for the purpose of obtaining an order of notice thereon, returnable in another county.

On a subsequent day the Court refused to give the order of notice, remarking, that the stat. of 1847, c. 13, did not repeal the existing law on the subject of divorce, but merely gave additional power in relation thereto. As the facts alleged in this libel do not bring the case within the third provision of Rev. Stat. c. 89, § 2, and the statute of 1847, c. 13, only gives power to decree a divorce in cases not before "provided for by law," the Court could not decree a divorce, if the facts alleged were established at the hearing. The order of notice, therefore, could be productive only of useless expense.

In the other cases, the Court declined to grant a divorce for the cause alleged.

RULE OF COURT.

SUPREME JUDICIAL COURT.

Ordered, That the THIRTY-SEVENTH RULE be amended, by striking out the following words, "and each party shall also note on the Copies or Abstracts, the points of law intended to be presented at the argument," and by inserting in the place thereof these words, "*each of the parties or their respective counsel, before or at the commencement of the argument of each case, shall furnish to each Justice of the Court present, and also to the Reporter, a written or printed statement of all the points of law to be made in the argument, noting under each point the authorities to be cited to sustain it.*"

Should both parties neglect to comply with this rule, the case, when it comes in the order of the docket to a hearing, will be continued, or judgment will be immediately entered therein, at the discretion of the Court.

Should one party comply and the other neglect to do so, the party complying may be heard in argument, and the case be decided without hearing the other party.

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PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

should convey the land levied upon to him, could not be sustained, the remedy being by process against the heirs. *Simmons* v. *Moulton*, 496.

See BANKRUPTCY, 3. BILLS AND NOTES, 6, 7. EXECUTORS AND ADMINISTRATORS. FRAUD. RECORD, 4. TAXES, 1, 2, 4.

ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS.

AGENCY.

1. As a general principle the same individual cannot be the agent of both parties; but persons having undertaken certain duties of a peculiar character such as brokers, are treated as the agents of both parties. *Hinckley* v. *Arey*, 362.

2. In making a contract for the composition of a debt, the same man cannot be the agent of both parties; but when the composition is agreed upon with the creditor by the agent of the debtor, he can be the agent of the creditor for another and distinct purpose. *Ib.*

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AMENDMENT.

See EXECUTION, 4, 5. PAUPER, 2. PRACTICE, 5. REVIEW, 2.

APPEAL.

See PROBATE.

APPRAISERS.

See EXECUTION, 1, 7.

ARBITRATION.

Where this and several other suits were referred to the same referees by separate rules of reference, without including any other matter, in all which the plaintiff was a party, but one of the defendants was not a party in any but this; and the referees met and heard all the cases at the same time, and the parties agreed, that the testimony of the numerous witnesses might be considered as applicable to each suit; and the referees, in making their separate reports, included their own charges for services in all the suits and all the other expenses of the references in their report as costs of this suit, and no part thereof in either of the other suits; *it was holden*, that the referees had exceeded their authority in including expenses incurred in other suits, and that the report, therefore, could not be accepted; but that although the referees erred in judgment, yet as it did not appear that they were influenced by any improper motives, the report should be re-committed, under the authority given by the statute 1845, c. 168. *Hewett* v. *Bowley*, 125.

ASSIGNMENT.

See ACTION, 5.

ASSUMPSIT.

See ACTION, 1. JURISDICTION, 4.

ATTACHMENT.

See EXECUTION, 2. OFFICER. RECEIPTER.

ATTORNEY AND COUNSELOR.

1. Where an attorney, being a practising attorney at law, in the transaction of business, takes a negotiable note to his principal, and it is suffered to remain in the possession of the attorney for many years, the law presumes, that he is entrusted with authority to receive payment of it.

Patten v. *Fullerton*, 58.

2. And if the consideration of the note to the principal was property sold, belonging to an infant to whom he was guardian, the power of the attorney to receive payment of the note would not be changed, when the principal ceased to be guardian. *Ib.*

3. And were the principal an unmarried female at the time the note was made, and she is afterwards married, the authority of her attorney to receive the money on the note would thereby be revoked, unless such authority were continued with the assent of the husband. With such assent the authority of the attorney would remain unchanged. *Ib.*

4. Payment, made before a note has become payable, to the duly authorized agent of the holder, has the same effect, as if made to the holder personally. *Ib.*

5. As a general position, payments made on such note to the attorney in specific articles instead of money, would not be a good payment, and binding upon the principal. But if one of several payments in specific articles to the attorney, be received by the principal, and the note is still suffered to remain in the possession of the attorney, and no objection is made either to the attorney or to the debtor, such payments would go in discharge of the note in the same way, as if they had been made in money. *Ib.*

See EVIDENCE, 4, 5, 9, 10.

BAILMENT.

The owners of a steamboat, being a common carrier, are liable for a shipment on board of her, lost by means of a collision with another vessel at sea, and without fault imputable to either, there being no express stipulation of any kind, between the owner of the goods and the owners of the boat, that they should be exempted from the perils of the sea.

Plaisted v. *Steam Nav. Co.*, 132.

BANKRUPTCY.

1. In an action against husband and wife to recover for goods sold to her before her marriage, where it appeared that the wife, while sole, on her petition duly filed, had been declared a bankrupt under the U. S. bankrupt act of 1841, and had presented a petition for her discharge, and then

intermarried with the other defendant; and subsequently to the marriage a certificate of discharge, under a decree of the court, was issued to her in her maiden name; *it was holden*, that such certificate was available to her and to her husband as a defence to such suit.

Chadwick v. *Starrett*, 138.

2. In order to be enabled to offer evidence to impeach a certificate in bankruptcy on account of "some fraud or wilful concealment by him of his property," the "prior reasonable notice, specifying in writing such fraud or concealment", required by the bankrupt act, should be by replication to the defendant's plea, seasonably filed, or by written notice seasonably given, setting forth, in either case, *specifically*, the fraud and concealment, and wherein it consisted, as if it were a special declaration in an action of the case. *Ib.*

3. Where one was declared a bankrupt under the late bankrupt law of the United States, the personal property of the bankrupt, whether inserted in his schedule of effects or not, vested in his assignee on his appointment. And if the property be sold by the assignee, pursuant to a decree of sale by the Court, the property vests in the purchaser, and he may maintain an action for the recovery thereof in his own name. *Jewett* v. *Preston*, 400.

4. A person commenced an action, and during its pendency became a bankrupt under the U. S. bankrupt act of 1841, and afterwards failed to support his action, and judgment was rendered against him for costs of suit, his bankruptcy not being then interposed by him as an objection — in an action of debt upon that judgment, his bankruptcy furnishes him with no defence.

Wilkins v. *Warren*, 438.

5. The contract upon which a judgment at law has been recovered, is merged and extinguished by the judgment, which constitutes a new debt, having its first existence at the time of the recovery. *Holbrook* v. *Foss*, 441.

6. A debt having its first existence after the debtor had filed his petition and had been declared a bankrupt, under the bankrupt law of the United States of 1841, could not have been proved in bankruptcy against him, and is not discharged by a certificate obtained by the bankrupt, in pursuance of such proceedings, after the existence of the debt. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Although a contract of guaranty of payment of an existing negotiable note is not negotiable, yet the note itself may be negotiated by the same instrument which creates the guaranty. *Myrick* v. *Hasey*, 9.

2. Where a note was made payable to R. D. H. or order, it was held, that these words, "I hereby guaranty the payment of the within note. R. D. H." written by the payee upon the back of the note, operated as a sufficient indorsement thereof. *Ib.*

3. The defendant, being the maker of a negotiable note, will not be permitted to prove usury by his own oath in defence, where the suit is brought by an indorsee. *Ib.*

4. Where a note then payable, having thereon a blank indorsement by the payee, was received of him by the holder, with the understanding, of which the indorser was perfectly conusant, that demand on the maker and

notice to the indorser were not intended to form a condition upon which alone the latter should become liable, — *it was held*, that demand and notice were thereby waived by the indorser. *Fullerton* v. *Rundlett*, 31.

5. Evidence of the declarations of the indorser as to the contract, prior to the indorsement of the note and in reference to it, tending to show the terms upon which the note was received, and especially when connected with subsequent conduct and declarations having the same tendency, is admissible. *Ib.*

6. To enable the plaintiff to maintain an action upon a promissory note, made payable at a particular time and place, it is not necessary to aver and prove its presentment at the time and place named therein. If the maker was there, prepared to pay it, that is matter of defence to be pleaded and established by him. *Lyon* v. *Williamson*, 149.

7. Although the maker was at the place of payment, at the time named, prepared to make payment of the note, and the holder was not there to receive the money, yet if he subsequently demand payment there, and cannot obtain it, he may maintain an action against the maker to recover the amount. *Ib.*

8. The plea, when such defence is made, to be a good one, must state, that the maker was ready to pay the money at the time and place named; that he has ever since been ready there to pay the same; and that he brings the money into Court for the plaintiff. The facts alleged may be put in issue, and must then be established by proof, or the defence must fail. *Ib.*

9. If a note be indorsed, after it has become overdue, thus — "indorser not holden, D. S." the indorser is nevertheless, liable therefor, if a payment has been made upon the note, or a set-off can be claimed, when the note exhibits no indication of them, and the indorser leaves the indorsee in entire ignorance of any thing of the kind. *Ticonic Bank* v. *Smiley*, 225.

10. If the indorser of a note has paid to the indorsee a part thereof, he may recover the amount so paid of the maker, in an action for money paid, although a part of the money still remains unpaid. *Garnsey* v. *Allen*, 366.

11. It is wholly immaterial whether such payment be made in money or other property, if it be received as a payment of so much. *Ib.*

12. And evidence offered by the maker, that the property received by the indorsee of the indorser was in fact of less value than the amount for which it was received, is inadmissible. *Ib.*

13. The receipt of the indorsee to the indorser, is admissible evidence to show payment. *Ib.*

14. The liability of the principal in a promissory note, to reimburse his surety for any payment made by the latter, in consequence of his so becoming surety, commences at the time the note is delivered to the payee; and whenever payment may be made by the surety, he is to be considered as a creditor of his principal, from the time the note was made and delivered. *Sargent* v. *Salmond*, 539.

See Consideration, 1, 2, 3. Donatio Causa Mortis.

CASE.

See FRAUD. MALICIOUS PROSECUTION.

COLLECTOR.

See TAXES.

COMMON CARRIER.

See BAILMENT.

CONSIDERATION.

1. The conveyance of land, subject to a mortgage, made by a former owner on condition that certain personal services should be performed by the mortgagor, is a sufficient consideration for a note given for the purchase money. *Hoyt* v. *Bradley*, 242.
2. A partial failure of consideration for a note, given in payment for land sold, not arising out of a failure of title, but out of fraudulent misrepresentations respecting the quantity of timber trees then upon it, may be given in evidence in defence in a suit upon such note, while it remains in the hands of the seller, or in the hands of one having no superior rights. *Hammatt* v. *Emerson*, 308.
3. And if the purchaser makes a contract to sell a portion of the land to another, and gives to the seller in part payment, a note, signed by such other as principal, and the purchaser as surety, this does not affect the relations between the seller and purchaser, nor take away the right of the latter to set up fraud in the contract, as a defence. *Ib.*
4. The payment of a part only of a sum due, at the time and place of payment, on a promise to cancel the whole claim, discharges the indebtedness to the amount of the sum paid and nothing more, there being no consideration for the promise to discharge. The least consideration, however, in such case is sufficient to make the agreement binding. *Hinckley* v. *Arey*, 362.
5. The rule of law is well established, that a payment made in money of a part does not operate to extinguish the whole debt, although it be received as a payment in full. There must be some consideration for the relinquishment of the portion not paid, or the agreement to receive a part payment in full will be without consideration and void. *White* v. *Jordan*, 370.

CONSTITUTIONAL LAW.

1. No statute is to be held retrospective, or in violation of any constitutional provisions, where it affects rights, unless such shall be the necessary construction. *Given* v. *Marr*, 212.
2. If a law of the State, allowing divorces to be decreed for new causes, were clearly retrospective, affecting conveyances already made, such law would, as to such conveyances, be unconstitutional and void. The act of 1829, c. 440, permitting divorces to be decreed, for desertion, for the term of five years, without reasonable cause, is not retrospective. *Ib.*

CONTRACT.

Where the plaintiff, "being about to set up a steam engine and planing machine to be connected therewith, agreed with the defendant, being a house carpenter, to take charge of and oversee the work, which was making drums, machinery and other geering necessary to connect the same, and to receive one dollar and fifty cents per day for his services; and where it was proved, that he so worked there, overseeing the work and directing until he pronounced the machinery to be in running order, and then left, — *it was holden*, that the defendant was not thereby bound by a special agreement to do the work in any manner; and that the defendant was entitled to be paid for his own labor.

Haskell v. *Sawyer*, 234.

See CONSIDERATION. MORTGAGE, 13. VENDOR AND PURCHASER, 3.

CONVEYANCE.

See DEED. TENANT IN COMMON.

CORPORATION.

1. All votes and proceedings of persons professing to act in the capacity of corporators, when assembled beyond the bounds of the State, granting the charter of the corporation, are wholly void. *Miller* v. *Ewer*, 509.
2. It is incumbent on the demandant, claiming title under a deed from a corporation, executed by one in the character of its agent, to prove that the corporation, by a legal vote, had authorized such person to make the conveyance. *Ib.*
3. But such corporation, duly organized and acting within the limits of the State granting the charter, may by vote transmitted elsewhere, or by an agent duly constituted, act and contract beyond the limits of the State. *Ib.*
4. An authority given in the charter, in general terms, to certain persons to call the first meeting of the corporators, does not authorize them to call such meeting, at a place without the State. *Ib.*

COURT.

See JURISDICTION.

COVENANT.

See DEED, 8, 9, 10, 11. MORTGAGE, 11.

CRIMINAL LAW.

1. Where a jury have been empannelled, in a criminal proceeding, and have rendered a verdict of acquittal, and judgment has been rendered thereon, although there was no evidence introduced against the accused, he cannot again be put on trial for the same offence. *Stevens* v. *Fassett*, 266.
2. And where the proceedings are upon a complaint and warrant, before a justice of the peace, in a matter where he has final jurisdiction, and where the accused has been arraigned, tried and discharged, as not guilty, and

judgment has been entered thereon, he cannot again be put upon trial under another similar complaint and warrant, for the same offence. *Ib.*

DAMAGES.

See ACTION, 3. DEED, 11.

DEBT.

See RECORD, 4.

DEED.

1. Where there are several particulars in the description of the premises in a deed, and it is found that two of these particulars wholly fail, and cannot apply to any thing; still the land intended to be conveyed, will pass by such deed, if there be enough in the other parts of the description to identify the land. *Vose* v. *Bradstreet*, 156.
2. If two grantors make a joint deed of a certain tract of land, the land may pass by such deed, if owned by either of the grantors in severalty, when such can be seen to have been the intention of the parties. *Ib.*
3. Where a deed was made by W. L. W. and G. W. P. Jr., to V. & S., with this description of the premises,— "a lot of land, situate in said A. conveyed to us by G. W. P. by deed dated May 25, 1836, and recorded book 92, page 51,"— and where the deed recorded on the book and page named, was from G. W. P. Sen. to G. W. P. Jr., particularly describing a lot of land and bearing the date of May 25, 1835, and there was no other deed on record from G. W. P. Sen. to G. W. P. Jr., or to W. & P., and no deed recorded between any of those parties dated May 25, 1836; — *it was holden*, that the land described in the deed recorded on "book 92, page 51," passed by the deed of W. &. P. to V. & S. *Ib.*
4. When buildings are conveyed, and are described as standing on a lot of land, it usually becomes apparent, that it was not the intention to convey the land. In such case the superstructure only passes. *Derby* v. *Jones*, 357.
5. When it is apparent, that the language, stating that they are standing upon a certain lot, is used only to describe the place where they are situated, in like manner and with like effect as if the deed had stated them to be standing on a particular square or street, no inference can be justly drawn, that it was not the intention, that the land on which they stand, but not the lot named, should pass by the conveyance. *Ib.*
6. By a devise or grant of a messuage or house, the land on which it stands will pass with it, unless there be something to indicate that such was not the intention. *Ib.*
7. But where the facts and circumstances in the case, clearly indicate, that the intention of the parties was that the land should not pass, the house only is conveyed. *Ib.*
8. If the buildings only, and not the land on which they stand, are conveyed by the deed, the covenant therein, that the grantor will not claim "any right or title to the aforesaid premises," applies only to the buildings, and can

have no influence upon any title to the land subsequently acquired by the grantor. *Ib.*

9. If a deed conveys land, particularly describing it by metes and bounds, without any reservation or exception in the descriptive part, and contains covenants that "the aforegranted and bargained premises are free of all incumbrances except the dower of the widow of J. S." and that the grantor "will warrant and defend the same against the lawful claims and demands of all persons, except the claim of the aforesaid dower;" the tract of land assigned to the widow for dower is not excepted, but the covenants, merely, are so restricted, that they will not bind the grantor to warrant or defend against the life estate assigned to the widow as dower. *Hardy* v. *Nelson*, 525.

10. When a grantee has been evicted by virtue of a judgment recovered against him, that judgment is legally admissible, in an action upon the covenants of the deed, to prove the fact of eviction, but not, without notice, to prove the superior title of the recovering party. But if the grantor had notice, of that suit and an opportunity to appear and defend, it is evidence against him to prove the title of the party recovering. *Ib.*

11. Upon the breach of the covenants of warranty in a deed of land, where the grantor was seized when he conveyed the premises, and the grantee entered and continued in possession until evicted, the measure of damages, in this State, is the value of the premises at the time of the eviction, with interest, and the expenses reasonably and actually incurred in the defence of the suit. *Ib.*

See ACTION, 1. CONSTITUTIONAL LAW, 2. CORPORATION, 2. EVIDENCE, 11. MORTGAGE, 13. TENANT IN COMMON.

DEMURRER.

See ABATEMENT. LOGS.

DEPOSITION.

See EVIDENCE, 19, 20.

DEVISE.

Where an estate is devised on condition of, or subject to, the payment of a sum of money, or where the intention of the testator to make an estate, specifically devised, the fund for the payment of a legacy is clearly exhibited, such legacy is a charge upon the estate; and a court of equity may decree, that the person in whom the estate is vested shall execute the trust. *Bugbee* v. *Sargent*, 338.

See DEED, 6.

DISTRICT COURT.

See JURISDICTION. PRACTICE, 1.

DIVORCE.

1. The stat. of 1847, c. 13, entitled "An act additional to chapter eighty-nine of the Revised Statutes, respecting divorce," does not repeal the laws then in force on that subject; but merely gives further power to the Court, "to decree a divorce from the bond of matrimony," in cases not then "provided for by law." *Anonymous*, 563.
2. The Court, therefore, have no power to decree a divorce, under the third provision of Rev. Stat. c. 89, § 2, or under Stat. 1847, c. 13, for the cause of desertion by one of the parties, for a time less than "for the term of five successive years." *Ib.*

See CONSTITUTIONAL LAW.

DONATIO CAUSA MORTIS.

1. If a promissory note be given and delivered by the payee to a third person, because the donee expects soon to die of the disorder then upon him, it is revocable at any time during the donor's life; and the same may be afterwards given to any other person. *Parker* v. *Marston*, 196.
2. Where the plaintiff claimed such note under a gift made by the donor two days before his death, and the defendant claimed the same under a gift from the same person, made seven days prior to his decease, the declarations of the donor, — made, as well as the gifts under which the parties claimed, during the sickness of which he died, prior to the time of the gift under which the defendant claimed, and within two months next before the death of the donor, — tending to show that his intention was to give this note to the plaintiff, and to give to the defendant other articles, were held to be inadmissible in evidence, on motion of the plaintiff. *Ib.*

DOWER.

1. The wife is not entitled to dower, during the life of her husband in lands of which he had been seized during the coverture, and had conveyed prior to the stat. of 1829, c. 440, although in 1842, she had obtained a divorce from her husband, on account of his wilful desertion of her, for the term of five years, without reasonable cause. *Given* v. *Marr*, 212.
2. At common law, a widow is entitled, in the assignment of dower, to one third out of each tract or parcel of the land. And this method of endowment is denominated "according to common right." *French* v. *Pratt*, 381.
3. But where the dower is assigned by the heir, he may assign the whole of one or more of the several tracts in lieu of a third of each one, which will be a good assignment, if accepted by the widow. And this is called an endowment "against common right." *Ib.*
4. If dower be assigned "according to common right," and the widow be evicted, by paramount title, of the third assigned to her in one parcel, she is entitled to be endowed anew in the remainder of that parcel. But if the widow be endowed "against common right," and be evicted of a part of

the land assigned to her, she can have no new assignment of dower by reason thereof. *Ib.*

5. And if a widow be endowed "against common right," according to the course of proceedings under probate jurisdiction, and be evicted by paramount title, of a part of the land so assigned to her as dower, this gives her no right to be endowed anew in other lands, either at common law, or under Revised Statutes, c. 95, § 14. *Ib.*

See EVIDENCE, 25.

ENTRY, WRIT OF.

See REAL ACTION.

EQUITY.

1. A court of equity will assist a judgment creditor to discover and reach the property of his debtor, fraudulently transferred, although not liable to be attached upon a writ, or seised on execution, when the creditor has exhausted his remedy at law, without having obtained payment of his debt. *Sargent* v. *Salmond*, 539.
2. If one has received a conveyance of an estate under such circumstances as will render the conveyance fraudulent as to creditors, still the grantee is not bound to restore this property to a creditor, to an amount beyond the sum justly due to him. And if a creditor takes judgment for double the amount justly due to him, a court of equity will not interfere to assist him in obtaining satisfaction of such judgment. *Ib.*
3. Nor will the Court interfere where land has been fraudulently conveyed, if the grantee has received no benefit therefrom, and the title is still a matter of controversy, and of litigation between such grantee and claimant of the property. *Ib.*

See DEVISE.

ESTOPPEL.

See MORTGAGE, 8, 11.

EVIDENCE.

1. On the trial of a special action on the case against the defendant, for a conspiracy between him and a deputy sheriff to defraud the plaintiff, by means of making a false return upon a writ in the defendant's favor, one who was injured equally with the plaintiff by the fraud, if it existed, is a competent witness. *Handley* v. *Call*, 35.
2. But on such trial, evidence that the defendant had applied to another deputy, to do a similar act in a different suit, is inadmissible. *Ib.*
3. On the trial of an action on the case, brought by a creditor, under the provisions of Rev. Stat. c. 148, § 49, against a person for aiding the debtor in the fraudulent concealment or transfer of his property, to prevent it from being attached or seized on execution, such debtor is a competent witness for the plaintiff. *Philbrook* v. *Handley*, 53.

be a conveyance of the premises by the husband, and a relinquishment by her, of all her claim to dower therein. *Ib.*

See ACTION, 4. BILLS AND NOTES, 3, 5, 6, 8, 12, 13. CONSIDERATION, 2, 3. CORPORATION, 2. DEED, 10. DONATIO CAUSA MORTIS, 2. EXECUTION, 7. JUDGMENT. PAUPER, 1, 4. TAXES, 3. WILL, 1, 4, 6.

EXCEPTIONS.

1. When a case is brought before the Court by bill of exceptions, no question which is not presented by the exceptions, is open for consideration. The legal conclusion is, that all other necessary instructions were correctly given. *White* v. *Jordan*, 370.

2. In the determination of a question presented by bill of exceptions, the court can consider only the testimony stated in the exceptions. *Brewer* v. *East Machias*, 489.

3. In a case coming into this Court by exceptions from the district court, no point can be raised except such as were taken in the district court. *Moody* v. *Clark*, 551.

EXECUTION.

1. Where the officer's return of a levy on land, states, that all three of the appraisers were duly selected and sworn, and "were all present, and viewed the premises, and made their several estimates of the value," and that two of them signed the certificate, "the other declining to sign the same," it is not necessary, that it should state the cause of the refusal of such appraiser to affix his signature. *McLellan* v. *Nelson*, 129.

2. By the stat. 1829, c. 431, "the estate, right, title and interest which any person has by virtue of a bond or contract in writing, to a conveyance of real estate upon condition to be by him performed," is liable to be attached and held after as well as before the condition has been performed, where no deed was given prior to the attachment. *Whittier* v. *Vaughan*, 301.

3. In making sale of such interest on execution it is not necessary for the officer to return, that he had given a deed to the vendee under his sale. It is sufficient, that it appears he had done so by the production of the deed itself. *Ib.*

4. Amendments of his return of a sale of such estate, right, &c. on execution, may be made by an officer, by leave of court, no rights of third persons intervening, if before they were made, the party, on looking at the return as it was, could not have misunderstood, that the proceedings by the officer had been substantially what the amended return shows them to have been. *Ib.*

5. If an execution be executed by one having official power for the purpose, an omission of the direction to the officer, may be supplied by an amendment, under leave of Court. And if there be an unauthorized erasure of the direction to the proper officer, and a new and different direction insert-

ed, the rule which allows the supply of an omission would render proper the restoration of the precept to its former condition.

Rollins v. *Rich*, 557.

6. But *bona fide* purchasers having no notice of the fraud, could not be affected by any such amendment or correction, made after their right accrued, unless there is something upon the record from which the correction can be made. If there is any thing there, indicating facts which render it probable that every thing has been done necessary to secure the object attempted, and it can be proved that the law was complied with, a purchaser cannot with such notice successfully supplant the other party. *Ib.*
7. In a levy upon land, where it appeared that the names of the persons sworn as appraisers, and the names signed as appraisers to the certificate of appraisal, were identical, and where the officer in his return named the same persons as appraisers with the exception of an initial letter for a middle name in one, and expressly referred to the certificate of the oath and the signatures of the appraisers as relating to the same persons named in his return, *it was holden*, that there was sufficient evidence of their identity. *Ib.*

See Tenant in Common, 3.

EXECUTORS AND ADMINISTRATORS.

1. An action upon a probate bond against an administrator, brought by the heirs at law for their own benefit, in the name of the judge of probate, where there is no allegation in the writ that special leave for bringing the suit was given by the judge, cannot be maintained, under Rev. Stat. c. 113, without proof of a decree ascertaining the amount due to such heirs.

Groton v. *Tallman*, 68.

2. But an action on such bond may be maintained in the name of the judge of probate by heirs at law, for the general benefit of the estate, in certain cases, such as where the administrator returns no inventory, or settles no account, or refuses to appear when cited by the probate court to settle an account, if it be alleged in the writ and proved, that it was "commenced by the express authority of the judge of probate." *Ib.*
3. The judge of probate cannot, however, it would seem, maintain a suit upon such bond in his own name alone, and on his own mere motion; but can only authorize the bringing of a suit, in cases where his consent is necessary. *Ib.*

See Action, 5.

EXTENT.

See Execution.

FEME COVERT.

See Attorney, 3. Bankruptcy, 1. Married Women.

FISHERY.

By the act of March 4, 1826, "to regulate the Alewive Fishery in Bristol," the fish committee chosen by the town, are to decide and determine whether the sluice ways in dams across the rivers and streams in that town, for the passage of fish, are good and convenient; and so long as they act within the sphere of their duty, they are not liable as trespassers; no one has the right to oppose them in the performance of their duties; and their judgment and decision is conclusive, unless they are guilty of corruption, or palpably mistake their duties, even although, in the opinion of others, their decision was erroneous, and their proceedings unreasonably hard against the owners of such dams. *Fossett* v. *Bearce*, 117.

FRAUD.

1. It is not necessary, that the creditor should first have obtained judgment against his debtor, in order to maintain an action on the forty-ninth section of c. 148, of the Revised Statutes. *Aiken* v. *Kilburne*, 252.
2. The statute does not require, that it should be made to appear that the person, who knowingly aids a debtor in the fraudulent concealment or transfer of his property, should derive a benefit therefrom to make him liable to the action of the creditor. *Ib.*
3. Where a fraudulent conveyance of property is made for the purpose and with the intent to defraud creditors, an action on the case to recover damages, for that cause, by one of those creditors, against the parties to such fraudulent conveyance, cannot be sustained. *Moody* v. *Burton*, 427.

See Action, 4. Bankruptcy, 2. Consideration, 2, 3. Equity. Evidence, 3, 6, 7, 16. Execution, 6. Mortgage, 6.

GIFT.

See Donatio Causa Mortis.

GUARANTY.

See Bills and Notes, 1, 2. Vendor and Purchaser, 3.

GUARDIAN AND WARD.

See Attorney, 2. Review, 2.

HUSBAND AND WIFE.

See Attorney, 3. Bankruptcy, 1. Dower. Married Women.

INDORSER.

See Bills and Notes.

JUDGE OF PROBATE.

See Executors and Administrators. Probate.

JUDGMENT.

A judgment is evidence of the amount of indebtedness between the parties to it; but is not binding as to third persons, not parties or privies thereto.
Sargent v. *Salmond*, 539.

See BANKRUPTCY, 5.

JURISDICTION.

1. To enable the Court to decide an action upon an agreed statement of facts, the statement must appear to have been made in a case legally before the Court for its decision. The parties cannot by their agreement present a case to the Court for its decision in a manner not authorized by law.
Hatch v. *Allen*, 85.
2. When an action comes into this Court by an appeal from a district court, if the latter court had not jurisdiction of the action, this Court can obtain none by virtue of the appeal, and the action will be dismissed. *Ib.*
3. The title to real estate cannot be considered as concerned or brought in question, in the sense intended by Rev. Stat. c. 116, § 1 and 3, when it is not put in issue by the pleadings or brief statement, and cannot be affected by the judgment. *Ib.*
4. In an action of assumpsit to recover compensation for the use of certain real estate, brought before a justice of the peace or municipal court, if the defendant pleads the general issue, and files a brief statement, in which he denies, that the plaintiff had any title to the premises, and alleges that he occupied under one who had title, such brief statement does not, under the statute, authorize the removal of the action to the district court, to be there tried and determined, without any trial or judgment by the justice of the peace or municipal court. *Ib.*
5. Courts of justice can give effect to Legislative enactments, only to the extent to which they may be made to operate, by a fair and liberal construction of the language used. It is not their province to supply defective enactments by an attempt to carry out fully the purposes, which may be supposed to have occasioned those enactments. This would be but an assumption by the judicial of the duties of the legislative department.
Swift v. *Luce*, 285.

JUSTICE OF THE PEACE.

See JURISDICTION, 4.

LAW AND FACT.

1. The Court cannot imply a promise, so as to take the contract out of the operation of the statute of limitations, as an inference of law, from the payment of a part of the debt; but the evidence should be submitted by the Court to the jury, with proper instructions, to enable them to do it.
White v. *Jordan*, 370.
2. The jury are to decide matters of fact, and those only. And when the facts are found by uncontradicted and unquestioned testimony, or by agreement,

appointed by a justice of the same county," as required by Revised Statutes, c. 132, § 4. *Ib.*

MALICIOUS PROSECUTION.

1. In an action to recover damages for a malicious prosecution, the question of probable cause, upon established facts, is a question of law. *Stevens* v. *Fassett*, 266.
2. If a person with an honest wish to ascertain whether certain facts will authorize a criminal prosecution, and he lays all such facts before one learned in the law, and solicits his deliberate opinion thereon, and the advice obtained is favorable to the prosecution, which is thereupon commenced, it will certainly go far, in the absence of other facts, to show probable cause, and to negative malice, in an action for malicious prosecution. *Ib.*
3. But if it appears, that such person withheld material facts, within his knowledge, or which in the exercise of common prudence he might have known, or if it appears, that he was influenced by passion, or a desire to injure the other party, and especially, if he received from another, learned in the law, whose counsel he sought, advice of a contrary character, upon the same question, the opinion which he invokes in his defence ought not to avail him; and it is well understood that it cannot be a protection. *Ib.*

MARRIED WOMEN.

1. The stat. 1844, c. 117, "to secure to married women their rights in property," is prospective merely. The interest, therefore, which the husband acquired in the real estate of the wife, by a marriage prior to that act, is not affected by it. *McLellan* v. *Nelson*, 129.
2. The statute of 1844, (c. 117,) entitled "An act to secure to married women their rights in property," has not so altered the common law, as to enable a *feme covert* to sell her personal property, without the assent of her husband. *Swift* v. *Lace*, 285.

MORTGAGE.

1. Where the holder of the equity of redemption, paid the amount secured by a mortgage of the land, and no intention of keeping the mortgage in force was disclosed at the time, and there was then no contract for the assignment thereof; and where, many years afterwards, the mortgagee made an assignment of the mortgage and of the notes secured by it, to the holder of the equity, so paying the notes; *it was holden*, that the mortgage was to be considered as discharged. *Given* v. *Marr*, 212.
2. The interest of a mortgagee of land cannot at law, pass to a third person, without an assignment, in some form, in writing, under seal, although the contract secured by the mortgage has been assigned by writing without seal. *Smith* v. *Kelley*, 237.
3. If a mortgagor, or his assignee, would enable himself to maintain a bill in equity to redeem the premises from the mortgage by means of a tender of the amount due, he must make the tender to the mortgagee or person

14. Thus, where the only condition of a mortgage was, that the mortgagor should "support the said Allen (the mortgagee) with suitable meat and drink, and all necessaries, and pay all doctor's bills for the said Allen," and where an agreement, under seal, was made between the parties at the same time, containing stipulations on the part of each, whereby it appeared, that it was necessary that the mortgagee should reside upon the premises, in order to be entitled to her support; *it was held*, that the condition of the mortgage could not be limited by the terms of the agreement. *Ib.*

NEW TRIAL.

1. A motion for a new trial, because the verdict was against the evidence, is grantable in some measure at discretion; and when the Court, upon an examination of the case, is satisfied, that injustice has not been done by the verdict, a new trial should not, ordinarily, be granted. *Handley* v. *Call*, 35.
2. The admission of illegal evidence does not, in every case of this character, entitle the party against whom it was admitted, and against whom the verdict was rendered, to a new trial. But if it be reasonable to believe, that the jury could have been unduly influenced by the wrongfully admitted testimony, or if it be doubtful whether they would otherwise have determined as they have done, a new trial should be granted. *Ib.*
3. On motions to set aside a verdict on the ground that it was against the evidence at the trial, and also on the ground of the discovery of new and material evidence since the trial, it is sufficient to authorize the granting of a new trial, if the Court are satisfied, that the facts of the case were not fully understood at the trial. *Bangor* v. *Brunswick*, 351.

NOTICE TO ACCOUNT.

See PRACTICE, 3.

OFFICER.

1. Courts will give effect to the returns made by officers, although informally made, when the intention is sufficiently disclosed by the language used, to be clearly discernible. But when the obscurity is so great, that the purpose cannot be ascertained, they will not attempt to make the return effectual by a construction merely conjectural. *Hathaway* v. *Larrabee*, 449.
2. Where an officer made a return of an attachment upon a writ, against three defendants, in the following words — "Penobscot, December 28, 1836, at eleven o'clock, A. M., I have attached all the right, title and interest the defendant has, in and to any real estate in the county of Penobscot" — *it was held by the Court*, that the language was too vague and uncertain to create a lien by attachment on the estate of either one of those defendants. *Ib.*

See EVIDENCE, 1, 2, 4. EXECUTION. RECEIPTER. REPLEVIN, 2, 3.

PAUPER.

1. At the trial of an action between two towns wherein the place of settlement of a pauper is the subject of controversy, the declarations of the pauper respecting his intention, in going from one place to another, made days before he left, and unaccompanied by any acts, are not admissible in evidence. *Bangor* v. *Brunswick*, 351.
2. In an action by one town against another, where the declaration originally contained merely a count in *indebitatus* assumpsit, on an account annexed to the writ for supplies furnished an individual named and his family, an amendment may be made, by permission of the presiding Judge, by alleging specially, in a new count, such facts as would show a liability of the defendants for the same under the provisions of Rev. Stat. c. 32, entitled "of paupers, their settlement, and support." *Brewer* v. *East Machias*, 489.
3. If a father, having a legal settlement in a town, removes therefrom, leaving there a legitimate minor son, who remains there until he is of full age, such son will not thereby become emancipated, or acquire a settlement in that town during the time, in his own right. *Ib.*
4. In the trial of actions between towns wherein the settlement of paupers is the subject of controversy, it is not necessary to prove by the best evidence, the record, that the persons acting as overseers of the poor, were legally chosen and qualified. It is sufficient to show, that they acted as such. *Ib.*
5. When persons, having settlements in other towns, fall into distress and stand in need of immediate relief, the overseers of the poor are not under the necessity of inquiring or considering, whether such persons have or have not property, for any other purpose than to enable them to determine, whether they have actually fallen into distress, and are in need of immediate relief. It is the design of the law, that relief should be afforded to those found in that condition; and if they have property, the amount expended for their relief, may be recovered of them, by the towns in which they may have a legal settlement. *Ib.*

PAYMENT.

See Attorney, 4, 5. Consideration, 4, 5.

PLEADING.

See Abatement. Bankruptcy, 2. Bills and Notes, 6, 7, 8.

POOR.

See Pauper.

POOR DEBTORS.

1. In a suit upon a poor debtor's bond, since the stat. 1842, c. 31, was in force, if the condition has not been performed, the damages are to be assessed by the Court, and not by the jury. *Call* v. *Barker*, 97.
2. If the debtor, on his examination, discloses that he has a note against another, and adds, — "it is, however, of little or no value, and I hereby offer to assign the same to the creditor, if he deems it to be of any value," the creditor is under no obligations to accept the note on those terms. The debtor is not made the judge of its value; others are to be selected or appointed to determine it according to the provisions of the statute. *Ib.*
3. If there be no agreement between the creditor and the debtor to have the value of a demand, disclosed by the debtor, applied in discharge of the debt, the demand should be disposed of according to the provisions of the stat. c. 148, § 29. *Ib.*
4. If the creditor, or his attorney, does not lead the debtor or the justices into any illegal course of proceeding, but merely sits in silence, and allows them to proceed in their own course, the rights of the creditor cannot be considered as thereby waived or forfeited. *Ib.*
5. The justices are not authorized by the statute, c. 148, § 31, to make out a certificate of discharge of the debtor, until the property disclosed by him, being choses in action, has been disposed of or secured, as provided in the two preceding sections. And if the oath be administered without such disposal, it can furnish no defence; and the plaintiff is entitled to have his damages assessed according to the provisions of stat. c. 148, § 39. *Ib.*
6. When the tribunal for taking the disclosure of a poor debtor, under the provisions of the statute, c. 148, composed of two justices of the peace and of the quorum, has been duly organized so as to acquire jurisdiction of the case, its judgment, contained in a certificate declaring that the debtor "hath caused the creditor to be notified according to law," is conclusive; and "evidence proposed with a view to control it, is not legally admissible." *Baker* v. *Holmes*, 153.
7. It appears to have been the intention of the framers of the poor debtor act in the Revised Statutes, to submit the question of the legality and sufficiency of the notice to the creditor, to the decision of the justices, and to make their decision conclusive. *Ib.*
8. The justices of the peace and of the quorum appointed to hear the disclosure of a debtor, and to administer to him the oath, if found entitled thereto under the provision of Rev. Stat. c. 148, have no authority by virtue of that appointment to act as appraisers of the property disclosed. *Wingate* v. *Leeman*, 174.
9. Where such justices certified in their record, that the debtor was "examined by us as to his property, and we were satisfied that he had no property, not exempted from attachment, save that he had two small notes of seven or eight dollars, both outlawed and of no value, and that he was clearly entitled to have the oath administered to him, and we therefore

admitted him to the oath"— *it was holden* that the justices had no authority to administer the oath, and that the proceedings could not be considered as a performance of the condition of the bond. *Ib.*

10. In an action upon a poor debtor's bond, wherein it appeared, that the principal debtor disclosed before the justices, that he had, at the examination, in his possession, "a five dollar bank bill and a dollar in specie," and that before the oath was administered, he "paid over three dollars to his attorney, and three dollars to the justices, as their fees, which they exacted before allowing the oath;" *it was holden*, that under such circumstances the justices had no authority to administer the oath to the debtor, and that their certificate of having done so furnished no defence to the suit upon the bond. *Butman* v. *Holbrook*, 419.

11. Where "there were two citations by the same debtors to the same creditor on different bonds made out at the same time and returnable at the same time"; and the minutes of the justices state, that the plaintiff's attorney appointed "one of the justices to act on each citation," and where each citation contained a notice to the creditor, that all the debtors were to make a disclosure at the same time, it is to be understood, that such justice was authorized to act upon all the cases named in it, and to do all acts respecting it, which the law required to be done.

Chamberlain v. *Sands*, 458.

12. Where the justices had been duly selected by the parties and were at the place designated, "within the time at which the creditor was cited to appear," and one of three debtors was also there, and the attorney of the creditor, the justices have jurisdiction, and may adjourn to a different hour of the same day, and have power at such adjournment to take the disclosures of and administer the oath to all the debtors. *Ib.*

13. Although two of the debtors did not personally appear until the adjournment, yet that fact did not take from the justices their jurisdiction, nor authorize the creditor's attorney to withdraw the authority vested in one of the justices by his appointment. *Ib.*

14. Under the poor debtor act, (Rev. St. c. 148) the debtor may select one of the justices to take his disclosure at any time after the citation to the creditor has been prepared and before the tribunal has been organized.

Ib.

15. If the record shows, that the two justices of the peace and of the quorum, selected by the parties in manner provided by law to take the disclosure of a debtor, "are unable to agree as to the sufficiency and legality of said notification," and "do not agree upon the selection of the third justice," and thereupon an officer makes the selection; this is sufficient to justify the selection of the third justice by the officer.

Moody v. *Clark*, 551.

16. When the third justice has once been legally called in to act with the others, by reason of their disagreement, he should act until the final decision is made. *Ib.*

See EVIDENCE, 23.

PRACTICE.

1. The report of a case by a Judge of the District Court, "presenting the legal points for decision" of the Supreme Judicial Court, under stat. 1845, c. 172, must be drawn up with the consent of the parties thereto. The facts stated in the report become by agreement the facts upon which the case is to be decided, and no other facts can be disclosed to this Court. Even the writ and pleadings, unless made a part of the case, cannot be examined for the purpose of influencing the Court.

Lyon v. *Williamson*, 149.

2. It is not contemplated in the constitution or laws, that a party can save the expense of legal counsel and assistance, go on as it were blindfold, and if he becomes the victim of his own rashness and indiscretion, make that rashness and indiscretion the basis of a claim to be restored to his original condition in the suit, especially when he produces no evidence, that he suffered any loss on the merits. *Wood* v. *Noyes*, 230.

3. No precise form of words is necessary in a notice to account, &c. It is enough if it be such, that it cannot mislead the party, or leave him in any doubt of the object of it. *Whittier* v. *Vaughan*, 301.

4. A party can have no right to select a portion of the evidence introduced, and request instructions upon the effect it should or might have upon the minds of jurors, when examined separately from the other evidence applicable to the same point. *White* v. *Jordan*, 370.

5. If after a question of law has been presented for decision on a report of the Judge presiding at the trial, a motion be made to amend the pleadings, for the purpose of introducing a new matter of defence, it will not be granted, if the proposed defence would not be a valid one.

Hardy v. *Nelson*, 525.

See Evidence, 24. Exceptions. Jurisdiction. Law and Fact. New Trial.

PRINCIPAL AND SURETY.

See Bills and Notes, 14.

PROBATE.

1. Under Rev. Stat. c. 105, "any person, aggrieved by any order, sentence, decree or denial of a judge of probate, may appeal therefrom to the supreme court of probate," although he was not a party to the proceedings before the probate court. *Sturtevant* v. *Tallman*, 78.

2. The court of probate can only be deprived of its jurisdiction for the settlement of the accounts of an administrator by some process or course of proceeding, which would legally remove the settlement to another tribunal. And its jurisdiction remains, although the administrator had before been cited to settle his accounts, had neglected to do so, and leave had been granted to the persons interested to commence a suit upon his bond, if no suit be commenced. *Ib.*

3. Where the decree of the probate court appealed from embraces only the

RECORD.

REFEREES.

See ARBITRATION.

REPLEVIN.

REPORT OF CASE.

See PRACTICE, 1, 5.

REVIEW.

RULE OF S. J. COURT.

See page 565.

SCHOOLS.

SHIPPING.

Where a ship is owned by two persons in equal shares, and one of them without any authority from the other, and without his knowledge or consent, repairs the vessel in a home port, he cannot recover of the other owner, any portion of the money expended for such repairs.

Benson v. *Thompson*, 470.

STATUTE.

Where a statute has received a judicial construction, and is afterwards re-enacted in the same terms, it is to be understood, that the legislature have adopted the construction given to it. *Myrick* v. *Hasey*, 9.

See CONSTITUTIONAL LAW.

STATUTES CITED.

1821,	*c.* 51,	Probate,	25	R. S. *c.* 115,	Chancery, 104
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SUPREME JUDICIAL COURT.

See EVIDENCE, 24. JURISDICTION. PRACTICE. RULE OF COURT.

SURETY.

See BILLS AND NOTES, 14.

TAXES.

1. When money claimed as rightfully due, is paid voluntarily and with a full knowledge of the facts, it cannot be recovered back, if the party to whom it has been paid, may conscientiously retain it. *Smith* v. *Readfield*, 145.
2. Where a person has paid the amount of taxes assessed upon him, he cannot recover it back, upon the ground that the assessment was illegally made, if there be no proof, that he was compelled to pay any portion thereof by duress of his person or seizure of his property, or that any part was paid under protest, and to avoid such arrest or seizure. *Ib.*
3. The mere fact that the taxes were paid to collectors, who had warrants for the collection, affords no satisfactory proof of payment by duress. *Ib.*
4. A person paying taxes illegally assessed upon him, cannot recover the amount of the town, without proof of payment to the treasurer of the town, or to some other legal officer or agent of the town, authorized to receive the money. *Ib.*
5. In trespass *quare clausum*, where the plaintiff produces a deed from the county treasurer, purporting to convey the land for the payment of taxes assessed thereon, a mere stranger, without semblance of title, cannot object, under the general issue, that such treasurer had not observed the rules of law, in making the sale. *Smith* v. *Bodfish*, 289.
6. But if the defendant produces a *prima facie* title to the land, the plaintiff, to support his tax title, must show that the provisions of law, authorizing such sale, have been strictly complied with. *Ib.*
7. The county treasurer, in making sale of a township of unincorporated land, to pay the taxes assessed thereon, by the county commissioners, for the purpose of making a road through the same, cannot exempt any portion of the township, except the reserved public lots, from its liability for the tax, unless owned by individuals who have paid their proportions of the tax; and regularly it should appear, in order to authorize a sale of the residue, by the recitals in the deed, who had so paid previously to the sale, and the amount paid by each, and the quantity of land on which each payment had been made. *Ib.*
8. Where a deed of a township of land has been made, and there are excepted tracts therein amounting to half the whole township, it is incumbent on the grantee, claiming title to a particular lot under such deed, to show that such lot is not included in the excepted tracts. *Ib.*
9. Where a lot of unimproved land is taxed as the "*real estate of a non-resident proprietor whose name is unknown*," described in the assessment only as a certain lot on a certain plan of lots in the town, and is advertised and sold as such, for the purpose of obtaining payment of the tax, when in fact, at the time of the assessment and long before and afterwards, the owner of the land, deriving his title under a deed of the lot duly recorded, resided in the same town wherein the lot of land is situated — such sale is illegal and void, although the collector conformed in all respects in making the sale to the provisions of law. *Barker* v. *Hesseltine*, 354.

TENANT IN COMMON.

1. The conveyance by a tenant in common of a portion of the common estate by metes and bounds, will not necessarily be inoperative upon his own rights or the rights of others. The law will give effect to such conveyance, so far as it may do so consistently with the preservation of the entire rights of the co-tenant, and no further. If the estate so conveyed by metes and bounds, or any part of it, shall, upon partition of the premises, be assigned to the right of the grantor or his assignee, the conveyance embracing it may operate, and convey the title from the grantor to the grantee.

Soutter v. *Porter*, 405.

2. Such a conveyance of a tenant in common, however, cannot in any event operate, contrary to the expressed declarations and intentions of the parties, to convey an estate in common instead of an estate in severalty. *Ib.*

3. Where one tenant in common conveys a portion only of the common property by metes and bounds, a creditor of the grantee, who levies his execution upon an undivided share of the whole common estate, acquires nothing by such levy. *Ib.*

TRESPASS.

See TAXES, 1, 2.

TRUST.

See DEVISE.

TRUSTEE PROCESS.

Where the principal debtor in a trustee process, had purchased land and given back to his grantor, a mortgage to secure his notes for the consideration, and then conveyed one half of the same, by deed of warranty, to the person summoned as trustee, and received the consideration therefor; and afterwards, the notes secured by the mortgage, remaining wholly unpaid, the principal debtor conveyed the other half of the land to the supposed trustee, who contracted with his grantor, as the consideration for this conveyance, to pay the notes secured by the mortgage, being then to the full amount of the value of the land, — but at the time of the service of the trustee process, no payment had been made, of any part of the notes secured by the mortgage, either by the supposed trustee or by the debtor; *it was holden*, that the supposed trustee must be discharged.

Lyford v. *Holway*, 296.

USURY.

See BILLS AND NOTES, 3.

VENDOR AND PURCHASER.

1. The law does not make the vendor responsible in damages, for every unauthorized, erroneous or false representation made to the vendee, although it may have been injurious. To make the party liable, the representation must have been false, have been fraudulently made, and have occasioned damage. *Hammatt* v. *Emerson*, 308.
2. And where one has made a representation positively, or professing to speak as of his own knowledge without having any knowledge on the subject, the intentional falsehood is disclosed, and the intention to deceive is also inferred. *Ib.*
3. An agreement, containing a guaranty, that there is a certain quantity of timber upon a tract of land, does not necessarily include the idea or authorize the inference, that the person making it, knows the fact to be, as the guaranty stipulates, that it shall be, for the foundation upon which business is to be transacted. *Ib.*

WILL.

1. In the trial of an action at law, if a will be offered in evidence, to show title to real estate under it, which appears by the record of the probate court to have been duly proved, approved and allowed in that court, it may still be treated as wholly inoperative, if the judge of probate, who approved and allowed such will, had not jurisdiction of it. *Patten* v. *Tallman*, 17.
2. If it was otherwise a matter within the jurisdiction of the judge of probate, to decide upon the probate of a particular will, the mere fact that he had attested it as one of the three subscribing witnesses thereto, does not deprive him of that jurisdiction. *Ib.*
3. If a will has been duly approved and allowed by a probate court, having jurisdiction, its validity cannot be called in question by a court of common law. Such adjudication of the court of probate, not vacated by an appeal, is final and conclusive upon all persons. And whether the court of probate decided any questions, necessarily arising and involved in its adjudication, correctly or incorrectly, can never be made a matter of inquiry and decision in a common law court, to affect that adjudication. *Ib.*
4. The competency of an attesting witness to a will is not to be determined upon the state of facts existing at the time when the will is presented for probate, but upon those existing at the time of the attestation. *Ib.*
5. If it be impossible, upon legal principles, to present the testimony of one of the three attesting witnesses to a will, it may be approved without his testimony. *Ib.*
6. If one of the three attesting witnesses to a will be otherwise a competent witness, he is not rendered incompetent, because he was, at the time of its attestation and at the time of its approval and allowance, judge of probate for that county. *Ib.*
7. Where the testator provided in his will, that if his two sons J. and H. or either of them, should, after his decease, become surety for any person or

persons, " they shall in such case forfeit all bequests, legacies and devises given them in this will;" and where afterwards, by a codicil to the same will, the testator devised " to my son H. in trust for my son J. during the natural life of the said J., the Gardiner's neck farm;" — *it was held*, that the estate, so devised in trust, was not forfeited, if J. and H. had become sureties for others. *Ib.*

WITNESS.

See EVIDENCE.

WRIT OF ENTRY.

See REAL ACTION.